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

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	)	**UNPUBLISHED OPINION**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

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

FACTS

Dr. Sambasivan, a native of India, is a board certified interventional cardiologist with a private practice in the Tri-Cities.[1] Kadlec, which operates a hospital in Richland,

granted staff privileges to Dr. Sambasivan in 2001. In 2004, the doctor relinquished his privilege to perform certain procedures. As a result of an agreement, he was removed from Kadlec's emergency interventional cardiology call coverage list and would undertake training and perform a number of proctored cardiology procedures.

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

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

Dr. Sambasivan filed suit against Kadlec in June 2008, raising six causes of action

[1] The activities of interventional cardiologists include the installation of stents and pacemakers and the performance of angioplasty.

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

At the meeting, the board also adopted a requirement, originally proposed by the Medical Staff Quality (MSQ) committee prior to Dr. Sambasivan's law suit, that all interventional cardiologists perform a minimum of 150 intervention procedures every two years as a condition for retaining or obtaining hospital privileges. The volume procedure requirement was the same standard recommended by the American College of Cardiologists and the American Heart Association. The MSQ committee, familiar with Dr. Sambasivan's background, had recommended that the new standard be phased in so that existing cardiologists could have a year to comply. Instead, the board gave the standards immediate effect and applied them retroactively to the interventional cardiologists with current privileges. Dr. Sambasivan was the only one of the four doctors who did not qualify. The board then revoked his interventional cardiology privileges. He remains on staff for the practice of noninterventional cardiology.

The trial court denied Dr. Sambasivan's motion for a preliminary injunction

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

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

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

ANALYSIS

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

Standards of Review

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

Breach of Contract Claim

Dr. Sambasivan argues that he had contractual due process rights to a hearing on the MEC's recommendation that his privileges should have restrictions on his acute and emergent surgical procedures. He argues that this right arises from Kadlec's corporate bylaws, the medical staff bylaws, and his professional services contract. Kadlec argues that the issue is moot in light of the fact that the board of directors declined to follow the MEC recommendation. We agree with Kadlec.

Dr. Sambasivan urges us to address the issue of whether hospital bylaws or

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

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

Intentional Interference with a Business Expectancy

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

The tort[2] of intentional interference with a business expectancy contains the following elements: (1) the existence of a valid contractual relationship or business expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer,

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

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

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

The Washington Supreme Court has held that the board of directors of a private hospital has wide discretion to establish qualifications for granting staff privileges to physicians. *Rao v. Bd. of County Comm'rs*, 80 Wn.2d 695, 497 P.2d 591 (1972) (*Rao* I); *Group Health Coop. of Puget Sound v. King County Med. Soc'y*, 39 Wn.2d 586, 237 P.2d 737 (1951). The *Rao* court noted that "even the governing bodies of public hospitals are vested with discretion in admitting doctors to staff privileges, and the courts will interfere with the exercise of this discretion only if it is shown to be 'arbitrary, tyrannical, or predicated upon a fundamentally wrong basis.'" 80 Wn.2d at 698 (quoting *Group Health*

Coop., 39 Wn.2d 586). In dicta, the court stated that it might reconsider the general rule where a private hospital discriminates against physicians on the basis of sex or race, but noted that *Rao* was not such a case. *Id.* at 700.

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

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

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

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

Dr. Sambasivan attempts to distinguish *Group Health* on the basis that he is an established member of the Kadlec medical staff, unlike the doctors at issue in *Group*

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

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

The trial court correctly dismissed the tortious interference claim.

Retaliation Claim

Dr. Sambasivan also argues that the trial court erroneously dismissed his retaliation claim because there were material questions of fact that precluded summary

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

judgment. We agree that this claim must be remanded for trial.

To state a claim for retaliation, the employee must show that he engaged in a statutorily protected activity, an adverse employment action was taken, and there was a causal link between the employee's activity and the employer's adverse action. *Hollenback v. Shriners Hosps. for Children*, 149 Wn. App. 810, 821, 206 P.3d 337 (2009). It is not necessary that the conduct complained of actually be unlawful—it is sufficient if the employee reasonably believes that the employer's conduct was discriminatory. *Renz v. Spokane Eye Clinic, PS*, 114 Wn. App. 611, 619, 60 P.3d 106 (2002).

Once the employee makes a prima facie showing of these elements, the employer may rebut the case by presenting evidence of a legitimate nondiscriminatory reason for the employment decision. *Id.* at 618. The burden then shifts back to the employee, who may offer evidence that the employer's reason is pretextual. *Id.* at 618-19. If both the employee and the employer present evidence for competing inferences of both retaliation and nonretaliation, then it is the trier of fact's task to choose between such inferences. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186, 23 P.3d 440 (2001) (discrimination claim); *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798, 120 P.3d 579 (2005) (retaliation claim).

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

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

Dr. Sambasivan filed suit on June 23, 2008. The board of directors was notified of the suit, including the fact that it contained a discrimination claim, on August 14, 2008. That same day the board adopted the retroactive volume requirement that cost the doctor

his interventional cardiology privileges at the hospital. Viewing these facts in a light most favorable to the doctor, they establish a prima facie case of retaliation—because the doctor filed a discrimination lawsuit, the hospital revoked his privileges. *Hollenback*, 149 Wn. App. at 821.

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

In this circumstance, where both parties have presented competing evidence and inferences to be drawn therefrom, it is appropriate for the trier of fact to resolve the issue.

Hill, 144 Wn.2d at 186; *Estevez*, 129 Wn. App. at 798. The trial court erred by ruling otherwise. The summary dismissal of the retaliation claim is reversed.

Unjust Enrichment Claim

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

Sufficiency of the Evidence. Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party where absent any contractual relationship, notions of fairness and justice require such recovery. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). To prevail on an unjust enrichment claim, the plaintiff must show that (1) the defendant received a benefit from him, (2) the defendant appreciated or knew of the benefit, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Id.* at 484-85. This court reviews a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). "Substantial evidence" is sufficient evidence to

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

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

The trial judge found that Kadlec benefited because Dr. Sambasivan's call service lightened the load on the other three area interventional cardiologists whom it otherwise would have to pay, it would have been more expensive to bring in physicians from outside the area, and it helped Kadlec market itself as a high-quality regional hospital with specialized cardiology services readily available. CP at 879-80. While we believe the evidence supports each of these findings, the dispositive fact is that Dr. Sambasivan's addition to the call list meant that Kadlec would not be paying the other three doctors as often and would save $7,000-$8,000 each month when Dr. Sambasivan was serving on call for free where the others he displaced had been paid $1,000 daily for serving.

Kadlec clearly received a financial benefit from his presence on the call list. The fact that Kadlec found it necessary to pay the other doctors also indicated that it derived a benefit from having them on call.

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

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

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

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

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

RCW 74.09.240, which incorporates a federal statute known as the "Stark" law,

states in part that,

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

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

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

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

service patients whom the hospital pays the doctor to see when they arrive at the hospital. Dr. Sambasivan responds that the purpose of the anti-referral statutes would not be furthered by interpreting the law as Kadlec urges. We agree with that argument.

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

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

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

directed only at physicians.[6]

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

Finally, we question Kadlec's basic premise that it can escape its liability to the doctor by asserting a violation of another law. There was nothing illegal about paying

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

Dr. Sambasivan to provide call service; if it was improper, Kadlec might have an argument. However, assuming that the Stark act applies to these facts, the fact that Kadlec did not arrange for Dr. Sambasivan's call service in accordance with the dictates of that statute does not excuse its failure to pay him for his efforts. Just as two wrongs do not make a right, two wrongs (Stark act violation and unjust enrichment) do not make one immune from liability for one of those wrongs. Kadlec does not get to benefit from its improper behavior.

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

Attorney Fees

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

Dr. Sambasivan's Fee Award. Kadlec challenges the fee awarded Dr. Sambasivan on the unjust enrichment claim on several theories, including the theory that the back wages fee-shifting statute is inapplicable to implied contracts. We disagree. It also

challenges the sufficiency of Dr. Sambasivan's billing records. With one small exception, we also disagree with those arguments.

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

RCW 49.48.030[7] provides:

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

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

This court reviews a superior court's interpretation of a statute de novo. *City of Walla Walla v. Topel*, 104 Wn. App. 816, 819, 17 P.3d 1244 (2001). The goal of statutory interpretation is to give effect to the intent of the legislature. *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). Here, the language of

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

RCW 49.48.030 is plain. The award of attorney fees is not discretionary. The court "shall" award reasonable fees to "any person" who prevails in an action for wages or salary owed. RCW 49.48.030.

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

Kadlec also argues that call payments cannot be characterized as "wages" or "salary." We disagree. In *Wise* we rejected an argument that contract based

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

compensation was not "wages" or "salary." *Id*. at 175. We see no basis for distinguishing between compensation required by written contracts and compensation arising from implied contracts. Both are "wages" or "salary" for the purposes of this statute.[9]

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

The trial court correctly determined that RCW 49.48.030 entitled Dr. Sambasivan

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

to his attorney fees for prevailing on the unjust enrichment claim.[10] We thus turn next to Kadlec's complaints about the fees requested.

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

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

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

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

Kadlec's Attorney Fees. Lastly, we address Dr. Sambasivan's contention that there should have been no award of attorney fees to either side. He reasons that there was no prevailing party as each side won significant issues. Kadlec correctly notes that the basis for the attorney fees awards was different for each party and that the prevailing party standard is not applicable here.

The trial court awarded Dr. Sambasivan his fees under the back wages provision,

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

Former RCW 7.71.030 (1987) provides in part:

> (1) This section shall provide the exclusive remedy for any action taken by a professional peer review body of health care providers as defined in RCW 7.70.020, that is found to be based on matters not related to the competence or professional conduct of a health care provider. . . .
>
> . . . .
>
> (3) Reasonable attorneys' fees and costs as approved by the court shall be awarded to the prevailing party, if any, as determined by the court.

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

In circumstances where statutes award attorney fees to the "prevailing party," it long has been common practice to deny fees if both sides prevail on a significant claim or issue. *E.g.*, *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990); *Nw. Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 985-86, 634 P.2d 837, 640 P.2d 710 (1981); *Goedecke v. Viking Inv. Corp.*, 70 Wn.2d 504, 513, 424 P.2d 307 (1967); *Ennis v. Ring*, 56 Wn.2d 465, 473, 341 P.2d 885, 353 P.2d 950 (1959).[11] Dr. Sambasivan argues that this rule should apply to this case. It does not.

[11] There are some circumstances where it is appropriate to apportion awards under

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

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

CONCLUSION

We reverse the summary dismissal of the retaliation claim and remand that claim for trial. We affirm on the other issues raised by Dr. Sambasivan. We also affirm on the issues raised by Kadlec in its cross appeal, except that we remand a portion of the attorney fees award for further consideration.

Affirmed in part, reversed in part, and remanded.

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this standard. *See Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

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

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Korsmo, C.J.

WE CONCUR:

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Sweeney, J.

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Kulik, J.