

TABLE OF CONTENTS

A. Plaintiff’s Lawsuit Never Had Any Chance of Success Given Releases He Signed and Immunities..... 2

B. In Addition, Plaintiff’s Dilatory Conduct Further Increased the Fees and Costs Incurred by Defendants. 4

C. Defendants Were Entitled to Mandatory Fees and Costs under RCW 70.41.210(5)..... 11

D. The Trial Court’s Bases for Granting Summary Judgment Dictated an Award of Discretionary Fees and Costs..... 13

E. The Particular Type of Unprofessional Conduct Engaged in by Plaintiff Is Inconsequential to the Summary Judgment Dismissal. 16

F. A Physician’s Privileges Do Not Automatically Terminate Due to Inaction. 17

G. Plaintiff Was Provided with all Due Process Available Under the Hospital Bylaws..... 18

H. Plaintiff Presented No Evidence of a Free Speech Violation 20

I. There Is No Liberty or Property Interest in One’s Professional Reputation. 21

J. Plaintiff Released All Claims Before Suit Was Filed..... 22

K. Plaintiff Provided No Evidence of Damages. 24

TABLE OF AUTHORITIES

Cases

Boyce v. West, 71 Wn. App. 657, 662, 862 P.2d 592, (1993)..... 23

Cowell v. Good Samaritan Cmty. Health Care, 153 Wn. App. 911, 943,
225 P.3d 294, 311 (2009)..... 13

Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346
(1979)..... 16

Meyer v. University of Washington, 105 Wn.2d 847, 851, 719 P.2d 98
(1986)..... 21

Morgan v. PeaceHealth, Inc., 101 Wn. App.750, 14 P.3d 773 (2000)..... 14

Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155 (1976) 21, 22

Smith v. Ricks, 31 F.3d 1478, 1487 (9th Cir. 1994)..... 13

Other Authorities

42 U.S.C § 11133..... 13

42 U.S.C. § 11133(a)(1)(A) 14

Regulations

RCW 18.130.180 12, 17

RCW 70.41.210 11, 12

RCW 70.41.210(1)..... 12

RCW 70.41.210(5)..... 3, 11, 12, 14

Defendants/Respondents filed their cross-appeal in order to realize the full benefit of the immunity granted them – immunity that encompasses not only a bar against ultimate liability, but also a right to indemnification for the fees and costs of defending against barred claims. Plaintiff’s claims were doomed to failure before his lawsuit was even filed. This lawsuit was entirely frivolous, and Defendants have incurred significant attorneys’ fees and costs in obtaining summary judgment dismissal and in having to defend that dismissal on appeal.

Plaintiff dedicates a total of 20 lines of his reply brief responding to Defendants’ cross-appeal. In his very limited response, he does not dispute any of the evidence cited by Defendants, nor does he address the Bylaws or any of the statutory schemes under which attorney fees and costs should have been awarded. By statute and the Bylaws, Defendants should not bear the costs of Plaintiff’s misguided lawsuit – fees and costs which Plaintiff sought to maximize through his litigation strategy. Defendants were, and are, entitled to their fees and costs.

With regard to Plaintiff’s appeal, he continues to make unsupported assertions and conclusory arguments that are contrary to the evidence and testimony. As with his opening brief, many, if not most, of plaintiff’s assertions are either unsupported by the record or are directly contradicted

by the record. Dismissal was appropriate for several independent reasons, none of which Plaintiff can overcome on appeal.

A. Plaintiff's Lawsuit Never Had Any Chance of Success Given Releases He Signed and Immunities.

Plaintiff admitted to unprofessional conduct in a stipulation to informal discipline he entered into with the Department of Health. CP 129. He attempts now to explain away this stipulation by saying it was because he was “admittedly careless” with regard to patient ST’s medical record – but physicians do not formally stipulate to unprofessional conduct with the DOH for carelessness in charting patient vital signs, as plaintiff would have this Court believe. More importantly, any stipulation to unprofessional conduct, regardless of the substance or reasons for that stipulation, would result in immediate termination for cause. CP 93. Likewise, any stipulation to unprofessional conduct must be reported to DOH and NPDB. CP 230-31. The stipulation signed by plaintiff even acknowledged that SVH was required by federal and state law to report to NPDB and DOH/MQAC the action it took on Plaintiff’s clinical privileges. CP 128.

Thus, even taking Plaintiff’s current version of ST’s treatment at face value – that the vital signs he recorded, which did not match the established data at the time, but did mysteriously coincidentally match

data from her prior admission to SVH – his stipulation to unprofessional conduct would have led to precisely the same result. His employment would still have been terminated, and his unprofessional conduct would had to have been reported to NPDB and DOH. As the trial court explained, Plaintiff now disputing the manner in which he committed unprofessional conduct did not create a material dispute of fact. Even under Plaintiff's current version of events involving ST, he never had a tenable basis for this lawsuit, and Defendants were always going to be entitled to summary judgment dismissal of his claims.

After prevailing on summary judgment, Defendants sought an award of attorneys' fees under several theories, including state and federal reporting statutes and a provision in the Bylaws. CP 584-597. In its order denying Defendants' motion, the trial court stated that Plaintiff's claims were not frivolous, unreasonable, without foundation, or made in bad faith. CP 637-640. The trial court denied fees despite the existence of mandatory fees and cost under RCW 70.41.210(5), and despite the trial court's own findings on summary judgment which precluded a conclusion that the suit had been filed in good faith.

Defendants should have been awarded their attorneys' fees and costs incurred in defending against this lawsuit which should never have been filed. The trial court's denial of attorney fees serves only to encourage

frivolous lawsuits against hospitals which carry out their mandatory reporting requirements and seek to protect patients from doctors who have admittedly engaged in unprofessional conduct.

B. In Addition, Plaintiff's Dilatory Conduct Further Increased the Fees and Costs Incurred by Defendants.

Moreover, even leaving aside the fact that no attorney fees or costs should ever have been incurred by Defendants, fees and costs were needlessly increased – dramatically – by Plaintiff's extreme dilatory litigation conduct. Defendants endured consistent dilatory conduct from Plaintiff for 19+ months while defending a lawsuit that lacked any basis.

Plaintiff's damages expert initially estimated that Plaintiff's wage loss alone would be millions of dollars¹. CP 1170-72. With such damages claimed, the discovery process in the matter was quite extensive and heavily contested, consisting of the exchange of thousands of documents, a dozen fact and expert depositions (with several others scheduled prior to dismissal), as well as discovery motions filed by both parties.

At the trial court, Plaintiff was represented by two separate law firms, Cable, Langenbach, Kinerk & Bauer, LLP, and Robert N. Meals, PLLC. Counsel from each firm took an active role in litigation, Robert Meals acting as lead counsel and Lawrence Cock participating in depositions and

¹ Although, as discussed in Defendants' opening brief, there was ultimately no admissible evidence of any wage loss at all attributable to Defendants.

arguing motions, including the motion for summary judgment. CP 247-50; 311-12; 477; 832. Despite having the convenience of dual representation of a single client, Plaintiff was unable, or unwilling, to meet discovery deadlines, abide by court orders, or adequately prepare for trial without repeated delays.

Plaintiff's first delay was failing to serve Defendants with the lawsuit for nearly three months after it was filed, by which time defense counsel and Plaintiff's counsel Lawrence Cock had developed trial conflicts and Defendants' opportunity to conduct discovery had been significantly shortened. CP 1094. As such, counsel coordinated to find a 2-3 week trial period that worked for all counsel and submitted a joint motion for a change of trial date to October 13, 2014, which was granted. CP 1094.

After the first trial continuance, the trial court directed counsel to appear for a status conference on February 12, 2014. CP 1007. The trial judge asked both counsel to advise him of any reason the parties could not be ready for trial by October 13, 2014. Plaintiff's counsel Lawrence Cock advised the Court that Plaintiff could be ready for trial by that date, and defense counsel said Defendants could also be ready then. *Id.* Because the case had already been continued once, the trial court notified all parties that it would not be inclined to permit any further trial delay absent exceptional circumstances. *Id.*

In an effort to identify the bases of Plaintiff's liability theories and damage claims, Defendants issued contention interrogatories to Plaintiff. CP 1038. On March 14, 2014, despite having filed the lawsuit more than a year earlier, Plaintiff objected to the contention interrogatories on the grounds that they were "premature" in light of the present stage of discovery. CP 1047. Because Plaintiff's claims required an expert to present a prima facie case, Defendants also issued discovery seeking information about Plaintiff's expert testimony. CP 1056. In response, Plaintiff quite surprisingly answered:

ANSWER: Dr. Shibley has not retained any experts at this time, but anticipates he will do so in the foreseeable future and will supplement his response as soon as the information is known.

Two months later, on May 12, 2014, Plaintiff listed a single expert, a physician recruiter, on his disclosure of primary witnesses. CP 1068. Plaintiff's counsel subsequently indicated he did not intend to call any physician recruiter expert in this case. CP 985.

Under the revised case schedule, the parties were required to disclose any "additional" (i.e., unanticipated rebuttal) witnesses by June 23, 2014. CP 1008. While Defendants served their disclosure on June 23, 2014 (and did not identify any new experts), Plaintiff requested additional time to complete his rebuttal disclosure. *Id.* Then, on the afternoon of July 3, 2014, Plaintiff served his "additional" witness disclosure identifying 19

new witnesses, including seven new expert witnesses. CP 1072-78. Defendants immediately realized Plaintiff's delay in identifying experts was going to present a challenge to completing discovery by the August 25, 2014 discovery cutoff and contacted Plaintiff's counsel several times in order to try to develop a deposition schedule. CP 1008.

Plaintiff's counsel continued to promise that he would decide which experts he planned to use at trial and provide deposition dates, but no dates were ever offered. *Id.* Then, in late July and early August 2014, Plaintiff's counsel said his experts were not available for deposition because they were on summer vacation, without providing specifics such as return dates or a proposed deposition schedule. CP 1096.

Finally, on August 5, 2014, with the discovery cutoff date looming and not a single deposition date offered, Defendants filed a motion to compel Plaintiff to identify his trial experts and produce them for deposition prior to the August 25, 2014 discovery cutoff date. CP 917-27. In the meantime, although Plaintiff waited until July 21, 2014 to first request a single deposition in this case, Defendants successfully scheduled all seven depositions Plaintiff requested prior to the August 25, 2014 discovery cutoff. CP 1008.

On August 4, 2014—after the July 7 change of trial date deadline had passed—Plaintiff filed a motion to continue the October trial date, arguing

his counsel's personal plans and circumstances in August prevented him from timely completing discovery (e.g., Mr. Meals' cited the possibility of a long-anticipated sale of one of his homes and a long-planned visit by a relative in August, while Mr. Cock said he would be gone four days in August for a family wedding and tied up two days for a CLE). CP 1116-20. Over Defendants' objection, the trial court granted Plaintiff's motion for continuance, setting the new trial date for December 8, 2014. CP 1122-23. And on August 14, the very day counsel received notice of the eight-week continuance, Plaintiff's counsel canceled **all** depositions scheduled to occur in this case during the remainder of August. CP 1083.

When the trial court granted Plaintiff's motion for continuance, Defendants' motion to compel Plaintiff experts' depositions by August 25, 2014 was pending. Unbeknownst to Defendants, Plaintiff's sole liability expert, Dr. Freedman, was planning an international trip in late-August through mid-September and responsibly checked in with Plaintiff's counsel on August 14, 2014. CP 1125-26. Plaintiff's counsel did not notify Defendants' counsel or the trial court of Dr. Freedman's planned trip and made no effort to schedule his deposition before he left. On the contrary, Plaintiff's counsel assured Dr. Freedman that it would be no problem scheduling his deposition in late September. CP 1126.

On August 22, 2014, the trial court granted Defendants' motion to compel, issuing an order identifying the three experts Plaintiff would be permitted to call at trial, and ordering Plaintiff to produce all three experts for deposition no later than September 5, 2014. CP 1009. In response to the court Order, Plaintiff's counsel still **did not** provide a single date for any Plaintiff expert depositions.

On August 28, 2014, Plaintiff filed a motion for reconsideration of the trial court's order compelling expert depositions. CP 986-87. Plaintiff did not mention any illness at that time, but rather argued that the discovery deadlines set by the trial court were unworkable for Plaintiff's experts. Plaintiff advised the trial court that his liability expert was out of the country and that he wanted to name an entirely new damages expert who would need a month to get ready for deposition. CP 982-84. As usual, no declarations or supporting documentation from Plaintiff's experts were offered to substantiate Plaintiff's claims or stated concerns, and the motion for reconsideration was noted for September 8, 2014, three days after the Court's deadline for Plaintiff to produce all experts for deposition. Plaintiff argued vociferously to the trial court that: "Granting reconsideration will not delay the December 8, 2014 trial date."

The trial court granted Plaintiff's motion for reconsideration, again providing Plaintiff with a more relaxed discovery schedule, allowing an

additional 25 days to produce his experts for deposition and allowing him to substitute a new damages expert. CP 986-87.

Concerned that Plaintiff's delays would continue, Defendants asked for a status conference. At the September 12, 2014 status conference, the trial court set various intermediary deadlines designed to preserve the December 8, 2014 trial date. CP 1010. Plaintiff's counsel Lawrence Cock advised the trial court that Plaintiff planned to file another motion for trial continuance, based upon Mr. Meals' claimed state of depression. *Id.* Defendants' counsel reiterated that she was unavailable to try this case after January 1, 2015, explaining that she was closing her legal practice and making a career change at that time. *Id.* The trial court advised Plaintiff's counsel that he was not inclined to delay the trial further, and that if a motion was filed based upon the health of Plaintiff's counsel, then the trial court would expect the motion to be accompanied by a declaration from a physician. *Id.*

Plaintiff's counsel subsequently filed a motion for a third trial continuance, which included no supporting declarations besides counsel's own. *Id.* Plaintiff's newest excuse for needing an extension was that one of his attorneys was depressed following a failed house sale. Despite Plaintiff not providing the trial court with the requisite declarations and having already been given extraordinary deadline extensions and

accommodations, the trial court granted Plaintiff's motion and continued the trial date to January 26, 2015. CP 1280-82. In its order denying attorneys' fees, the trial court did not separately address that Plaintiff's dilatory litigation conduct provided a basis for attorneys' fees and costs. See CP 637-640.

C. Defendants Were Entitled to Mandatory Fees and Costs under RCW 70.41.210(5).

In his response brief, Plaintiff offers no authority or argument that challenges Defendants' entitlement to fees and costs under Washington's reporting immunity statute, RCW 70.41.210. In fact, Plaintiff's brief dedicates a total of only 20 lines to addressing Defendants' claims, and only as they relate to *discretionary fees and costs*. The state reporting statute, however, makes attorneys' fees and cost **mandatory** when a Defendant prevails against a claim that its report to the DOH was made in bad faith.

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) ("The

prevailing party...**shall** be entitled to recover the costs of litigation, including reasonable attorneys' fees." (emphasis added)). As a result of the trial court's summary judgment order, Defendants were indisputably the prevailing party, and therefore, entitled to mandatory fees and costs associated with defending against Plaintiff's claims.

Further, Plaintiff does not dispute that SVH was required to file a report to the Washington State Department of Health regarding patient ST. CP 128. Per RCW 70.41.210(1):

The chief administrator or executive officer of the hospital shall report to the department when the practice of a health care practitioner ... is restricted, *suspended*, limited, or terminated based upon a conviction, determination, or finding by the hospital that the health care practitioner has committed an action defined as *unprofessional conduct* under RCW 18.130.180.

Because Plaintiff later admitted that his conduct with regard to patient ST was indeed unprofessional conduct, he is precluded from even suggesting that SVH did not have an obligation to report the very same conduct to DOH in accordance with the statute, even though he now disputes the manner in which his conduct with regard to ST was unprofessional.

Plaintiff does not dispute Defendants' entitlement to fees and costs under RCW 70.41.210 because there is no argument to make. The trial court even noted that the contents of the report "falls within the heartland of the type of information protected by RCW 70.41.210(5)." Clearly, if

immunity applies under the statute, the prevailing party's entitlement to fees and costs contained in the same paragraph applies as well, and such fees and costs are mandatory. Accordingly, Defendants were, and are, entitled to the mandatory attorneys' fees and costs associated with having to defend their protected actions.

D. The Trial Court's Bases for Granting Summary Judgment Dictated an Award of Discretionary Fees and Costs.

When Congress sought to promote peer review by giving immunity to health care providers who participate in a bona fide peer review process, it also concluded that immunity alone would not deter meritless suits by disaffected physicians. As such, a fee and cost-shifting provision was implemented and applied to such actions where the claims or conduct in litigation were "frivolous, unreasonable, without foundation, or in bad faith." 42 U.S.C. § 11113; see *Cowell v. Good Samaritan Cmty. Health Care*, 153 Wn. App. 911, 943, 225 P.3d 294, 311 (2009); *Smith v. Ricks*, 31 F.3d 1478, 1487 (9th Cir. 1994). In its Order granting summary judgment, the trial court recognized that Plaintiff had not produced evidence and, as to most of his causes of action, did not even fashion an argument in support of his claims against Defendants.

Nevertheless, Plaintiff asserts that his claims could not have been frivolous, unreasonable, without foundation, or made in bad faith because

(1) he believes some unspecified claim will be resurrected on appeal, and (2) he declares that there are “hotly disputed material issues of fact that three witnesses attest to[.]” Neither argument has any basis in law or fact. Plaintiff makes these assertions without referencing the record, citing case law, or even articulating his arguments. He fails to identify the purported “three witnesses” or explain how he believes that his current version of events related to his examination of patient ST is at all significant to the dismissal of his claims.

In order to rebut the presumption of immunity, a plaintiff must establish through admissible evidence, 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); 42 U.S.C. § 11133(a)(1)(A). Plaintiff’s arguments attempting to rebut the presumption of immunity conflict with the record evidence and fail to meet the heightened standard for rebutting the immunity presumption. *See also Morgan v. PeaceHealth, Inc.*, 101 Wn.App.750, 14 P.3d 773 (2000). To the contrary, the record is replete with evidence confirming that no reasonable person in Plaintiff’s position could have believed there was a good faith basis for pursuing this lawsuit.

Plaintiff mischaracterizes the testimony of Dr. Witkop in an attempt to support his assertion that no investigation was performed by Defendants

before Plaintiff's employment was terminated. To the contrary, it is undisputed that Dr. Witkop interviewed Dr. Pisani and Plaintiff before consulting with the Executive Committee about her findings. During the interview, Plaintiff admitted to unprofessional conduct in his treatment, or lack thereof, of patient ST. Plaintiff's conduct was further confirmed by his stipulation to the DOH. Because Plaintiff admitted to unprofessional conduct, a terminable offense under his employment contract, the specifics of the unprofessional conduct are entirely irrelevant – his employment was properly terminated. CP 93.

Plaintiff also argues that Defendants are not entitled to immunity because the termination of his employment, and action on his privileges, were allegedly not taken in furtherance of quality healthcare but “a knee jerk response to Dr. Pisani's decision to quit.” As discussed below, the record evidence establishes precisely the opposite. Plaintiff never presented any admissible evidence to support his conspiracy theory, and his admitted unprofessional conduct in his treatment of patient ST confirms that quality healthcare was indeed compromised by his actions, in any event. Defendants acted appropriately. Because Plaintiff provided nothing more than conjecture, the trial court correctly concluded that he did not meet the heightened standard necessary to survive summary judgment based on Defendants' immunity.

Given the trial court's acknowledgement that Plaintiff offered no support at all for his claims asserted against Drs. Witkop and Pisani or most of the claims asserted against SVH, there is simply no way that this lawsuit could accurately be characterized as a "well-meaning lawsuit". Unsupported assertions, no matter how many times they are repeated, are not facts, and do not create a reasonable basis for a lawsuit. Moreover, Plaintiff's conduct throughout the discovery process was at best unreasonable, and at worst, done in bad faith. As such, Plaintiff should have to answer for the fees and costs that he imposed on Defendants by pursuing this lawsuit.

E. The Particular Type of Unprofessional Conduct Engaged in by Plaintiff Is Inconsequential to the Summary Judgment Dismissal.

Contrary to Plaintiff's view, not every fact that is disputed is significant for purposes of summary judgment. 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). Among other independent reasons, the trial court granted summary judgment because the undisputed evidence showed that there was no basis for holding that SVH breached a duty owed to Plaintiff when he admitted to unprofessional conduct and was afforded all procedural rights under the Bylaws.

Plaintiff's employment contract provided for termination if he was found to have engaged in unprofessional conduct as defined by RCW 18.130.180. The undisputed facts confirm that Plaintiff's employment was terminated for unprofessional conduct related to patient ST. Because Plaintiff later admitted to DOH that he indeed engaged in unprofessional conduct with regard to ST, his assertion that he was just very careless, rather than fabricating the record out of whole cloth, is not a dispute of material fact. His employment would have been terminated either way, and he would have been reported to DOH and NPDB either way. The trial court correctly determined that Plaintiff's current version of events did not create a dispute of material fact. Rather, at most there was a dispute of immaterial fact, and summary judgment was nevertheless appropriate.

F. A Physician's Privileges Do Not Automatically Terminate Due to Inaction.

Plaintiff asserts again, still incorrectly, that he had no clinical privileges on March 8, 2011. As explained in Defendants' opening brief, the Bylaws and undisputed expert testimony presented by Defendants establish precisely the opposite. In advancing this argument, Plaintiff conflates two distinct concepts, staff appointment and clinical privileges. He cites to Article 4, Sec. 4a of the Bylaws – but this provision addresses staff appointment, not clinical privileges.

In his briefing, Plaintiff argues that he, and any provisional physician on staff, would have their medical privileges terminated upon expiration of his/her six month provisional staff appointment period – he fails to understand, or simply ignores, the difference between “staff appointment” and clinical privileges. A physician’s appointment as a staff member provides him access to the governance of the medical staff (such as voting rights). CP 277-78. Membership on the staff does not define what the physician is allowed to do clinically. Clinical privileges, on the other hand, allow the physician to perform procedures or operations at the particular hospital. CP 285-87. The characterization of a physician’s clinical privileges, and procedures for acting on such privileges, are instead governed by Arts. 6 and 7 of the Bylaws. CP 285-90. As with any physician possessing privileges at SVH, limitations on or termination of privileges are only achieved by action of the Governing Body. CP 288-90. The unrefuted expert testimony establishes that Plaintiff possessed clinical privileges at SVH when the MEC recommended summary suspension for his having engaged in unprofessional conduct.

G. Plaintiff Was Provided with all Due Process Available Under the Hospital Bylaws.

Plaintiff again asserts that he was not provided with due process, but this assertion is flatly contradicted by the record evidence, and ignores the

terms of the Bylaws. Despite the initial use of the word “termination”, it is undisputed that the MEC intended to recommend “summary suspension” of Plaintiff’s privileges. The procedures for taking corrective action on a physician’s clinical privileges are outlined in Art. 7. The due process procedures applicable to summary suspension of a physician’s privileges are contained in Sec. 2 of Art. 7. CP 289.

Plaintiff cites to Sec. 1 of Art. 7 to complain that he was not invited to the March 8, 2011 MEC meeting – but summary suspension is governed by Sec. 2, not Sec. 1. See CP 190-91. Moreover, the unrefuted expert testimony submitted by Defendants established that 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. Plaintiff had no right to attend the March 8 MEC meeting, or even to know about it in advance.

Further, despite Plaintiff's unsupported allegations, the MEC meeting on March 8, 2011 was scheduled and took place *earlier* than their "next regular meeting". CP 532-34. Each right contained in the procedural steps under Sec. 2 was provided to Plaintiff. See CP 289. In fact, Plaintiff exercised several of his rights under the Bylaws, particularly two levels of appeal as outlined in Art. 8, which resulted in the same conclusion. Plaintiff also asserts that a "summary suspension report" is only provided to the NPDB when a physician's "professional conduct presents an 'imminent danger' to patient safety" – but the Court must simply disregard this unsupported assertion that is directly contradicted by the Bylaws and unrefuted expert testimony. The trial court correctly concluded that Plaintiff had been provided with sufficient due process.

H. Plaintiff Presented No Evidence of a Free Speech Violation

Plaintiff next asserts that Dr. Witkop somehow violated his right to free speech. As explained in Defendants' opening brief, this argument is raised for the first time on appeal, and therefore should be disregarded as untimely. More importantly, his assertion of a violation of free speech rights is based on his unsupported and incorrect assertion that Dr. Witkop "terminated his employment to keep Dr. Pisani from quitting[.]" The record evidence establishes precisely the opposite. Moreover, it's undisputed that Dr. Witkop did not learn about Plaintiff's unprofessional

conduct with regard to ST until late on February 16 – after she had met with Plaintiff earlier that day regarding his performance plan (plaintiff’s assertion that Dr. Witkop gave him a “favorable performance review” on February 16 is incorrect). CP 116, 118-119. Plaintiff’s assertion (Reply, p. 14) that as of February 16, Dr. Witkop had known for several days of the allegations regarding ST is simply false.

In any event, as explained in Defendants’ opening brief, Plaintiff can’t meet the elements of a prima facie claim for retaliation in employment based on exercise of First Amendment rights. See also *Meyer v. University of Washington*, 105 Wn.2d 847, 851, 719 P.2d 98 (1986). Plaintiff provided no evidence contradicting Dr. Witkop’s testimony that his employment would have been terminated for his own actions with regard to patient ST, unrelated to his disagreement with Dr. Pisani about a different patient.

I. There Is No Liberty or Property Interest in One’s Professional Reputation.

Plaintiff contends that Defendants violated his procedural due process rights under the U.S. Constitution because Defendants “published negative comments to the National Practitioner Data Bank for everyone ... to see.” In support of his claim, Plaintiff cites *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155 (1976), where the plaintiff, accused of being a shoplifter,

alleged that his procedural due process rights were violated, claiming an interest in reputation and future employment opportunities. *Id.* at 701. The U.S. Supreme Court concluded that an interest in reputation is “neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.” *Id.* at 712. Reputation alone is not deserving of constitutional protection. *Id.* The *Paul* Court indicated that some other injury to property or liberty is a threshold requirement.

Plaintiff asserts that he can meet the *Paul* standard, but this assertion is based on his unsupported assertion that some action by Defendants stigmatized his professional reputation and deprived him of other employment opportunities. In reality, as discussed in Defendants’ opening brief, it’s undisputed that Plaintiff’s job prospects were not impacted by anything done by Defendants. To the contrary, his earnings actually increased...until poor performance on his part at subsequent jobs. CP 206-208, 470-472. Moreover, as discussed above, Plaintiff was provided with sufficient due process, in any event. In baldly asserting that “a physician” has “a constitutionally protected liberty interest in his or her reputation,” Plaintiff cites only to a law review article.

J. Plaintiff Released All Claims Before Suit Was Filed.

Plaintiff asserts that April 10, 2010 Authorizations (CP 177, 179) he signed could not serve to release his claims – but cites only to easily

distinguishable criminal case law involving waiver of *constitutional rights* by a defendant without knowledge of the consequences. His contention that no release signed in advance of a disagreement can be valid is simply wrong under well-established Washington law. In reality, advance releases are routinely enforced in Washington. See, e.g., *Boyce v. West*, 71 Wn. App. 657, 662, 862 P.2d 592, (1993). Pre-injury releases are enforceable and construed according to the legal principles applicable to contracts. *Id.* The April 10, 2010 Authorizations barred all of the claims Plaintiff brought in this lawsuit.

Plaintiff also reads the Severance Agreement and Release (CP 136-139) far too narrowly. It released not only causes of action based on employment, but “all claims or differences that relate in any way to his employment,” and specifies that the release is to “resolve all issues” between SVH and Plaintiff. The release contained in the Severance Agreement precluded every claim alleged in Plaintiff’s complaint. Despite Plaintiff’s protestations, this release does not frustrate public policy. Plaintiff could simply have elected not to sign the Severance Agreement and Release, but instead chose to do so because he wanted the money – and he must live with the consequences of his choice to sign. Moreover, Plaintiff bases this argument on his incorrect assertion that he had no privileges as of the date he signed the Severance Agreement on

March 1, 2011. Finally, he asserts that the Severance Agreement's non-disparagement clause somehow prohibited SVH from carrying out its mandatory obligation to report unprofessional conduct. Not surprisingly, he cites to no authority for this untenable proposition.

K. Plaintiff Provided No Evidence of Damages.

Plaintiff asserts for the first time on appeal that he is entitled to “nominal damages” for alleged violation of his due process rights. This argument should be disregarded as untimely, but must also be flatly rejected as based on Plaintiff's false statement that there are “undisputed violations” of his due process rights. In reality, all admissible evidence is directly to the contrary. As discussed above, *as a matter of law* Defendants violated no due process right. This is yet another example of Plaintiff attempting to pass off unsupported personal opinions as evidence.

Plaintiff asserts that he experienced “significant economic damage” as a result of Defendants' actions – but the record makes clear that he submitted no evidence of damages caused by Defendants. To the contrary, it is undisputed that he obtained subsequent employment, making more money than he had earned at SVH. If not for his poor work performance at subsequent jobs, he would still be employed, making more money than he did at SVH, despite anything done by Defendants. His assertion that his purported current employment situation has something to

do with Defendants, rather than with his subsequent poor job performance and/or his formal DOH stipulation to unprofessional conduct, is sheer speculation. He presented no evidence at all that anything done by any Defendants caused him to lose a particular position or negatively impacted his future job prospects. His failure to submit any admissible evidence of damages provides an independent basis for this Court to affirm dismissal.

The trial court's dismissal of Plaintiff's claims should be affirmed. Plaintiff largely seeks to resurrect on appeal claims as to which he didn't even try to oppose summary judgment. The trial court's denial of attorneys' fees and costs should be reversed, however, and the case should be remanded to the trial court to calculate the attorneys' fees and costs to be awarded to Defendants. Defendants should also be awarded their attorneys' fees and costs on appeal.

DATED this 2nd day of November, 2015.

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