

**FILED**

OCT 25 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 31858-3-III

COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

---

VENKATARAMAN SAMBASIVAN,  
an individual,  
Appellant,

vs.

KADLEC MEDICAL CENTER,  
a corporation,  
Respondent.

---

BRIEF OF APPELLANT

---

Michael E. de Grasse  
Counsel for Appellant  
WSBA #5593

P. O. Box 494  
59 South Palouse Street  
Walla Walla, Washington 99362  
509.522.2004

## TABLE OF CONTENTS

	<u>Page</u>
<u>INTRODUCTION</u>	1
<u>ASSIGNMENTS OF ERROR, ISSUES AND STANDARD REVIEW</u>	3
<u>Assignments of Error</u>	3
<u>Issues</u>	4
<u>Standard of Review</u>	5
<u>STATEMENT OF THE CASE</u>	6
<u>Course of Proceedings</u>	6
<u>Facts</u>	11
<u>ARGUMENT</u>	
I. BY ITS RETALIATORY REVOCATION OF DR. SAMBASIVAN'S PRIVILEGES TO PRACTICE INTERVENTIONAL CARDIOLOGY, KADLEC DENIED HIM ALL THE BENEFITS TO WHICH HE WAS ENTITLED UNDER HIS EMERGENCY DEPARTMENT CALL CALL COVERAGE CONTRACT, AND INTERFERED WITH HIS ABILITY TO PROVIDE INTERVENTIONAL CARDIOLOGY SERVICES TO HIS PATIENTS, THEREBY SUPPLYING THE CONTRACTUAL PREDICATE FOR HIS FEDERAL RETALIATION CLAIM.	18

	<u>Page</u>
II. BY ITS RETALIATORY REVOCATION OF DR. SAMBASIVAN'S PRIVILEGES TO PRACTICE INTERVENTIONAL CARDIOLOGY, KADLEC ACTED ADVERSELY AGAINST HIM AS AN INDEPENDENT CONTRACTOR, THEREBY VIOLATING THE WASHINGTON LAW AGAINST DISCRIMINATION.	22
III. THE SUMMARY DISMISSAL OF DR. SAMBASIVAN'S RETALIATION CLAIM, AFTER THIS COURT REVERSED THE PRIOR DISMISSAL, RECOGNIZED DR. SAMBASIVAN'S PRIMA FACIE CASE AND REMANDED THAT CLAIM FOR TRIAL, SHOULD BE REVERSED AS CONTRARY TO THE LAW OF THE CASE, AS WELL AS RELATED PRINCIPLES OF APPELLATE JURISPRUDENCE.	24
IV. ATTORNEY FEES	29
<u>CONCLUSION</u>	30

APPENDIX

Opinion in Sambasivan v. Kadlec,  
No. 30657-7-III (CP 384)

Emergency Department Call  
Coverage Agreement Interventional  
Cardiology (CP 424)

Excerpts from Kadlec’s Brief in prior  
Appeal (No. 30657-7-III)

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Baxter v. Ford</i> , 179 Wash. 123, 35 P. 2d 1090 (1934)	27
<i>CBOCS West, Inc. v. Humphries</i> , 553 U.S. 442 (2008)	18
<i>Columbia Steel Co. v. State</i> , 34 Wn. 2d 700, 209 P. 2d 482 (1949)	28
<i>Domino’s Pizza, Inc. v. McDonald</i> , 546 U.S. 470 (2006)	21
<i>Galbraith v. TAPCO Credit Union</i> , 88 Wn. App. 939, 946 P. 2d 1242 (1997)	23
<i>Greene v. Rothschild</i> , 68 Wn. 2d 1, 414 P. 2d 1013 (1966)	28
<i>Herron v. Tribune Pub. Co., Inc.</i> , 108 Wn. 2d 162, 736 P. 2d 249 (1987)	5
<i>In re Shoptaw’s Estate</i> , 54 Wn. 2d 602, 343 P. 2d 740 (1959)	21
<i>In re Wilson’s Estate</i> , 53 Wn. 2d 762, 337 P. 2d	

	<u>Page</u>
56 (1959)	28
<i>Lybbert v. Grant County</i> , 141 Wn. 2d 29, 1 P. 3d 1124 (2000)	5
<i>Malo v. Alaska Travel Fisheries, Inc.</i> , 92 Wn. App. 927, 965 P. 2d 1124 (1998)	24
<i>Marquis v. Spokane</i> , 130 Wn. 2d 97, 922 P. 2d 43 (1996)	23
<i>Miller v. Sisters of St. Francis</i> , 5 Wn. 2d 204, 105 P. 2d 32 (1940)	28

Statute and Rule

<u>Title</u>	<u>Page</u>
42 USC 1981	18,19,20
42 USC 1988	29
RCW 49.60.030	29
RCW 49.60.210	22,24
RAP 18.1	29

COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

VENKATARAMAN SAMBASIVAN,) No. 31858-3-III  
an individual, )  
Appellant, )  
vs. ) BRIEF OF  
KADLEC MEDICAL CENTER, ) APPELLANT  
a corporation, )  
Respondent. )

INTRODUCTION

Venkataraman Sambasivan, M.D., is a well-qualified interventional cardiologist who was stripped of his privileges to practice interventional cardiology at Kadlec by its board of directors in August, 2008, when the board departed from the recommendations of its own medical executive committee. As assessed by Dr. Christopher Ravage, then chair of Kadlec's cardiology department, the board's retroactive application of

new credentialing standards to Dr. Sambasivan causing revocation of his privileges was without precedent, unfair to Dr. Sambasivan and medically unnecessary.(CP 394)

Dr. Sambasivan's claim of retaliation was initially dismissed by the trial court on summary judgment. This Court reversed concluding on the issue presented, causation, that "the evidence did support the doctor's position."(CP 395)

On remand, Kadlec moved for summary judgment on a legal theory that could have been asserted in the prior appeal. Kadlec contended that Dr. Sambasivan's retaliation claim must fail because he has shown neither interference with contractual relations nor adverse action against his own contract with Kadlec. In Dr. Sambasivan's view, the record evidence is plainly contrary to Kadlec's position. Moreover, Kadlec should be precluded from advancing the current theory by the law of the case. Therefore, on the facts and law the trial court should be reversed and the case remanded, finally, for trial.

ASSIGNMENTS OF ERROR, ISSUES  
AND STANDARD OF REVIEW

Assignments of Error

1. The trial court erred by granting summary judgment for Kadlec dismissing with prejudice Sambasivan's retaliation claim. (CP 495)

2. The trial court erred by holding that Sambasivan's claim of retaliation under certain federal law, 42 USC 1981, failed because, as a matter of law and on indisputable facts, Sambasivan had no contractual relationship with which Kadlec interfered.(CP 492-93)

3. The trial court erred by holding that Sambasivan's claim of retaliation under the Washington Law Against Discrimination failed because, as a matter of law and on undisputable facts, Sambasivan had no employment or independent contractor relationship with Kadlec that was the subject of adverse, retaliatory action. (CP 492-93)

4. The trial court erred by holding that Kadlec's motion for summary judgment was not precluded by the doctrine of the law of the case.(CP 492)

Issues

1. Whether the trial erred by granting summary judgment for Kadlec dismissing with prejudice Sambasivan's retaliation claim.

2. Whether the trial court erred by holding that Sambasivan's claim of retaliation under certain federal law, 42 USC 1981, failed because, as a matter of law and on indisputable facts, Sambasivan had no contractual relationship with which Kadlec interfered.

3. Whether the trial court erred by holding that Sambasivan's claim of retaliation under the Washington Law Against Discrimination failed because, as a matter of law and on indisputable facts, Sambasivan had no

employment or independent contractor relationship with Kadlec that was the subject of adverse, retaliatory action.

4. Whether the trial court erred by holding that Kadlec's motion for summary judgment was not precluded by the doctrine of the law of the case.

#### Standard of Review

As the decision on appeal is a summary judgment, review is de novo. *Herron v. Tribune Pub. Co., Inc.*, 108 Wn. 2d 162,169, 736 P. 2d 249 (1987). All facts, and all reasonable inferences that may be drawn from them, are viewed most favorably to the nonmoving party. *Lybbert v. Grant County*, 141 Wn. 2d 29,34, 1 P. 3d 1124 (2000).

## STATEMENT OF THE CASE

### Course of Proceedings

Dr. Venkataraman Sambasivan appeals the dismissal on summary judgment of his retaliation claim against Kadlec Medical Center. (CP 497)

A native of India, Dr. Sambasivan is a board certified interventional cardiologist who has a private practice in the Tri-Cities.(CP 385) He has also held practice privileges as a member of the Kadlec medical staff. (CP 385-86)

In June 2008, Dr. Sambasivan sued Kadlec for national origin discrimination. (CP 386) In 2009, Dr. Sambasivan amended his complaint for the second time, modifying his disparate treatment discrimination claim to one of retaliation.(CP 5-6) Among other causes of action, Dr. Sambasivan brought an unjust enrichment claim arising from Kadlec's unfair refusal to pay him for emergency call coverage, unlike other similarly situated interventional

cardiologists who were paid.(CP 3-4,138,140)

In 2010, Dr. Sambasivan's retaliation claim together with certain other claims were dismissed by the trial court on summary judgment.(CP 119,146) Following that dismissal, a bench trial of Dr. Sambasivan's unjust enrichment claim resulted in a favorable judgment for Dr. Sambasivan awarding him damages, interest, costs and attorney fees.(CP 146) Among the facts found by the trial court were these:

24. The plaintiff was one of the four interventional cardiologists on the defendant's call coverage list from July 1, 2005, to October 21, 2006. The plaintiff was not paid for providing call coverage during this period, but the other three physicians were paid.  
(CP 138)

...

32. When the plaintiff was placed on the on call list and began providing certain cardiological services in July, 2005, he was not offered a contract by the defendant. The plaintiff was not paid for providing his services. The plaintiff was treated unfairly.(CP 140)

33. In several instances, the defendant paid physicians retroactively for providing call coverage, but, in this instance, the defendant has refused to pay the plaintiff retroactively for providing call coverage for the period July 1, 2005, until October 21, 2006. The defendant has treated the plaintiff unfairly.(CP 140)

The judgment in favor of Dr. Sambasivan was affirmed by this Court on October 23, 2012 (Cause No. 30657-7-III) in an opinion concluding that “[t]he evidence amply supported the determination that Kadlec had been unjustly enriched by Dr. Sambasivan providing free service while others were paid for their call service.”(CP 399;copy of the opinion is in the appendix of this brief)

In addition to affirming the judgment for Dr. Sambasivan, this Court reversed the dismissal of his retaliation claim (while affirming other dismissals) and remanded that claim for trial.(CP 410) In reversing the trial court, this Court held that the “evidence did support the doctor’s position” rebutting “Kadlec’s evidence of

nonretaliatory reasons” for its adverse action against Dr. Sambasivan.(CP 394)

The first summary judgment dismissing Dr. Sambasivan’s retaliation claim was memorialized in an order that specified:

For purposes of its analysis, the Court assumes, but does not decide, that a contractual relationship exists between Dr. Sambasivan and Kadlec that gives rise to a retaliation claim under federal and state law.(CP 121)

Although Kadlec cross appealed the judgment for Dr. Sambasivan, the above-quoted component of the trial court’s first summary dismissal of the retaliation claim was never challenged by Kadlec. Moreover, Kadlec never asserted, in the course of litigating the prior appeal, that Dr. Sambasivan’s retaliation claim should fail for lack of a contractual relationship.(See appendix for excerpts from Kadlec’s brief in the prior appeal)

Instead of challenging Dr. Sambasivan’s retaliation claim on contractual grounds, Kadlec’s attack heretofore in this Court was grounded on an asserted failure to show a

causal connection between Dr. Sambasivan's initial disparate treatment discrimination claim and Kadlec's retaliatory, adverse action of stripping him of certain practice privileges. Kadlec's briefing to this Court in the prior appeal is bereft of a contention that Dr. Sambasivan's retaliation claim lacked the requisite contractual predicate.

On the first appeal Kadlec could have argued that Dr. Sambasivan had shown neither a contractual relationship that he enjoyed and with which Kadlec interfered, nor a contractual relationship between Dr. Sambasivan and Kadlec that was the subject of adverse retaliatory action. Kadlec asserted neither point. This Court's holding and rationale properly resolved the only issue, causation, as presented in the appeal of the dismissal of the retaliation claim. The trial court was reversed and the case was remanded for trial.(CP 410)

On remand, the trial court conducted a telephonic status conference on April 11, 2013. In the course of that conference, the trial court solicited dispositive motions.

(CP 492:7-11) Until this invitation by the trial court, Kadlec never indicated to the trial court or the appellant an intent to file a dispositive motion. The mandate of this court issued on December 4, 2012 (CP 150), and the parties were waiting for trial. In accordance with the trial court's invitation, Kadlec then sought summary judgment dismissing Dr. Sambasivan's retaliation claim.(CP 179) Dismissal was granted by oral ruling on July 12, 2013.(RP 64-65) After entry of summary judgment, this appeal ensued.(CP 497)

#### Facts

The factual circumstances necessary to understand Dr. Sambasivan's position are set forth in this Court's opinion that reversed the trial court's first summary dismissal of his retaliation claim. Here are pertinent excerpts from that opinion:

In April 2007, Kadlec and Dr. Sambasivan entered into a written agreement that provided compensation for call coverage. Dr. Sambasivan's privileges at Kadlec were up for renewal

in 2008. The hospital hired an outside professional, Dr. Robert Duerr, to review the cases of the four interventional cardiologists. During the review process, Dr. Sambasivan began to believe he was being treated differently by the hospital than the other three interventional cardiologists.

Dr. Sambasivan filed suit against Kadlec in June 2008, raising six causes of action including national origin discrimination. Kadlec's board of directors met August 14, 2008. Notice of the lawsuit was discussed at the meeting. The board also considered a recommendation from Kadlec's Medical Executive Committee (MEC) to reinstate Dr. Sambasivan's privileges with restrictions on his acute and emergent surgical procedures. The board instead voted to reinstate Dr. Sambasivan without the restrictions.

At the meeting, the board also adopted a requirement, originally proposed by the Medical Staff Quality (MSQ) committee prior to Dr. Sambasivan's law suit, that all interventional cardiologists perform a minimum of 150 intervention procedures every two years as a condition for retaining or obtaining hospital privileges. The volume procedure requirement was the same standard recommended by the American College of Cardiologists and the American Heart Association. The MSQ committee, familiar with Dr. Sambasivan's background, had recommended that the new standard be phased in so that existing cardiologists could

have a year to comply. Instead, the board gave the standards immediate effect and applied them retroactively to the interventional cardiologists with current privileges. Dr. Sambasivan was the only one of the four doctors who did not qualify. The board then revoked his interventional cardiology privileges. (CP 385-387)

...

Since employers will rarely disclose that they are motivated by retaliation, plaintiffs generally must rely on circumstantial evidence to demonstrate retaliatory purpose. *Hollenback*, 149 Wn. App. at 823. The plaintiff is not required to show that retaliation was the “but for” cause of the adverse employment action, but he is required to establish that it was at least a substantial factor. *Id.* “One factor supporting a retaliatory motive is a close proximity in time between the protected activity and the employment action.” *Id.*

The trial court granted summary judgment dismissal of the retaliation claim, concluding that Dr. Sambasivan failed to establish a genuine issue of material fact regarding whether there was a causal connection between his filing a lawsuit on June 23, 2008, that included a discrimination claim and the decision of the Kadlec board of directors on August 14, 2008, to adopt a proficiency requirement for interventional cardiology privileges. The trial court further ruled that Dr. Sambasivan did not put forth

sufficient evidence to rebut Kadlec's evidence of nonretaliatory reasons for adopting the proficiency threshold. We believe that the evidence did support the doctor's position.

Dr. Sambasivan filed suit on June 23, 2008. The board of directors was notified of the suit, including the fact that it contained a discrimination claim, on August 14, 2008. That same day the board adopted the retroactive volume requirement that cost the doctor his interventional cardiology privileges at the hospital. Viewing these facts in a light most favorable to the doctor, they establish a prima facie of retaliation—because the doctor filed a discrimination lawsuit, the hospital revoked his privileges. *Hollenback*, 149 Wn. App. at 821.

The burden then shifted to Kadlec to show a nondiscriminatory purpose for its action. *Renz*, 114 Wn. App. at 618. It did so by presenting evidence that the volume requirement enhanced patient safety. At that point the burden shifted back to Dr. Sambasivan to present evidence suggesting that the hospital's reason was a pretext. *Id.* at 618-19. To meet this renewed burden, the doctor points to the fact that the MSQ committee had recommended phasing in the requirements over a one-year period and that Dr. Christopher Ravage, the chair of the cardiology department, thought that retroactive application of the new standards was unprecedented, unfair to the doctor, and not medically necessary. Clerk's Papers (CP) at 599-601. Dr. Sambasivan's own declaration cites national standards

suggesting the same thing. CP at 551. In light of these facts, we believe Dr. Sambasivan has presented evidence suggesting that the board's rationale was pretextual.(CP 394-395)

Thus, the summary judgment dismissing the retaliation claim was reversed and remanded for trial.

Faced with trial on these facts, Kadlec shifted position. It sought, again, summary dismissal of Dr. Sambasivan's retaliation claim, but on a theory that it had never advocated in this Court. Kadlec now asserts that there is no contract or contractual relationship on which Dr. Sambasivan could ground his retaliation claim under federal or state law.

At all times material to this case, Dr. Sambasivan provided certain professional services to Kadlec as an independent contractor. This contractual relationship between the parties was memorialized by an Emergency Department Call Coverage Agreement Interventional Cardiology.(CP 424;copy of agreement found in appendix) Among other things that agreement

provided and specified that:

**1.1 Duties.** Physician agrees to participate in the emergency room rotation call schedule (the “Call Schedule”) for the specialty of Interventional Cardiology. . . . (CP 425)

**1.6 Compliance with Bylaws, Rules and Regulations.** Physicians shall comply with:

- a. The Medical Staff Bylaws, rules and regulations, and definitions of participation in ED on call responsibilities, incorporated by reference;(CP 425)

**3.1 Compensation.** The Medical Center agrees to pay Physician Seven Hundred Dollars (\$700.00) per Call Coverage Day. . . .(CP 426)

**5.1 Independent Contractor.** In the performance of the duties identified herein, Medical Center and Physician intend and agree that Physician is at all times acting and performing hereunder as an independent contractor of Medical Center.(CP 427)

Plainly, this contract between the parties provided substantial benefits to both. By stripping Dr. Sambasivan of his privileges to practice interventional cardiology,

Kadlec deprived him of the benefits flowing to him from that contract.

In addition to Kadlec's causing Dr. Sambasivan to lose his capacity to enjoy the benefits of his call coverage contract, he lost the benefits resulting from his general services as an interventional cardiologist to patients who sought treatment at Kadlec. Specifically, Dr. Sambasivan has identified patients "who likely would have sought and received interventional cardiology services from the plaintiff [Dr. Sambasivan], but for the board's action of August, 2008."(CP 474)

## ARGUMENT

I. BY ITS RETALIATORY REVOCATION OF DR. SAMBASIVAN'S PRIVILEGES TO PRACTICE INTERVENTIONAL CARDIOLOGY, KADLEC DENIED HIM ALL THE BENEFITS TO WHICH HE WAS ENTITLED UNDER HIS EMERGENCY DEPARTMENT CALL COVERAGE CONTRACT, AND INTERFERED WITH HIS ABILITY TO PROVIDE INTERVENTIONAL CARDIOLOGY SERVICES TO HIS PATIENTS, THEREBY SUPPLYING THE CONTRACTUAL PREDICATE FOR HIS FEDERAL RETALIATION CLAIM.

As a person of color and of Indian origin, Dr.

Sambasivan sued Kadlec for retaliation.(CP 5-6) Claims of retaliation are cognizable under the federal civil rights statute codified as 42 USC 1981. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008).

Germane to this case are these sections of the pertinent federal civil rights statute:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 USC 1981(a)

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. 42 USC 1981(b)

By stripping Dr. Sambasivan of his privileges to practice interventional cardiology in reponse to his claim of discrimination, Kadlec retaliated against him contrary to the statute.

As shown by the call coverage contract between Dr. Sambasivan and Kadlec, Dr. Sambasivan was an independent contractor to Kadlec. In that capacity, he provided call coverage for which he was compensated. When Kadlec revoked Dr. Sambasivan’s privileges to practice interventional cardiology, he lost all capacity to provide services that were the essential undertaking of that contract. Therefore, Kadlec’s retaliatory action against Dr.

Sambasivan deprived him of the benefits of the call coverage contract

In addition to the benefits of the call coverage contract, Kadlec's retaliation prevented Dr. Sambasivan from forming contracts with individual patients to provide interventional cardiology services. By revoking Dr. Sambasivan's privileges to practice interventional cardiology, Kadlec deprived him of the legal capacity to serve patients who would have come to him at Kadlec for interventional cardiology consultations and procedures. The prospect of those patients seeking consultation and procedures from Dr. Sambasivan was real.(CP 474) Therefore, Kadlec's retaliation against Dr. Sambasivan deprived him of his legal capacity to "make and enforce" contracts with patients for medical services. 42 USC 1981(a).

Although he has done so, Dr. Sambasivan need not show that Kadlec directly interfered with a contract between Kadlec and himself. Rather, he must merely show that the retaliatory action by Kadlec interfered with his

rights under existing or proposed contractual relationships.

*Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, n. 3 (2006).

While Kadlec's action directly interfered with a contract between Dr. Sambasivan and itself (the call coverage contract), its action also interfered with Dr. Sambasivan's ability to serve prospective patients. The economic aspect of the physician-patient relationship is contractual. *In re Shoptaw's Estate*, 54 Wn. 2d 602, 605, 343 P. 2d 740 (1959). Given the contractual nature of the economic relationship between Dr. Sambasivan and prospective patients, Kadlec's action that deprived him of his ability to serve those patients also supplies a contractual predicate for Dr. Sambasivan's retaliation claim under 42 USC 1981.

II. BY ITS RETALIATORY REVOCATION OF DR. SAMBASIVAN'S PRIVILEGES TO PRACTICE INTERVENTIONAL CARDIOLOGY, KADLEC ACTED ADVERSELY AGAINST HIM AS AN INDEPENDENT CONTRACTOR, THEREBY VIOLATING THE WASHINGTON LAW AGAINST DISCRIMINATION.

As previously recognized by this Court, Dr. Sambasivan has established a claim of retaliation under the Washington Law Against Discrimination that may not be summarily denied. The prohibition of retaliation is expressly set forth in RCW 49.60.210. That statutory provision is not limited to employees:

It is an unfair practice for any employer, employment agency, labor union, *or other person* to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted or she as opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter. RCW 49.60.210(1)(emphasis supplied)

This statutory protection against retaliation is available to independent contractors. *Marquis v. Spokane*, 130 Wn. 2d 97,112, 922 P. 2d 43 (1996).

The nature of Dr. Sambasivan's relationship to Kadlec is undeniably that of an independent contractor. As expressly set forth in Dr. Sambasivan's call coverage agreement with Kadlec:

**5.1 Independent Contractor.** In the performance of the duties identified herein, Medical Center and Physician intend and agree that Physician is at all times acting and performing hereunder as an independent contractor of Medical Center.(CP 427)

Based on his status as an independent contractor, Dr. Sambasivan should be accorded all protections provided against retaliation by the Washington Law Against Discrimination.

This state's law against retaliation protects victims of discrimination and, accordingly, should be liberally construed. That protection should not be limited to those in an employment relationship. *Galbraith v. TAPCO Credit*

*Union*, 88 Wn. App. 939,950-951, 946 P. 2d 1242 (1997).

Liberal construction of the Washington Law Against Discrimination extends coverage of RCW 49.60.210 to any entity that is “functionally similar” to an employer. *Malo v. Alaska Travel Fisheries, Inc.*, 92 Wn. App. 927,930, 965 P. 2d 1124 (1998). By stripping Dr. Sambasivan of all privileges to practice interventional cardiology, Kadlec acted in a manner that was functionally similar to an employer. Assuming that the clear status of Dr. Sambasivan as an independent contractor is found not to pertain to Kadlec’s retaliatory action, Dr. Sambasivan should, nevertheless, be protected under the Washington Law Against Discrimination. The trial court should be reversed.

III. THE SUMMARY DISMISSAL OF DR. SAMBASIVAN’S RETALIATION CLAIM, AFTER THIS COURT REVERSED THE PRIOR DISMISSAL, RECOGNIZED DR. SAMBASIVAN’S PRIMA FACIE CASE AND REMANDED THAT CLAIM FOR TRIAL, SHOULD BE REVERSED AS CONTRARY TO THE

LAW OF THE CASE, AS WELL AS RELATED  
PRINCIPLES OF APPELLATE JURISPRUDENCE.

At the outset of the oral argument of Kadlec's second request for summary dismissal of Dr. Sambasivan's retaliation claim, this colloquy was had between the trial court and one of Kadlec's lawyers:

THE COURT: Well, here we are again.

MR. ROBBINS: Funny about that.

THE COURT: Mr. Robbins, it's your fault. You had it there in your hand, and you let it slide out of your hand.

MR. ROBBINS: Well, Your Honor, we did our level best to educate Division III, but what can we do? (2 RP 4-10)

Though this might have been the trial court's attempt at comic relief, it was no joke to Dr. Sambasivan. In any event, it foreshadowed the trial court's imminent ruling contrary to settled law.

The holding and rationale of the Court of Appeals decision in this case are clear:

Dr. Sambasivan also argues that the trial court erroneously dismissed his retaliation claim because there were material questions of fact that precluded summary judgment. We agree that this claim must be remanded

for trial. ( CP 393)

...

The trial court further ruled that Dr. Sambasivan did not put forth sufficient evidence to rebut Kadlec's evidence of nonretaliatory reasons for adopting the proficiency threshold. We believe that the evidence did support the doctor's position. (CP 394)

...

Viewing these facts in a light most favorable to the doctor, they establish a prima facie case of retaliation--because the doctor filed a discrimination law suit, the hospital revoked his privileges.(CP 395)

...

In light of these facts, we believe Dr. Sambasivan had presented evidence suggesting that the board's rationale was pretextual.(CP 395)

...

In this circumstance, where both parties have presented competing evidence and inferences to be drawn therefrom, it is appropriate for the trier of fact to resolve the issue. . . . The trial court erred by ruling otherwise. The summary dismissal of the retaliation

claim is reversed.(CP 396)

...

We reverse the summary dismissal of the retaliation claim and remand that claim for trial.(CP 410)

The course on remand was clear: Dr. Sambasivan's retaliation claim should have been tried, not summarily dismissed.

Proper application of the doctrine of the law of the case requires reversal of the trial court's summary judgment. As held in *Baxter v. Ford*, 179 Wash. 123,127, 35 P. 2d 1090 (1934):

Upon retrial the parties in the trial court were all bound by the law as made by the decision on the first appeal. On appeal therefrom the parties in this court are bound by that decision unless and until authoritatively overruled.

The decision of this Court has not been challenged, much less overruled, and is, therefore, binding below.

In following *Baxter, supra*, Justice Beals elaborated the doctrine of the law of the case and noted that the doctrine precludes questions that were formerly

determined, but also questions “that might have been determined.” *Columbia Steel Co. v. State*, 34 Wn. 2d 700,705, 209 P. 2d 482 (1949), quoting *Miller v. Sisters of St. Francis*, 5 Wn. 2d 204,207, 105 P. 2d 32 (1940). Accord: *Greene v. Rothschild*, 68 Wn. 2d 1,7, 414 P. 2d 1013 (1966). The issues involving Dr. Sambasivan’s contractual relationships could have been litigated in the prior appeal, but they were not. Therefore, the law of the case doctrine should have precluded Kadlec from renewing its abandoned claim that Dr. Sambasivan lacked contractual relationships or status to bring a retaliation claim under federal or state law.

Ordinary principles of appellate jurisprudence require the trial court to heed this Court’s ruling. Given the holding and rationale, questions involving Kadlec’s liability for retaliation, on remand, should have been limited to questions of causation only. See: *In re Wilson’s Estate*, 53 Wn. 2d 762,764, 337 P. 2d 56 (1959). Thus,

Kadlec should not be allowed to disinter arguments that, in the prior appeal, could have been made but were not.

Kadlec has conflated Dr. Sambasivan's express contract claim that was litigated in the prior appeal with the contractual relationship that must be shown to ground a retaliation claim. This Court declined Dr. Sambasivan's invitation to rule that medical staff bylaws gave him contractual due process rights, and affirmed the dismissal of that breach of contract claim.(CP 389) This Court did not hold that absent a breach of contract claim Dr. Sambasivan could have no retaliation claim. Nothing in law or fact allows Dr. Sambasivan a retaliation claim only if medical staff bylaws constitute a binding contract between hospitals and medical staff members.

#### IV. ATTORNEY FEES

Pursuant to RAP 18.1, the appellant requests attorney fees and expenses in accordance with governing federal and state civil rights statutes: 42 USC 1988; RCW

49.60.030. Given the posture of this case, resolution of the attorney fee and expenses question will abide the final result in this case.

CONCLUSION

On the basis of the foregoing argument, the summary should be reversed, and Dr. Sambasivan's retaliation claim should be remanded for trial.

Dated this 24<sup>th</sup> day of October, 2013.

Respectfully submitted,



Michael E. de Grasse  
WSBA #5593  
Counsel for Appellant

Opinion in Sambasivan v. Kadlec,  
No. 30657-7-III (CP 384)

FILED

OCT 23, 2012

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

VENKATARAMAN SAMBASIVAN,	)	No. 30657-7-III
	)	
Appellant,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
KADLEC MEDICAL CENTER, a	)	
corporation,	)	
	)	
Respondent.	)	

KORSMO, C.J. — Dr. Venkataraman Sambasivan appeals the dismissal on summary judgment of three of his claims against the Kadlec Medical Center of Richland. Kadlec cross appeals a judgment and award of attorney fees in favor of the doctor. We agree that a factual issue exists concerning Dr. Sambasivan’s retaliation claim and reverse the summary dismissal of that claim, while affirming the trial court on all other issues.

0-000000384

FACTS

Dr. Sambasivan, a native of India, is a board certified interventional cardiologist with a private practice in the Tri-Cities.<sup>1</sup> Kadlec, which operates a hospital in Richland, granted staff privileges to Dr. Sambasivan in 2001. In 2004, the doctor relinquished his privilege to perform certain procedures. As a result of an agreement, he was removed from Kadlec's emergency interventional cardiology call coverage list and would undertake training and perform a number of proctored cardiology procedures.

Kadlec restored him to the emergency call list on July 1, 2005, after he had completed the training and the proctored procedures. In February 2005, Kadlec began to pay the three doctors serving on the interventional cardiology emergency call list \$1,000 for each day of call service and each doctor agreed to serve two days a month on the call list without compensation. Kadlec did not pay Dr. Sambasivan for call service when it returned him to the list as the fourth doctor. That situation lasted until October 21, 2006.

In April 2007, Kadlec and Dr. Sambasivan entered into a written agreement that provided compensation for call coverage. Dr. Sambasivan's privileges at Kadlec were up for renewal in 2008. The hospital hired an outside professional, Dr. Robert Duerr, to review the cases of the four interventional cardiologists. During the review process, Dr.

---

<sup>1</sup> The activities of interventional cardiologists include the installation of stents and pacemakers and the performance of angioplasty.

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

Sambasivan began to believe he was being treated differently by the hospital than the other three interventional cardiologists.

Dr. Sambasivan filed suit against Kadlec in June 2008, raising six causes of action including national origin discrimination. Kadlec's board of directors met August 14, 2008. Notice of the lawsuit was discussed at the meeting. The board also considered a recommendation from Kadlec's Medical Executive Committee (MEC) to reinstate Dr. Sambasivan's privileges with restrictions on his acute and emergent surgical procedures. The board instead voted to reinstate Dr. Sambasivan without the restrictions.

At the meeting, the board also adopted a requirement, originally proposed by the Medical Staff Quality (MSQ) committee prior to Dr. Sambasivan's law suit, that all interventional cardiologists perform a minimum of 150 intervention procedures every two years as a condition for retaining or obtaining hospital privileges. The volume procedure requirement was the same standard recommended by the American College of Cardiologists and the American Heart Association. The MSQ committee, familiar with Dr. Sambasivan's background, had recommended that the new standard be phased in so that existing cardiologists could have a year to comply. Instead, the board gave the standards immediate effect and applied them retroactively to the interventional cardiologists with current privileges. Dr. Sambasivan was the only one of the four

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

doctors who did not qualify. The board then revoked his interventional cardiology privileges. He remains on staff for the practice of noninterventional cardiology.

The trial court denied Dr. Sambasivan's motion for a preliminary injunction concerning the revocation of interventional cardiology privileges. The trial court also denied his motion to compel discovery of Dr. Duerr's peer review of the other interventional cardiologists. The trial court did allow the complaint to be amended. The revised causes of action were breach of contract, unjust enrichment, intentional interference with a business expectancy, and retaliation. The national origin discrimination claim was dropped in favor of the retaliation theory.

Kadlec moved for summary judgment on all theories of liability and the trial court granted the motion on all but the unjust enrichment claim. That theory ultimately proceeded to bench trial. Dr. Sambasivan prevailed and was awarded damages and his attorney fees related to that claim. The billing records did not segregate the time spent on the successful claim. Recognizing the difficulty of doing so, the trial court ultimately awarded 40 percent of the amount sought. The hospital was awarded attorney fees on the breach of contract and tortious interference claims. After offsetting the competing awards, judgment for roughly \$17,000 was entered in favor of Kadlec.

The final judgment following trial also memorialized the summary judgment ruling. Dr. Sambasivan appealed directly to the Washington Supreme Court. Kadlec cross appealed. The case was subsequently transferred to this court.

#### ANALYSIS

The appeal and cross appeal require us to review the trial court's resolution of each of the four claims for relief and the propriety of the attorney fees awards.

##### *Standards of Review*

Long settled standards govern our review of this case. An appellate court reviews a summary judgment de novo; our inquiry is the same as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*; *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

##### *Breach of Contract Claim*

Dr. Sambasivan argues that he had contractual due process rights to a hearing on the MEC's recommendation that his privileges should have restrictions on his acute and emergent surgical procedures. He argues that this right arises from Kadlec's corporate bylaws, the medical staff bylaws, and his professional services contract. Kadlec argues

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

that the issue is moot in light of the fact that the board of directors declined to follow the MEC recommendation. We agree with Kadlec.

Dr. Sambasivan urges us to address the issue of whether hospital bylaws or employment contracts give rise to due process protections, a topic that Washington courts have not yet addressed. We decline to address the question in light of the fact that the doctor would obtain no relief even if we agreed with his theory. The board rejected the recommendation from the MEC. Thus, the absence of a hearing did not harm Dr. Sambasivan and he would not benefit from a favorable ruling by this court. We leave the question of contractual due process rights to another day.

The trial court correctly granted summary judgment on the breach of contract claim.

*Intentional Interference with a Business Expectancy*

Dr. Sambasivan also argues that the trial court wrongly dismissed his intentional interference with a business expectancy claim, contending that the hospital groundlessly stripped him of his privileges by adopting the new volume standards. The trial court dismissed the claim on the basis that the hospital had discretion to adopt standards for granting staff privileges. We agree with the trial court.

The tort<sup>2</sup> of intentional interference with a business expectancy contains the following elements: (1) the existence of a valid contractual relationship or business expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination thereof, (4) that the defendants interfered for an improper purpose or used improper means, and (5) resulting damage. *Pleas v. City of Seattle*, 112 Wn.2d 794, 802-03, 774 P.2d 1158 (1989). Interference may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of profession. *Id.* at 804. Exercising one's legal interests in good faith is not improper interference. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

At issue in light of the trial court's ruling is the fourth element—interference for an improper purpose or by an improper means. Well established case law backs the trial court's conclusion that this element was not satisfied.

The Washington Supreme Court has held that the board of directors of a private hospital has wide discretion to establish qualifications for granting staff privileges to physicians. *Rao v. Bd. of County Comm'rs*, 80 Wn.2d 695, 497 P.2d 591 (1972) (*Rao I*); *Group Health Coop. of Puget Sound v. King County Med. Soc'y*, 39 Wn.2d 586, 237 P.2d

---

<sup>2</sup> In light of our disposition of this claim, we need not address the doctor's alternative argument that this claim is not precluded by the former "economic loss rule." See *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010).

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

737 (1951). The *Rao* court noted that “even the governing bodies of public hospitals are vested with discretion in admitting doctors to staff privileges, and the courts will interfere with the exercise of this discretion only if it is shown to be ‘arbitrary, tyrannical, or predicated upon a fundamentally wrong basis.’” 80 Wn.2d at 698 (quoting *Group Health Coop.*, 39 Wn.2d 586). In dicta, the court stated that it might reconsider the general rule where a private hospital discriminates against physicians on the basis of sex or race, but noted that *Rao* was not such a case. *Id.* at 700.

The *Rao* case was litigated for over six years, culminating in two additional Court of Appeals opinions. In the first of those, the court stated that:

We do not believe the court, by its language in the *Rao* case . . . meant to conclude that the actions of private hospitals would be reviewable if they were ‘arbitrary, tyrannical or predicated upon a fundamentally wrong basis.’ . . . [T]he law as it now stands declines to impose upon private hospitals the need to explain their actions (which could be based upon a myriad of valid reasons).

*Rao v. Auburn Gen. Hosp.*, 10 Wn. App. 361, 367-68, 517 P.2d 240 (1973) (*Rao* II).

Dr. Sambasivan claims that *Group Health* and *Rao* are not controlling here. He argues that *Group Health* antedates the development of many of our discrimination laws, and also that the case is distinguishable because the physicians in *Group Health* were not established members of the medical staff, whereas he is a Kadlec medical staff member.

He also argues that his discrimination claim puts this case within the *Rao* exceptions for discrimination. Both arguments fail.

Dr. Sambasivan attempts to distinguish *Group Health* on the basis that he is an established member of the Kadlec medical staff, unlike the doctors at issue in *Group Health*. His argument is unconvincing because the *Group Health* holding was not limited to qualifications for physicians applying to be members of the medical staff. In addition, subsequent cases have held that the *Group Health* rule applies both to physicians seeking staff privileges, as well as to cases involving the withdrawal of staff privileges. *See, e.g., Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 515, 637 P.2d 940 (1981).

The discrimination exception claim fails because although Dr. Sambasivan initially alleged discrimination by Kadlec, he dropped that claim prior to summary judgment and instead elected to bring a retaliation claim.<sup>3</sup> Accordingly, under the wide discretion granted to private hospitals to exclude physicians from staff privileges in *Group Health* and *Rao*, Dr. Sambasivan has failed to establish a material issue of fact regarding whether Kadlec interfered for an improper purpose or used improper means.

---

<sup>3</sup> For similar reasons, we decline to address Dr. Sambasivan's contention that the trial court wrongly denied discovery concerning the peer review process. Because that information only went to his dismissed discrimination claim, it was of no relevance to the remaining claims and was therefore not discoverable. CR 26(b)(1). We do not address the privilege claims concerning that material.

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

The trial court correctly dismissed the tortious interference claim.

*Retaliation Claim*

Dr. Sambasivan also argues that the trial court erroneously dismissed his retaliation claim because there were material questions of fact that precluded summary judgment. We agree that this claim must be remanded for trial.

To state a claim for retaliation, the employee must show that he engaged in a statutorily protected activity, an adverse employment action was taken, and there was a causal link between the employee's activity and the employer's adverse action.

*Hollenback v. Shriners Hosps. for Children*, 149 Wn. App. 810, 821, 206 P.3d 337 (2009). It is not necessary that the conduct complained of actually be unlawful—it is sufficient if the employee reasonably believes that the employer's conduct was discriminatory. *Renz v. Spokane Eye Clinic, PS*, 114 Wn. App. 611, 619, 60 P.3d 106 (2002).

Once the employee makes a prima facie showing of these elements, the employer may rebut the case by presenting evidence of a legitimate nondiscriminatory reason for the employment decision. *Id.* at 618. The burden then shifts back to the employee, who may offer evidence that the employer's reason is pretextual. *Id.* at 618-19. If both the employee and the employer present evidence for competing inferences of both retaliation and nonretaliation, then it is the trier of fact's task to choose between such inferences.

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

*Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186, 23 P.3d 440 (2001) (discrimination claim); *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798, 120 P.3d 579 (2005) (retaliation claim).

Since employers will rarely disclose that they are motivated by retaliation, plaintiffs generally must rely on circumstantial evidence to demonstrate retaliatory purpose. *Hollenback*, 149 Wn. App. at 823. The plaintiff is not required to show that retaliation was the “but for” cause of the adverse employment action, but he is required to establish that it was at least a substantial factor. *Id.* “One factor supporting a retaliatory motive is a close proximity in time between the protected activity and the employment action.” *Id.*

The trial court granted summary judgment dismissal of the retaliation claim, concluding that Dr. Sambasivan failed to establish a genuine issue of material fact regarding whether there was a causal connection between his filing a lawsuit on June 23, 2008, that included a discrimination claim and the decision of the Kadlec board of directors on August 14, 2008, to adopt a proficiency requirement for interventional cardiology privileges. The trial court further ruled that Dr. Sambasivan did not put forth sufficient evidence to rebut Kadlec’s evidence of nonretaliatory reasons for adopting the proficiency threshold. We believe that the evidence did support the doctor’s position.

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

Dr. Sambasivan filed suit on June 23, 2008. The board of directors was notified of the suit, including the fact that it contained a discrimination claim, on August 14, 2008. That same day the board adopted the retroactive volume requirement that cost the doctor his interventional cardiology privileges at the hospital. Viewing these facts in a light most favorable to the doctor, they establish a prima facie case of retaliation—because the doctor filed a discrimination lawsuit, the hospital revoked his privileges. *Hollenback*, 149 Wn. App. at 821.

The burden then shifted to Kadlec to show a nondiscriminatory purpose for its action. *Renz*, 114 Wn. App. at 618. It did so by presenting evidence that the volume requirement enhanced patient safety. At that point the burden shifted back to Dr. Sambasivan to present evidence suggesting that the hospital's reason was a pretext. *Id.* at 618-19. To meet this renewed burden, the doctor points to the fact that the MSQ committee had recommended phasing in the requirements over a one-year period and that Dr. Christopher Ravage, the chair of the cardiology department, thought that retroactive application of the new standards was unprecedented, unfair to the doctor, and not medically necessary. Clerk's Papers (CP) at 599-601. Dr. Sambasivan's own declaration cites national standards suggesting the same thing. CP at 551. In light of these facts, we believe Dr. Sambasivan has presented evidence suggesting that the board's rationale was pretextual.

In this circumstance, where both parties have presented competing evidence and inferences to be drawn therefrom, it is appropriate for the trier of fact to resolve the issue. *Hill*, 144 Wn.2d at 186; *Estevez*, 129 Wn. App. at 798. The trial court erred by ruling otherwise. The summary dismissal of the retaliation claim is reversed.

*Unjust Enrichment Claim*

Kadlec argues in its cross appeal that the evidence does not support the bench verdict in favor of Dr. Sambasivan on his unjust enrichment claim. Kadlec also argues that federal law prohibited it from paying the doctor without a contract. We conclude that the evidence does support the judgment and that the federal law defense is without merit.

*Sufficiency of the Evidence.* Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party where absent any contractual relationship, notions of fairness and justice require such recovery. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). To prevail on an unjust enrichment claim, the plaintiff must show that (1) the defendant received a benefit from him, (2) the defendant appreciated or knew of the benefit, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Id.* at 484-85. This court reviews a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v.*

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

*Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). “Substantial evidence” is sufficient evidence to persuade a fair-minded person of the truth of the declared premise.

*Panorama Vill. Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000). Conclusions of law are reviewed de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). We defer to the trial court’s credibility determinations. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

Kadlec contends that none of the three elements of unjust enrichment were established at trial. Kadlec argues that it received no benefit, was unaware that Dr. Sambasivan was even taking call, and it is not unjust to have not paid the doctor. We believe the evidence supports each element.

The trial judge found that Kadlec benefited because Dr. Sambasivan’s call service lightened the load on the other three area interventional cardiologists whom it otherwise would have to pay, it would have been more expensive to bring in physicians from outside the area, and it helped Kadlec market itself as a high-quality regional hospital with specialized cardiology services readily available. CP at 879-80. While we believe the evidence supports each of these findings, the dispositive fact is that Dr. Sambasivan’s addition to the call list meant that Kadlec would not be paying the other three doctors as often and would save \$7,000-\$8,000 each month when Dr. Sambasivan was serving on

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

call for free where the others he displaced had been paid \$1,000 daily for serving. Kadlec clearly received a financial benefit from his presence on the call list. The fact that Kadlec found it necessary to pay the other doctors also indicated that it derived a benefit from having them on call.

Kadlec next argues that it was not aware of Dr. Sambasivan's call service. If it was not aware, it should have been. Dr. Ravage notified Kadlec's chief operating officer that he was adding the doctor to the call rotation, thus putting the hospital on notice that Dr. Sambasivan was performing call service for it. The accounting department would have known that it was not paying as much to the other three physicians each month for call services, a fact that should have put the hospital on notice in light of its policy of paying the interventional cardiologists for call service. Moreover, the vice-president of medical staff testified that following Dr. Sambasivan's reinstatement in 2005, he was not offered a contract due the possibility of further review of his privileges. This evidence further showed that the hospital knew the doctor was working without a contract. The totality of this testimony was sufficient to support the trial judge's determination that Kadlec knew of the benefit it was receiving from Dr. Sambasivan's call service.

Kadlec next challenges the determination that it would be unjust to not pay Dr. Sambasivan for his services, arguing that because he was not offered a contract due to the tenuous nature of his hospital privileges, it was not unfair to decline to pay him. That

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

argument is easily refuted by the fact that the other three interventional cardiologists had provisions in their contracts that allowed the hospital to terminate them without cause with 30 days notice or to terminate them immediately if the doctor lost his hospital privileges. Such clauses could easily have been included in a contract with Dr. Sambasivan, thus removing concern about his on-going status with the hospital. Fundamentally, this claim turns on the fact that without knowing the changed circumstances, Dr. Sambasivan was providing call service for free while the other three specialists were being paid by the hospital for their call service. It was not unjust to insist that he be compensated in the same manner. If Kadlec believed Dr. Sambasivan should be providing call service for free, it should have contracted with him to do so.

The evidence amply supported the determination that Kadlec had been unjustly enriched by Dr. Sambasivan providing free service while the others were paid for their call service. The evidence supported the judgment.

*Stark Law.* Alternatively, Kadlec argues that it could not pay Dr. Sambasivan for his call service because it would violate federal and state law to do so. Kadlec's unique argument that its violation of the law should shield itself from civil liability is unpersuasive.

RCW 74.09.240, which incorporates a federal statute known as the "Stark" law, states in part that,

(3)(a) Except as provided in 42 U.S.C. § 1395nn, physicians are prohibited from self-referring any client eligible [for Medicare and Medicaid] for the following designated health services to a facility in which the physician or an immediate family member has a financial relationship:

.....  
(x) Inpatient and outpatient hospital services.

A “financial interest” includes a “compensation arrangement” between the physician and the hospital. RCW 74.09.240(3)(b)(ii).

Under 42 U.S.C. § 1395nn(e)(3)(A), there is no Stark violation if, among other requirements, the arrangement between the physician and the facility is “set out in writing, signed by the parties, and specifies the services covered by the arrangement,” and “the term of the arrangement is for at least 1 year.” The purpose of the statute is to prevent some of the self-dealing that occurs when physicians refer patients to institutions in which they have a financial interest. *United States ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88, 95 (3d Cir. 2009). Other provisions of the Washington statute enact federal anti-bribery and anti-kickback legislation. RCW 74.09.240(1), (2).

Kadlec argues that because Dr. Sambasivan sees Medicare and Medicaid patients in his private practice, some of whom were referred to Kadlec, it would violate the Stark act to compensate the doctor for his call service in the absence of a written contract, even though there is no direct connection between those private practice patients and the call service patients whom the hospital pays the doctor to see when they arrive at the hospital.

Dr. Sambasivan responds that the purpose of the anti-referral statutes would not be furthered by interpreting the law as Kadlec urges. We agree with that argument.

Initially, we question the application of these statutes to Kadlec under the circumstances of this case. Both RCW 74.09.240(3) and 42 U.S.C. § 1395nn are directed expressly to “physicians,” not hospitals or other entities with whom the physicians may deal. Kadlec has not directed us to any specific statute that prohibits it from paying doctors to perform services for it if those physicians also happen to refer their unrelated private Medicare and Medicaid patients to the hospital.<sup>4</sup> While certainly statutory schemes are not limited to prohibiting only direct quid pro quo arrangements<sup>5</sup> and could

---

<sup>4</sup> The anecdotal authorities provided by Kadlec, consisting of newspaper stories about a hospital in western Washington, are not factually on point. According to the press clippings, the hospital hired physicians—some of whom did not have written contracts—to perform medical services for children at its facility, which resulted in the hospital billing Medicaid for the use of the facility. This fact pattern, involving the hospital paying the physicians seeing the same patients it was billing for, is different than the situation here where the doctors who referred some of their private patients to the hospital were paid for being available to see emergency patients at the facility.

<sup>5</sup> RCW 74.09.240(1) and (2) are expressly directed at classic quid pro quo kickback and bribery activities and apply to all participants in the schemes. *See Wright v. Jeckle*, 158 Wn.2d 375, 382-83, 144 P.3d 301 (2006). Both are class C felonies. In contrast, RCW 74.09.240(3) is directed only at physicians and does not contain an enumerated penalty for violation.

be drafted to include indirect inducements from hospitals and clinics, these statutes are directed only at physicians.<sup>6</sup>

The focus of RCW 74.09.240(3), and its federal counterpart, is on physicians who benefit from the self-referral of patients. That is not what happened here. While Kadlec's evidence on this point is skimpy, it appears that the hospital referrals in question involved patients seen by Dr. Sambasivan in his private practice rather than those hospital patients who he saw as a result of his call service. There is no indication that the doctor received any benefit from Kadlec for referring his private patients to the hospital. There also is no indication in the record that the call service payments were a disguised inducement for Dr. Sambasivan to refer his private patients to Kadlec. As the doctor argues, the purpose of these statutes is to prevent doctors from benefitting from referrals. There was no benefit to Dr. Sambasivan from referring his private patients to Kadlec, nor does Kadlec argue that the call payments were actually bribes or kickbacks to the doctor. We do not think the purpose of the Stark act is furthered by applying it to these facts. In this circumstance, the Stark act does not provide a defense for Kadlec.

---

<sup>6</sup> Where hospitals and other entities face civil liability, it appears to arise from other statutes that have interplay with the Stark act. For instance, in *Kosenske*, the hospital's potential liability arose under the false claims act due to the alleged false certification that the hospital's dealings with the co-defendant doctors conformed with the Stark act: 554 F.3d at 91-93.

Finally, we question Kadlec's basic premise that it can escape its liability to the doctor by asserting a violation of another law. There was nothing illegal about paying Dr. Sambasivan to provide call service; if it was improper, Kadlec might have an argument. However, assuming that the Stark act applies to these facts, the fact that Kadlec did not arrange for Dr. Sambasivan's call service in accordance with the dictates of that statute does not excuse its failure to pay him for his efforts. Just as two wrongs do not make a right, two wrongs (Stark act violation and unjust enrichment) do not make one immune from liability for one of those wrongs. Kadlec does not get to benefit from its improper behavior.

Kadlec's Stark act defense is without merit. The trial court did not err by finding for Dr. Sambasivan on his unjust enrichment claim.

*Attorney Fees*

Both parties challenge the trial court's respective attorney fee awards. Dr. Sambasivan contends that because there was no prevailing party, neither side should have been awarded fees. Kadlec's cross appeal argues that implied contracts do not fall within the scope of our state labor laws. We reject both arguments and affirm the trial court's respective rulings, which we will address separately.

*Dr. Sambasivan's Fee Award.* Kadlec challenges the fee awarded Dr. Sambasivan on the unjust enrichment claim on several theories, including the theory that the back

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

wages fee-shifting statute is inapplicable to implied contracts. We disagree. It also challenges the sufficiency of Dr. Sambasivan's billing records. With one small exception, we also disagree with those arguments.

This court reviews a trial court's award of attorney fees for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 49.48.030<sup>7</sup> provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

The statute is remedial and is liberally construed to advance the legislature's intent to protect employee wages and ensure payment. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002).

This court reviews a superior court's interpretation of a statute de novo. *City of Walla Walla v. Topel*, 104 Wn. App. 816, 819, 17 P.3d 1244 (2001). The goal of statutory interpretation is to give effect to the intent of the legislature. *Hubbard v. Dep't*

---

<sup>7</sup> We quote the current version of RCW 49.48.030, which was amended by Laws of 2010, chapter 8, section 12048 to make the language gender neutral.

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

*of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). Here, the language of RCW 49.48.030 is plain. The award of attorney fees is not discretionary. The court “shall” award reasonable fees to “any person” who prevails in an action for wages or salary owed. RCW 49.48.030.

Kadlec raises several objections to the application of this statute. First, seizing upon the “employer or former employer” language, Kadlec argues that the statute is inapplicable because there was no employer-employee relationship between the hospital and the doctor. This court rejected a similar argument in *Wise v. City of Chelan*, 133 Wn. App. 167, 175, 135 P.3d 951 (2006). There the trial court had denied attorney fees on the basis that the plaintiff had been an independent contractor and could not be an “employee” under the statute. Turning to the “any person” language of the statute, this court concluded that the person did not need to be an “employee” to recover attorney fees. *Id.* at 174-75. Similarly here, the reference to “employer” does not mean that only a person in an employee-employer relationship can recover attorney fees. The “employer” language is descriptive rather than a necessary condition for recovery.<sup>8</sup>

---

<sup>8</sup> This result is consistent with the outcome in *Fire Fighters*, 146 Wn.2d 29. Although the “employer” issue was not raised there, the court permitted a labor union to recover attorney fees for its representation of two employees in an arbitration action. There clearly was no employer-employee relationship between the city and the labor union.

Kadlec also argues that call payments cannot be characterized as “wages” or “salary.” We disagree. In *Wise* we rejected an argument that contract based compensation was not “wages” or “salary.” *Id.* at 175. We see no basis for distinguishing between compensation required by written contracts and compensation arising from implied contracts. Both are “wages” or “salary” for the purposes of this statute.<sup>9</sup>

Kadlec next complains that Dr. Sambasivan failed to plead RCW 49.48.030 in his complaint, relying upon our decision in *Warren v. Glascam Builders, Inc.*, 40 Wn. App. 229, 698 P.2d 565 (1985), *overruled on other grounds by Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 733 P.2d 960 (1987). There we upheld the trial court’s decision not to award attorney fees under an employment agreement where the employee failed to raise the statute to the trial court. We reasoned that the lack of notice prevented the employer from presenting evidence concerning whether the statute applied to the contract at issue. The case had been tried on the issue of whether the contract language had been violated or not. *Id.* at 231-32. Unlike *Warren*, there is no such problem in this case. The

---

<sup>9</sup> This result is similar to that in *Fraser v. Edmonds Cmty. Coll.*, 136 Wn. App. 51, 147 P.3d 631 (2006). There a former employee recovered on a promissory estoppel claim involving an unfulfilled promise to rehire a retired employee. This court concluded that the recovery was the equivalent to “wages or salary owed” and permitted recovery of attorney fees under RCW 49.48.030.

statute was raised on the first day of trial and Kadlec has not argued that it was unable to address the issue to the trial court. *Warren* does not govern here.

The trial court correctly determined that RCW 49.48.030 entitled Dr. Sambasivan to his attorney fees for prevailing on the unjust enrichment claim.<sup>10</sup> We thus turn next to Kadlec's complaints about the fees requested.

The gist of Kadlec's complaints is that Dr. Sambasivan's billing records are not detailed enough and segregated sufficiently to justify the trial court's award. In our view, those complaints go to the weight to be given the evidence presented to the trial court. The court's decision to accept the records and simply award only 40 percent of the requested amount in light of the lack of segregation, the fact that much of the discovery and facts at issue overlapped the various recovery theories, and the fact that the doctor had prevailed on only one claim falls within its discretion. We note that the trial court's ruling expressly noted that Kadlec's billing records similarly were deficient in segregation and detail. A busy trial judge is not required to keep giving parties a "do over" as long as necessary to get it correct. Just as the judge could have declined to award attorney fees for inadequate proof, we think the judge could roughly apportion the

---

<sup>10</sup> The trial court also cited "equity" as a basis for awarding fees to Dr. Sambasivan. Kadlec correctly argues that equity could not be a basis for attorney fees in this case. We do not discuss that argument in light of our conclusion that the statute authorized the award.

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

fees based on the significance of the issue to the overall case. That appears to be what the trial judge did here. That is a tenable basis for ruling and does not amount to an abuse of discretion.

However, the Washington Supreme Court has clearly indicated that the trial court must weed out “wasteful or duplicative” hours claimed. *Mahler*, 135 Wn.2d at 434. Kadlec rightly complains about the efforts spent to justify the attorney fees awarded Dr. Sambasivan. The doctor claimed a total of 24.5 hours of attorney time spent preparing the fee request and then revising the request at the trial court’s direction. It appears that some of this time is either “wasteful or duplicative” and should have been disallowed. On remand, the court should consider whether the entire 24.5 hours should have been included in the tally.

Thus, we affirm the award of attorney fees to Dr. Sambasivan with the possible exception of any duplicative or wasteful portion of the 24.5 hours spent complying with the trial court’s requests to justify the fees sought. The trial court should consider that issue on remand.

*Kadlec's Attorney Fees.* Lastly, we address Dr. Sambasivan’s contention that there should have been no award of attorney fees to either side. He reasons that there was no prevailing party as each side won significant issues. Kadlec correctly notes that the

basis for the attorney fees awards was different for each party and that the prevailing party standard is not applicable here.

The trial court awarded Dr. Sambasivan his fees under the back wages provision, RCW 49.48.030, discussed previously. Kadlec was awarded its fees with regard to two claims—tortious interference and breach of contract—that arose under the peer review act, chapter 7.71 RCW. The peer review act has its own fee-shifting provision.

Former RCW 7.71.030 (1987) provides in part:

(1) This section shall provide the exclusive remedy for any action taken by a professional peer review body of health care providers as defined in RCW 7.70.020, that is found to be based on matters not related to the competence or professional conduct of a health care provider. . . .

(3) Reasonable attorneys' fees and costs as approved by the court shall be awarded to the prevailing party, if any, as determined by the court.

The "shall" language of former RCW 7.71.030 mandates reasonable attorney fees for the prevailing party on a claim covered by RCW 7.71.030. *Perry v. Rado*, 155 Wn. App. 626, 642-43, 230 P.3d 203, *review denied*, 169 Wn.2d 1024 (2010).

In circumstances where statutes award attorney fees to the "prevailing party," it long has been common practice to deny fees if both sides prevail on a significant claim or issue. *E.g.*, *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990); *Nw. Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 985-86, 634 P.2d 837, 640 P.2d 710 (1981); *Goedecke v. Viking Inv. Corp.*, 70 Wn.2d

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

504, 513, 424 P.2d 307 (1967); *Ennis v. Ring*, 56 Wn.2d 465, 473, 341 P.2d 885, 353 P.2d 950 (1959).<sup>11</sup> Dr. Sambasivan argues that this rule should apply to this case. It does not.

In the circumstance where there are multiple bases for awarding attorney fees, it is appropriate to give effect to each fee-shifting provision and apply it to the relevant claims. *E.g.*, *Cowell v. Good Samaritan Cmty. Health Care*, 153 Wn. App. 911, 942-43, 225 P.3d 294 (2009), *review denied*, 169 Wn.2d 1002 (2010) (applying both RCW 7.71.030 and 42 U.S.C. § 11113 to different claims). In *Cowell*, the same parties prevailed on the same claims and received separate awards under each statute. Here, different parties prevailed on claims governed by different statutes. It is entirely appropriate to give effect to both. The prevailing party standard does not apply in this circumstance.

The trial court correctly awarded each party its fees under the statutes governing the claims for which each prevailed. There was no error.

#### CONCLUSION

We reverse the summary dismissal of the retaliation claim and remand that claim for trial. We affirm on the other issues raised by Dr. Sambasivan. We also affirm on the

---

<sup>11</sup> There are some circumstances where it is appropriate to apportion awards under this standard. *See Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

No. 30657-7-III  
Sambasivan v. Kadlec Medical Center

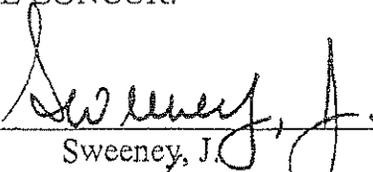
issues raised by Kadlec in its cross appeal, except that we remand a portion of the attorney fees award for further consideration.

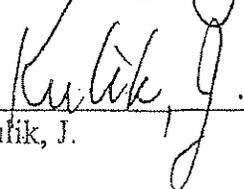
Affirmed in part, reversed in part, and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Korsmo, C.J.

WE CONCUR:

  
\_\_\_\_\_  
Sweeney, J.

  
\_\_\_\_\_  
Kulik, J.

Emergency Department Call Coverage  
Agreement Interventional Cardiology (CP 424)

EMERGENCY DEPARTMENT CALL COVERAGE AGREEMENT

INTERVENTIONAL CARDIOLOGY

This Agreement is entered into this 21 day of March, 2007, by and between KADLEC MEDICAL CENTER, a Washington non-profit corporation located in Richland, Washington, (hereinafter Medical Center) and VENKATARAM SAMBASIVAN, MD, (hereinafter Physician).

WITNESSETH

WHEREAS, the Medical Center operates a general acute care hospital located in Richland, Washington, which maintains an emergency department, the operation of which require continuous access to the specialized professional medical services of physicians to provide emergency room care and services to the Medical Center patients and the community;

WHEREAS, the Medical Center desires to assure the continuous availability of such specialized services by contracting with Physician to participate in a rotation to provide continuous emergency department coverage;

WHEREAS, the Medical Center's recognition as a regional referral center has placed an increased burden on certain of its medical staff specialists with regard to the resulting increase in emergency cases;

WHEREAS, the Physician is duly licensed in the State of Washington and qualified as a doctor of medicine with experience in furnishing such emergency services;

WHEREAS, the Physician is willing to assume the responsibility of providing emergency call coverage in accordance with recognized medical standards, applicable laws, the bylaws of the Medical Center's medical staff, the corporate bylaws and policies of the Medical Center, and the terms and conditions set forth herein;

WHEREAS, the Parties desire to enter into this Agreement in order to provide for continuous and uninterrupted coverage of and access to emergency medical and surgical services according to usual and customary standards and for the purpose of promoting consistency of service, standardization, and uniformity of the administration of emergency services; promoting efficient scheduling, economy, and availability of the services; promoting efficient supervision and training of personnel; facilitating the exchange of information among physicians; and ensuring that such highly specialized services are available to the community twenty-four (24) hours per day, seven (7) days per week, three hundred sixty-five (365) days per year; and

WHEREAS, this Agreement seeks to fulfill the Medical Center's charitable mission and provide for consistent compliance with federal and state law regarding the treatment of emergency medical conditions, regardless of a patient's ability or inability to pay for such treatment; and

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

KAD 000004  
CONFIDENTIAL

0-000000424

Article I  
Scope of Services of Physician

1.1 Duties. Physician agrees to participate in the emergency room rotation call schedule (the "Call Schedule") for the Specialty of Interventional Cardiology and acknowledges that such commitment requires Physician to furnish emergency medical/surgical services (the "Services") to the Medical Center patients as required during any scheduled twenty-four (24)-hour call period.

1.2 If Physician is a member of the active Medical Staff at the Medical Center, Physician acknowledges that Physician has an obligation to provide emergency call coverage in accordance with the Medical Center's Medical Staff Bylaws, unless granted an exemption or waiver of such obligation as per the Rules, Regulations and/or Bylaws of the Medical Staff or Medical Center.

1.3 Nothing in this Agreement shall be interpreted to dictate Physician's practice of medicine, delivery of direct patient care or independent medical judgment of Physician; including Physician's ability to assess whether Physician's clinical qualifications allow Physician to provide such emergency treatment of patient(s) at the Medical Center.

1.4 Call Schedule. Physician shall be available to provide the Services to the Medical Center patients in accordance with a Call Schedule prepared on a monthly basis by the Chair of the Interventional Cardiology Department, following consultation with participating physicians. Such Call Schedule shall be finalized and delivered to the Medical Staff Office no later than 90 days preceding the month to which the Call Schedule applies.

1.5 Transfer Center. Physician shall participate in, cooperate with and support the Medical Center's Transfer Center, its policies and procedures, including the transfer coordination process via conference call and responding to the Transfer Center in a timely manner. Physician acknowledges that the Medical Center may record such Transfer Center calls.

1.6 Compliance with Bylaws, Rules and Regulations. Physician shall comply with:

- a. The Medical Staff Bylaws, rules and regulations, and definitions of participation in ED on call responsibilities, incorporated by reference;
- b. The Emergency Department Rules and Regulations and Medical Staff Department Rules regarding Emergency Call and Rules specific to ED call payment reimbursement, as forth by the Kadlec Medical Center Ad Hoc Committee Multi Disciplinary Emergency Department Call Report, as set out in attached Exhibit B.
- c. The Physician On-Call Policy, as set out in attached Exhibit C, including any future revisions to such policy

Article II  
Qualifications of Physician

2.1 Qualifications. Physician represents and warrants that Physician is:

- a. A member in good standing of the medical staff at the Medical Center;
- b. Has a current status as a participating provider in the Medicare and Medicaid programs;

- c. Has a current registration with the DEA to prescribe controlled substances without sanctions, restriction or limitation;
- d. Has professional liability insurance in the minimum amount as required by the Medical Staff Bylaws and this Agreement;
- e. Has a current unrestricted license to practice medicine in the State of Washington;
- f. Complies with all the bylaws, and regulations, policies, directives and compliance plans of the Medical Center and Medical Staff which are applicable to on call responsibilities and definitions; and
- g. Is free from the influence of alcohol, drugs and/or controlled substances at all times when engaged in providing on call services.

2.2 If at any time Physician fails to meet these requirements, Physician shall notify the Medical Center and shall immediately cease to provide services under this Agreement.

### Article III Compensation of Physician/

3.1 Compensation. The Medical Center agrees to pay Physician Seven Hundred Dollars (\$700.00) per Call Coverage Day, (i.e., twenty-four (24) hour period of Call Coverage)

#### 3.2 Conditions of Payment

- a. Physician shall provide a detailed log of call coverage furnished in the form of the "Call Documentation Form," a copy of which is attached hereto as Exhibit A, and shall submit such log within ten business (10) days of the end of the month in which the Services were provided.
- b. The aggregate compensation for each month of Call Coverage furnished hereunder shall be payable within 15 business days of the following month in which Services were performed, and after the Medical Center's verification and reconciliation of the Call Schedule(s) and revisions to such Call Schedule(s), and other physicians in the Specialty Call Schedule with Physician's documentation. Such payment shall serve to compensate Physician for all of Physician's Services under this Agreement.
- c. Physician shall assist the Medical Center in the gathering of data necessary to review and modify the Emergency Department Call and Compensation Plan, as approved by the Board of Directors of the Medical Center

3.3 Reasonable Compensation. The Parties agree that the compensation is set in advance, is reasonable and consistent with fair market value and does not take into account the volume or value of any referral or any other business generated by Physician.

3.4 Other Providers. Medical Center shall have the ability to purchase said ED Call Coverage from other provider(s) and/or contract for ED Call Coverage from other provider(s) for ED Call Coverage not provided by the Medical Staff of the Medical Center.

Article IV  
Professional Services Billing

4.1 Physician shall have the sole right to bill for Physician's professional services furnished to Medical Center patients under this Agreement.

Article V  
Independent Contractor

5.1 Independent Contractor. In the performance of the duties identified herein, Medical Center and Physician intend and agree that Physician is at all times acting and performing hereunder as an independent contractor of Medical Center. Nothing in this Agreement is intended or shall be construed to create an employer/employee relationship or a joint venture or partnership relationship or to allow either party to exercise control or direction over the manner and method by which the other party performs the services which are the subject matter of this Agreement, provided, however, that the services to be provided Physician shall be provided in a manner consistent with applicable law and the terms of this Agreement.

5.2 Physician shall not be covered by worker's compensation or unemployment insurance carried by the Medical Center; nor shall Physician be eligible to participate in any pension, welfare or other employee benefit plan provided by the Medical Center to its employees; nor shall the Medical Center make any kind of withholding from the Compensation paid Physician pursuant to this Agreement.

Article VI  
Term/Termination

6.1 Term. This Agreement shall commence April 1, 2007, and shall terminate March 31, 2008, unless otherwise terminated as per the terms of this Agreement.

6.2 Termination Without Cause. Either party can terminate this Agreement with 30 days prior written notice by one party to the other.

6.3 Termination for Cause. At any time during the term of this Agreement, the Medical Center may terminate this Agreement for Cause, which termination shall become effective upon delivery of written notice of termination to Physician, or effective as otherwise provided herein, "Cause" shall mean any of the following:

- a. Failure of Physician to comply with any material term of this Agreement within ten (10) days after the Medical Center has provided Physician written notice that Physician is not in compliance with such material term; provided that if the Medical Center deems such non-compliance to result in immediate danger to patients, to violate applicable laws, or to jeopardize the Medical Center's JCAHO accreditation, the Medical Center may immediately terminate this Agreement upon the provision of written notice to the Physician;
- b. Conduct on the part of Physician which, in the sole discretion of Medical Center, could negatively affect the quality of professional care provided to Medical Center patients or the performance of the duties required hereunder, or be prejudicial or adverse to the best interest or welfare of the Medical Center or its patients;

- c. Medical Center determines to provide call coverage through an alternative method; provided that the Medical provides the Physician thirty (30) days prior written notice; or
- d. Physician's conviction of a criminal offense related to healthcare, or Physician's listing by a federal agency as being debarred, excluded or otherwise ineligible for federal program participation.

6.4 Immediate Termination by Medical Center. The Medical Center may terminate this Agreement immediately, upon the occurrence of any of the following events:

- a. If Physician fails to maintain an unrestricted license to practice medicine in the State of Washington or has his license suspended, revoked or terminated;
- b. If Physician has his registration to use or prescribe any controlled substance in providing services hereunder suspended, revoked or terminated;
- c. If Physician has his membership on the Medical Staff of the Medical Center curtailed, suspended or revoked or if his clinical privileges are curtailed, suspended or revoked;
- d. If Medical Center reasonably determines that the health or welfare of patients is jeopardized by the actions or behavior of Physician; or
- e. The death of Physician.

6.5 Termination by Change in Law. If Medical Center determines based upon a written opinion from Medical Center's legal counsel that any provision of this Agreement or its appendices or the continued performance of the Medical Center any Physician hereunder may be in violation of any law, regulation, indenture or other agreement with respect to, or may otherwise jeopardize, the Medical Center's qualifications as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or any successor provision, or the maintenance of current, or issuance of any future, tax exempt financing of the Medical Center, including, but not limited to, Revenue Procedure 97-13, the Medical Center may propose a modification to the terms of this Agreement to bring the Medical Center into compliance. If such notice is given to Physician and if Medical Center and Physician are unable to agree upon a modification within ninety (90) days of such written notice, this Agreement may be terminated by Medical Center at any time thereafter.

6.6 Effect of Termination. As of the effective date of termination of this Agreement, neither Party shall have any further rights or obligations hereunder, except, (i) as otherwise provided herein; (ii) for the rights and obligations accruing prior to such effective date of termination; or (iii) as a result of any breach of this Agreement.

6.7 Effect of Termination - Active Staff Membership ED Call Responsibility. If Physician is a member of the active medical staff at Medical Center, and is not exempt under the Emergency Department Call Rules and Regulations and/or Medical Staff Bylaws, termination of this Agreement does not relieve Physician of Physician's Emergency Department Call responsibility as a member of the active staff of the Medical Center.

Article VII  
Miscellaneous

7.1 Access to Books and Records. Physician shall make this Agreement and his books, documents and records available to the Secretary of Health and Human Services, the Comptroller General or their authorized representatives, until the expiration of four years after the services furnished hereunder; provided, however, that if any of Physician's duties hereunder are carried out through a subcontractor, if such contract has a value or cost of \$10,000 or more over a 12-month period, Physician shall obtain the written undertaking of such subcontractor to make the subcontract as well as the subcontractor's books, documents and records available to the same extent. Nothing in this Section 9.1 shall be interpreted or construed to allow assignment of this Agreement except as otherwise provided in Section 9.3 herein.

7.2 Compliance with Laws and other Requirements. The Medical Center and Physician agree that each shall comply with all applicable requirements of federal, state and local governmental agencies and nongovernmental accrediting, peer review or quality assurance organizations now or hereafter in force and effect, to the extent that they bear on the subject matter of this Agreement. These include, without limitation, the following:

- a. All applicable federal, state and local governmental laws, rules and regulations, including laws, rules and regulations related to the Medicare and Medicaid Programs;
- b. All applicable standards of certifying or accrediting agencies;
- c. All applicable guidelines, rules and standards established from time to time by third party payors, including but not limited to Medicare or Medicaid; and
- d. All applicable governmental and nongovernmental quality assurance and utilization review programs.

7.3 Assignment. Any rights or duties hereunder may not be subcontracted or otherwise assigned or delegated by either party without the written consent of the other, except that the Medical Center may assign its rights and duties hereunder to a parent, subsidiary or affiliate, or by merger or pursuant to a sale of all or substantially all of its assets or as part of a corporate reorganization, in any of which instances this Agreement shall be binding upon Physician.

7.4 Indemnification. Physician shall defend, indemnify and hold the Medical Center, its directors, officers, agents and employees harmless from and against any and all claims, demands, liabilities, damage and expenses, including attorney's fees, arising out of or related to the Physician's performance of this Agreement.

7.5 Arbitration. In the event of any claims or disputes arising out of this Agreement, the parties agree to first make good faith efforts to amicably resolve any such claims or disputes. In the event mutual resolution attempts fail, the parties agree to submit the same to binding arbitration at a location to be mutually agreed upon in Benton County, Washington. In the event the parties are unable to agree upon an arbitrator, the same shall be selected by the presiding judge for the Benton County Superior Court at the request of either party. The mandatory arbitration rules, as implemented in Benton County Superior Court, shall be binding as to procedure. The prevailing party in any such resolution shall be entitled to recover reasonable attorneys' fees.

7.6 Amendment. All amendments to this Agreement must be in writing and be approved and signed by both parties.

7.7 Notices. Any notice, demand or communication required, permitted or desired to be given hereunder shall be deemed effectively given when personally delivered or sent by certified or registered mail, postage paid, return receipt requested, or when sent by reputable overnight delivery service which provides evidence of delivery, addressed as follows:

TO MEDICAL CENTER:

Kadlec Medical Center  
888 Swift Blvd.  
Richland, WA 99352  
Attention: CEO

TO PHYSICIAN:

TRICITY CARDIOVASCULAR Dept Line  
V. SWANSON MD FACC  
1200 N. 14th St #295, Pasco, WA 99301

Or to such other addresses, and to the attention of such other persons or officers, as either party may designate by timely written notice.

7.8 Confidentiality. All records pertaining to the provision of Services at the Medical Center (exclusive of Physician's billing records) shall be the property of the Medical Center, and such records may not be removed from the Medical Center without the Medical Center's specific consent, which consent shall not be unreasonably withheld. Physician shall not disclose nonpublic information relating to the Medical Center's operations to persons other than the Medical Center or the Medical Center's Board or management or the Medical Center's Medical Staff, or such governmental or private accreditation or licensing bodies or third-party reimbursement agencies with whom the Medical Center has directed or authorized Physician to deal, except as required by law or unless the Medical Center shall have given written consent for the release of information. The above shall be deemed to include patients' records and all other nonpublic information kept in the normal operation of the Medical Center.

Physician acknowledges that during his or her association with the Medical Center, Physician may be brought into contact with business plans, methods of operations, pricing policies, marketing strategies, records, trade secrets and other information regarding the Medical Center, its officers, employees, patients, vendors, finances, financings, billings, payor arrangements, and services, all of the foregoing obtained by Physician or disclosed to Physician, or known by Physician as a consequence of his or her relationship with the Medical Center under this Agreement ("Confidential Information"). Therefore, Physician shall not in any manner, directly or indirectly, disclose to any third party whatsoever, or use for any purpose other than to carry out Physician's duties hereunder, any such Confidential Information. Upon the termination of this Agreement by either Party or for any reason, Physician shall immediately return to the Medical Center any and all materials containing such Confidential Information. The restrictions in this Section on disclosure and use of information shall not apply to information which is in the public domain, or which comes into the public domain through no fault of Physician, or if such disclosure is required by law. The obligations set forth in this Section shall survive the termination or expiration of this Agreement indefinitely.

7.9 Non-Exclusivity/Referrals. Nothing in this Agreement shall be construed to preclude Physician from obtaining staff privileges in any other institution, whether or not in direct competition with the Medical Center. Nothing in this Agreement is to be construed to require or suggest referrals by either party to the other, or to restrict the Physician's professional judgment to use any medical facility deemed necessary or desirable in order to provide proper and appropriate treatment or care to a patient or

to comply with the wishes of the patient. Physician shall not receive any compensation or remuneration for referrals. The Parties represent and warrant that the compensation hereunder is based on comparable data and is not determined in a manner that takes into account the volume or value of any referrals between the parties.

7.10 Governing Law. The interpretation and enforcement hereof, and the rights of the parties hereunder, shall in all respects be governed by the laws of the State of Washington.

7.11 No Third Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein be deemed to confer, upon any person other than the Parties and the respective successors and permitted assigns of the Parties, any rights, remedies, obligations, or liabilities whatsoever.

WITNESS the due execution of this Agreement as of the date first above written.

KADLEC MEDICAL CENTER

By: *Van T. My*  
Title: *Vice President, Medical Staff & Business Development*

VENKATARAM SAMBASIVAN, MD

*V. Sambasivan*

Excerpts from Kadlec's Brief in  
prior Appeal (No. 30657-7-III)

No. 86177-3

Appeal from Benton County Cause No. 08-2-01534-1

RECEIVED  
20 Nov. 2011  
M. S. D. H.

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

VENKATARAMAN SAMBASIVAN, an individual,

Appellant/Cross-Respondent,

v.

KADLEC MEDICAL CENTER, a corporation,

Respondent/Cross-Appellant.

---

BRIEF OF RESPONDENT/CROSS-APPELLANT  
KADLEC MEDICAL CENTER

---

David B. Robbins, WSBA No. 13628  
Renee M. Howard, WSBA No. 38644  
Bennett Bigelow & Leedom, P.S.  
1700 Seventh Avenue, Suite 1900  
Seattle, WA 98101  
Telephone: (206) 622-5511  
Fax: (206) 622-8986

**COPY**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. COUNTER-STATEMENT OF THE ISSUES .....	3
III. CROSS-APPELLANT KADLEC'S ASSIGNMENTS OF ERROR AND ISSUES .....	5
IV. COUNTER-STATEMENT OF THE CASE .....	6
A. Facts Relevant to Issues in Sambasivan's Appeal .....	6
B. Proceedings Below.....	11
C. Facts Relevant to Cross-Appellant Kadlec's Appeal of Call Coverage Claim. ....	13
V. ARGUMENT IN RESPONSE TO SAMBASIVAN'S APPEAL .....	15
A. Standard of Review.....	15
B. The Trial Court Appropriately Dismissed Sambasivan's Breach of Express Contract Claim for Failure To Establish a Breach. ....	16
C. Sambasivan's Tortious Interference Claim Was Properly Dismissed Because He Failed to Raise a Genuine Fact Issue of Illegal or Improper Interference by Kadlec in Adopting the Proficiency Requirement. ....	28
D. Summary Judgment Dismissal of the Retaliation Claim Was Proper Because Sambasivan Failed to Raise a Genuine Fact Issue of a Causal Nexus Between the Board's Action and His Earlier Lawsuit Alleging Discrimination, and Failed to Rebut Evidence of Non-Retaliatory Reasons for Adopting the Proficiency Threshold with Immediate Effect.....	28

TABLE OF CONTENTS

	<u>Page</u>
E. The Trial Court Properly Denied Sambasivan’s Motion to Compel.....	34
1. Standard of Review.....	34
2. Trial Court Did Not Abuse Its Discretion in Denying Sambasivan’s Motion to Compel.....	34
3. The Discovery Motion Is Moot Because Sambasivan Amended His Complaint and Abandoned His Unlawful Discrimination Claim.....	38
F. The Trial Court Properly Awarded Kadlec Attorney Fees and Did Not Apply the “Prevailing Party” Analysis of Contractual Fee-Shifting Cases.....	41
VI. ARGUMENTS ON CROSS-APPEAL.....	44
A. The Trial Court Erred in Finding Sambasivan Was Entitled to Payment for Call Coverage Under a Quasi-Contract Theory.....	44
1. Standard of Review.....	44
2. The Trial Court’s Ruling Does Not Take Into Account the Federal Stark Law, Which Renders the Implied Contract Payments Illegal.....	45
3. The Trial Court’s Findings That Sambasivan Established the Elements of an Unjust Enrichment Claim Are Not Supported by Substantial Evidence.....	48
a. No Substantial Evidence That Sambasivan’s Taking Uncompensated Call from July 1, 2005 to October 26, 2006 Conferred a Benefit on Kadlec.....	49

TABLE OF CONTENTS

	<u>Page</u>
b.    No Substantial Evidence That Kadlec Knew and Appreciated Any Benefit Conferred By Sambasivan's Uncompensated Call. ....	50
c.    No Substantial Evidence That Not Paying Sambasivan for Emergency Department Call Would Be Unjust Under the Circumstances. ....	53
B.    The Trial Court Erred in Awarding Sambasivan Attorney Fees for Prevailing on His Call Claim. ....	58
1.    Sambasivan's Alleged Quasi-Contractual Relationship with Kadlec is Not a Relationship That Triggers RCW 49.48.030. ....	59
2.    No "Principle of Equity" Supports a Fee Award in an Unjust Enrichment Case. ....	61
C.    The Amount of Fees Awarded by the Trial Court Was Unreasonable. ....	63
1.    Failure to Segregate .....	65
2.    Failure to Specify Nature of Work Performed. ....	67
3.    Inclusion of Unrelated Work .....	68
4.    Inclusion of Travel Time .....	70
5.    Fees for Alternative Motion Preparation .....	71
VII.  CONCLUSION. ....	71

**C. Sambasivan's Tortious Interference Claim Was Properly Dismissed Because He Failed to Raise a Genuine Fact Issue of Illegal or Improper Interference by Kadlec in Adopting the Proficiency Requirement.**

Without evidence of intentional interference by Kadlec, Sambasivan cannot establish the elements of a tortious interference claim. Because the trial court correctly concluded that the Board's adoption of the proficiency requirement was lawful, it necessarily follows that Sambasivan's "tortious interference claim relative to the board's August 14, 2008 action also fails as a matter of law" because he fails to "raise a genuine issue of material fact as to the existence of any illegal or improper interference by Kadlec in adopting the eligibility standard."<sup>23</sup> (CP 872)

**D. Summary Judgment Dismissal of the Retaliation Claim Was Proper Because Sambasivan Failed to Raise a Genuine Fact Issue of a Causal Nexus Between the Board's Action and His Earlier Lawsuit Alleging Discrimination, and Failed to Rebut Evidence of Non-Retaliatory Reasons for Adopting the Proficiency Threshold with Immediate Effect.**

Sambasivan argues that a causal nexus between his filing of a lawsuit in June 2008 (which alleged, among others, a claim for discrimination), and the Board's August 14, 2008 action "must be inferred," apparently solely due to temporal proximity. That is, because Kadlec's CEO informed the Board members at the August 14, 2008

---

<sup>23</sup> The trial court did not reach the issue of the application of the economic loss rule to Sambasivan's tortious interference claim. That issue is fully briefed in Kadlec's Memorandum in Support of its Partial Motion for Summary Judgment (Breach of Express Contract / Tortious Interference) and Reply in support. (CP 121 & 690)

meeting that a physician had recently sued the hospital, and identified the various claims Sambasivan brought against the hospital, the court should somehow infer, with nothing more, that the Board's decision to adopt a facially neutral proficiency requirement at that same meeting was in retaliation for bringing a discrimination claim.

There is no basis in law for such a far-fetched inference. Cases that Sambasivan cites are hardly dispositive. See, e.g., *Vasquez v. State*, 94 Wn.App. 976, 985 (1999) (in a retaliatory discharge case, the court noted simply that "proximity in time between the discharge and the protected activity" is "[a]mong the factors suggesting retaliatory motivation") (emphasis added); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 505 (9<sup>th</sup> Cir. 1989) ("timing of layoffs" was but one factor cited by the court from which "a jury could infer retaliatory motivation" in a wrongful discharge case; other factors are also listed).

The fact that the causal nexus prong of a retaliation claim involves a party's motivation does not mean summary judgment dismissal of retaliation claims is inappropriate, as Sambasivan suggests. While evidence of motive is often circumstantial, such evidence must be "specific and substantial in order to create a triable issue with respect to whether the employer intended to [retaliate]." *Goodwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9<sup>th</sup> Cir. 1998). Circumstantial evidence must

also “[t]end to show that the employer’s proffered motives were not the actual motives because they are inconsistent or otherwise not believable.”

*Id.*

Here, the sole proffered piece of evidence, circumstantial or otherwise, is a single entry in the Board minutes that reflects the Kadlec CEO informed the Board of a multi-claim lawsuit filed against the hospital. (CP 69) This can hardly create a material fact issue as to whether Sambasivan has “specific and substantial” circumstantial evidence of retaliation. Nor does this evidence “tend to show” that the proffered motives of the voting Board members (as expressed in each member’s sworn declaration) are “not believable.” *Id.*

The notion that a court should nonetheless “infer” a retaliatory motive is without merit. As stated in *Hollenback v. Shriner’s Hospitals for Children*, 149 Wn. App. 810, 206 P.2d 337 (2009), any “inference” or presumption of retaliatory motive that may be afforded to a prima facie claim of retaliation is removed when the “employer meets its burden and produces some evidence of a nonretaliatory reason” for its action. *Id.* at 823. At that point, the burden shifts back to the plaintiff to “establish a genuine issue of material fact by showing that the employer’s stated reason for the adverse employment action was a pretext for a discriminatory or retaliatory purpose.” *Id.* If that burden cannot be met,

then summary judgment dismissal is appropriate. *Barker v. Advanced Silicon Materials, L.L.C.*, 131 Wn. App. 616, 625, 128 P.3d 633 (2006).

Sambasivan put forth no competent evidence to satisfy his burden. He ignores the fact that the MSQ recommendation to adopt the proficiency standard originated before the lawsuit was served. (CP 1941) He further ignores that the standard applied to, and was satisfied by, other physicians of varied national origins. He argues that, despite the recommendations of national cardiac care trade associations and independent consultants and the requirements of State regulators, the Board's decision has "contrary to its own practice and medical science." (Appellant's Br. at 32) Whether the Board was "right" from a "medical science" point of view, however, is irrelevant. The relevant inquiry is whether the board acted with a non-retaliatory purpose. Here, the Board members' uncontroverted sworn statements indicate that they did.<sup>24</sup>

"[W]hen the employee's evidence of pretext is weak or the employer's non-retaliatory evidence is strong, summary judgment is appropriate." *Milligan v. Thompson*, 110 Wn. App. 628, 42 P.3d 418 (Div. II 2002).

---

<sup>24</sup> Each Board member testified: "Mr. Wortman's statements about the litigation were brief and informational only," and that the Board members were "concerned that a delay in implementing the nationally-recognized standard that was recommended by the MEC would not serve the interest of optimal patient care and safety that the Board sets as its first priority." (CP 178-79 (Cowan Declaration, adopted by all voting Board members, see, e.g., CP 187, ¶3))

Perhaps because Sambasivan has no evidence to refute the Board's reasons for adopting the proficiency requirement, he implores the court to apply the esoteric doctrine expressed in *In re Estate of Black*, a proof of lost will case where the court refused to grant summary judgment as to the validity of a second will. The court found that "the entry of summary judgment at the initial probate hearing was incompatible with [the statutory probate] scheme [RCW 11.24.010]." 116 Wn. App. 476, 485 66 P.3d 670 (Div. III 2003). In other words, because summary judgment is a final judgment on the merits, it would "inadvertently short circuit[] the statutory probate scheme" which allows for both an initial probate hearing and a separate proceeding to address any will contests. *Id.* Obviously, no such scheme exists in this litigation, and *Black's* summary judgment holding has never been applied outside the probate setting.<sup>25</sup>

In any event, *Estate of Black* involved witness credibility issues, which led the court to consider the value of witness cross-examination at trial. *Id.* at 487. Here, no credibility issues have been raised as to the

---

<sup>25</sup> More persuasive is the Court of Appeal's decision in *Clawson v. Corman*, 154 Wn. App. 1018 (Div. I 2010), which rejected a summary judgment defense based on *Estate of Black*. The court pointed out that "the opposing party may not merely recite the incantation, 'Credibility' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Id.* The court also observed that the availability of discovery vitiates any argument that information is particularly within the knowledge of the defendants: "Despite full access to the tools of discovery, Clawson does not identify any specific disputed facts or evidence that tend to undermine the material declarations supporting summary judgment." *Id.*

sworn testimony of Kadlec's voting Board members. Indeed, their testimony is entirely consistent with the minutes of the Board meeting, which state that the purpose of adopting the proficiency requirement was to protect patients and the hospital by immediately adopting a credentialing criteria recommended by the Medical Executive Committee and the ACC, the AHA, the SCAI, and the Department of Health, among others. (CP 177-78) The only thing that Sambasivan can offer is the bald assertion that the Board's action "must have been" retaliatory (and in response to the lawsuit's discrimination claim rather than the other claims he asserted) because he doesn't understand what else it could be. That is not enough. *See Vakharia v. Swedish Covenant Hosp.*, 987 F. Supp. 633, 647 (N.D. Ill. 1997) (noting that "it is not enough . . . to raise the possibility that suspension of privileges may have been the result of base motives when the evidence corroborates the reasons given," and granting summary judgment for defendant on § 1981 claim).

Sambasivan had access to the full range of discovery tools to establish his case and indeed took depositions of Board members. He has no basis to request a free ticket to a trial on the merits of factually uncontested proof. The trial court's summary judgment dismissal of the retaliation claim was proper.