72855-5 72855-5

NO. 72855-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ERIC SHIBLEY, MD,

Plaintiff/Appellant/Cross-Respondent

v.

KING COUNTY PUBLIC HOSPITAL DISTRICT #4 d/b/a SNOQUALMIE VALLEY HOSPITAL, a municipal corporation; KIMBERLY WITKOP, M.D., individually; LESTER C. WITKOP, individually; the marital community of KIMBERLY WITKOP, M.D. and LESTER C. WITKOP; and RICHARD J. PISANI, M.D.

Defendants/Respondents/Cross-Appellants

OPENING BRIEF OF
DEFENDANTS/RESPONDENTS/CROSS-APPELLANTS

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I. BRIEF SUMMARY OF CASE

This case arises from King County Public Hospital District No. 4 d/b/a Snoqualmie Valley Hospital's ("SVH") termination of Dr. Eric Shibley's employment as a hospitalist because he admitted to falsifying a patient record by charting that he had performed a required physical examination when he had not actually examined the patient. A physician falsifying a patient record by falsely claiming to have examined a patient obviously presents a serious danger to patients. Plaintiff stipulated to unprofessional conduct under RCW 18.130.180 with regard to the patient record at issue; this one fact, by itself, doomed his lawsuit to failure before it was even filed.

Hospital privileges are distinct from hospital employment. To maintain the safety of its patients, SVH also terminated Plaintiff's hospital privileges to practice medicine at SVH, and complied with mandatory state and federal reporting requirements by reporting to medical quality regulators what Plaintiff has himself admitted was unprofessional conduct.

Plaintiff sued SVH, Dr. Richard J. Pisani, and Dr. Kimberly Witkop and her husband Lester Witkop (collectively, "Defendants"), alleging that the termination of his employment and his privileges was improper despite his admitted falsification of a patient chart. His many causes of action can be separated into two categories: (1) those arising from SVH's termination

of his *employment*, and (2) those arising from SVH's termination of his *hospital privileges and adverse action reporting*.

Defendants moved for summary judgment, arguing that termination of Plaintiff's employment was justified because it is undisputed that he admitted to unprofessional conduct as defined by RCW 18.130.180, and was terminated for unprofessional conduct. Regarding termination of his privileges and subsequent compliance with reporting requirements, Defendants noted that they were immune for complying with these requirements, and that Plaintiff had also released Defendants from liability in a Severance Agreement and Release, credentialing application, hospital bylaws, and every authorization for release of information he has signed since applying for privileges elsewhere. Finally, related to the claims against Dr. Witkop and Dr. Pisani, Defendants noted that, separate and apart from the release and immunity issues, Plaintiff's own expert tacitly agreed that Dr. Witkop and Dr. Pisani did not breach any duty owed to Plaintiff.

In his response to Defendants' motion, Plaintiff did not dispute that the claims against Dr. Witkop and Dr. Pisani were baseless. Further, Plaintiff did not offer any evidence or argument in support of most causes of action asserted against SVH, leaving only a breach of the Bylaws claim, against only SVH, by the time of the summary judgment hearing.

In responding to the contention that Plaintiff contractually released SVH from any liability, Plaintiff addressed only the release included in his severance agreement, baldly asserting that SVH's general counsel committed fraud (unpleaded) weeks **after** the release was signed. Plaintiff, however, did not even attempt to demonstrate all nine elements of fraud by clear, cogent, and convincing evidence. Plaintiff also admitted that SVH's reporting of actions taken on his privileges was required by state and federal Law, failed to address SVH's presumption of immunity under the Health Care Quality Improvement Act ("HCQIA")[1], and ignored the "absolute immunity from civil liability" phrase provided in the Bylaws for privileging decisions and reporting. And finally, Plaintiff introduced no evidence of any damages caused by any conduct of any defendant.

The trial court correctly granted Defendants' motion for summary judgment, finding, as a matter of law, that there was no genuine issue of material fact as to any claim against Dr. Witkop or Dr. Pisani, and that dismissal of all claims alleged against SVH was appropriate on a number of independent bases.

After Defendants were granted summary judgment dismissal of all claims against them, they moved for both mandatory and discretionary

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[1] 42 U.S.C. § 11101, *et seq.* (1986) Health Care Quality Improvement Act of 1986

attorneys' fees and costs under RCW 70.41.210(5), RCW 7.71.035, the Bylaws, and 42 U.S.C. § 11112. Despite having agreed that all of Plaintiff's claims lacked merit and Defendants were immune, being aware that Plaintiff had not even opposed summary judgment as to nearly all of his pleaded causes of action and had not opposed summary judgment as to Dr. Witkop or Dr. Pisani, and being aware of Plaintiff's long history of egregious dilatory litigation conduct, the Court declined to award Defendants the requested fees and costs.

Plaintiff appealed the dismissal of his lawsuit, and Defendants cross-appealed the trial court's denial of attorneys' fees and costs. This Court should affirm the trial court's summary judgment dismissal of Plaintiff's lawsuit. This Court should reverse the trial court's order denying attorneys' fees and costs, and should remand to the trial court for the trial court to determine the appropriate award of attorneys' fees and costs.

II. ASSIGNMENT OF ERROR ON DEFENDANTS' CROSS-APPEAL

Assignment of error: The trial court erred in declining to award Defendants any attorneys' fees and costs, in finding that Plaintiff's lawsuit was not frivolous, and in not finding that Plaintiff's litigation misconduct warranted an award of attorneys' fees and costs.

III. STATEMENT OF ISSUES

A. Restatement of Issues Pertaining to Plaintiff's Appeal

Issue One: Whether, even assuming Plaintiff had a property and/or liberty interest in his hospital privileges, the trial court correctly found that SVH did not deprive him of his right to procedural due process when the peer review committee (MEC) summarily suspended his privileges, and unrefuted expert testimony establishes that SVH acted appropriately in all respects?

Issue Two: Whether Defendants were entitled to summary judgment dismissal of all claims related to the termination of Plaintiff's employment, because he accepted a severance package which included a clause releasing Defendants from liability, because he did not oppose dismissal of these claims on summary judgment, and because he admitted to committing unprofessional conduct, a terminable offense?

Issue Three: Whether Defendants were entitled to summary judgment dismissal of all claims related to the termination of Plaintiff's hospital privileges, because his privileges survived the termination of his employment, he admitted to unprofessional conduct, and absent termination of his privileges he could have admitted patients to the hospital and treated them there despite SVH's knowledge of his having falsified at least one patient medical record?

Issue Four: Whether the trial court correctly determined that there was no genuine issue of material fact as to any claim of fraud, given that Defendants followed all procedural steps contained in the Bylaws, the initial use of the incorrect term by the peer review committee was not a material breach of the Bylaws, and Plaintiff did not satisfy the elements of a fraud claim?

Issue Five: Whether Defendants were entitled to summary judgment for all claims arising from SVH's filing of a mandatory Adverse Action Report when the peer review committee's finding were upheld in multiple levels of review, Defendants are immune from liability under state and federal law and the Bylaws, and Plaintiff waived his right to assert claims in numerous documents?

Issue Six: Whether the trial court correctly dismissed all claims as to which Plaintiff presented no admissible evidence and/or argument in opposition to Defendants' summary judgment motion?

Issue Seven: Whether Defendants were entitled to summary judgment dismissal of all claims for the additional, independent reason that Plaintiff produced no admissible evidence of any damages arising from any alleged act of any Defendant.

Issue Eight: Whether the trial court correctly determined that the claims against Dr. Witkop and Dr. Pisani failed for the additional reason that Plaintiff did not state any *prima facie* claim against either of them?

B. Statement of Issues Pertaining to Defendants' Cross-Appeal

Issue One: Whether the trial court erred in refusing to award Defendants their attorneys' fees and costs when, as a matter of law, Defendants were entitled to mandatory fees and costs under RCW 70.41.210, the state duty to report immunity statute?

Issue Two: Whether the trial court, after granting summary judgment, abused its discretion by failing to award any attorneys' fees and costs to Defendants under state and federal peer review immunity statutes (RCW 7.71.035(1) and 42 U.S.C. § 11113), and/or the Bylaws, given that Plaintiff's claims against SVH were never viable due to his stipulation that he committed unprofessional conduct and his having signed releases, and he tacitly admitted that all claims against Dr. Witkop and Dr. Pisani were frivolous, unreasonable, and without any foundation?

Issue Three: Whether the trial court, after granting summary judgment, abused its discretion by failing to award any attorneys' fees and costs to Defendants under state and federal peer review immunity statutes and/or the Bylaws, given Plaintiff's litigation misconduct that needlessly wasted significant further time and resources?

IV. COUNTERSTATEMENT OF THE CASE

A. SVH's Termination of Plaintiff's Employment

Plaintiff is an internal medicine physician who practices as a hospitalist, which means he is employed or contracted to care for hospital in-patients. He was employed at SVH under the terms of an employment contract dated September 1, 2010. CP 90-99. SVH is a small 25-bed facility. CP 2, 36.

Plaintiff's employment at SVH was his first job as a practicing physician after completing his medical training, and he struggled during his first few months with some of the time management and communication skills necessary for the delivery of quality in-patient care in a hospital. CP 117. Dr. Witkop[2], his immediate supervisor, counseled Plaintiff a few times, and then on February 16, 2011, placed Plaintiff on a formal performance improvement plan. CP 116-17, 151-152.

The events leading to Plaintiff's eventual termination began shortly before he was placed on this formal performance improvement plan. At approximately 1:30 PM on February 8, 2011, while Plaintiff was the hospitalist on-duty, a patient with a suspected post-operative infection

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[2] Dr. Witkop is SVH's Vice President of Medical Affairs, and in that capacity, supervises the medical providers at SVH's hospital and medical clinics. CP 115. She is a trained hospitalist herself, and she was directly involved in hiring Plaintiff in 2010. She was Plaintiff's immediate supervisor while he was employed at SVH. CP 115.

("Patient ST") was admitted to SVH from another facility. CP 337. A post-operative infection requires close and prompt medical attention (i.e., infection in her spinal fluid could quickly become extremely dangerous). CP 122. As the only hospitalist on-duty at the time of admission, Plaintiff had an obligation to perform and document a thorough history and physical exam of the patient upon admission. CP 106-07. Plaintiff did not examine the patient on February 8, 2011, and he was scheduled to go off duty on February 9, 2011, at which time he transferred all patients to Dr. Pisani, the next hospitalist coming on duty. CP 120. On February 9, 2011, Dr. Pisani went in to see Patient ST. Patient ST and her husband stated to Dr. Pisani that he was the first doctor they'd seen since her admission the day before. CP 211. Yet Dr. Pisani had heard Plaintiff dictating a medical record about Patient ST. CP 212. When Plaintiff's dictation was later transcribed, Dr. Pisani saw that Plaintiff had dictated a chart note documenting a detailed admitting history and physical ("H&P") examination of Patient ST. CP 214.

On February 16, 2011, the day Dr. Pisani was finishing his week as the on-duty hospitalist and was transferring patients back to Plaintiff, Dr. Pisani asked Plaintiff about Patient ST and his notes regarding her H&P. CP 212-13. Plaintiff admitted he had not examined Patient ST, and that he had nevertheless dictated an H&P chart note as if he had. CP 213. An

examination of Patient ST's laboratory results and recorded vital signs demonstrated that all of the critical values and measurable data in Plaintiff's dictated H&P were wrong. CP 171.

Later that same day, Plaintiff then stopped Dr. Witkop in the stairwell and complained about a disagreement he had with Dr. Pisani. CP 103-05, 108-09, 120. Plaintiff said Dr. Pisani had accused him of failing to examine a patient on whom he had dictated an H&P. CP 119. Dr. Witkop asked Plaintiff if it was true that he had failed to examine a patient yet dictated an H&P in the chart as if he had examined her. CP 120. Plaintiff admitted that he had dictated an H&P on Patient ST without actually examining her, but offered justifications and excuses. CP 120, 124.

Plaintiff's admission to her in the stairwell was the first Dr. Witkop had heard about his having dictated an H&P without examining ST. CP 120. Dr. Witkop talked to Dr. Pisani later that evening. Dr. Pisani explained the events of February 9, 2011, and Plaintiff's admission to him on February 16 that he had not examined Patient ST but had dictated an H&P documenting a patient exam that never occurred. CP 214.

Plaintiff admitted again to Dr. Witkop the following day, in the presence of SVH's then Director of Human Resources, Gary Brenner, that he had dictated an H&P without examining ST. CP 215. It is inherently inaccurate for a physician to record a physical examination that never

occurred. Falsely documenting, in a patient record, that an examination occurred when none actually had is a serious patient safety issue, and unprofessional conduct. Dr. Witkop consulted with the Executive Committee[3], and the Executive Committee agreed that Plaintiff's employment must be terminated for this unprofessional conduct. CP 121-22.

During this entire process, Plaintiff freely admitted that he had dictated an H&P without examining ST, but argued that dictating an H&P without actually seeing a patient really was not that big a deal, and he should not be fired for having done so. CP 124. It was not until much later that Plaintiff changed his story to assert that he had actually examined patient ST before dictating the H&P on February 9. See CP 171.

In response to charges later brought against Plaintiff by the Washington State Department of Health ("DOH"), Plaintiff admitted that the medical record he dictated "related to Patient [ST]'s vital signs and physical examination was inaccurate" and that he had "committed unprofessional conduct in violation of RCW 18.130.180(4)." CP 128-29. RCW 18.130.180(4) provides:

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[3] The Executive Committee is separate and apart from the Medical Executive Committee, the former handling employment issues and the latter handles issues affecting hospital privileges. CP 121.

> The following conduct, acts, or conditions constitute unprofessional conduct for any license holder under the jurisdiction of this chapter:
>
> (4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed….

SVH terminated Plaintiff's employment on February 17, 2011 "on the grounds of falsification of patient records." CP 134. Despite Plaintiff being terminated for cause and not contractually entitled to severance pay, SVH provided him with 30 days of additional pay in consideration for his signing a Severance Agreement and Release ("Release") which released Defendants from all liability related to his termination:

> Employee…unconditionally releases District, its insurers, predecessors, successors, assigns, agents, Board of Directors, officers, directors and employees, past, present and future ("Released Parties") from any and all claims, demands, liabilities and causes of action of every kind stemming from or in any way related to Employee's employment by District or the termination of the employment relationship. This release specifically covers any and all claims Employee may have for wrongful discharge in violation of public policy; discharge based on exercise of protected rights; claims under federal and state, or local laws which prohibit employment discrimination or retaliation or which otherwise regulate the employment relationship…any and all statutory and common law causes of action including any tort claims for personal injury…".

CP 111, 136-39.

B. SVH's Suspension and Subsequent Termination of Plaintiff's Hospital Privileges, and Due Process Afforded to Him

Physicians need not be employed by a hospital to have privileges to practice medicine in that hospital. Employment issues addressed through Human Resources are entirely separate from medical privileging/quality/patient safety issues that are addressed through a hospital's peer review process. Despite the termination of his employment, Plaintiff could immediately have begun admitting and treating patients at SVH, given that he still had privileges at SVH. CP 520. Accordingly, the end of Plaintiff's employment could not be the end of the matter. Given his admitted falsification of a patient record – admitted unprofessional conduct that posed a serious threat to patient safety – SVH's Medical Executive Committee ("MEC") was ethically and legally obligated to examine his privileges at SVH. CP 230-31.

On March 8, 2011, the MEC determined by vote that Plaintiff's actions constituted unprofessional conduct and his medical privileges needed to be suspended pending his right under the Bylaws to demand an administrative hearing. CP 193-95, 256. Plaintiff complains that he was not invited to the March 8, 2011 MEC meeting, but that is not how the process works. See CP 190-91. For safety reasons, a physician whose privileges are being discussed due to admitted unprofessional conduct is

not given advance notice that his privileges are about to be suspended. CP 517-18. The suspension is done as soon as the MEC meets, and **then** the physician is given due process if he wishes to challenge the recommendation of termination of privileges, and then the right to appeal follows. CP 518-19. The process played out here exactly as it's supposed to play out, as established by the Bylaws and the unrefuted expert testimony of Defendants' expert, Dr. Clark Jones. See CP 231-32, 518-23.

Following the MEC meeting on March 8, 2011, Plaintiff exercised his right under the Bylaws to demand an administrative hearing (a/k/a "Fair Hearing") to challenge the MEC's recommendation to terminate his hospital privileges. Plaintiff was given the ability to strike/challenge with regard to the makeup of the panel. See CP 193-95. Represented by counsel, he engaged in a two-day hearing before a panel of three physicians and presiding officer Judge Terry Lukens (ret.). CP 193-95, 210-15. Sworn witness testimony was taken and exhibits were admitted. Plaintiff called his own witnesses and was provided the opportunity to question Dr. Witkop, Dr. Pisani, and Mr. Brenner.

Plaintiff did not help himself with his ever-changing stories. It was at the administrative hearing level that he first changed his story, from admitting he had not seen the patient, to claiming he had seen her the morning after she was admitted. See CP 171. He was then confronted

with the fact that all of the objectively verifiable information in his dictated H&P (i.e., the vital signs that are recorded so that one can go back and look at what they were at a given time) was inaccurately reported in his medical record. See CP 171. When put on the spot with this at the administrative hearing, Plaintiff said that he did not record the actual vital signs as displayed at the time of his purported exam, but rather recorded an "average" of the patient's vital signs over time[4]. See CP 171. Then, when confronted with the fact that the vitals recorded in his note did not represent an average, but rather were identical to the vital signs from a prior hospital admission (i.e., he had copied them from the patient's last hospital admission), his explanation became that when he had testified earlier that he records the "average" vital signs, he had not meant a "mathematical average".

The administrative panel did not buy any of these unbelievable and shifting explanations. CP 170-72. The panel found after deliberation that Plaintiff falsified the H&P for Patient ST and that his testimony was misleading and untrue, and upheld the MEC's decision. CP 170-74.

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[4] Meaning, for example, that apparently if the patient had a 99-degree temperature which then spiked to 105 degrees, he would then record a temperature of 102 degrees – a ludicrous assertion for any doctor to make, and unprofessional conduct in itself. See CP 171.

After losing his administrative hearing, Plaintiff subsequently appealed to SVH's Board of Commissioners, again represented by counsel. The Board voted to affirm the MEC and Hearing Panel's recommendation and officially terminated Plaintiff's hospital privileges on January 5, 2012, in an Order that set forth the reasons his privileges were terminated, and the hearings and appeals he was afforded prior to this final action. CP 146-49. Plaintiff's only liability expert, Dr. Skip Freedman, testified that he had no criticisms about the way the administrative hearing was conducted or how the Board, acting on the outcome of this hearing, implemented the final decision to terminate Plaintiff's privileges. CP 158.

C. Dr. Pisani's Role, as One Member of SVH's Peer Review Committee, in Voting on Whether to Suspend and Recommend Termination of Plaintiff's Hospital Privileges

Dr. Pisani is a board-certified, Mayo Clinic-trained internal medicine and pulmonary medicine specialist who was employed by SVH as a hospitalist during Plaintiff's tenure with the hospital. CP 234-35. Dr. Pisani was not a hospital administrator and he did not supervise Plaintiff—his role at SVH was as a peer to Plaintiff as they traded hospitalist duties. CP 235. As a peer, Dr. Pisani had no authority or role in the termination of Plaintiff's employment. CP 235.

The only causes of action alleged against Dr. Pisani related to his actions as a voting member of the MEC, the peer review committee that

suspended and recommended termination of Plaintiff's medical privileges. See CP 20-33. Plaintiff's sole liability expert, Dr. Freedman, agreed that Dr. Pisani's relevant role in the matters at issue in this lawsuit was limited to his participation in the March 8, 2011 MEC meeting when that committee suspended Plaintiff's privileges for unprofessional conduct, pending his right to seek an administrative review hearing pursuant to the hospital Bylaws. CP 157, 161-62. Dr. Freedman also testified that any opinion that Dr. Pisani's participation and single vote at the MEC meeting made any difference would be "speculation." CP 160-61.

D. Defendants' Summary Judgment Motion, Trial Court's Dismissal of Plaintiff's Claims, and Trial Court's Denial of Fees and Costs

Plaintiff filed a 28-page Complaint for Damages, and later an amended complaint, alleging ten (10) separate causes of action against Defendants. CP 1-33, 645-48. After finally being allowed to complete the necessary discovery, Defendants sought dismissal of all causes of action arising from the termination of Plaintiff's *employment* because Plaintiff admitted to unprofessional conduct. CP 58. He was terminated for unprofessional conduct, and unprofessional conduct as defined by RCW 18.130.180 is an explicit cause for termination in his employment contract. CP 93, 134. In addition, Plaintiff's sole liability expert was not critical of SVH's termination of Plaintiff's employment, and Plaintiff had signed a

severance agreement releasing Defendants from the liability claims he later asserted in this lawsuit. CP 58, 136-37, 156-57.

Defendants also sought dismissal of all causes of action arising from SVH's peer review activities that resulted in the termination of Plaintiff's *hospital privileges and the reporting of his unprofessional conduct* to state and federal regulators of medical quality. CP 58. Hospitals are required to report a physician's unprofessional conduct to governmental medical quality regulators, and state and federal law provided Defendants with immunity for complying with this requirement. CP 67-70. Plaintiff also consented to SVH reporting to these regulatory agencies and released Defendants from liability for doing so. CP 177, 179, 217-223. Further, Defendants noted that Plaintiff's sole liability expert practiced in Oregon and testified that he was unfamiliar with the reporting requirements of Washington State, and never intended to offer testimony on the topic at trial. CP 157. Plaintiff's liability expert also offered no criticism of the "Fair Hearing" process SVH provided to Plaintiff as a mechanism for administratively appealing its privileging decision, or the SVH Board of Commissioners' decision to terminate Plaintiff's hospital privileges in accordance with the outcome of that Fair Hearing. CP 158.

Finally, Defendants noted that Plaintiff could not demonstrate a causal link between his claimed damages and any actions taken by Defendants.

CP 80-81. Plaintiff obtained other employment two months after his termination. His subsequent job paid well, and he earned more money in 2011 and 2012 than he would have if he had stayed at SVH. CP 199-203, 228. One and one-half years later, Plaintiff was terminated by his subsequent employer for poor performance. CP 206. His supervisor at the subsequent job testified that Plaintiff's termination from that job had nothing to do with any actions by Defendants. CP 207. Rather, Plaintiff would still have that job, earning good money as a hospitalist, if he had adequately performed. CP 206-08. A subsequent employer also ceased using Plaintiff's services based on his inadequate performance at yet another job. CP 470-72.

Plaintiff responded to Defendants' summary judgment motion by offering nothing to defeat Defendants' position that the claims against Dr. Witkop and Dr. Pisani must be dismissed. See CP 401-23. Further, Plaintiff did not dispute dismissal of most of his causes of action asserted against SVH (negligence, discrimination, wrongful discharge, vicarious liability, Consumer Protection Act violation, and Blacklisting). Nor did he argue that SVH in any way breached his employment contract, or even claim that he had satisfied the elements of a *prima facie* defamation cause of action. This effectively meant that, by the time of the summary judgment hearing, he was arguing only his breach of the Bylaws claim,

against only SVH, and arguing that SVH was not immune or released. In opposing summary judgment, Plaintiff focused on his misinterpretation of the Bylaws to support his argument that SVH and its general counsel's actions in reporting Plaintiff's admitted unprofessional conduct was fraudulent and breached the Bylaws. Without even coming close to satisfying the heightened standard for proving fraud – which he had not even pleaded – Plaintiff argued that SVH's general counsel's after-the-fact conduct somehow vitiated the Release and the immunity provided by the federal and state reporting statutes and the Bylaws. CP 413-17.

The trial court issued a 16-page Order granting Defendants' Motion for Summary Judgment on November 20, 2014. CP 568-83. With regard to Dr. Witkop, the trial court noted there was not "a legitimate cause of action against Dr. Witkop" and dismissed the claims against her. CP 571. Regarding Dr. Pisani, the trial court noted that Plaintiff did "not claim that anything Dr. Pisani did constitutes a cause of action under the 10 claims he has made" and also dismissed the claims against Dr. Pisani. CP 571-72. Finally, regarding SVH, the trial court made several findings. See CP 572-82. With respect to the termination of Plaintiff's employment, the trial court pointed to Plaintiff's admission of unprofessional conduct and the signing of the Release as requiring dismissal of the claims related to his employment termination. CP 572-74. With regard to the actions on

Plaintiff's clinical privileges and reporting of plaintiff's admitted unprofessional conduct, in dismissing all remaining claims the Court referenced the: (1) uncontroverted evidence validating the MEC's actions; (2) lack of evidence of fraud, negligence, or any other cause of action; (3) inconsequential nature of the initial use of the term "termination" instead of "summary suspension," given the due process undisputedly afforded to Plaintiff; (4) absence of any breach of any duty with regard to the reporting of Plaintiff's admitted unprofessional conduct; (5) immunities afforded for reporting Plaintiff's unprofessional conduct; and (6) absence of evidence of any damages caused by any act of SVH. CP 574-82. Plaintiff filed a notice of appeal from the order granting Defendants' summary judgment motion. CP 618-20.

V. STATEMENT OF THE CASE SUPPORTING CROSS-APPEAL

A. Plaintiff's Discovery, Disclosure, and Trial Delays

As discussed in detail below, Defendants were entitled to an award of attorneys' fees and costs under multiple statutes and the Bylaws. Because one basis for awarding attorneys' fees and costs is extreme dilatory litigation conduct by a party, a brief discussion is necessary regarding the considerable amount of unnecessary time spent by Defendants and their counsel due to Plaintiff's repeated failure to meet deadlines and comply with court orders. This leaves aside the fact that the lawsuit should never

have been filed in the first place, such that **all** fees and costs incurred by Defendants were wholly unnecessary and should never have been incurred. The record thoroughly establishes the history of Plaintiff's dilatory conduct prior to dismissal, which includes the following examples of ways Plaintiff frustrated the discovery process, forcing Defendants to expend even more time and incur even more unnecessary expenses litigating this matter:

- Plaintiff's objections to written discovery as "premature" despite being in litigation for 10 months;
- Plaintiff's belated disclosure of 19 additional witnesses, 7 of whom were designated as expert witnesses, with inadequate descriptions;
- Plaintiff's refusal to respond to Defendants' numerous requests for Plaintiff expert's deposition availability, leading to an order compelling expert depositions;
- Plaintiff's failure to produce experts for deposition when ordered, motion for reconsideration and ultimate delay of another month;
- Plaintiff's multiple motions for continuance of the trial date and subsequent motions for reconsideration;
- Plaintiff's belated refusal to accept service of subpoena *duces tecum*s on his experts;
- Plaintiff's request for a delay in the summary judgment hearing disguised as a motion to compel the re-deposition of witnesses and parties; and
- Plaintiff's refusal to produce several compensation surveys relied on by his damages expert, in violation of multiple court orders. Note that Defendants **never** received the surveys. CP 586-87; CP _____[5].

[5] The remaining supporting documentation has just been designated in a supplemental designation of Clerk's Papers, so Defendants do not yet have the CP cites for these items. In their final brief, Defendants will advise the Court of the applicable CP cites.

The quantity of motion practice in this matter alone demonstrates just how involved the factual and legal issues were due to Plaintiff's approach to this case. The trial court was well aware of the manner in which the claims were vigorously pursued by Plaintiff at every juncture despite the utter lack of evidence, and the fact that Defendants had immunity and had already been released. Defendants were forced to spend an extraordinary amount of time attempting to get basic information from Plaintiff so as to defend against his claims, while at the same time he was claiming millions of dollars in damage without any support. See CP 595. Given the nature of the claims and damages sought, as well as Plaintiff's approach, Defendants were forced to incur significant fees and costs to obtain dismissal of this lawsuit that should never have been filed.

B. Defendants' Motion for Attorneys' Fees and Costs

After prevailing on summary judgment, Defendants sought an award of attorneys' fees and costs on several bases, including state and federal reporting statutes and the Bylaws. See CP 584-97. In its order denying Defendants' motion, the trial court stated its view that Plaintiff's claims, although all dismissed on summary judgment, were not frivolous, unreasonable, without foundation, or made in bad faith (CP 637-40) – but this incorrect reasoning ignored that Plaintiff's claims were always going

to fail given Defendants' immunity and the Release signed by Plaintiff, even leaving aside the complete absence of any substantive evidence to support his pleaded causes of action. Defendants filed a notice of cross-appeal from the trial court's order denying their motion for attorneys' fees and costs. CP 852-58.

VI. ARGUMENT REGARDING PLAINTIFF'S APPEAL

A. Introduction

Because Defendants had immunity for all actions complained of, and because Plaintiff released all claims in any event, this Court can cleanly and quickly affirm the summary judgment dismissal of his claims.

Plaintiff asserts that there are disputes of material fact which the trial court resolved against him, but he is simply wrong. To the contrary, the Court found that any factual disputes were immaterial. CP 572-73. The material facts were all undisputed. CP 568-70, 577. Plaintiff admitted to unprofessional conduct to the DOH, and is estopped from denying this admission now.[6] As the trial court noted, Plaintiff disputes **how** he committed unprofessional conduct with regard to this patient record, but does not dispute **that** he committed unprofessional conduct with regard to this patient record. CP 572-73. It's immaterial whether Plaintiff fabricated

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[6] *See Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001); *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

the chart entry or was simply wildly inaccurate – either way, it's unprofessional conduct, as he has admitted, which means that termination of his employment and reporting to the National Practitioner Databank ("NPDB") and DOH were also proper as a matter of law.

Plaintiff asserts that summary judgment is reviewed de novo, and then launches into unsupported assertions and narrative arguments (including many never presented to the trial court). He attacks the text of the trial court's summary judgment decision, rather than showing that there was evidence and legal argument presented to the trial court that supports all of the elements of a specific cause of action against a specific defendant such that it was harmful error to dismiss that particular cause of action. It is certainly not the role of the appellate court (or even the trial court, for that matter) to review the factual findings from the underlying administrative proceedings that already went through a full hearing and appeal process. Plaintiff's Statement of the Case largely fails to cite to the record – not surprising, given that no evidence exists to support many, if not most, of his assertions – and instead relies on conjecture, speculation, and apparent personal opinions. Such argument, unsupported by record evidence, should not be considered on appeal. *See, e.g., Nye v. University of Washington*, 163 Wn. App. 875, 885, 260 P.3d 100 (2011).

No hospital can employ, or give privileges to, a physician who

fabricates patient records and falsely claims to have conducted required examinations of patients. CP 230-31. This is particularly true at a small hospital like SVH, where there is only one hospitalist on duty at a time, on alternating week-long rotations. Plaintiff's actions were very dangerous, and SVH reacted appropriately and reasonably to Plaintiff's admitted unprofessional conduct. In an effort to improve the quality of health care, Washington State has enacted laws and regulations mandating that hospitals report incidents of professional misconduct and provides immunity from liability to those who do – yet this case is an alarming example of high costs extracted against a small public hospital and its administrators when they take both the letter and spirit of those professional obligations seriously.

Plaintiff had been employed for only five months, but was already on a plan of improvement. CP 151-52. He failed to examine patient ST, which could have had terrible consequences for this elderly patient who had a suspected post-operative infection. He then attempted to cover this error before going off duty the next morning by dictating a chart note describing an H&P that he had not performed. When Dr. Pisani confronted him, Plaintiff admitted he had not really examined this patient. Plaintiff later admitted this to Dr. Witkop, and the next day he admitted this again to Dr. Witkop in the presence of Mr. Brenner, but argued that

dictating an H&P without examining the patient was not a big deal. CP 124. Such unprofessional conduct was cause under his employment contract for immediate termination, and he was terminated. CP 90-99. Such unprofessional conduct also had to be reported to DOH and the NPDB, and federal and state laws give SVH immunity for having reported this admitted unprofessional conduct. To this very day, Plaintiff has cited to no authority that a physician who falsifies a patient chart should be allowed to continue employment or have continued hospital privileges. In exchange for a severance package, he also signed the Release. CP 136-39.

Moreover, all of Plaintiff's claims failed substantively, in any event. As discussed above, Plaintiff did not even oppose entry of summary judgment on most of his causes of action, and did not oppose dismissal of Dr. Pisani or Dr. Witkop. The Court must simply disregard all the new arguments made in Plaintiff's brief, which he did not make in opposing summary judgment. "Issues cannot, with only limited exceptions, be raised for the first time on appeal." RAP 2.5(a); *Wells v. W. Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 681, 997 P.2d 405 (2000); *In re Detention of Ambers*, 160 Wn.2d 543, 158 P.3d 1144 (2007); *Almquist v. Finley School Dist. No. 53*, 114 Wn. App. 395, 402, 57 P.3d 1191, 1195 (2002). The purpose of the rule requiring that an issue be reviewed on appeal only if it was raised in the trial court is to afford the

trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Almquist*, 114 Wn. App. at 401 n. 2.

For example, plaintiff made no First Amendment argument in his summary judgment opposition, but now makes such an argument on appeal. Likewise, he did not argue in opposition to summary judgment that the elements of a defamation cause of action had been satisfied *prima facie*, but now asserts that the trial court erred in dismissing his defamation cause of action (although he still does not explain how he believes he has submitted admissible evidence on every element of a defamation cause of action). Regardless of arguments that Plaintiff attempts to make now, he opposed summary judgment by arguing only that SVH's alleged breach of the Bylaws somehow saved his breach of contract cause of action from summary judgment dismissal, so that single breach of contract cause of action is all that is before this Court on appeal.

B. Standard of Review

The trial court's summary judgment dismissal is reviewed de novo. *Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998). In reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court – whether the pleadings, affidavits, depositions, and admissions on file demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." CR 56(c). A material fact "is a fact upon which the outcome of the litigation depends, in whole or in part." *Lamon v. McDonnell Douglas Corp.,* 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). This Court may affirm the trial court based on any theory supported by proof in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). As the trial court noted, the material facts are not in dispute here, and Defendants were entitled to summary judgment under the undisputed evidence, for a number of independent reasons.

C. The Trial Court Correctly Found that Plaintiff Possessed Hospital Privileges on March 8, 2011 as Defined by the Bylaws

Plaintiff's primary argument in responding to Defendants' summary judgment motion was, and his primary argument on appeal is, that all actions by Defendants after the MEC's meeting on March 8, 2011, were void and invalid because Plaintiff simply did not possess privileges after that date. He argues his view that, under Art. 4, Sec. 4a of the Bylaws, following a 6-month provisional period, a practitioner's hospital privileges automatically terminate if actions are not taken. In its order granting summary judgment, the trial court rejected Plaintiff's argument on several bases: (1) the Bylaws unambiguously create a 6-month provisional period for *staff appointment*, not privileges; (2) SVH's hospital administrator testified that the hospital's practice was to automatically extend

provisional privileges until a date that the MEC could meet to determine whether full privileges were appropriate; and (3) the Bylaws specifically note that time periods referenced in the Bylaws are "advisory only and not mandatory" and should accommodate the parties' schedules. CP 575-76.

By its terms, Art. 4, Sec. 4a pertains to staff appointment. CP 277. Plaintiff's entire argument on appeal is based on a proffered interpretation which is flatly contradicted by the plain language of the provision, as the trial court recognized, and refuted by undisputed expert testimony. When Plaintiff applied for privileges at SVH, he applied for active privileges for two years. CP 231. The privileges began with a six-month provisional period, after which time the Medical Staff was authorized to take one of three conscious actions related to Plaintiff's privileges: (1) promote him from provisional to full active staff; (2) decide that they wanted to watch him longer and therefore extend his provision privileges for up to 18 months; or (3) consciously decide that they did not wish to promote him to the active medical staff. CP 231, 277. His privileges did not vanish at the conclusion of six months while the MEC was in the process of scheduling a meeting to address the impact of his unprofessional conduct on his privileges—the provisional privileges remain in effect until the MEC meets and takes action. CP 231, 459-60.

Statutory and contract interpretation are matters of law. *Johnson v. Yousoofian*, 84 Wn. App. 755, 760-64, 930 P.2d 921 (1996). Plain and unambiguous language is construed from the four corners of the document, without resorting to extrinsic evidence. *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). The language in the Bylaws addressing provisional staff members is clear.

Plaintiff appears to argue that a physician employee can admit to unprofessional conduct and be fired for that unprofessional conduct within his six-month provisional staff status, but somehow prevent SVH from complying with its mandatory reporting obligations for unprofessional conduct, by virtue of the misconduct having occurred during his first six months of employment. This assertion is inconsistent with the Bylaws and contrary to state and federal reporting requirements, and would be disastrous for public policy reasons. SVH's uncontroverted expert testimony demonstrated that the process played out appropriately here, and as would be typical in this situation. CP 231, 517-521. In light of these facts and determinations, and the complete absence of any contrary evidence, the trial court correctly held that there was no genuine issue of

material fact as to what SVH did with respect to Plaintiff's privileges on March 8, 2011, or how SVH did it.[7]

On appeal, Plaintiff argues that the trial court erred because it did not consider the "critical provision" in the Bylaws, however, the trial court cites to Art. 4, Sec. 4a in its order, even quoting language directly from that section. CP 574-75. The trial court properly held that according to the plain language of the Bylaws, the lapse of a staff member's 6-month provisional period has no effect on his or her clinical privileges, and Plaintiff's privileges were active during the March 8, 2011 MEC meeting.

D. The Trial Court Properly Dismissed Claims that SVH Acted Fraudulently When the MEC Voted to Suspend Plaintiff's Privileges, SVH Filed a Report with the NPDB, and SVH Shortly Thereafter Corrected Language in the Report

1. Plaintiff was afforded all procedural rights provided in the Bylaws.

The trial court first noted that the Bylaws provide the MEC with full authority to summarily suspend all portions of any physician's privileges when done "in the best interest of patient care." CP 191, 579. In assessing the MEC's actions during the March 8, 2011 meeting, the trial court identified the actions taken by the MEC and compared them to the

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[7] Plaintiff asserts that the Hospital Bylaws were an enforceable contract between him and SVH. Brief, pp. 28-29. The summary judgment Order indicates that Washington courts have not previously addressed the issue, but the trial court assumed the Bylaws were a contract for purposes of summary judgment. CP 576. Although SVH does not concede this point, it is a non-issue in this appeal.

procedural requirements for summarily suspending a physician's privileges as stated in the Bylaws. The court noted the following undisputed facts: SVH's report to the NPDB and the DOH citing revocation of privileges and Plaintiff's act of unprofessional conduct; the subsequent filing of an amended report reflecting a "summary suspension" rather than a "termination" of privileges; SVH providing Plaintiff with two levels of appellate review of MEC's recommendation; and the MEC's recommendation being upheld at each level. CP 578-79.

With regard to procedure, the trial court noted that, despite his claims to the contrary, Plaintiff was provided with all rights and procedures afforded in the Bylaws for physicians who have had their privileges summarily suspended – that the evidence strongly supported that SVH followed all procedural steps, including providing a written report notifying the physician of the MEC's decision and reasons why (Art. 7, Sec. 2a), entitlement to have the MEC consider the matter at the next regular meeting (Sec. 2b), and entitlement to a hearing before the Governing Body (Sec. 2c). CP 191, 579-80. There was simply no right or process specific to summary suspension that Plaintiff was not afforded. CP 580.

On appeal, Plaintiff argues that the trial court erred when it determined that summary suspension was valid, because he believes that when SVH

terminated his employment, he no longer posed a risk to patients. This argument ignores the fact that his privileges continued, and ignores reporting requirements. He cites *Smigaj v. Yakima Valley Memorial Hospital*, 165 Wn.App. 837, 269 P.3d 323 (2012), but *Smigaj* is entirely inapposite. In *Smigaj*, the Court of Appeals held that the defendant hospital was not entitled to immunity because it did not satisfy the third element of the HCQIA, which requires the hospital to provide adequate notice and procedures, or to prove an exception if procedures are not provided. *Id.* at 859-60. Under the HCQIA, a defendant may still qualify for immunity despite suspending a physician's privileges <u>without</u> providing adequate notice and procedures, if the action was taken to prevent imminent danger to the health of a patient. 42 U.S.C. § 11112(c)(2). In *Smigaj*, the peer review committee imposed a suspension of the plaintiff doctor's privileges without notice or providing procedures, because it contended that the subject event, which occurred three months prior, posed a risk to other patients. *Id.* at 860. The Court of Appeals held that because the peer review committee waited three months to act, this suggested that the plaintiff doctor's actions did not pose an imminent danger to other patients, so the imminent danger exception did not apply, and the defendant hospital was therefore not excused for having failed to provide procedures. *Id.* at 859-861.

Unlike in *Smigaj*, Plaintiff's privileges were suspended only after he admitted to unprofessional conduct, and all procedural safeguards were offered and completed. CP 256. This was confirmed by Plaintiff's expert. CP 158. Because SVH provided appropriate procedures, this element of the HCQIA was properly satisfied and SVH was not required to satisfy any exceptions or prove that keeping Plaintiff's privileges active posed an imminent danger to patients.

2. Initial use of "terminated" rather than "suspension" on NPDB Report is immaterial and insufficient to support any claim

With respect to SVH having initially termed the summary cessation of Plaintiff's privileges a "termination" rather than a "suspension" on the initial report to the NPDB, the trial court determined that it was certainly not a material breach of the Bylaws, and there was also no evidence that it caused any damages. CP 580. The trial court noted that in all ways other than the word used, Plaintiff's privileges were summarily suspended on March 8, 2011. CP 581. SVH's general counsel was made aware of the error and subsequently filed an amended report to address the same. Upon correction, the original report was no longer available for anyone to see. See CP 521-523. In light of the fact that all of the procedural steps taken by the MEC reflected a summary suspension under the Bylaws, SVH's filing of the amended report was entirely reasonable. CP 232, 520.

Further, the trial court found no evidence that the error, which was corrected within one month of the filing of the original report, somehow caused Plaintiff any damages in the interim weeks, particularly when the summary suspension was justified and would had to have been reported to the NPDB in any event. CP 252-53, 522-23, 582.

A plaintiff claiming fraud must prove each of the following nine elements by clear, cogent, and convincing evidence:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wash.2d 486, 505, 925 P.2d 194 (1996). As the trial court noted, Plaintiff baldly claimed that SVH, its general counsel, and the MEC perpetrated a fraud on him in many respects, including with the word used in the initial report to the NPDB. Plaintiff did not, however, even attempt to satisfy the elements of a fraud cause of action, much less by the applicable heightened standard, let alone with any admissible evidence, meaning his unpleaded fraud claim could not survive summary judgment. *See, e.g., Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 170, 736 P.2d 249 (1987) (prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find

each element of the claim). He cites to a 1925 case for the proposition that "[f]raud occurs when a person who makes a false statement, knows it is false and intends to deceive the alleged victim who justifiably relies on the statement and is injured as a result." Brief, p. 34. However, Plaintiff certainly did not rely on the NPDB report for anything, even leaving aside the fact that there is no evidence of anything fraudulent about the report to the NPDB. Surely he isn't saying that the NPDB report was filed with the intent of deceiving <u>him</u>. Even his argument, standing alone, does not satisfy the elements of a fraud cause of action.

On appeal, Plaintiff again alleges that Defendants fraudulently created a second allegedly false report to the NPDB that changed the term used, and supports this assertion with a contrived conspiracy theory that is utterly devoid of any evidentiary support. In fact, it appears that he completely skips the "application of law to fact" portion of his argument, and simply declares that SVH committed fraud because SVH corrected the report to the NPDB. The absence of admissible evidence simply underscores that his fraud claim could not survive summary judgment and was properly dismissed, even leaving aside that he had not pleaded a fraud cause of action.

E. The Trial Court Appropriately Determined that Defendants Were Released *AND* Enjoy Immunity from Plaintiff's Claims

The trial court correctly held that Defendants were immune from Plaintiff's claims and he had released such claims in multiple documents. This Court agreeing on either immunity or release would require this Court to affirm dismissal of all claims related to the filing of, and information contained in, the original and corrected adverse action report.

1. Defendants are immune under 42 U.S.C. § 11133(a)(1)(A), RCW 70.41.210(5), and the Bylaws.

Both federal and state law require a hospital to timely report adverse effects on a physician's clinical privileges to the relevant medical quality regulators. 42 U.S.C. § 11133(a)(1)(A); RCW 70.41.210(1)-(3). Certain information is required to be provided by the reporting entity, including the identity of the physician, a description of the adverse action taken, and a description of the physician's acts that compelled the entity to take action. 42 U.S.C. § 11133(a)(3). Under state law, a hospital must file a report with the DOH within 15 days or be subject to civil, monetary penalties. RCW 70.41.210(3)-(4).

SVH's report here complies. In its original report, filed with both the NPDB and the DOH (CP 848-49, 883-86), SVH reported the following:

> Physician employment was terminated and subsequently his privileges were *terminated* on grounds of one act of unprofessional conduct exhibited as documentation of

> conducting a patient history and physical without having examined the patient. CP 884.

Once SVH's general counsel was notified of the terminology error, he amended the report to read:

> Physician's employment was terminated and subsequently his privileges were *summarily suspended* for a period in excess of 30 days pending a hearing on grounds of one act of alleged unprofessional conduct exhibited as documentation of conducting a patient history and physical without having examined the patient. CP 895, 901.

In its order granting summary judgment, the trial court acknowledged that SVH is entitled to state and federal statutory immunity for the very actions complained of by Plaintiff. The trial court stated that although Plaintiff made several accusations of bad faith or other nefarious conduct on the part of SVH, he did not present any evidence supporting a claim that SVH filed the report for any reason other than to fulfill its federal and state obligations in light of his unprofessional conduct. CP 582. Therefore, Defendants were entitled to immunity, and consequently, summary judgment related to any claim associated with filing of the adverse action report.

Under state and federal immunity statutes, a hospital is **presumed** to be immune for damages arising from peer review activities or fulfilling its reporting obligations. The burden is on the plaintiff to rebut the presumption by providing admissible evidence which demonstrates, by a

preponderance of the evidence, that the report, or information contained in it, was unwarranted or filed in bad faith. *See* RCW 70.41.210(5); *Cowell v. Good Samaritan Community Health Care*, 153 Wn. App. 911, 925-26, 225 P.3d 294 (2009)); 42 U.S.C. § 11112(a); *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992) ("the rebuttable presumption of § 11112(a) creates a somewhat unusual standard: Might a reasonable jury, viewing the facts in the best light for Austin, conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)"). Statutory immunity from damages should be decided at the summary judgment stage. *Wood v. Archbold Med. Ctr., Inc.*, 738 F.Supp.2d 1298, 1349 (M.D. Ga. 2010).

As at the trial court, Plaintiff's arguments on appeal are in conflict with the evidence in the record, and do not even come close to meeting the heightened standard for rebutting the immunity presumption. First, Plaintiff incorrectly assumes that the adverse action report was only provided to the NPDB and, therefore, SVH is not entitled to the immunity under the state statute. This argument is contrary to the evidence: in fact, the adverse action report was submitted to the NPDB, as well as to DOH. CP 848-49, 883-86. As such, Defendants are entitled to the presumption of immunity under both the state and federal statutes. Second, the record is clear that Plaintiff was provided adequate notice and hearing procedures

under federal and state statutory standards. CP 193, 256. He does not explain why the notice that was given or the hearing procedures provided were not adequate. His sole liability expert had no disagreement with the procedures of which he took full advantage. CP 158. Finally, he has not provided any evidence that the brief initial use of the word "termination" caused him damages for the short period of time before it was corrected to "suspension". As a matter of law, SVH was obligated to submit a report to the NPDB and the DOH when Plaintiff himself has admitted to engaging in unprofessional conduct, the catalyst for reporting.

Plaintiff cites to *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324 (10th Cir. 1996), and *Osuagwu v. Gila Regional Medical Center*, 850 F.Supp.2d 1216 (D.N.M. 2012), in support of his claim that Defendants were not entitled to immunity under the federal reporting statute. These cases, however, are easily distinguishable.

In *Brown*, the Tenth Circuit upheld a trial court's refusal to grant immunity under the HCQIA because the plaintiff was able to produce significant evidence to support her allegations that information submitted by the defendants in her medical review process was false and misleading. Likewise, in *Osuagwu*, the defendant hospital was denied HCQIA immunity because the plaintiff was not given a fair opportunity to confront and cross-examine the anonymous physicians who prepared the

peer-review forms and because the peer review panel was not impartial. Here, as discussed above, the MEC's recommendation to suspend Plaintiff's privileges was based on his admitted fabrication of a patient record. Although he changed his story later, even his new story amounts to unprofessional conduct, to which he later formally stipulated. The summary suspension and recommendation of termination of privileges gave rise to a series of administrative rights of which Plaintiff took full advantage. Despite being provided with every conceivable administrative protection under the Bylaws, Plaintiff was unsuccessful in discrediting the MEC's actions. The deficiencies that existed in *Brown* and *Osuagwu* simply do not exist here and therefore provide no support for Plaintiff's efforts to resurrect his claims. *See also Cohlmia v. St. John Medical Center*, 693 F.3d 1269, 1277-1278 (10th Cir. 2012).

Given SVH's obligation to report Plaintiff's unprofessional conduct to DOH and the NPDB, and the complete absence of any evidence of any bad faith by SVH in carrying out its mandatory reporting obligation, the trial court correctly determined that Defendants are immune from all liability related to having submitted reports to the NPDB and the DOH. Defendants were also immune from all such claims under the Bylaws. CP 182-183.

2. Plaintiff released claims in several documents

Separate and apart from Defendants' entitlement to immunity, the trial court also determined that Plaintiff released his right to bring claims against Defendants related to SVH's reporting obligations or the termination of his employment. Plaintiff signed the Severance Agreement and Release and accepted compensation in exchange for a release of any and all claims arising from his employment termination. CP 136-39. As part of the application and credentialing process at SVH, he had also released Defendants from any claim for damages arising out of information/reports provided to licensing boards or physician reporting organizations. CP 177, 179. Finally, for all positions that Plaintiff applied to following his termination from SVH, he signed authorizations for release of information that released from liability all parties who provided information to inquirers. CP 217-23, 225.

The effect of a release is a question of law. *See, e.g., Scott v. Pacific West Mountain Resort,* 119 Wn.2d 484, 490, 834 P.2d 6 (1992). A release is avoidable only if the release itself was induced by fraud, misrepresentation, or overreaching, or if there is clear and convincing evidence of mutual mistake. *Nationwide Mut. Fire Ins. Co. v. Watson,* 120 Wn.2d 178, 187, 840 P.2d 851 (1992).

Plaintiff has never claimed that the numerous releases he signed were induced by fraud or the like. In fact, he accepted a lucrative severance package from SVH in exchange for the Release and it is only because he signed the Release that he received compensation, which he admits he kept. CP 136-39, 242, 245. The releases he signed are enforceable and the trial court correctly determined that they provided an additional basis for Defendants to be awarded summary judgment.

F. The Trial Court Correctly Found That Plaintiff Submitted No Evidence of Damages

Finally, the trial court held that Plaintiff failed to provide any admissible evidence of any damages arising from any act of any Defendant, providing an additional, independent basis for the lawsuit having been dismissed on summary judgment. A plaintiff cannot obtain damages without proving the alleged acts caused his claimed injury. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997). Damages are not proven when the plaintiff's evidence submitted to the trier of fact is nothing more than speculation or conjecture. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.*, 160 Wn. App. 728, 737, 253 P.3d 101 (2011).

The undisputed facts show that Plaintiff's income actually **increased** after he was terminated from SVH and following the submission of the adverse action reports. CP 199-203. His annual income under his employment contract with SVH was $225,000. He was terminated in February 2011. According to his W-2's, Plaintiff's income in 2011 and 2012 was $291,859 and $305,851, respectively. *Id.* The undisputed facts also show that Plaintiff's income began to decrease only after he was terminated from his subsequent jobs for poor performance. CP 206-208; 470-472. Plaintiff provided no evidence that the original adverse action report submitted by SVH caused him to lose any particular job, as opposed to other reports submitted against him, the DOH charges against him, his stipulation to unprofessional conduct in response to the DOH's charges, and his subsequent termination from multiple jobs for poor performance.

On appeal, Plaintiff argues that the brief initial use of the term "terminated" in the initial adverse action report caused him damages, but this is simply contrary to the evidence. Plaintiff's own expert even acknowledged that he knows of no harm that resulted from this brief initial error in terminology. CP 166. Moreover, Plaintiff does not criticize the final decision by the governing board to terminate his privileges following a hearing and appeal. It is sheer speculation to claim that SVH's original adverse action report, filed almost two years before he was fired from his

subsequent job for poor performance, and available only briefly, caused any damages. The trial court properly dismissed all claims for this additional, independent reason.

G. The Trial Court Properly Dismissed All Claims of Alleged Violations of Due Process Because There Is No Liberty or Property Interest in One's Hospital Privileges, and Plaintiff Was Provided with Due Process in any Event

As discussed above, the trial court determined that the undisputed evidence shows that Plaintiff was afforded all procedural due process provided in the Bylaws, and the procedure was consistent with state and federal peer review statutes which provide immunity. Leaving aside the fact that SVH was required to report his admitted unprofessional conduct, Plaintiff did not submit any evidence that the notice and hearing procedures were not followed or that they were curtailed in any respect. In fact, Plaintiff took advantage of all appellate procedures under the Bylaws which yielded the same result at each level, and his sole expert had no criticisms of the process. On appeal, however, Plaintiff claims that these same procedures deprived him of his constitutional right to due process. He claims that he has both a liberty and property interest in his clinical privileges and that SVH's alleged lack of notice and hearing violated his rights.

To evaluate a constitutional due process claim, the Court considers "(1) whether the interest plaintiff asserts rises to the level of a property [or liberty] interest, and if so, (2) whether, in light of the competing interests of the individual and the state, the procedures afforded plaintiff before termination satisfied due process." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Although a physician's medical license is a constitutionally protected property interest requiring due process, Washington case law is clear that no physician has a property or liberty interest in his or her clinical privileges, absent express tenure. *See Nguyen v. State, Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 523, 29 P.3d 689; *Ritter* v. *Board of Com'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 509-10 (1981); *Giles v. Department of Soc. & Health Servs*., 90 Wn.2d 457, 461, 583 P.2d 1213 (1978).

This case law makes clear that Plaintiff had no property or liberty right to SVH privileges because he did not have a contract which specified any particular right to privileges. Furthermore, the information communicated to the NPDB and DOH was accurate in advising that an adverse action was taken on his privileges because of an act of unprofessional conduct. Moreover, he did not offer any evidence that the report damaged his reputation, foreclosed opportunities to obtain other employment, or resulted in later dismissal. Despite the suspension of his privileges by

SVH, Plaintiff still maintained his license and was able to obtain employment elsewhere. Accordingly, the trial court correctly found that, as a matter of law, SVH did not violate Plaintiff's due process rights.

H. The Trial Court Appropriately Dismissed All Claims Against Dr. Witkop and Dr. Pisani Because Plaintiff Failed to Provide any Evidence to Substantiate His Claims

Although Plaintiff devotes little attention on appeal to his specific claims against Dr. Witkop and Dr. Pisani individually, he refers to all Defendants collectively in his assignments of error and argument section. Accordingly, Defendants address briefly here why the dismissal of these individual defendants was appropriate, for additional reasons beyond the arguments discussed above which are applicable to all Defendants.

1. Claims against Dr. Witkop were properly dismissed.

The trial court recognized that the only role that Dr. Witkop had in the events that Plaintiff claims caused him damages was as the SVH employee who terminated his employment for unprofessional conduct, to which admitted, and to which he later admitted in a formal Stipulation with DOH. Even then, Dr. Witkop did not make the decision alone. The decision to terminate his employment was made after the incident was investigated, and following a consult with the Executive Committee about her findings. Only then did Dr. Witkop, in her capacity as Plaintiff's supervisor, terminate his employment. Moreover, as Plaintiff's expert

admitted, Dr. Witkop had no contractual relationship with Plaintiff. CP 157. Any contractual duty that Plaintiff claims was breached as a result of these events was owed by SVH and not by Dr. Witkop as an individual.

Since the inception of litigation and, most critically, in response to Defendants' motion for summary judgment, Plaintiff offered no evidence to support a contention that Dr. Witkop was negligent or in breach of a contractual duty owed to Plaintiff. See also RCW 4.24.250. The trial court correctly determined that based on the undisputed facts, Plaintiff's unsupported contentions did not create an issue of material fact with regard to any claim related to Dr. Witkop. As such, dismissal of all claims against her was required.

On appeal, Plaintiff maintains that Dr. Witkop breached his employment agreement when she failed to give him an opportunity to cure his conduct, and that she violated his right to free speech when he was allegedly terminated for criticizing Dr. Pisani's treatment. Besides the fact that Plaintiff's own expert admitted that Dr. Witkop had no direct contractual relationship with Plaintiff, to this very day Plaintiff has provided no evidence that Dr. Witkop terminated him for any reason other than the reason stated in his letter of termination – her conclusion that he falsified a medical record. CP 164-65. Even more importantly, Plaintiff himself admitted that his conduct constituted "unprofessional conduct in

violation of RCW 18.130.180(4)," and unprofessional conduct in violation of this statute is an expressly stated cause for termination in his employment contract. CP 128-29, 136-39. Although Plaintiff claims to be entitled to a right to cure the breach of his employment contract under ¶ 5.1(d), he ignores ¶ 5.1(c) which provides for "Immediate Termination" for unprofessional conduct as defined by RCW 18.130.180, the very conduct to which he admitted. CP 93. Moreover, how could a physician possibly "cure" the loss of trust that necessarily follows his admitted fabrication of a patient record?

Further, Plaintiff argues that the trial court erred by failing to determine that Dr. Witkop violated his right to free speech. Leaving aside the fact that Plaintiff did not raise this argument below, he fails to satisfy the required elements. *See Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 24, 974 P.2d 847 (1999) ("in order to present a prima facie case of retaliation in employment based on the exercise of First Amendment rights, a public employee must demonstrate: (1) the speech deals with a matter of public concern; (2) the employee's free speech interest is greater than the employer's interest in promoting the efficiency of the public services provided; (3) the speech was a substantial or motivating factor in the personnel decision adverse to the employee; and (4) in the absence of the protected speech, the employer would not have made the same

personnel decision."). Even if there was any evidence at all supporting an argument that Plaintiff was terminated for anything other than his admitted unprofessional conduct – which there is not – he did not show that SVH would **not** have made the same personnel decision in the absence of the alleged protected speech. To the contrary, his admitted unprofessional conduct in fabricating a patient record would have resulted in the termination of his employment, in any event.

In short, Plaintiff's arguments relating to Dr. Witkop provided no basis for the trial court to deny summary judgment, and his briefing provides no basis for this Court to reverse the summary judgment dismissal of the claims against her and her husband.

2. Claims against Dr. Pisani were properly dismissed.

Similarly, the trial court acknowledged the limited role Dr. Pisani played, in determining that no genuine issue of material fact existed as to any claim against him. The trial court recognized that Dr. Pisani was involved in only three respects: (1) he confronted Plaintiff about Plaintiff's admitted unprofessional conduct; (2) he was 1 of 5 voting members of the MEC; and (3) he seconded a motion recommending termination of Plaintiff's privileges. Although Plaintiff disputes some of the factual assertions made by Dr. Pisani, he is critical only of the procedure that led to the suspension of his hospital privileges, not the actions by Dr. Pisani as

a minority voting member of the MEC. As such, the trial court held that Dr. Pisani's undisputed actions did not constitute a cause of action under any of the ten claims Plaintiff had made. Plaintiff's brief provides no basis for this Court to reverse the trial court's dismissal of all claims against Dr. Pisani.

VII. ARGUMENT ON DEFENDANTS' CROSS-APPEAL

State and Federal statutes and the Bylaws each required that Defendants be awarded their attorneys' fees and costs incurred in obtaining dismissal of Plaintiff's frivolous lawsuit, given that it never had a good faith basis or any chance of success. The trial court erred in denying Defendants' motion for attorneys' fees and costs. Whether reasonable attorneys' fees are available is reviewed de novo on appeal. *Gander v. Yeager*, 167 Wn. App. 638, 646-47, 282 P.3d 1100 (2012).

A. Attorney Fees under RCW 70.41.210 Are Mandatory

The state reporting immunity statute, RCW 70.41.210, provides for the mandatory award of attorneys' fees and costs to defendants who are forced to defend against a lawsuit for having reported unprofessional conduct of a physician. In relevant part, RCW 70.41.210(5) provides:

> (5) A hospital, its chief administrator, or its executive officer who files a report under this section is immune from suit, whether direct or derivative, in any civil action related to the filing or contents of the report, unless the conviction, determination, or finding on which the report and its

> content are based is proven to not have been made in good faith. The prevailing party in any action brought alleging the conviction, determination, finding, or report was not made in good faith, ***shall*** be entitled to recover the costs of litigation, including reasonable attorneys' fees.

(Emphasis added.) In denying Defendants' motion for attorneys' fees under this statute, the trial court held that Defendants were not entitled to fees because the trial court believed that Plaintiff's reporting-related claims only referenced the adverse action report submitted to the NPDB, and not the report to DOH. CP 856.

Not only is the trial court's reasoning for denying Defendants their attorneys' fees under this statute in conflict with its Order granting their motion for summary judgment, but the adverse action report submitted to DOH was a copy of the report submitted to the NPDB. CP 848-51. Several of Plaintiff's claims were based on the content of the reports, and not the agency to which they were submitted. Because the reports are identical, his claims for defamation and violations of Washington's Blacklisting statute, among other claims, would naturally encompass the submission to DOH. Further, in its Order granting Defendants' motion for summary judgment, the trial court noted that Defendants were entitled to the immunities provided under RCW 70.41.210 with regard to Plaintiff's reporting-related claims, stating that Plaintiff's unprofessional conduct "falls within the heartland of the type of information protected by RCW

70.41.210(5)." CP 581. Immunity existed before suit was even filed. Accordingly, Defendants were entitled to mandatory attorneys' fees and costs under this statute, for having had to defend their protected actions, and the trial court erred in denying attorneys' fees and costs.

B. Defendants Are Entitled to Fees and Costs Under State and Federal Peer Review Immunity Statutes

State and Federal peer review immunity statutes provide entitlement to attorneys' fees for the prevailing party when it is determined that an opposing party's claims, defenses, or conduct was frivolous, unreasonable, without foundation, or in bad faith. RCW 7.71.035(1); 42 U.S.C. § 11113. These fee and cost-shifting provisions serve the statutes' overall purpose by reducing the economic risk of participating in peer review.

In its Order denying Defendants' request for attorneys' fees, the trial court stated its view that although none of Plaintiff's complaints about the actions of SVH constituted a recognized cause of action, he brought a "well-meaning lawsuit that, after discovery, could not survive summary judgment." CP 857. Defendants respectfully disagree with this assessment, given that Plaintiff's claims were entirely precluded by immunity and release before he even filed suit.

Moreover, according to the plain language of the statutes, a plaintiff will not withstand a motion for attorneys' fees by pleading a single

legitimate cause of action along with nine frivolous actions. Each and every cause of action must be reasonable and have some foundation. RCW 7.71.035(1); see also *State ex rel. Evergreen Freedom Foundation v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 615-16, 49 P.3d 894 (2002). Further, the statutes also provide for a broader review of frivolous or bad faith behavior by a plaintiff by including not just the failure of the substance of his claims but also his conduct throughout litigation. RCW 7.71.035(1); 42 U.S.C. § 11113.

Clearly all claims asserted against Dr. Witkop and Dr. Pisani were frivolous, unreasonable, and without any foundation. Plaintiff never provided any evidence to even remotely support his claims against either, and did not even respond to Defendants' summary judgment arguments seeking dismissal of the claims against the individual defendants. His expert even acknowledged that neither Dr. Witkop nor Dr. Pisani did anything that might be considered negligent. CP 167-68. Yet, Dr. Witkop and Dr. Pisani suffered through a year and eight months of litigation (plus this ongoing appeal), including Plaintiff's repeated delays and rescheduling of depositions. Not only the frivolous nature of the claims alleged by Plaintiff, but also his dilatory litigation conduct, entitled Defendants to attorneys' fees under these statutes.

Plaintiff took the same approach with regard to all ten causes of action against SVH. Not only did he not present any evidence, relying instead on only speculation, his own expert contradicted several of his claims, admitting that there was no evidence to support certain claims (CP 154-68), he repeatedly violated court orders requiring him to turn over discovery (which was never provided), scheduled and then canceled several depositions, and moved for not one but three trial continuances offering an evolving series of excuses from vacations to the failed sale of one of the homes belonging to one of his attorneys.

A defendant is entitled to an award of fees under these statutes when it is the substantially prevailing party. RCW 7.71.035(2); 42 U.S.C. § 11113. Here, SVH prevailed on every claim, and since Plaintiff did not even mention or make any effort to support the majority of his claims against SVH, including unpleaded claims (e.g. fraud), SVH clearly substantially prevailed on frivolous and unreasonable claims that lacked foundation—thus **requiring** the trial court to award fees and costs under the state and federal immunity statutes. The trial court abused its discretion in declining to award fees and costs under these statutes, and this Court should reverse.

C. Defendants Are Entitled to Attorneys' Fees Under the Bylaws

The trial court also erred in denying Defendants' request for attorneys' fees under Art. 2 Sec. 6 of the Bylaws. In declining to award fees under the Bylaws, the trial court did not include any analysis specific to the Bylaws. CP 857. Defendants are entitled to attorneys' fees and costs under the Bylaws for similar reasons to those discussed above regarding statutes, but the Bylaws provide a separate and independent basis for an award of attorneys' fees and costs to Defendants:

> In any suit concerning membership on the Medical Staff or Clinical Privileges at the Hospital commenced by a Practitioner against the District, its Governing Body, employees, representatives or agents, or the Medical Staff, seeking damages or other relief, the final judgment of a court of competent jurisdiction may award the prevailing party or parties actual reasonable attorneys fees and other reasonable expenses incurred to be allocated among the parties by the court with respect both to contribution and entitlement to receive.

CP 666. There can be no dispute that Plaintiff's claims arose out of the terms of the Bylaws addressing proper procedures for taking action on a practitioner's privileges. Indeed, the only claim he was even arguing by the time of the summary judgment hearing was that SVH had breached the Bylaws. Accordingly, Plaintiff is bound by the attorneys' fees and expenses provision also included in the Bylaws. As discussed above, his action in filing and maintaining claims against all three Defendants despite their clear entitlement to

immunity, their having already been released for all such claims, and a complete lack of supporting evidence entitled Defendants to an award of attorneys' fees and costs associated with defending against these claims. The trial court abused its discretion in declining to award fees and costs under the Bylaws, and this Court should reverse the trial court's denial of attorney's fees and costs.

VIII. ATTORNEYS' FEES ON APPEAL

Pursuant to RAP 18.1, RCW 7.71.030(3), RCW 70.41.210, and 42 U.S.C. § 11113, Defendants request that this Court award them attorneys' fees and costs on appeal. First, if Defendants prevail on their cross-appeal, this Court should also grant attorneys' fees for the cross-appeal. *See Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198 (2007). Because, for the reasons stated above, Defendants were entitled to attorneys' fees in the trial court, they should also receive fees on appeal.

Second, Defendants should be awarded fees and costs for defending against this appeal which makes arguments which are again wholly unsupported by evidence and contrary to settled Washington law. RAP 18.9 and 42 U.S.C. § 11113 each give the Court the power to impose fees upon a party who "files a frivolous appeal." Additionally, RCW 4.84.185 provides for a prevailing party in a civil action "to receive expenses for opposing [a] frivolous action or defense." The statute applies to frivolous

appeals as well as trial actions. *Fernando v. Nieswandt*, 87 Wn. App. 103, 111-12, 940 P.2d 1380 (1997). Defendants should be awarded their attorneys' fees and costs on appeal.

IX. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order granting summary judgment dismissal of all claims against the Defendants, and should reverse the trial court's order denying attorneys' fees and costs. The case should be remanded with instructions to determine an appropriate award of attorneys' fees and costs to Defendants.

DATED this 30th day of July, 2015.

SOHA & LANG, P.S.

By: _____

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NO. 72855-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ERIC SHIBLEY, MD,

Plaintiff/Appellant/Cross-Respondent

v.

KING COUNTY PUBLIC HOSPITAL DISTRICT #4 d/b/a SNOQUALMIE VALLEY HOSPITAL, a municipal corporation; KIMBERLY WITKOP, M.D., individually; LESTER C. WITKOP, individually; the marital community of KIMBERLY WITKOP, M.D. and LESTER C. WITKOP; and RICHARD J. PISANI, M.D.

Defendants/Respondents/Cross-Appellants

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUL 30 PM 4:30

CERTIFICATE OF SERVICE

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ORIGINAL

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On July 30, 2015, true and correct copies of:

1. Opening Brief of Defendants/Respondents/Cross-Appellants;

2. Motion of Defendants/Respondents/Cross-Appellants for Leave to File Overlength Opening Brief; and

3. Declaration of Service.

were served on the parties in this action as indicated:

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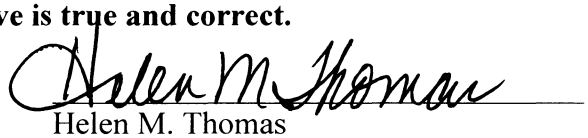
Executed on this 30th day of July, 2015, at Seattle, Washington.

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



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