

NO. 72855-5-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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ERIC R. SHIBLEY, M.D., Appellant,

v.

KING COUNTY HOSPITAL DISTRICT NO. #4 d/b/a SNOQUALMIE  
VALLEY HOSPITAL, KIMBERLY WITKOP, M.D. AND RICHARD J.  
PISANI, M.D., Respondents.

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REPLY BRIEF OF APPELLANT & CROSS RESPONDENT

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**Law review article**

*Blacklisted: The Constitutionality of the Federal System  
For Publishing “Bad” Doctors in the National Practitioner Data  
Bank*, Katharine Van Tassel, 33 *Cardozo Law Review* 2032 (2012).....9

**A. Dr. Shibley never, ever admitted that he did not examine patient ST in the morning on February 9, 2011.**

Patient ST, her husband and Dr. Shibley all testified that Dr. Shibley examined patient ST on the morning of February 9, 2011. CP 349; 355; 362. Throughout every proceeding in this matter, Dr. Shibley has consistently *denied* that he ever “admitted” to Dr. Pisani or Dr. Witkop (or to Dr. Witkop in the presence of Mr. Brenner on February 17, 2011) that he did not examine patient ST on February 9, 2011. CP 365. This is the crucial “material issue of fact” from which every issue in this case flows. If a jury were to find that Dr. Shibley examined patient ST around 9:30 am on February 9, 2011, then he did not “falsify a medical record by documenting that he had performed a history and physical without examining the patient” and the defendants’ attempt to terminate his medical staff privileges during the Medical Executive Committee (MEC) meeting on March 8, 2011 was wrongful for multiple reasons: not only because he did in fact examine patient ST in the morning on February 9, 2011, but also because he was never given notice or an opportunity to respond beforehand as provided for in the Medical Staff Bylaws and the 14<sup>th</sup> amendment to U.S. Constitution; and because the MEC had no authority to terminate any physician’s privileges as well as the fact that on that date, he did not have any privileges for the MEC to act upon. Furthermore, it would necessarily follow that because Dr. Shibley examined patient ST, the reports that the hospital submitted to the National Practitioner Data Bank (NPDB) were false because they stated

that Dr. Shibley's privileges were either terminated or summarily suspended because he allegedly "falsified a medical record" by documenting "a patient history and physical without having examined the patient" CP 901 and thus they never should have been submitted to the NPDB to begin with.

**B. Defendants repeatedly conflate their allegation of "unprofessional conduct" that Dr. Shibley "falsified a medical record by documenting a history and physical without examining the patient" which he has consistently denied, with his admission to the state medical quality assurance commission that the vital signs he dictated in patient ST's history and physical were inaccurate.**

Defendants begin by arguing that because Dr. Shibley admitted to the Washington Medical Quality Assurance Commission (WMQAC) on November 6, 2011 that he committed "unprofessional conduct" in violation of RCW 18.130.180, he never had any case against them. Respondents' Opening Brief, p. 1. For many reasons, that is simply not correct. Dr. Shibley admitted to WMQAC that the vital signs he dictated into patient ST's history and physical (blood pressure and heart rate taken by nurses) on February 9, 2011 were inaccurate. He took them from the wrong computer screen and agreed to minor disciplinary action because he was admittedly careless. CP 128. That had nothing to do with the defendants' allegations that he "falsified a medical record" and 'did not examine patient ST', which he has consistently denied to this day. The trial court acknowledged the difference between the two in its order. CP 572. Nevertheless, throughout their brief, defendants repeatedly mix the two interchangeably, evidently hoping this court will find that Dr. Shibley

purportedly 'admitted' that he dictated patient's history and physical without examining was the same as his admission to WMQAC when one had nothing to do with the other. The unprofessional conduct he stipulated to with WMQAC (dictating an inaccurate H&P) had nothing to do with the reports they submitted to the NPDB alleging that he had "falsified a medical record by documenting a patient history and physical without having examined the patient" long before he ever knew anything was even happening.

**C. Defendants could not "terminate" or 'summarily suspend' Dr. Shibley's medical staff privileges on March 8, 2011 because his provisional privileges "conclusively terminated" on March 1, 2011 and because the MEC had no authority to terminate his privileges without notice or an opportunity to be heard.**

Despite the plain language contained in Bylaws Article 4, section 4a, that provisional privileges *conclusively terminate* at the end of six months if the physician is not advanced to either the active or courtesy staff, the defendants argue that Dr. Shibley's provisional privileges somehow continued on through the time of the MEC meeting on March 8, 2011 and went far beyond that time into early 2012, by claiming that his privileges were only "suspended" after March 8, 2011 even though the MEC never said it suspended them, nor did it provide him with any rights specified in the Bylaws attendant to a summary suspension. Although the trial court made a passing reference to Bylaws Article 4, section 4a in its order (CP 574), it did not address the following express provision in that section of the bylaws: "Upon expiration of a Practitioner's appointment to the

provisional staff, the failure to transfer the Practitioner from provisional to Active or Courtesy Staff Membership shall be conclusively deemed a termination of his staff appointment.” CP 277. (emphasis added) Dr. Shibley’s provisional privileges expired on March 1, 2011, undisputedly six months after they began on September 1, 2010. A physician whose privileges have expired has no medical staff appointment or clinical privileges. He is simply off the staff and gone. The trial court’s attempt to distinguish medical staff “membership” or a medical staff “appointment” from privileges is a distinction without meaning. As expressly provided in Bylaws Article 4, section 4a, the failure to transfer a provisional physician to another category of Medical Staff Membership after his provisional privileges expire means that his staff *appointment conclusively terminates*. Webster’s defines “conclusively” as “decisively.” When that happens, as it did in Dr. Shibley’s case, the physician’s privileges terminate, period. Dr. Witkop misled the MEC into believing that Dr. Shibley still had privileges when it met on March 8, 2011, and that it had the authority to terminate those privileges, neither of which was true. Accordingly, the MEC’s attempt to terminate Dr. Shibley’s “privileges” on March 8, 2011 was invalid.<sup>1</sup> Thus, the “adverse action reports” that Snoqualmie Valley Hospital submitted to the NPDB in March and April 2011 alleging that his privileges had been terminated or summarily suspended because he had ‘falsified a medical record by

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<sup>1</sup> Note also that during the MEC meeting on March 8, 2011, Dr. Pisani voted to terminate Dr. Shibley’s privileges which cleared the way for him to continue working at Snoqualmie Valley Hospital.

dictating an H&P without examining the patient' should never have been submitted to the NPDB to begin with—not only because Dr. Shibley had no privileges to terminate or suspend—but also because he never had any notice of their allegations or an opportunity to refute them before the defendants permanently harmed his professional reputation and career.<sup>2</sup>

**D. Dr. Shibley was not afforded any of the procedural due process rights contained in the Bylaws that were supposed to be provided to a physician whose privileges are “summarily suspended.”**

The Bylaws provide the following procedural rights to a physician whose privileges have been summarily suspended: (1) “If the corrective action could result in a ...suspension of Clinical Privileges...the affected Practitioner *shall* be permitted to make an appearance before the Medical Executive Committee *prior to* its taking action” (Article 7, Section 1c) CP 288 (emphasis added); (2) [He] *shall* be given a copy of a written report describing the particular circumstances resulting in such summary suspension (Article 7, Section 2a) CP 289; and (3) [He] “shall be entitled to request promptly in writing that the Medical Executive Committee consider the matter at its next regular meeting or within such reasonable time as the Medical Executive Committee be convened.” (Article 7, Section 2b) CP 289. Dr. Shibley was afforded NONE of these rights; he did not even know that the MEC had tried to take action against privileges the hospital still thought he had until March 14, 2011, six days after the

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<sup>2</sup> While it is correct that that hearing committee subsequently concluded that Dr. Shibley “falsified” patient ST’s history and physical, that determination came many months after March 2011 and it could easily be argued that the hearing committee appointed by the hospital did so in order to protect the hospital from its exposure to substantial damages for the mistakes it made in the first place.

MEC meeting on March 8, 2011, and even then he was informed that the action taken was a termination of such ‘privileges’, not a ‘summary suspension.’ CP 876. Defendants continued to maintain their position that they had terminated Dr. Shibley’s ‘privileges’ for the next two weeks CP 890 until they quietly changed their position on March 28, 2011 when Jay Rodne, general counsel, slipped the term ‘summary suspension’ into a paragraph on the second page of a letter sent to Dr. Shibley’s counsel on March 28, 2011. CP 194. The hospital was obligated to permit Dr. Shibley to meet with the MEC before his privileges were supposedly suspended and if Dr. Shibley had been provided the procedural rights related to a summary suspension of his privileges and he had been allowed to meet with the MEC, he might well have been able to explain what had actually happened—that he had in fact examined patient ST on February 9, 2011—and refuted whatever Dr. Witkop told the committee on March 8, 2011. But she finessed all of his rights and he was never given any notice that the MEC had supposedly ‘summarily suspended’ his assumed privileges or given any opportunity to meet with the MEC on March 8, 2011. It was all downhill after that.

**E. The hospital’s general counsel perpetrated a fraud on Dr. Shibley when he tried to cover up the hospital’s initial report to the NPDB by changing the MEC’s action on March 8, 2011 from termination and or revocation of privileges into a ‘summary suspension’ and then submitting another adverse action report to the NPDB.**

A summary suspension report published in the NPDB indicates that a physician’s professional conduct presents an “imminent danger” to patient

safety which was clearly not the case on March 8, 2011. Here, there is no contemporaneous evidence that the MEC ever in fact “summarily suspended” Dr. Shibley’s nonexistent privileges. CP 874-875. The hospital’s general counsel changed the MEC’s action on March 8, 2011 from termination or revocation of privileges into a 'summary suspension' in order to try to take advantage of the exception to the notice and hearing requirement in 42 U.S.C. § 11112(a) after he was reminded in a letter that no notice or hearing had been provided before the MEC tried to take action against Dr. Shibley’s privileges. It was fraudulent because he reported an event that never happened. The general counsel should have reviewed the Bylaws, realized that Dr. Shibley had no privileges for the MEC to take action against, admitted the mistake, and withdrawn the false report to the NPDB. But that did not happen. Instead, he tried to cover up the mistake by submitting a “corrected” report to the NPDB that only made the matter worse. Because the MEC’s attempt to terminate Dr. Shibley’s nonexistent privileges was invalid for a multitude of reasons and no privileges in fact were ever summarily suspended, the entire process must be voided because it was fraudulent and invalid.

**F. Dr. Witkop violated Dr. Shibley’s right to free speech when she terminated his employment in order to keep Dr. Pisani from quitting and when she presented information to the MEC on March 8, 2011 that persuaded the committee to vote to terminate his nonexistent privileges.**

In order to succeed on a claim of free speech protected by the First Amendment, a plaintiff must show that (1) he was subjected to an adverse

employment action, such as being denied a benefit by a hospital; (2) he engaged in speech that was constitutionally protected because it touched on a matter of public concern; (3) the protected expression was a substantial motivating factor for the adverse action; and (4) in the absence of protected speech the employer would not have made the same decision. See *Dewey v. Tacoma School District No. 10*, 95 Wn.App. 18, 974 P.2d 847 (1999) cited on page 50 of Respondents' Opening Brief; *Allen v. Iranon*, 283 F.3d 1070, 1074 (9<sup>th</sup> Cir. 2002); *Pool v. VanRheen*, 297 F.3d 899, 906 (9<sup>th</sup> Cir. 2002); *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9<sup>th</sup> Cir. 2000). According to Jay Rodne, general counsel for Snoqualmie Valley Hospital, the "heated exchange" between Dr. Shibley and Dr. Pisani on February 16, 2011 was the motivating factor in Dr. Pisani's decision to quit later that day<sup>3</sup> and his decision to quit was a substantial motivating factor in Dr. Witkop's decision to terminate Dr. Shibley's employment the next day on February 17, 2011. None of this would have happened if Dr. Shibley and Dr. Pisani had not gotten into a heated exchange on February 16, which led Dr. Witkop to decide to use the allegation that Dr. Shibley had dictated a history and physical without seeing patient ST as her reason for terminating his employment so she could retain Dr. Pisani. Thus, Dr. Shibley was subjected an adverse employment action because he engaged in constitutionally protected speech that touched on a matter of public concern (the health and safety of

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<sup>3</sup> CP 342. It is undisputed that Mr. Rodne's reference to patient ST regarding this heated exchange actually occurred in the morning on February 16, 2011 and referred to their respective treatment of patient RB, not patient ST.

patient RB) and his speech – the heated argument with Dr. Pisani over their treatment of patient RB – resulted in his being fired on February 17, the day after Dr. Wikop had just given Dr. Shibley a favorable performance review and a mentoring plan for the next six months. Under these circumstances, her termination of his employment violated Dr. Shibley’s right to free speech.

**G. Defendants are not immune from liability, are not excused from failing to provide pre-deprivation procedural due process to Dr. Shibley, or from failing to comply with their own Bylaws related to a ‘summary suspension’ of his purported privileges because there was never any emergency or investigation of the matter and on March 8, 2011 he posed no “imminent danger” to patient safety.**

**1. Dr. Shibley was entitled to procedural due process under the Fourteenth Amendment because defendants stigmatized his constitutionally protected liberty interest in his professional reputation and foreclosed his freedom to take advantage of other employment opportunities.**

Because Snoqualmie Valley Hospital is local government entity, 14<sup>th</sup> amendment due process applies before it can deprive a physician of a liberty interest.<sup>4</sup> Here, Dr. Shibley has a liberty interest in his professional reputation because a governmental entity placed a stigma on his reputation by publishing negative comments to the National Practitioner Data Bank for everyone in the healthcare industry to see, which were made in

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<sup>4</sup> Defendants argue that the trial court properly dismissed all claims of alleged violations of due process because there is no liberty or property interest in one’s hospital privileges. (Opening brief, p. 46) While they may be correct that the long outdated case *Ritter v. Board of Commissioners of Adams County Public Hospital District No. 1*, 96 Wn.2d 503 (1981) which held that a physician does not have a property interest in staff privileges has not yet been overruled, they are mistaken as to a physician not having a constitutionally protected liberty interest in his or her professional reputation. See also, *Blacklisted: The Constitutionality of the Federal System for Publishing “Bad” Doctors In The National Practitioner Data Bank*, K. Van Tassel, 33 *Cardozo Law Review* 2032, 2057; 2063 (2012).

conjunction with terminating and/or suspending his purported medical staff privileges and were allegedly false. See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) a case involving a governmental posting of the names of “excessive drinkers” in which the Court concluded that some sort of a hearing had to be afforded before such a list of names could be published because an individual has a protected liberty interest in his or her good name and reputation. Here, that hearing should at least have been the informal meeting with the MEC that Dr. Shibley was supposed to have been given according to the Bylaws after appropriate notice of a summary suspension (or termination) which he never received before detrimental action was taken. Bylaws Article 7, Section 1b. CP 288.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court said that a state may not deprive a person of the freedom “to engage in any of the common occupations of life” without due process. 408 U.S. 564, 572-573. A person is entitled to a hearing under the Fourteenth Amendment if a decision not to rehire him was accompanied by “a charge against him that might seriously damage his standing and associations in the community” or “impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.” *Roth*, 408 U.S. at 573. Here, in addition to terminating Dr. Shibley’s employment after weighing the pros and cons of deciding to retain Dr. Pisani rather than Dr. Shibley, Dr. Witkop imposed a stigma on Dr. Shibley by accusing him of ‘falsifying a medical record’ by

documenting a history and physical without examining the patient” which has severely impaired his freedom to take advantage of other employment opportunities.

Finally, in *Paul v. Davis*, 424 U.S. 693 (1976) the Supreme Court established a “stigma plus” standard in which it required that in addition to placing a stigma, the government must also deprive the individual the denial of some more tangible interest such as employment or the alteration of a right or status recognized by state law. Here, the “stigma plus” standard is met because defendants not only stigmatized Dr. Shibley’s professional reputation, they also terminated his employment and deprived him of other employment opportunities when they did that. CP 367-368.

- 2. Defendants are not immune from liability for damages and are not excused for their failure to provide Dr. Shibley with any pre-deprivation due process because there was no “emergency” and he did not pose any threat of imminent danger to patient safety on March 8, 2011.**

Defendants argue that they are immune from liability under 42 U.S.C. §11133(a)(1)(A), RCW 70.41.210(5) and the Bylaws. (Opening brief, p. 38). This argument incorrectly assumes that they were entitled to submit the reports and make the conflicting negative statements they made about Dr. Shibley at the time they were made on March 14, 2011 and April 12, 2011. The record in this case shows that this was a self-created “obligation” to report events that Dr. Shibley contends never happened before he was ever given notice or an opportunity to respond to what defendants were accusing him of. Furthermore, the issue is whether the

defendants are entitled to immunity under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 §§U.S.C. §11101 et seq., RCW 70.71.020 (1987). For many reasons, HCQIA immunity does not apply to Dr. Shibley's case. First, HCQIA does not apply if "such information [reported to the NPDB] is false and the person providing it knew that such information was false." 42 U.S.C. §11137(c); see also *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1334 (10<sup>th</sup> Cir. 1996). In Dr. Shibley's case, neither NPDB report accurately reported the action taken; the MEC did not terminate his privileges on March 8, 2011, nor did they 'summarily suspend' his privileges on that date. And of course Dr. Shibley contends that the allegation that he dictated a history and physical for patient ST without examining the patient was false because the defendants either knew or should have known that it was not true. That is because they admitted that they never interviewed patient ST, her husband or undertook any other investigation of the matter before terminating his employment on February 17, 2011 and subsequently "terminating" or "summarily suspending" his non-existent privileges at the MEC meeting on March 8, 2011. CP 381-383; 375-376.

In order to qualify for HCQIA immunity, defendants must meet all of the following four conditions by showing that a professional review action (1) was taken in the reasonable belief that the action was taken in furtherance of quality healthcare; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures

afforded to the physician or other such procedures that are fair to the physician; and (4) in the reasonable belief that the action was warranted by the facts known after the reasonable effort to obtain the facts and adequate notice and hearing procedures have been afforded to the physician. 42 U.S.C. §11112(a). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in HCQIA unless the presumption is rebutted by a preponderance of the evidence. Here, it is undisputed that defendants did not undertake any investigation of this matter, nor did they provide Dr. Shibley with any due procedural due process before attempting to take action against his nonexistent 'privileges and submitting damaging adverse action reports to the NPDB on March 14, 2011 and April 12, 2011. CP 330. Furthermore, the termination of his employment and the subsequent action regarding his purported privileges had nothing to do with the "furtherance of quality healthcare" because it was a knee jerk response to Dr. Pisani's decision to quit after he and Dr. Shibley got into a heated argument over their respective treatment of another patient, RB. CP 376; CP 331-332. Why else would Dr. Witkop spend time during the evening on February 16, 2011 weighing the pros and cons of keeping either Dr. Shibley or Dr. Pisani if she were genuinely upset over Dr. Shibley's alleged "admission" that he did not examine patient ST, unless Dr. Pisani had quit because he refused to work with Dr. Shibley anymore, which then presented her with an "either him or me has to go" situation? CP 872. Dr. Witkop's decision

to fire Dr. Shibley the next day had nothing to do with the furtherance of quality healthcare *per se*, but rather was done in order to persuade Dr. Pisani to change his mind about quitting after he refused to work with Dr. Shibley anymore. Finally, if Dr. Witkop actually had a “reasonable belief that such action was warranted” why didn’t she say something about her concern about whether Dr. Shibley had actually examined patient ST when she met and gave him a favorable performance review on February 16 when she said she already suspected for several days that he had not done that?

There is one exception to the adequate notice and hearing requirement for HCQIA immunity contained in 42 U.S.C. § 11112(a) but only if there is an emergency that excuses providing pre-deprivation due process and that clearly was not present in this case. See 42 U.S.C. § 11112(c)(1)(B). But that does not apply to the facts of this case because Dr. Shibley clearly did not present an imminent danger to the health of any individual and because defendants did not conduct any further investigation into the matter within 14 days after the adverse action was taken—whatever it was, whenever it was taken. For each of these reasons, defendants are not entitled to HCQIA immunity in this case.

Nor are defendants entitled to immunity pursuant to RCW 70.41.210(5) because that statute only applies to reports made to the Washington Department of Health, not to reports made to the NPDB which are the issue in this case.

Nor are defendants entitled to immunity pursuant to Article 2, Section 2c of the Bylaws because the hospital cannot confer “absolute immunity” upon itself for any acts it commits regardless of the facts or circumstances as a condition of granting privileges, before a physician is even appointed to the medical staff. CP 270. Such an extreme application of that Bylaw provision would essentially insulate the hospital from any liability regardless of how outrageous or illegal its conduct was, and license the hospital to violate any rights provided elsewhere to staff physicians in the Bylaws and the U.S. Constitution. It is well settled that in order to be enforceable such a waiver must involve the intentional relinquishment of a known right or privilege relating to a particular right that has been surrendered. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *State v. Frawley*, 181 Wash.2d 452, 334 P.3d 1022 (2014). Here, there is no way that Dr. Shibley could have possibly known which particular right or rights he was supposedly ‘surrendering’ when he merely applied for medical staff privileges that he needed to go to work at his first job after he completed his residency. To grant the hospital immunity for any subsequent acts in this case would violate both the law and public policy; the hospital could no more insulate itself from liability beforehand than Lucy Van Pelt could in the old “Peanuts” cartoon in 1967 when she had all her friends sign a document she presented to them that “absolved her from all blame.”

**H. Dr. Shibley did not release defendants from liability for damage to his professional reputation and career.**

The damaging reports that Snoqualmie Valley Hospital submitted to the National Practitioner Data Bank on March 14, 2011 and April 12, 2011 which included accusations of fraud and falsification of a medical record remain in the Data Bank to this day for everyone in the healthcare industry to see. Once this information is seen, no one is interested in employing Dr. Shibley, or granting him medical staff privileges despite the fact that WMQAC ended his probation early back in January 2013 and he is currently a board-certified internist who currently holds an unrestricted license to practice medicine in Washington. CP 335.

Defendants argue that Dr. Shibley released them from liability because of language contained in forms he signed on April 10, 2010 before he was ever granted privileges or began to work at the hospital (CP 177, CP 179); because he signed a Severance and Release Agreement on March 1, 2011 (CP 136-139) and because he subsequently signed authorizations for release of information that released from liability all parties who provided information to inquirers. (CP 217-223; 225) None of these documents released defendants from Dr. Shibley's claims in this case. The forms he signed on April 10, 2010 before he was ever granted provisional privileges could not possibly have released the hospital from liability for future, unknown misconduct because those forms did not refer to a known right or privilege relating to a particular right that he allegedly surrendered six months before he ever reported for work at the hospital. See *Johnson v.*

*Zerbst; State v. Frawley, supra.* Second, the Settlement and Release document he signed on March 1, 2011 pertained only to claims related to his employment, not to his privileges which were never mentioned in the document nor did he even have as of that date.<sup>5</sup> Third, the release language contained in the forms he signed when he applied for privileges at other facilities after he left Snoqualmie Valley Hospital referred only to that instance and not to anything that had occurred previously, particularly if the information was false or self-generated in bad faith. To apply the language otherwise would once again violate public policy because it would be unconscionable for hospital to commit illegal acts against a physician and then demand that the doctor release them “from any and all claims” whenever they occurred as a condition of his seeking other employment.

**I. Dr. Shibley has suffered economic damages far in excess of the nominal damages allowed by the U.S. Supreme Court in *Carey v. Piphus*.**

In addition to being entitled to nominal damages for undisputed violations of his 14<sup>th</sup> amendment constitutional procedural due process rights pursuant to the U.S. Supreme Court’s holding in *Carey v. Piphus*, 435 U.S. 247 (1978), Dr. Shibley is entitled to present to a jury evidence of significant economic damage he has suffered to his career and professional reputation as a result of defendants’ wrongful acts. His career

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<sup>5</sup> The Severance and Release Agreement recites: “The parties intend by this Agreement to resolve all issues between them and Employee intends to release District, its employees and agents from any and all claims or differences that relate in any way to his *employment* with the District and termination of the employment relationship.” CP 136.

has totally changed. He has been deprived of any career advancement and has been unable to obtain any fellowship since leaving Snoqualmie Valley Hospital. His hospitalist career is over because no hospital will grant him privileges with after Snoqualmie Valley Hospital placed a black mark on his record. CP 334-335. The effect is ongoing because people who Google his name read the allegations of fraud and falsifying a medical record and then go away. CP 335. A jury should be permitted to consider evidence of damage to Dr. Shibley's professional reputation and decide whether he is entitled to any damages beyond nominal damages for what defendants did to him in this case.

**J. Defendants are not entitled to an award of attorneys' fees and expenses because Dr. Shibley's claims for violation of constitutional due process, defamation, breach of contract and free speech rights were not frivolous, unreasonable or without any foundation.**

Defendants' contention that Dr. Shibley's lawsuit was frivolous, did not have a good faith basis and never had any chance of success is preposterous. Even the trial court acknowledged that Dr. Shibley had brought a "well-meaning lawsuit that, after discovery, could not survive summary judgment." CP 857. This appeal addresses Dr. Shibley's specific reasons why he believes the trial court erred when it entered summary judgment against all of his claims, particularly regarding the constitutional procedural due process issue; whether he even had privileges for the defendants to take adverse action against on March 8, 2011; as well issues regarding fraud, immunity, alleged releases and his

right to free speech—not to mention that most of the issues in the case focus on a hotly disputed material issue of fact that three witnesses attested to—his examination of patient ST on February 9, 2011 before he dictated her history and physical before leaving the hospital later that afternoon. The trial court properly exercised its discretion when it declined to award Defendants attorneys’ fees and expenses because it believed that Dr. Shibley’s complaints was not frivolous, unreasonable or without foundation. Because there is substantial merit regarding the significant issues raised in this appeal, this court should not award attorneys’ fees to Respondents and Cross-Appellants for this appeal.

#### **I. Conclusion.**

Once Dr. Shibley and Dr. Pisani argued over their respective treatment of patient RB in the morning of February 16, 2011 and Dr. Pisani told Dr. Witkop he was quitting because he could no longer work with him, Dr. Shibley’s fate was sealed. That evening, Dr. Witkop did not focus on Dr. Shibley’s alleged failure to examine patient ST. Instead, she weighed the factors in favor of keeping one over the other because she knew if she kept Dr. Shibley that Dr. Pisani would leave. CP 872; CP 376. She decided to retain Dr. Pisani by terminating Dr. Shibley. She had to come up with a reason for doing so, so she accused him of dictating a history and physical for patient ST without examining the patient. Dr. Shibley bitterly denied her allegation when she terminated him the next day on February 17, 2011 but did not protest further because he no longer

wished to work at Snoqualmie Valley under the circumstances. The parties signed a Severance and Release Agreement on March 1, 2011 “for cause” in which neither party admitted fault and in which both parties agreed not to disparage the other. CP 138. A week afterward, without any notice to Dr. Shibley or giving him any opportunity to appear before the MEC, the committee met and voted to terminate privileges that no longer existed at that time. A week after that, on March 14, 2011, the hospital submitted a report to the NPDB alleging that he had falsified a medical record by documenting that he had performed a history and physical without examining the patient. All of Dr. Shibley’s claims—violation of constitutional due process, breach of the notice and hearing provisions in the bylaws, invalid action because he had no privileges on March 8, 2011, defamation and violation of his right to free speech—stem from these material facts which he should be allowed to present to a jury.

DATED this 21<sup>st</sup> day of September, 2015.

LAW OFFICES OF ROBERT N. MEALS

By:   
Robert N. Meals, WSBA #19990  
Attorney for Appellant and Cross-  
Respondent Eric Shibley, M.D.

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On September 21, 2015, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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

Executed at Bakersfield, CA on September 21, 2015.

A handwritten signature in black ink, appearing to read "Robert N. Meals". The signature is written in a cursive style with a large initial "R".

/s/ Robert N. Meals

Robert N. Meals