Supreme Court No. 100682-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 81936-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN HASSAPIS, M.D.,

Appellant,

v.

WHIDBEY PUBLIC HOSPITAL DISTRICT
d/b/a WHIDBEYHEALTH MEDICAL CENTER,

Respondent

PETITION FOR REVIEW

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I. Identify of Petitioner and Decision Below.

Petitioner John Hassapis, M.D. ("Petitioner"), seeks review of Division One's January 24, 2022, unpublished decision ("Decision") affirming the trial court's dismissal of his breach of contract wage claim complaint against Respondent Whidbey Public Hospital District ("Hospital"), __ Wn.App.2d ____, 2022 WL 202713 (2022) (Appendix, A-1 to A-12).

The Petition focuses on the first premise of CR 56(c) and settled law placing the burden on the moving party and obligating the court to vacate a judgment where the burden was not met, regardless of the response papers below; and the interplay between summary judgment principles and policies to decide cases on the merits in the context of CR 1 and RAP 1.2(a) with the limitations on review stated in RAP 9.12 – how broadly or narrowly to construe "issues" raised to the trial court for purposes of considering arguments as to those issues on appeal. The issues arise in a premature MSJ brought before discovery was completed, seeking to give the plaintiff the bum's rush.

As to summary judgment principles, the moving party has the initial burden to demonstrate there is no dispute of material fact; *and also* that, based on the undisputed facts, the party is entitled to judgment as a matter of law. If their moving papers fail, it is error to grant summary judgment regardless of the responding party's papers, or even if no papers are filed. Further, that review by the appellate court is genuinely *de novo* – the reviewing court must, at minimum, review to determine if the moving party met its burden. By contesting the motion, the responding party necessarily challenged the moving party's right to judgment. If the moving party failed to meet its burden, the responding party should get her day in court, not denied it.

The case presents the novel issue of the interplay between RAP 9.12, which limits consideration of summary judgment appeals to the "evidence and issues" raised to the trial court, with RAP 1.2(a) which calls for a liberal interpretation of the appellate rules to "facilitate the decision of cases on the merits", and Civil Rules 1, 56, and case law which provide for *de novo* review of

MSJ's based on the record before the trial court, consideration of the evidence and all reasonable inferences from the perspective of the non-moving party, and an application that insures that plaintiffs' who have colorable claims with a factual basis will not be denied their day in court. *See Keck v. Collins,* 184 Wn.2d 358, 369, 357 P.3d 1080 (2015). How broadly or narrowly "issues" are construed under RAP 9.12 is a key issue herein.

Finally, the Decision's formalistic approach places all plaintiffs at risk, as it ignored undisputed evidence that the motion was premature and full discovery was needed to ascertain what the Hospital records actually showed about Petitioner's production, meriting a CR 56(f) continuance, which request was throughout the trial court response. *See* CP 142:2-3; 151:6-7 (additional discovery needed about the work performed) & 151:8-152:5 (detailing dispute over hospital data); 153:5-11 (CR 56(f) argument); 160:14-19 ("Without additional discovery it is impossible to answer the question of what Dr. Hassapis earned. For that reason the Court should deny [the] motion.").

II. Issues Presented for Review.

This Court and the Court of Appeals have repeatedly reversed summary judgments for moving parties if the moving party's submission on summary judgment did not, on *de novo* review, meet its burden under Rule 56 of showing it is entitled to judgment as a matter of law based on the undisputed facts, regardless of the response papers, if any.[1] The Hospital's moving papers on summary judgment failed to meet its burden because the data it submitted – the evidence – when viewed in the non-moving party's favor instead showed that Petitioner was shorted over $62,000 for at least one of the years of his employment such that his breach of contract claim is valid, minimally for that year.

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[1] *See, e.g.,* the following, each ***reversing*** the grant of summary judgment: *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *Green v. A.P.C,* 136 Wn.2d 87, 960 P.2d 912 (1998); *LaPlante v. State,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Graves v. P.J. Taggares Co.,* 94 Wn.2d 298, 606 P.2d 1223 (1980); *Hash by Hash v. Children's Orthopedic Hospital,* 110 Wn.2d 912, 757 P.2d 507 (1988); *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 810 P.2d 4 (1991); *City of Tacoma v. Smith,* 50 Wn.App. 717, 750 P.2d 647 (1988); and *Byrne v. Cooper,* 11 Wn.App. 549, 523 P.2d 1216 (1974).

Where the Hospital's moving papers failed to sustain its initial burden required under Rule 56 for summary judgment, must summary judgment be reversed when the evidence before the court shows the Hospital failed to meet its burden, regardless of what Petitioner submitted or argued below?

Must the Decision be reversed where the Court of Appeals determined to accept the Hospital's explanation of its 2019 production data sheet over a plain, common-sense analysis of that data in favor of Petitioner, which a jury would be entitled to make, thus resolving a disputed issue of fact in favor of the moving party?

In these circumstances where the fundamental issue between the parties on summary judgment was whether Dr. Hassapis was properly paid under the contract written by the Hospital, did the Court of Appeals err by narrowly construing the "issues" it said were raised to the trial court and would review on appeal on the basis of RAP 9.12 where such an interpretation negates reviewing the record submitted by the parties to

determine whether there is an issue for trial under a correct application of the law – which here includes a correct application of the parties' governing law, the employment contract? [2]

Should review be granted to address and harmonize the interplay between the settled principles of Rule 56 calling for *de novo* review of the evidence viewed in favor of the non-moving party and the Decision's misapplication of RAP 9.12 to unduly limit the scope of appellate review and deny a deserving plaintiff his day in court, in the context of the directives of RAP 1.2(a) and CR 1 to decide cases on the merits where possible and ensure plaintiffs with colorable claims get their day in court?

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[2] Petitioner's MSJ Response raised the following issues to the trial court, among others, that: "WhidbeyHealth's interpretation of the Employment Agreement defies the Washington canons of contract construction…Under WhidbeyHealth's definition it would be *impossible* for the most productive surgeon to earn production pay, rendering the entire model for production pay ineffectual and meaningless", MSJ Response at 3, CP 143; and "There is a genuine issue of material fact surrounding WhidbeyHealth's numbers and summary judgment should be denied," MSJ Response at 3, CP 143. Petitioner's response brief stated, twice: "At the heart of this matter is a disagreement about what [the Hospital] should have paid Dr. Hassapis." CP 153:2-3; CP 160:15-16.

Where the record is replete with evidence of the incomplete discovery and inconsistencies in the evidence submitted by the moving party, and where the case had been received in Island County for three months when heard on September 1, 2020, was it error to grant summary judgment over the request for more time to conduct discovery to get the data the Hospital had control of, and allow Petitioner access to the kind of information needed to rebut the assertions made by the Hospital on summary judgment, when it controlled all the pertinent information, and there is no dispute that it had failed to make full disclosures before it filed is moving papers?

III. Statement of the Case.

Petitioner was hired by the Hospital in 2014 to provide general surgery services under the contract the Hospital wrote, as described with the background facts in the opening brief ("OB") at 6-16. For nearly six years, Petitioner typically worked over 3,000 hours a year taking care of patients with the surgeries, pre-op and post-op consults, and office visits, and taking call on top

of that. The contract provided he was to be paid additional wages over the base salary if his production justified it – "production-based pay" – a common mechanism for compensating physicians to ensure fair compensation for extra work while staying in compliance with federal law.

But the Hospital never gave Petitioner his production data over his five+ years there, despite numerous requests. It never paid him more than his base salary, despite evidence the Hospital submitted on summary judgment which showed it should have paid him an additional $62,000+ under the contract terms for at least 2017. *See* App. A-13-25. Even though Petitioner had to sue the Hospital and propound requests for production to get an initial disclosure of its data for his work, the Hospital still has not provided a full and complete accounting of his production data.

Although it had not produced all the documents required in Petitioner's requests for production, the Hospital hurriedly noted up its summary judgment motion on June 20, 2020, five weeks after the case was transferred to Island County from

Snohomish County, and less than five months after the complaint was filed, to be heard August 18, 2020, less than seven months after the complaint was filed. *See* CP 1, 17 and 36, specifically noting the motion before Judge Churchill, who had not filed to retain her seat in the fall election.[3] The motion date was moved to September 1, 2020, when it was heard by zoom. *See* RP. After argument, the trial court denied Petitioner's request for a continuance to complete discovery and granted summary judgment for the Hospital based on its construction of the contract and representations of the Hospital's declarations, despite the conflict with the evidence provided by Petitioner as

[3] This fast motion before discovery was completed was "railroading," the bum's rush. *Compare*, *Celotex v. Catrett,* 477 U.S 317, 326 (1986) (MSJ filed one year after complaint and discovery had concluded, precluding any "serious claim" of "railroading"). The Hospital made a "supplemental production" of Petitioner's work-production data for 2017 in its moving papers on summary judgment in August, 2020, *without* calling attention to that supplemental production in its filing, or actually submitting a supplemental production. *See* App. A-15-17, discussing the material 2017 data first "produced" as part of the Hospital's MSJ moving papers.

to the inaccuracy of the financial documents submitted by the Hospital.

As pointed out in the papers below, the Hospital's finance department was in disarray as it was apparently unable to provide Petitioner's production. *See* CP 185-86 ¶¶ 20-24, CP 188 ¶¶34-36. (Hassapis Dec.). This evidence raises the concern of whether, for incompetence, understaffing, or otherwise, the Hospital sought the expedited MSJ because it was unable to provide all the data from his work, which could mean sanctions for spoliation as in *JK v. Bellevue School Dist.,* ___ Wn.App.2d ___, 500 P.3d 138 (2021) (sanctions and default judgment on liability spoliation and discovery violations entered against defendant school district for its failure to preserve records which were critical evidence to the plaintiff's claims).

The Court of Appeals affirmed on the basis the issues and "arguments" Petitioner made on appeal had not been presented to the trial court and thus "preserved" (as to the 2017 compensation figures); or were not raised until the appellate

reply brief, and thus were not properly before the appellate court under RAP 9.12 and a published Division II case.

IV. Reasons Why This Court Should Grant Review.

A. Review is appropriate RAP 13.4(b)(1) & (2) because the Decision conflicts with multiple decisions of this Court – *e.g., Ranger Ins. Co. v. Pierce County, Green v. A.P.C, Jacobsen v. State, LaPlante v. State,* and *Rossiter v. Moore* – and multiple published decisions of the Court of Appeals, *e.g., White v. Kent Med. Ctr., Inc., P.S.*, *City of Tacoma v. Smith,* and *Byrne v. Cooper*. Each decision reversed a grant of summary judgment because, as is the case here, the moving party's papers did not meet their initial burden of showing they were entitled to judgment as a matter of law.

The trial court granted summary judgment despite the fact the Hospital's moving papers, when examined, did not show it was entitled to judgment in its favor when all inferences from the evidence submitted are taken in Dr. Hassapis' favor. The Decision affirmed, even though Petitioner pointed out on appeal that the Hospital's moving papers showed he was shorted over $62,000 for 2017. This conflicts directly with each of the noted cases, each of which ***reversed*** a grant of summary judgment because the moving party's papers did not show they were

entitled to judgment, as required by CR 56(c). There can be no preservation issue given the nature of these decisions, the moving party's clear initial burden, and the fact Petitioner strongly contested that the Hospital should be granted judgment.

In ***Jacobsen v. State****,* 89 Wn.2d 104, 108, 110-111, 569 P.2d 1152 (1977), a case cited in the briefing below, this Court explained (emphasis added), before vacating the summary judgment:

> Initially the burden is on the party moving for summary judgment **to prove** by uncontroverted facts that there is no genuine issue of material fact. *LaPlante v. State*, supra, 85 Wn.2d at 158, 531 P.2d 299; *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962); 6 J. Moore, FEDERAL PRACTICE ¶ 56.07, ¶ 56.15(3) (2d Ed. 1948). **If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials**. *Preston v. Duncan, supra*, 55 Wn.2d at 683, 349 P.2d 605, see also Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 WASH.L.REV. 1, 15 (1970).

Jacobson v. State, 89 Wn.2d at 110-111. The earlier case of ***LaPlante v. State****,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975) explained (emphasis added):

> The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. If, however, there is a genuine issue of material fact a trial is necessary. It is the trial court's function to determine whether such a genuine issue exists. **The burden of proving, by uncontroverted facts, that no genuine issue exists is upon the moving party**.

The pre-rules decision of ***Rossiter v. Moore***, 59 Wn.2d 722, 724, 370 P.2d 250 (1962) shows this requirement on the moving party under Rule 56 was consistent with prior procedure, holding that the burden is on the moving party to show there is no genuine dispute of a material fact and "this burden cannot be shifted to the adversary," ***reversing*** for moving party's failure to meet burden.

None of these cases have been overruled. The Decision is controlled by and is inconsistent with each of them.

More recently this Court applied those basic principles in *Green v. A.P.C,* 136 Wn.2d 87, 960 P.2d 912 (1998), and *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008), to ***reverse*** grants of summary judgment

because the moving defendant's bare assertions were insufficient to meet the moving party's burden. *Greene* reversed a summary judgment where the moving defendants failed to meet their burden as required under CR 56(c):

> The defendants here bore the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). They did not carry their burden when they failed to produce evidence upon which the trial court could have properly relied in concluding [the plaintiff] should have known about her T-shaped uterus more than three years before she filed suit. We therefore ***reverse*** the summary judgment, and remand the case for further proceedings."

136 Wn.2d at 99-101 (emphasis added). *Ranger Ins. Co.* also reversed where the moving defendants failed to meet their initial burden. Neither *Greene* nor *Ranger Ins. Co.* have been overruled. The Decision conflicts with them both.

Finally, the Decision is also in conflict with each of the Court of Appeals decisions listed in fn. 1, *supra,* each of which also reversed summary judgments for the failure of the moving party to meet its initial burden.

No case has affirmed a summary judgment where the moving party's papers failed to sustain its initial burden of showing it is entitled to judgment in its favor under the undisputed facts submitted, much less when the moving party's papers show the non-moving plaintiff's claim is valid. Review should be granted.

B. Review Should Be Granted Per RAP 13.4(b)(4) To Determine The Proper Scope Of Appellate Review Of Summary Judgments And The Interplay Between The Civil Rules, RAP 1.2(a), And The Limiting Terms Of RAP 9.12.

1. Scope of RAP 9.12 and interplay summary judgment principles with CR 1 and RAP 1.2(a)

This Court recently restated the purpose of summary judgment when adopting the "*Burnet* rule" for determining whether to exclude late-submitted declarations on summary judgment motions: the point of summary judgment both in the trial court and on appeal is to get it right and do justice per CR 1,

> "[O]ur overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Burnet v. Spokane Ambulance,* 131 Wn.2d, 484, 498, 933 P.2d 1036 (1997) (citing CR 1). The " 'purpose [of

> summary judgment] is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exist.' " *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir.1940)).

Keck v. Collins, 184 Wn.2d at 369 (***reversing*** summary judgment).[4]

One purpose of reviewing a grant of summary judgment under the *de novo* standard is to make sure a deserving plaintiff gets his or her day in court rather than be shut out on a technicality. It is not a "docket-clearing" procedure, nor is RAP 9.12. The civil rules were adopted in large part to insure persons

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[4] Under the analogous federal rule an unopposed summary judgment also must be denied if the record on summary judgment does not establish the moving party is entitled to judgment as a matter of law, and will be reversed if granted. *See, e.g., Martinez v. Stanford,* 323 F.3d 1178, 1183 (9th Cir. 2003)((reversing summary judgment for moving party's failure to establish entitlement to judgment, stating, "regardless of whether [the non-moving party] timely responded (or responded at all)…, we cannot affirm the district court's order unless the [moving party] affirmatively showed that 'there is no genuine issue as to any material fact and that [they were] entitled to a judgment as a matter of law… Fed. R. Civ. P. 56(c).").

with triable claims get their day in court. *Curtis Lumber Co. v. Sortor,* 83 Wn.2d 764, 767, 522 P.2d 822 (1974) (explaining that "the basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as 'the sporting theory of justice'," ***reversing*** summary judgment). *Accord, Keck v. Collins*

The Decision relied primarily on *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn.App.2d 765, 425 P.3d 560 (2018) and RAP 9.12 to affirm the trial court and disregard Petitioner's arguments without any analysis of the text of the RAP, nor of the disconnect between its application of *Johnson* and the appellate rule with the text of Rule 56 and established case law. The application given by the Decision sharply restricted appellate review beyond what the terms of RAP 9.12 require, and is contrary to RAP 1.2(a) and the text and spirit of Civil Rules 1 and 56, as aptly summarized in *Keck v. Collins.* Review should be granted so this Court can authoritatively

determine how to harmonize RAP 9.12 with RAP 1.2(a), the civil rules, the settled law on summary judgment, and the underlying principle of doing justice by giving claimants with genuine controversies their day in court.

Review by this Court was not sought in *Johnson*, which has been cited in ten unpublished Court of Appeals decisions. *Johnson's* application of RAP 9.12 seems to have taken on a life of its own, giving this Court another reason to review this case under RAP 13.4(b)(4), as well as the conflict of this interpretation of the rule with the case law under Rule 56.

There is a genuine question over the *Johnson* interpretation of RAP 9.12 which is more narrow than the text of the rule requires, particularly when viewed through RAP 1.2(a)'s mandate. The first sentence of the rule provides (emphasis added) that "On review of an order granting or denying a motion for summary judgment the appellate court will consider only **evidence and issues** called to the attention of the trial court." But the Decision at page 7 (App. A-7) quotes *Johnson* for a much

more limiting proposition derived from a full trial setting, that "An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal." *Johnson,* 5 Wn.App.2d at 780 ¶39, citing *Sourakli v. Kyriakos, Inc.,* 144 Wn.App. 501, 509, 182 P.3d 985 (2008), *rev. den.,* 165 Wn.2d 1017 (2009).

The Decision only quotes RAP 9.12 in its footnote 4 and does not analyze either the rule or *Johnson*. Instead, the Decision ignored the rule's focus on the broader "evidence and issues" raised to the trial court, latching onto the more limiting concept of excluding any "argument not pleaded or argued to the trial court." The RAP says all *issues* raised to the trial court are fair game; the Decision's gloss limits review to *arguments* raised to the trial court, a preservation principle from the trial setting, not the summary judgment setting, and a point that is more limiting

than the terms of RAP 9.12.[5] The Court should grant review to address this issue.

An important element to the legal errors in the Decision is the reliance on a very narrow definition of "issues raised below" to disregard Dr. Hassapis' arguments on appeal. The central issue before the trial court and the appellate court were whether Petitioner was correctly paid under his contract. As stated plainly in Petitioner's trial court response, "At the heart of this matter is a disagreement about what [the Hospital] should have paid Dr. Hassapis." CP 153:2-3; CP 160:15-16. Thus, the correct interpretation of his contract was always raised to and before the

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[5] *Johnson* relied on *Sourakli* without analysis or discussion, which in turn took the same exclusion on appeal of "an argument neither pleaded nor argued to the trial court" stated in *Sneed v. Barna,* 80 Wn.App. 843, 847, 912 P.2d 1035 (1996). *Sneed*, though a summary judgment case, has no reference to RAP 9.12. It relied on *Woodcreek Land Ltd. Partnerships v. City of Puyallup,* 69 Wn.App. 1, 11, 847 P.2d 501 (1993), which also did not cite RAP 9.12, but relied on *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983), an appeal from a full medical malpractice trial on the merits in which the plaintiff had failed to preserve for appeal during trial an element of her medical negligence claim, ***not*** a summary judgment ruling.

trial court, just as were the applicable statutes. As the contract was essentially the "law" between the parties, its interpretation and application was always at issue and the appellate court should give it a correct interpretation, as with a statute.

It is settled that RAP 9.12 does not preclude consideration of applicable law not cited to the trial court, whether that be a statute or a fire code provision since, as this Court pointed out, a "fire code provision is not evidence; it is law." *Ellis v. City of Seattle,* 142 Wn.2d 450, 459-60 fn. 3, 13 P.3d 1065 (2000). *Accord, Estrada v. McNulty,* 98 Wn. App. 717, 720-21, 988 P.2d 492 (1999) (new theory of statutory applicability as a "quasi-testamentary" beneficiary designation properly considered on appeal of summary judgment where trial court necessarily considered the various versions of the statute in ruling which one applied).

Moreover, there was nothing untoward in Dr. Hassapis challenging the Hospital's interpretation of the contract application in his reply brief on appeal when the Hospital argued

the contract in its response brief – the nature of a reply brief is to respond to arguments made in the response, which is Petitioner did.

2. Improperly deciding disputed fact issues and denying continuance.

Finally, the Decision repeats that Petitioner "offered no evidence to rebut" the various assertions made by Hospital counsel or finance department staff. This was for good reason – the MSJ was brought pre-emptively before document discovery by the Hospital was complete, the predicate for depositions. The Hospital's "bum rush" tactics were designed to, and did, keep Petitioner from obtaining the data and other information that would let him challenge its positions.

The analysis used in the Decision is an example of a return to a miscarriage of justice by overlaying archaic procedural requirements to disregard the evidence submitted by the Hospital fatal to its own motion and shows why review should be granted since it is inconsistent with *Keck v. Collins* and *Curtis Lumber Co.,* and undoes the very purpose of the rules stated in CR 1.

3. Federal cases apply Rule 56 to give meaningful effect to the moving party's burden and *de novo* review. They reverse where that burden is not met, even where there was no response filed, consistent with the text of the rule.

Our courts acknowledge the "persuasive authority" of "federal decisions interpreting federal counterparts of our own rules" including as to Rule 56. *Young v. Key Pharmaceuticals,* 112 Wn.2d at 226, citing cases. The Ninth Circuit in particular is in accord with Washington's established case law requiring the moving party to meet its burden first, reversing summary judgments even when the non-moving party has not responded at all. *See, e.g., Martinez v. Stanford, supra,* 323 F.3d at 1183, cited in the opening and reply briefs below, which ***reversed*** summary judgment for the moving party's failure to establish entitlement to judgment and commented. *Accord, Blankenhorn v. City of Orange,* 485 F.3d 463, 470 (9th Cir. 2007) ("We may not affirm a grant of summary judgment if

there is any genuine issue of material fact or the district court incorrectly applied the substantive law.").

V. Conclusion.

Petitioner asks the Court to grant review and set the matter for argument at its earliest opportunity. Alternatively, Petitioner asks the Court to grant review, vacate the trial court's dismissal and remand for discovery and trial under the basic principles of Rule 56 that on *de novo* review the Hospital's moving papers failed to show it was entitled to judgment as a matter of law, or a continuance to complete discovery was improvidently denied.

> This document contains 4, 502 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 23rd day of February, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By */s/Gregory M. Miller*
Gregory M. Miller, WSBA No. 14459
Attorneys for Appellant John Hassapis, M.D.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Via court e-filing website/Portal, which sends notification of such filing to the following:

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DATED this 23rd day of February, 2022.

/s/ Elizabeth C. Fuhrmann
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FILED
1/24/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN HASSAPIS, Appellant, v. WHIDBEY PUBLIC HOSPITAL DISTRICT, Respondent.	)	No. 81936-4-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — John Hassapis, M.D. sued his former employer, Whidbey Island Public Hospital d/b/a WhidbeyHealth Medical Center (WhidbeyHealth) for breach of contract and wage claims. Dr. Hassapis appeals the trial court's summary judgment and dismissal of his claims arguing that the court erred in denying his request for a continuance to conduct further discovery and in granting summary judgment. We affirm.

FACTS

Dr. Hassapis worked as a surgeon at a critical access hospital in Fortuna, California from 1995 to 2014. In June 2014, Dr. Hassapis and WhidbeyHealth entered into a physician employment agreement (agreement). Under the agreement, WhidbeyHealth would employ Dr. Hassapis as a general surgeon for an initial three-

year term, with automatic one-year renewals. The agreement remained in effect from July 16, 2014 until Dr. Hassapis's termination on November 1, 2019. Dr. Hassapis agreed to devote all of his professional time on behalf of WhidbeyHealth.

WhidbeyHealth agreed to pay Dr. Hassapis a base compensation and excess call compensation. Base compensation was defined in the agreement as:

> 35% of Gross Charges[1] for services personally performed by the Physician. The first through third year guarantee is $351,575 per year, to be paid as described in Section 3 below. If 35% of Gross Charges exceeds $351,575 during the twelve months of the first through third year, the difference between 35% of Gross Charges and $351,575 will be paid to the Physician before the end of the first quarter of the following year. Beginning year 4, compensation will be equal to 35% of Gross Charges unless new terms are mutually agreed upon by physician and the District.

Along with base compensation, the agreement sets a compensation ceiling equal to the 75th percentile of full-time physicians surveyed by the Medical Group Management Association (MGMA).

WhidbeyHealth was obligated under the agreement for the first through third years to pay Dr. Hassapis 35 percent of his gross charges, with a minimum guarantee of $351,575, up to the compensation ceiling. For later years Dr. Hassapis was entitled to 35 percent of his gross charges, without a minimum guarantee, up to the compensation ceiling.

After his termination, in January 2020, Dr. Hassapis sued WhidbeyHealth alleging that it did not pay him the difference between his base pay and 35 percent of

---

[1] Gross Charges were defined as:
all monies charged for physician professional services rendered by the Physician at the Physician Offices and at the Hospital. Revenues for "designated health services," as defined in 42 U.S.C. § 1395nn, shall not be included in the calculation of Physician's Charges.

his gross charges. Instead, he alleged that WhidbeyHealth never calculated 35 percent of his gross charges, and instead paid him the base pay of $351,575 for each year he was employed. The complaint asserted a breach of contract claim and a statutory wage claim.

In response to discovery requests, in March 2020 WhidbeyHealth provided Dr. Hassapis's gross charges and 35 percent of those charges for 2014 through 2019:

2014: $319,885.00 x .35 = $111,959.75
2015: $939,408.11 x .35 = $328,792.84
2016: $755,313.34 x .35 = $264,359.67
2017: $664,522.60 x .35 = $232,582.91
2018: $787,551.40 x .35 = $275,642.99
2019: $762,647.10 x .35 = $266,926.49

> The "Gross Numbers" for 2017 through 2019 were pulled from Centricity, the electronic health record system that is currently used and accessible by WhidbeyHealth. Prior to Centricity, which was implemented in 2017, Defendant used Healthwind. Thus, the "Gross Charges" listed above for 2014 – 2017 are preliminary, as some of the data is from the Healthwind system. Defendant currently has limited access to Healthwind and will supplement this response once it has been able to access the system to verify the numbers for 2014 – 2017.

On June 9, 2020, counsel for WhidbeyHealth e-mailed the referenced Healthwind reports to counsel for Dr. Hassapis showing the additional gross charges for Dr. Hassapis from 2014 through 2016, and part of 2017. The report showed $144,732.88 of additional charges for 2017. Counsel for WhidbeyHealth explained that to calculate gross charges for 2017:

> you need to add the number from the attached to the number from the Centricity report we already sent, for a total of $144,732.88 + $644,522.60 = $809,255.48 x .35 = $283.239.42. Dr. Hassapis was paid $351,575.00 in base comp in 2017, so he was paid more than his contract required that year as well.

Two weeks after providing the supplemental responses, counsel for WhidbeyHealth contacted counsel for Dr. Hassapis and proposed a summary judgment

hearing date of August 18, 2020. Dr. Hassapis requested more time and the parties moved the proposed hearing date to September 1, 2020. WhidbeyHealth moved for summary judgment on August 4, 2020, two months after sending the Healthwind reports (all final physician production numbers) to Dr. Hassapis. Dr. Hassapis made no efforts to schedule depositions or seek more discovery between receiving the updated gross charge information and the September 1, 2020, summary judgment hearing date.

In its motion for summary judgment, WhidbeyHealth argued that Dr. Hassapis was not entitled to a production bonus based on gross charges for the first three contract years or the fourth year to the last year of employment. WhidbeyHealth's motion included a declaration from its general counsel, Jake Kempton (Kempton declaration), attaching the reports produced during discovery—including the 2017 Centricity report, the 2017 Healthwind report, and an August 4, 2020, report generated to break out the 2017 data that was charged at the end of the third contract year. Consistent with the previously provided discovery responses and supplemental communication between counsel, Kempton attached exhibits and explained that Dr. Hassapis's gross charges for 2014 were $319,885.00, and 2015 were $939,408.11. He also attached exhibits and explained that the gross charges for Dr. Hassapis "from 1/1/2016 to 12/31/2016 ($755,313.34), from 1/1/2017 to 12/31/2017 ($144,732.88 + $664,522.60), and from 7/16/2017 to 12/31/2017 ($373,218.90)."

In his response to the motion for summary judgment, Dr. Hassapis focused largely on interpretation of the agreement, arguing (1) that WhidbeyHealth's interpretation of the agreement was unconscionable, (2) that the definition of "Gross Charges" was ambiguous and should not exclude "designated health services," (3)

WhidbeyHealth offered no extrinsic evidence to support its interpretation of the agreement, and (4) that without context or plain meaning the agreement must be construed against WhidbeyHealth.

Dr. Hassapis also asserted there were disputes of material fact over work he performed and charges attributed to him. He challenged the accuracy of the reports included in the Kempton declaration, asserting that the reports were missing 1 parathyroidectomy and 2 laparoscopic appendectomies in 2014, and 25 colonoscopies in 2019. He also asserted that they included several procedures that he did not perform.

Dr. Hassapis also submitted a 2019 report titled "surgical center analysis" that included line items for Dr. Hassapis showing $642,413.00 for inpatient surgeries and $3,014,746.00 for outpatient surgeries. Dr. Hassapis explained that the report "did not have enough information for me to understand how the figures on it were calculated or how much of the charges I was entitled to."

In reply, WhidbeyHealth offered the declaration of its Director of Finance, Jennifer Reed, explaining that even if the purportedly missing procedures in 2014 and 2019 were included, Dr. Hassapis's gross charges would still not meet the amount of professional charges necessary to earn more than the base compensation. Reed also explained that the 2019 report "surgical center analysis" submitted by Dr. Hassapis reflected facility charges, not specifically services personally performed by Dr.

Hassapis. Reed's testimony was consistent with information provided in June 2020 by WhidbeyHealth's counsel.[2]

The trial court granted WhidbeyHealth's motion. The court determined that Dr. Hassapis's unconscionability argument did not apply; that the meaning of "Gross Charges" was unambiguous and limited to services personally performed by Dr. Hassapis; that he was paid more than the base wage for the first three contract years; that he was paid more than the base wage for the fourth contract year through the end of his employment; and that even if the missing procedures Dr. Hassapis contends were added, he was still overpaid. The trial court also determined that Dr. Hassapis had failed to establish a genuine issue of material fact. Finally, the court held that there was no support for granting a CR 56(f) continuance. Dr. Hassapis appeals.

ANALYSIS

This court reviews a trial court's grant of summary judgment de novo. Qualcomm, Inc. v. Dep't of Revenue, 171 Wn.2d 125, 131, 249 P.3d 167 (2011). Summary judgment is "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Kittitas County v. Allphin, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). The trial court may grant summary judgment if the pleadings, affidavits, depositions, and admissions demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Sheehan v. Cent. Puget Sound Reg'l Transit Auth., 155 Wn.2d 790, 797, 123 P.3d 88 (2005). The court must construe the

[2] On June 9, 2020, counsel for WhidbeyHealth explained to counsel for Dr. Hassapis that the 2019 surgical center analysis report referenced by Dr. Hassapis was only for facility charges and "does not include the professional charges for the surgeons, nor relate to surgeon pay at all."

facts in a light most favorable to the nonmoving party. Ranger Ins. Co. v. Pierce County, 164 Wn.3d 545, 552, 192 P.3d 886 (2008).

A. 2017 Charges

In his appellate brief, Dr. Hassapis focuses mainly on the assertion that the Kempton declaration supports a conclusion that he was owed a production based bonus of at least $62,291 in 2017.[3] This is so, Dr. Hassapis claims, because he reads the Kempton declaration's statement of gross charges for Dr. Hassapis "from 1/1/2017 to 12/31/2017 ($144,732.88 + $664,522.60), and from 7/16/2017 to 12/31/2016 ($373,218.90)" as meaning that the numbers for the full year of ($144,732.88 + $664,522.60) should be added to the numbers broken out for the second half of the year ($373.522.60) for a total of $1,182.474. And because 35 percent of that total number is $413,866 and exceeds his base compensation of $313,575, by $62,291, Dr. Hassapis is owed additional salary. We disagree for two reasons.

First, this argument is not properly before us on appeal because Dr. Hassapis failed to raise this issue below before the trial court. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. Johnson v. Lake Cushman Maintenance Co., 5 Wn. App. 2d 765, 780, 425 P.3d 560 (2018); RAP 9.12.[4] As discussed above, while Dr. Hassapis questioned some reports submitted with the Kempton declaration, the arguments were limited to a few missed procedures and his misunderstanding of the 2019 surgical center analysis. Dr. Hassapis did not dispute the

[3] On appeal, Dr. Hassapis abandons his argument that the definition of gross charges in the agreement was unconscionable, relegating the assertion to a footnote in his opening brief as something that could be addressed on remand.

[4] RAP 9.12 states, "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."

2017 charges set out by Kempton. Thus, Dr. Hassapis's argument that he was underpaid in 2017 is not properly before us.

Second, even if we did consider this argument, it fails because Dr. Hassapis misunderstood the reporting. WhidbeyHealth initially produced documentation from Centricity documenting $644,522.60 for 2017 gross charges and advised Dr. Hassapis that the number was preliminary because the hospital was waiting on additional information from the previous electronic health record system. On June 9, 2020, it obtained the additional report and explained that the first Centricity report ($644,522.60) should be added to the newly obtained Healthwind report ($144,732.88). This resulted in $809,255.48 in gross charges for the 2017 calendar year.

The Kempton declaration offered with WhidbeyHealth's motion for summary judgment, included a third report generated on August 4, 2020, breaking out the portion of those $809,255.48 in gross charges that accumulated from July 16, 2017, through December 31, 2017 ($373,218.90). Dr. Hassapis incorrectly reads this third report, for the first time on appeal, as reflecting additional gross charges beyond the previously disclosed 2017 calendar year total of $809.255.48. The $373,218.90 reflected in the Kempton declaration is a subset of the 2017 calendar year total, not an additive figure.[5] As a result, even if we considered Dr. Hassapis's argument, he failed to establish a genuine issue of material fact that he was underpaid in 2017. Summary judgment was proper.

[5] This is consistent with the declaration testimony of Jennifer Reed. Reed testified, after reviewing Kempton's declaration, that Dr. Hassapis's gross charges for the initial three-year contract period of July 2014 through July 2017 totaled $2,450,643.03. Reed arrived at this number using the reports, including Kempton's declaration, using $436,036.58 as the value for the first half of 2017 (the last portion of the third contract year). This figure was arrived at by subtracting $373,218.90, the value Dr. Hassapis asserts is additive, from the total of $809,255.48.

B. 2019 Charges

In his reply brief, Dr. Hassapis argues that the 2019 surgical center analysis establishes that he had a total production of over $1 million in the first month of 2019. This argument again fails.

First, Dr. Hassapis did not identify this issue in his opening brief or in his statement of issues as required by RAP 10.3. A reply brief must be "limited to a response to the issues in the brief to which the reply brief is directed." RAP 10.3(c). Generally, this court does not review an issue raised and argued for the first time in a reply brief. Bergerson v. Zurbano, 6 Wn. App. 2d 912, 926, 432 P.3d 850 (2018). This issue is not properly before us.

But even if the issue were before us, Dr. Hassapis fails to demonstrate that the 2019 surgical center analysis creates a material issue of genuine fact. As discussed above, this document was provided to Dr. Hassapis in October 2019. In June 2020, counsel for WhidbeyHealth explained to counsel for Dr. Hassapis that the 2019 surgical center analysis only included facility charges and "does not include professional charges for the surgeons, nor relate to surgeon pay at all." Counsel for WhidbeyHealth offered to talk more about the report, but reiterated "it has nothing to do with, nor is it helpful to figure out, gross charges and Dr. Hassapis' pay under his contract."

Dr. Hassapis took no further action before summary judgment to understand the report. Instead, he attached the report to his declaration in response to WhidbeyHealth's motion for summary judgment explaining that he "did not have enough information for me to understand how the figures on it were calculated or how much of the charges I was entitled to." In reply, Whidbey Health's director of finance reiterated

counsel's earlier statement that the surgery center analysis "reflect and include facility charges rather than charges for services personally performed by Dr. Hassapis." Dr. Hassapis offers no evidence to support his contention that the 2019 surgery center analysis reflects his gross charges or pay. Summary judgment was thus proper.

C. CR 56(f) Request to Continue

Dr. Hassapis argues that the trial court erred in denying a CR 56(f) continuance because WhidbeyHealth's production of records was materially deficient and incomplete and must be supplemented with further discovery. We disagree.

The trial court's grant or denial of a motion for a CR 56(f) continuance will not be disturbed absent a showing of manifest abuse of discretion. Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). A court may properly deny a continuance when "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." Turner, 54 Wn. App. at 693. The court may ground a denial in any one of the three factors. Gross v. Sunding, 139 Wn. App. 54, 68, 161 P.3d 380 (2007).

Dr. Hassapis failed to meet the requirements necessary to obtain a continuance. He failed to present the trial court with a good reason for delay in obtaining evidence to respond to WhidbeyHealth's motion. The court heard WhidbeyHealth's motion for summary judgment on September 1, 2020. The lawsuit had been pending for seven months and Dr. Hassapis had the reports from WhidbeyHealth for almost three months. Dr. Hassapis failed to request a deposition or further discovery during that time. Dr.

Hassapis also failed to articulate to the trial court what additional evidence he expected to receive through further discovery. Because Dr. Hassapis failed to demonstrate why a CR 56(f) continuance was necessary, the trial court did not abuse its discretion in denying the request.

D. Oral Argument

During oral argument here, Dr. Hassapis's appellate counsel argued that the trial court erred in interpreting the contract in two, three-year periods because the contract prescribed an annual reconciliation method; therefore, the court manifestly abused its discretion and we must reverse. This issue was not raised in Dr. Hassapis's opening brief or identified as an issue on appeal.

When asked at oral argument why this issue was not identified or discussed in the opening brief, his counsel assured the court that the issue had indeed been briefed. That afternoon, Dr. Hassapis's counsel submitted a letter to the panel stating that the "two three-year periods of production review" argument is "woven throughout the reply brief" and provided page cites to direct the court to the issue within the reply brief.

Again, a reply brief must be "limited to a response to the issues in the brief to which the reply brief is directed." RAP 10.3(c). We will not review an issue raised and argued for the first time in a reply brief. Bergerson, 6 Wn. App. 2d at 926. Because Dr. Hassapis failed to identify or discuss this issue in his opening brief, we decline to review the issue.

Affirmed.

Mann, C.J.

WE CONCUR:

Andrus, A.C.J.

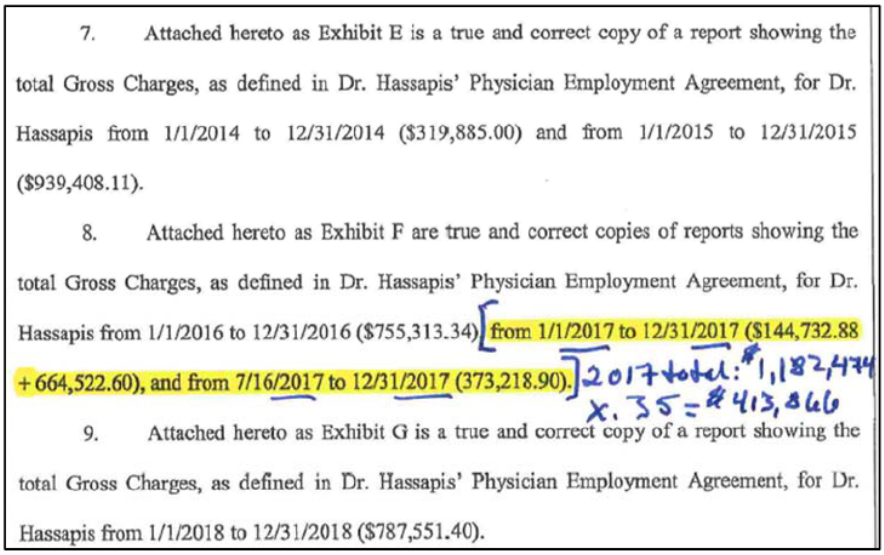
Verellen J

appeal de novo."). Attorney fees may be awarded by the court when authorized by a contract, statute, or recognized ground of equity. *Id.* The basis for fees here is RCW 49.48.030, which makes a fee award to an employee mandatory for a successful wage claim.

B. Summary Judgment Must Be Reversed Because The Hospital's Own Documents Show Dr. Hassapis Earned A Production-Based Bonus of at least $62,291 In 2017 And The Hospital Failed to Pay As Required.

1. The Hospital's documents, on their face, show it breached the contract by showing Dr. Hassapis should have been paid a production-based bonus in 2017.

As detailed *supra,* the Hospital's documents provided on summary judgment, on their face as stated in the Kempton Dec., ¶ 8, show for 2017 annual "total Gross Charges, ***as defined in Dr. Hassapis' Physician Employment Agreement***, for Dr. Hassapis for 2017, and listing the totals of the three reports with their date ranges. However, unlike the summaries for all the other years -- 2014, 2015, 2016, and 2018 – the Kempton Declaration does not give a total for the 2017 annual income. That total annual income for 2017 is $1,182,474.38, as seen in this illustration of CP 56:



7. Attached hereto as Exhibit E is a true and correct copy of a report showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2014 to 12/31/2014 ($319,885.00) and from 1/1/2015 to 12/31/2015 ($939,408.11).

8. Attached hereto as Exhibit F are true and correct copies of reports showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2016 to 12/31/2016 ($755,313.34) from 1/1/2017 to 12/31/2017 ($144,732.88 + 664,522.60), and from 7/16/2017 to 12/31/2017 (373,218.90). 2017 total: $1,182,474 x .35 = $413,866

9. Attached hereto as Exhibit G is a true and correct copy of a report showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2018 to 12/31/2018 ($787,551.40).

CP 56, with highlighting and notes added, Appendix p. A-1 hereto. *See* CP 57, App. A-3, signature page attesting under penalty of perjury the figures stated therein were true and correct.

As noted in the clip of CP 56, thirty-five per cent of Dr. Hassapis' total gross charges for calendar 2017 is $413,866, which is $62,291 more than the base salary of $351,575. Thus, the evidence submitted by the Hospital shows, on its face, that Dr. Hassapis should have been paid at least $62,291 more than the salary he was paid for 2017 based on the "gross

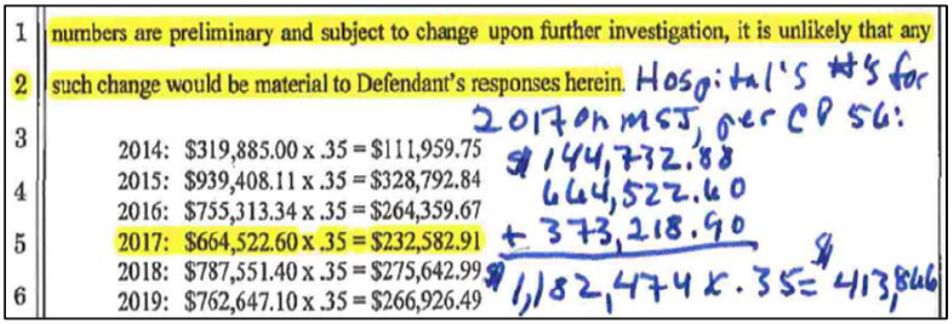
charges" production the Hospital states is attributed to him.[7] This constitutes a breach of contract and a violation of the wage statutes, requiring both reversal of the dismissal and entry of judgment in favor of Dr. Hassapis for the breach, with the precise damages to be determined on remand after completion of discovery.

2. The Hospital documents show it withheld, then obscured, Dr. Hassapis' production data when more data was produced on summary judgment, justifying a finding of willful withholding of wages where there is no other explanation and Dr. Hassapis gets the presumption withheld information in a party's control is in his favor.

The Hospital's March, 2020, response to Dr. Hassapis' initial written discovery stated its position of what his production was for each calendar year from 2014 through 2019 using its definition of "gross charges". *See* CP 171-172, App. A-6-7 hereto. The response to Interrogatory 14 stated, under penalty of perjury and CR 11 (albeit with cautions that there were problems with getting the data from a prior provider and would be supplemented), that his production for 2017 was $664,522.60,

[7] The $62,291 is a minimum figure because, as explained *infra*, the 2017 data documented in the Kempton Declaration contains a type of listing of production for the second half of the year worth $373,218.90, for which there is no equivalent for the first half of 2017, nor for any part of any other year. Since they are figures for only half of 2017, it permits an inference on summary judgment in Dr. Hassapis' favor that there was a similar amount of production for the first half of 2017 which has ***not yet been disclosed.*** If that is the case after discovery is completed, then his total production would be $1,555,692 and his 35% compensation should have been $544,492, and the MGMA 75th percentile cap would have kicked in to limit his total compensation to $527,358. *See* CP 178-179 (MGMA 2017 figures produced in discovery). If so, Dr. Hassapis' compensation shortfall would be $175,783 for 2017. A finding of willful withholding would double it.

which translated to pay of $232,582.91 if he was to be paid at 35% of his production. CP 172, line 5.[8] However, as just seen, the Kempton declaration in the Hospital's moving papers filed August 4, 2020, showed a material difference in the production attributed to Dr. Hassapis. The difference is starkly shown in this clip from the Hospital's interrogatory responses at CP 172:


numbers are preliminary and subject to change upon further investigation, it is unlikely that any such change would be material to Defendant's responses herein. Hospital's #'s for 2017 on MSJ, per CP 56:

2014: $319,885.00 x .35 = $111,959.75
2015: $939,408.11 x .35 = $328,792.84
2016: $755,313.34 x .35 = $264,359.67
2017: $664,522.60 x .35 = $232,582.91
2018: $787,551.40 x .35 = $275,642.99
2019: $762,647.10 x .35 = $266,926.49

$ 144,732.88
664,522.60
+ 373,218.90
$ 1,182,474 x .35 = $ 413,866

CP 172, highlights and annotations added, Appendix p. A-5 hereto.

The 2017 data disclosure in Ex. F of the Kempton Declaration raise other serious questions beyond demonstrating, on their face, that the Hospital breached its contract by failing to pay Dr. Hassapis at least the $413,866 its own figures show he should have been paid in 2017 under the contract, a shortfall of some $62,291, for starts. First, the summary for 2017 was the only year for which the Kempton Declaration did not state the

[8] However, these figures at CP 172 were ***not*** updated or changed when the Hospital supplemented its discovery responses in mid-July, two weeks before it filed is moving papers for summary judgment.

yearly total. *See* CP 56-57, ¶¶ 7-10. Un-totaled like the other years, it was essentially "hiding in plain sight".

Second, the Kempton Declaration was the first time this data for the second half of 2017 totaling $373,218 had been disclosed. The data pages have no Bates numbers showing they had been produced in discovery. *See* CP 95-105. That is because it was *not* produced. It *did not exist* in this document form until the day the summary judgment motion was filed: a footer on the left lower margin of each page shows a "Report Date" of August 4, 2020 at 10:30 AM – the same day the declaration was filed in superior court. *See* CP 55, showing the filed stamp at 4:25 on August 4, 2020. Nothing in the record indicates this report of Dr. Hassapis' production could not have been run earlier, either to respond to discovery, or to calculate his pay in 2017. Nor does anything indicate why it was for only half of 2017, nor where is the similar report for the first half of 2017, for all of 2018, or for any of the other years.

Finally, disclosing this report for the first time buried in statistical runs in a summary judgment submission hardly comports with proper and meaningful discovery response. More problematically, Dr. Hassapis had no opportunity to find out any of the above questions by deposition or otherwise – perhaps that was the intent of the "stealth" disclosure. Certainly

APPENDIX

Page(s)

Annotated page 2 of the August 4, 2020 Declaration of Jake Kempton in Support of Defendant's Motion for Summary Judgment (CP 56 Marked) A-1

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Annotated discovery responses from the Hospital included in the exhibits to the August 24, 2020 Declaration of Gregory Albert in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment (CP 171-172 Marked) ..... A-4 to A-5

Discovery responses from the Hospital included in the exhibits to the August 24, 2020 Declaration of Gregory Albert in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment (CP 171-172)..... A-6 to A-7

Highlighted chart provided by Hospital to Dr. Hassapis of all surgeons' non-clinic production, January – September, 2019, Ex. E to Hassapis Dec. (CP 219) A-8

practice of such activity, and were made at or near the time indicated therein by someone with knowledge.

3. Attached hereto as Exhibit A is a true and correct copy of the June 11, 2014 Physician Employment Agreement between Dr. Hassapis and WhidbeyHealth.

4. Attached hereto as Exhibit B is a true and correct copy of a letter dated September 12, 2019 from Ron Telles to Dr. Hassapis. Despite a diligent search, I was unable to locate the signed version. This letter was sent to Dr. Hassapis on September 9, 2019, and, upon information and belief, Dr. Hassapis has a signed copy of same in his possession.

5. Attached hereto as Exhibit C is a true and correct copy of a November 1, 2019, letter from Ron Telles to Dr. Hassapis.

6. Attached hereto as Exhibit D is a true and correct copy of the November 1, 2019, Personnel Action Request (PAR) relating to Dr. Hassapis' termination.

7. Attached hereto as Exhibit E is a true and correct copy of a report showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2014 to 12/31/2014 ($319,885.00) and from 1/1/2015 to 12/31/2015 ($939,408.11).

8. Attached hereto as Exhibit F are true and correct copies of reports showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2016 to 12/31/2016 ($755,313.34) from 1/1/2017 to 12/31/2017 ($144,732.88 + 664,522.60), and from 7/16/2017 to 12/31/2017 (373,218.90). 2017 total: $1,182,474 x .35 = $413,866

9. Attached hereto as Exhibit G is a true and correct copy of a report showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2018 to 12/31/2018 ($787,551.40).

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Fax: (206) 957-7008

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8. Attached hereto as Exhibit F are true and correct copies of reports showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2016 to 12/31/2016 ($755,313.34), from 1/1/2017 to 12/31/2017 ($144,732.88 + 664,522.60), and from 7/16/2017 to 12/31/2017 (373,218.90).

9. Attached hereto as Exhibit G is a true and correct copy of a report showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2018 to 12/31/2018 ($787,551.40).

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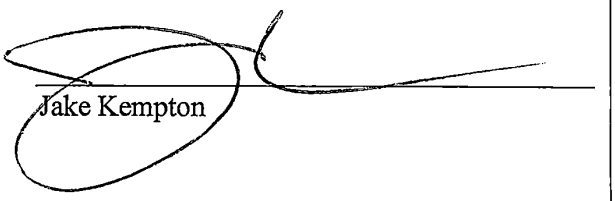
10. Attached hereto as Exhibit H is a true and correct copy of a report showing the total Gross Charges, as defined in Dr. Hassapis' Physician Employment Agreement, for Dr. Hassapis from 1/1/2019 to 12/31/2019 ($762,647.10).

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of August, 2020, at Coupeville, Washington.



Jake Kempton

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at such an early stage, to demand that WhidbeyHealth state each and every affirmative or other defense to liability it may assert, exhaustively explain the facts which WhidbeyHealth believes may support its affirmative and other defenses, and make legal conclusions and explain its rationale for such conclusions.

Please also see the objections to Interrogatory No. 2, which are incorporated herein as if set forth in full.

Subject to and without waiving the foregoing and any further objections, as it relates to Plaintiff's allegations as presently understood, WhidbeyHealth does not currently contend the contractual provisions at issue are ambiguous. WhidbeyHealth complied with all terms of the Employment Agreement relating to compensation and termination, and WhidbeyHealth owes no damages to Dr. Hassapis under the Employment Agreement.

INTERROGATORY NO. 14: Identify all charges made to every patient or payor on behalf of such patient for testing, diagnostics, surgery, consultation, or other service provided by Plaintiff or ordered by Plaintiff during the years 2014, 2015, 2016, 2017, 2018, and 2019. Identify how those charges were calculated and who was responsible for making those calculations.

ANSWER: Objection. Interrogatory No. 14 may seek production of patient health information, which is confidential under various state and federal laws, including HIPAA's Privacy Rule (45 CFR Part 160 and Part 164) and HCIA (Chap. 70.02 RCW). Also, given the clear and unambiguous definition of "Gross Charges" in the Employment Agreement, seeking the amount of charges for services other than charges for professional services personally rendered by Dr. Hassapis is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Such a request would also be overbroad and unduly burdensome.

Subject to and without waiving the foregoing and any further objections, following are the total "Gross Charges" for 2014 through 2019, as defined in the Employment Agreement, along with the calculation for Base Compensation under the Employment Agreement. Although these

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numbers are preliminary and subject to change upon further investigation, it is unlikely that any such change would be material to Defendant's responses herein. Hospital's #'s for 2017 on MSJ, per CP 56:

2014: $319,885.00 x .35 = $111,959.75
2015: $939,408.11 x .35 = $328,792.84
2016: $755,313.34 x .35 = $264,359.67
2017: $664,522.60 x .35 = $232,582.91
2018: $787,551.40 x .35 = $275,642.99
2019: $762,647.10 x .35 = $266,926.49

$144,732.88
664,522.60
+ 373,218.90
$1,182,474 x .35 = $413,866

The "Gross Numbers" for 2017 through 2019 were pulled from Centricity, the electronic health record system that is currently used and accessible by WhidbeyHealth. Prior to Centricity, which was implemented in 2017, Defendant used Healthwind. Thus, the "Gross Charges" listed above for 2014 - 2017 are preliminary, as some of the data is from the Healthwind system. Defendant currently has limited access to Healthwind and will supplement this response once it has been able to access the system to verify the numbers for 2014 – 2017. Please also see the documents produced contemporaneously herewith as WHIDBEY000082-000692 relating to 2017 through 2019, and documents for 2014 through 2016 (and part of 2017) will be supplemented if and when they can.

Please see the objections and response to Interrogatory No. 2 relating to how "Gross Charges" is calculated.

INTERROGATORY NO. 15: Describe in detail how "Gross Charges," as the term is used in Plaintiff's employment agreement, are calculated.

ANSWER: Please see the objections and response to Interrogatory No. 2, which are incorporated herein as if set forth in full, relating to how "Gross Charges" is calculated.

INTERROGATORY NO. 16: Identify the "75th percentile of MGMA physician" , as stated in Dr. Hassapis' contract, used to calculate the "Compensation Ceiling" for Dr. Hassapis for each year from 2014 to present.

ANSWER: Please see the documents attached hereto as WHIDBEY000053-000060.

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at such an early stage, to demand that WhidbeyHealth state each and every affirmative or other defense to liability it may assert, exhaustively explain the facts which WhidbeyHealth believes may support its affirmative and other defenses, and make legal conclusions and explain its rationale for such conclusions.

Please also see the objections to Interrogatory No. 2, which are incorporated herein as if set forth in full.

Subject to and without waiving the foregoing and any further objections, as it relates to Plaintiff's allegations as presently understood, WhidbeyHealth does not currently contend the contractual provisions at issue are ambiguous. WhidbeyHealth complied with all terms of the Employment Agreement relating to compensation and termination, and WhidbeyHealth owes no damages to Dr. Hassapis under the Employment Agreement.

INTERROGATORY NO. 14: Identify all charges made to every patient or payor on behalf of such patient for testing, diagnostics, surgery, consultation, or other service provided by Plaintiff or ordered by Plaintiff during the years 2014, 2015, 2016, 2017, 2018, and 2019. Identify how those charges were calculated and who was responsible for making those calculations.

ANSWER: Objection. Interrogatory No. 14 may seek production of patient health information, which is confidential under various state and federal laws, including HIPAA's Privacy Rule (45 CFR Part 160 and Part 164) and HCIA (Chap. 70.02 RCW). Also, given the clear and unambiguous definition of "Gross Charges" in the Employment Agreement, seeking the amount of charges for services other than charges for professional services personally rendered by Dr. Hassapis is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Such a request would also be overbroad and unduly burdensome.

Subject to and without waiving the foregoing and any further objections, following are the total "Gross Charges" for 2014 through 2019, as defined in the Employment Agreement, along with the calculation for Base Compensation under the Employment Agreement. Although these

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INTERROGATORY NO. 15: Describe in detail how "Gross Charges," as the term is used in Plaintiff's employment agreement, are calculated.

ANSWER: Please see the objections and response to Interrogatory No. 2, which are incorporated herein as if set forth in full, relating to how "Gross Charges" is calculated.

INTERROGATORY NO. 16: Identify the "75th percentile of MGMA physician" , as stated in Dr. Hassapis' contract, used to calculate the "Compensation Ceiling" for Dr. Hassapis for each year from 2014 to present.

ANSWER: Please see the documents attached hereto as WHIDBEY000053-000060.

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WhidbeyHealth Medical Center
Surgical Center Analysis - Surgery Only, No Clinic
For the Year to Date ending 9/30/19

GENERAL SURGERY	Cases	Charges	Pay %	Payments	Direct Cost	OH	Total Cost	Profit/(loss)
Inpatient Surgeries								
Borja	11	291,950.00	38%	110,941.00	59,817.00	39,658.00	99,475.00	11,466.00
Hajduczok	3	154,836.00	29%	44,353.50	44,903.00	25,349.00	70,252.00	(25,898.50)
Cochran	1	30,362.00	29%	8,804.98	8,667.00	4,948.00	13,615.00	(4,810.02)
Nchotu	1	102,301.00	29%	29,667.29	32,256.00	18,738.00	50,994.00	(21,326.71)
Rangel	1	33,383.00	16%	5,218.62	6,865.00	6,338.00	13,203.00	(7,984.38)
McSorley	5	128,989.00	38%	49,482.70	33,851.00	21,390.00	55,241.00	(5,758.30)
Idjadi	4	336,371.00	38%	127,820.98	82,404.00	21,993.00	104,397.00	23,423.98
KERR	2	72,876.00	29%	21,134.04	20,181.00	11,129.00	31,310.00	(10,175.96)
Miller, G	5	183,715.00	45%	83,574.56	40,617.00	36,121.00	76,738.00	6,836.56
Miller, S	1	36,815.00	39%	14,380.25	6,766.00	5,547.00	12,313.00	2,067.25
Waite, B	2	39,459.00	29%	11,443.11	14,301.00	8,776.00	23,077.00	(11,633.89)
Oman	5	128,408.00	45%	57,783.60	23,687.00	20,970.00	44,657.00	13,126.60
Huddleston	2	112,714.00	29%	32,687.06	26,561.00	16,798.00	43,359.00	(10,671.94)
Siggard	5	372,001.00	15%	55,925.08	109,987.00	29,484.00	139,471.00	(83,545.92)
Bauer	1	18,940.00	28%	5,316.84	5,609.00	2,944.00	8,553.00	(3,236.16)
Glem	7	197,826.00	35%	68,354.16	56,059.00	39,079.00	95,138.00	(26,783.84)
Hassapis	12	692,413.00	44%	303,477.53	163,864.00	121,263.00	285,127.00	18,350.53
Total Inpatient Surge	68	2,933,359.00		1,030,365.29	736,395.00	430,525.00	1,166,920.00	(136,554.71)
Outpatient Surgeries								
Borja	27	300,269.00	28%	83,173.36	70,548.00	29,442.00	99,990.00	(16,816.64)
Cochran	81	1,973,204.00	28%	544,279.10	428,589.00	163,267.00	591,856.00	(47,576.90)
Tomlinson	23	301,131.00	28%	84,316.68	60,789.00	23,799.00	84,588.00	(271.32)
Aube	1	6,689.00	50%	3,344.50	356.00	166.00	522.00	2,822.50
Robinson	2	6,689.00	25%	1,652.00	960.00	490.00	1,450.00	202.00
Chinn	7	91,109.00	49%	44,734.89	20,279.00	8,122.00	28,401.00	16,333.89
Seavey	63	1,366,484.00	28%	377,394.31	323,236.00	128,231.00	451,467.00	(74,072.69)
Johnson	189	1,036,876.00	27%	281,985.90	241,296.00	84,906.00	326,202.00	(44,216.10)
Fain	1	5,003.00	24%	1,218.34	588.00	187.00	775.00	443.34
Yee	4	70,493.00	24%	16,895.30	12,024.00	5,569.00	17,593.00	(697.70)
McSorley	18	287,084.00	28%	80,383.52	73,611.00	27,482.00	101,093.00	(20,709.48)
Idjadi	42	1,184,087.00	34%	401,856.71	282,689.00	90,484.00	373,173.00	28,683.71
Simpson	1	6,689.00	46%	3,088.67	693.00	340.00	1,033.00	2,055.67
Kerr	3	19,993.00	28%	5,598.04	4,285.00	1,793.00	6,078.00	(479.96)
Key	16	626,679.00	28%	173,213.86	151,985.00	46,687.00	198,672.00	(25,458.14)
Miller,G	373	2,707,948.00	35%	948,886.25	571,091.00	249,198.00	820,289.00	128,597.25
Arisco	3	43,720.00	28%	12,241.60	8,238.00	3,498.00	11,736.00	505.60
Waite	7	122,451.00	28%	34,286.28	27,936.00	8,030.00	35,966.00	(1,679.72)
Wagoner	31	351,060.00	28%	97,868.64	73,598.00	27,958.00	101,556.00	(3,687.36)
Oman	147	1,201,400.00	28%	336,392.00	274,548.00	116,774.00	391,322.00	(54,930.00)
Cuschieri	53	223,864.00	28%	62,681.92	46,112.00	20,747.00	66,859.00	(4,177.08)
Huddleston	52	550,016.00	33%	183,213.75	97,939.00	42,254.00	140,193.00	43,020.75
Siggard	51	460,025.00	29%	132,546.76	103,831.00	39,267.00	143,098.00	(10,551.24)
Bauer	2	22,629.00	42%	9,529.14	6,358.00	2,440.00	8,798.00	731.14
Glem	45	933,800.00	31%	292,085.98	173,095.00	63,549.00	236,644.00	55,441.98
Hassapis	396	3,014,746.00	34%	1,019,813.24	623,780.00	269,131.00	892,911.00	126,902.24
	1,638	16,914,138.00		5,232,680.74	3,678,454.00	1,453,811.00	5,132,265.00	100,415.74
TOTALS	1,706	19,847,497.00		6,263,046.03	4,414,849.00	1,884,336.00	6,299,185.00	(36,138.97)

Notes to Analysis:

a. Payments include denials
b. Analysis does not include any clinic time

CARNEY BADLEY SPELLMAN

May 07, 2021 - 4:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81936-4
Appellate Court Case Title:	John Hassapis, M.D., Appellant v. Whidbey Public Hospital District, Respondent
Superior Court Case Number:	20-2-00211-3

The following documents have been uploaded:

- 819364_Briefs_20210507164433D1743269_7633.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Hassapis Opening Brief.pdf

A copy of the uploaded files will be sent to:

- fuhrmann@carneylaw.com
- johnson@carneylaw.com
- jsteiner@masattorneys.com

Comments:

Sender Name: Elizabeth Fuhrmann - Email: fuhrmann@carneylaw.com
Filing on Behalf of: Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20210507164433D1743269

CARNEY BADLEY SPELLMAN

February 23, 2022 - 4:28 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	John Hassapis, M.D., Appellant v. Whidbey Public Hospital District, Respondent (819364)

The following documents have been uploaded:

- PRV_Letters_Memos_20220223162703SC501948_5312.pdf
  This File Contains:
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  The Original File Name was Letter to Clerk WA SCT enclosing filing fee for Petition for Review.PDF
- PRV_Petition_for_Review_20220223162703SC501948_0282.pdf
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  Petition for Review
  The Original File Name was Petition for Review FINAL.pdf

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- johnson@carneylaw.com
- jsteiner@masattorneys.com
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Comments:

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Filing on Behalf of: Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email:)

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