IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

RAMON ANEL,)
Plaintiff,)
v.) Cause No. 14-2-10378-6 KNT
FRANCISCAN MEDICAL GROUP, a)
Washington Corporation;)
FRANCISCAN HEALTH SYSTEM, a)
Washington Corporation; and)
CATHOLIC HEALTH INITIATIVES,)
a Colorado Corporation,)
Defendants.)

SUMMARY JUDGMENT HEARING

August 21, 2015

The Honorable Judge Richard McDermott Presiding

TRANSCRIBED BY: Reed Jackson Watkins
Court-Approved Transcription
206.624.3005

A P P E A R A N C E S

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August 21, 2015

THE COURT: Thank you all. Please be seated. I thought maybe we could start a little bit earlier if everybody is ready. We'd have a little bit more time that way I think.

So I have a roster, so let me call roll here. And then I need to make some notes to myself, because I want to know who everybody is.

So Mr. Blankenship?

MR. BLANKENSHIP: Yes, Your Honor.

THE COURT: Thank you. Mr. Woods?

MR. WOODS: Yes, Your Honor.

THE COURT: Thank you. And your client?

MR. WOODS: Dr. Anel, Dr. Ramon Anel.

THE COURT: And how do I say your last name, sir?

DR. ANEL: It's An-yell, it's like A-N-Y-E-L-L, Anyel.

THE COURT: Anyel. Okay. I'll remember. Thank you.

DR. ANEL: Thank you, sir.

THE COURT: And then counsel table over here. Mr. Madden?

MR. MADDEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. MADDEN: I'm local counsel and with me here are these two gentleman from the Colorado bar who have been admitted pro hac vice.

THE COURT: All right. And Mr. Churas, is it?

MR. MADDEN: No, that's my colleague. She's not here.

THE COURT: Oh, Ms. Churas, I'm sorry. Please don't tell her I said that. She'll be upset with me.

All right. Mr. Gallagher? Gallaher?

MR. GALLAGHER: Gallagher actually, Your Honor.

THE COURT: Gallagher?

MR. GALLAGHER: Sean Gallagher.

THE COURT: Oh, come on. Where's that?

MR. GALLAGHER: Well, if it was March 17th, it would be Gallaher.

THE COURT: That's true. It would be. Thank you, sir.

And Mr. Murray?

MR. MURRAY: Yes, Your Honor. Good morning.

THE COURT: All right. Thank you. All right.

Is there anyone else here that I should know about?

MR. BLANKENSHIP: Eric Goldsworthy is also an attorney who is going to be involved in the case as well, Your Honor.

THE COURT: Does he work with you, sir?

MR. BLANKENSHIP: Yes, he does.

THE COURT: All right. And your last name, sir?

MR. GOLDSWORTHY: Goldsworthy, G-O-L-D-S-W-O-R-T-H-Y.

THE COURT: First name, sir?

MR. GOLDSWORTHY: Richard.

THE COURT: Good first name. Remember that,

Mr. Blankenship.

MR. BLANKENSHIP: Your Honor, I don't even know where we did that. But to the extent we did, I apologize.

THE COURT: You can blame Mr. Woods. That's okay.

MR. WOODS: No, he can't.

THE COURT: He's young. Anybody else that you want me to know? All right. Thank you.

Gentlemen, you have furnished me with enough reading material to sink a small cruiser. So and I've tried my very best to get it all organized and summarized.

I have a couple of things that we can do right out of the chute. First, the plaintiff's motion to seal exhibits to the Declaration of Mr. Blankenship in Support of the Plaintiff's Motion for Summary Judgment was not opposed, therefore, it's granted. Mr. Blankenship, if you have an order, I'll sign when we're done. Okay?

MR. BLANKENSHIP: Yes, Your Honor.

THE COURT: All right. I'd like to next take a look at the Motion to Strike the Jury Demand or Compel Arbitration. And I can do that one right out of the chute. I don't want to spend a lot of time on it, gentlemen. It seems to me that all of the constitutional issues concerning that validity of the original agreement to compel arbitration, or for arbitration in lieu of a jury trial are, the same exact contract with that clause in it, is before the State Supreme

Court; isn't that right?

MR. BLANKENSHIP: Yes, Your Honor.

THE COURT: In a companion case, well, it's not a companion case, but it's a case that is similar, at least the same defendant. Correct? And the State Supreme Court's going to rule whether this is a legal and binding clause or not. And the Court of Appeals ruled that it was, and reversed the trial judge, who said that it was unconstitutional.

Isn't that about where we're at right now?

MR. BLANKENSHIP: We are, but the Court has not taken review yet, Your Honor.

THE COURT: Have they accepted review? They haven't.

MR. BLANKENSHIP: They have not accepted review and we're prepared to argue it in the sense that because of collateral estoppel, this is technically separate parties and so I think that you could still hear it and rule upon it, Your Honor.

THE COURT: And what is the defense, which one of you gentlemen wants to address that issue?

MR. GALLAGHER: Your Honor, I'm going to be addressing this motion and then Mr. Murray will be addressing the other motions.

THE COURT: Okay. So, Mr. Gallagher, do you agree with the current status that Mr. Blankenship has just outlined, that the Court hasn't decided whether they're going to accept it or not. Right now the Court of Appeals just made a ruling,

they've appealed. Don't know where they are yet.

MR. GALLAGHER: That's correct, Your Honor.

THE COURT: All right. So there's a two-fold issue: one is whether or not the language of the agreement itself is constitutional, which is what the Court of Appeals ruled. Secondly, the issue of whether or not it's been waived in this case basically. Correct?

MR. BLANKENSHIP: That's correct, Your Honor. Unconscionable and a waiver.

THE COURT: I don't believe at this point in time that I can address the issue of constitutionality because there has been a ruling from the Court of Appeals on this very issue. Whether I agree or disagree with that ruling, I think I'm bound by that ruling.

So at this point in time the only thing that I can address is whether or not is has been waived. And that'll be my feeling. I think that hopefully the State Supreme Court will take this issue on. I read over your brief very carefully and think that there are some really interesting issues that should be addressed by the State Supreme Court, it seems to me.

But I think that given my ability to rule as a trial judge, I'm bound by a ruling that appears to be on all fours with this particular contract by the Court of Appeals until that ruling is changed.

So I'm not going to address the issue of its constitutionality. I'll reserve a ruling on that until there's a final appellate decision. All right?

The second issue, however, is one of waiver. And I know that originally there was a note that the defense made in early April, I think it was on the 7th of April as I recall, for a motion to transfer this to arbitration. And then the matter was continued at the request of both and I signed an order on I think the 24th of April mistakenly, indicating that the matter would be switched to arbitration.

And then saw an email from defense counsel indicating that they were surprised that I had signed that order, because they had already sent an email to me asking me to strike the hearing because they were going to move the matter to July for summary judgments and a bunch of other motions.

Is that right so far? Am I pretty much historically --

MR. GALLAGHER: Your Honor --

THE COURT: And so then I signed another order indicating that the one that I had previously signed was vacated. And so is that historically correct?

MR. GALLAGHER: Your Honor, that's right --

THE COURT: Mr. Murray, you can address that issue, too. We're just housekeeping right now so I can set the stage.

MR. GALLAGHER: He's going to feed it to me and I'll speak for Mr. Murray. Our recollection is the reason that we

renoted hearing was because Mr. Blankenship had a family vacation and we were in some discussions about whether we could resolve this informally with opposing counsel and we agreed to defer ultimately the noting and the briefing on this until a later date. The hope was that we would have a hearing on all of the pending motions in July, but we couldn't get it scheduled until August.

THE COURT: Right. Thank you, sir. Mr. Blankenship, what's your recollection?

MR. BLANKENSHIP: My recollection is yes, it was served while I was on vacation, the Friday before I left. And Counsel agreed to reschedule it. I don't believe we had any control or demand that it be noted out as far as it was noted out, but that could have been partially because Counsel was out of town.

So yes it was noted then. It wasn't noted as a dispositive motion. It was noted right before I went on vacation and we were -- so we agreed to make it a dispositive motion. And that's kind of how it went down.

But the fact that it ended up in August wasn't necessarily a plan between me and opposing counsel.

THE COURT: Your argument is that they waived their rights to arbitration by filing all of these summary judgment motions and by litigating this matter in the manner in which they have.

Can you elaborate on that argument for me?

MR. BLANKENSHIP: Certainly, Your Honor.

THE COURT: I'm not asking you to address the argument of the claims involving Dr. Anel after he left the Franciscan Group. I don't believe, and you can address this, but my initial feeling is that the arbitration agreement doesn't apply to his actions once he has been terminated in terms of whether it's arbitration or a jury trial.

And so I, if you have something different, if I missed something, let me know. But I went back and looked at everything and looked at the wording, and it's pretty clear to me that it applies to employees and once he's no longer an employee, and you argue that he wasn't an employee, but we can talk about that in a different context.

But for purposes of whether or not an agreement to compel arbitration in lieu of a jury trial or a judge trial is in effect, it doesn't apply once he's no longer there. So the additional issues that they have raised about how he was treated after he left and the causes of action that they have filed and we're litigating by way of summary judgment today, aren't governed by this agreement.

So as far as I'm concerned, if you have something different, let me know, so we can at least narrow the issues.

Now let's talk about the issues where when he was clearly working for the Franciscan Group, and I'll call them the

"Franciscan Group," although there are a number of different entities. I understand he was paid out of one in Colorado, but there are three different entities basically that had a part in some of this. But let's just call them the "Franciscan Group," for now, okay.

MR. BLANKENSHIP: We'll do that, Your Honor.

THE COURT: So tell me why the Franciscan Group has waived their -- by litigating has waived his requirement that he participate in arbitration?

MR. BLANKENSHIP: Well, Your Honor, we're relying on the waiver principles from Washington law. And the defendants clearly and unambiguously waived the right to arbitration by litigating this case for nearly a year and a half.

THE COURT: They're going to argue that the case was pending before the Court of Appeals. They already had a judge rule in King County against them, so they were just protecting their backside by litigating, because that's the ruling that they had. And when the Court of Appeals made their ruling on March 15th of this year, then they're going to argue that, well then they can go ahead and make a motion to arbitrate.

I mean, you can see that one coming. How do you respond to that?

MR. BLANKENSHIP: Well, the way I'd respond to that is even to this day they have not moved to stay or compel

arbitration. The primary relief in their motion is to strike the jury trial. The alternative relief is arbitration.

So basically a party waives a right to arbitrate if it elects to litigate instead of arbitrate. Even the motion on its face basically shows and the waiver cases dictate that if the defendant or the employer here shows a preference towards litigation instead of arbitration, they've waived it. And it couldn't be any more the case when we've done all this briefing on the summary judgment and essentially they've asked this Court to fully adjudicate the case on the merits.

Unlike any other Washington case that we have seen, even after hearing from the Court of Appeals, they continued to litigate for 45 days or close to that before they filed the motion to compel or to strike the jury trial.

So basically right here, if you look at the River House case, we only need to show that as the events unfolded, the party's conduct reached a point where it was inconsistent with any other intention but to forego the right to arbitration. And I think we're here. We're here where the defendants have asked the jury trial to be stricken without a basis.

And in arguing for arbitration as the River House case states, the party arguing for waiver is not required to show that it's adversary has never mentioned arbitration or even equivocated the process to be followed. It just has to show,

Your Honor, that they have been inconsistent with a desire to arbitrate.

And as Counsel said, we even discussed negotiating something to get out of arbitration. But this case has been litigated by the parties and the defendants have chosen to actually have you fully adjudicate and dismiss this case on the merits. And they can't forum shop and say, "In the alternative, well, we want you to compel arbitration if we don't like your ruling, or if you don't strike the jury demand." I mean, we are here litigating in Superior Court.

So the fact that the defendants have litigated like they have is pure forum shopping. It's completely --

THE COURT: Just a second, Mr. Blankenship. Ramona, would you check and make sure that we're picking him up? If not, he just needs to move a little closer.

Keep speaking, sir. I just want to make sure that you're being picked up on our audio system. It just dawned on me that you might be just kind of in the dark area.

Is he being picked up?

MR. BLANKENSHIP: How about this, Your Honor?

THE COURT: Well, you'll be picked up there. But why don't you bring the podium just a little bit more forward? I think that the speakers will all pick you up.

First of all, stay right where you were and tell a sentence or two so she can decide if she can hear you.

MR. BLANKENSHIP: Testing one, two, three. Testing. Testing one, two, three.

THE CLERK: It's picking him up.

MR. BLANKENSHIP: They asked for a bench trial.

THE COURT: Is it okay?

THE CLERK: Yes.

THE COURT: All right. Move back about a foot and you'll be okay.

MR. BLANKENSHIP: Okay.

THE COURT: Perfect right there. Go ahead. Thank you.

MR. BLANKENSHIP: So, Your Honor, in this motion they asked for a bench trial in superior court. That is exactly showing a preference to litigate. And in addition to filing four summary judgments, they have asked for a bench trial, not an arbitration. That's the motion that's before you.

What could be more clearly evidenced as a desire to litigate in superior court than asking for the Court to litigate in superior court just without a jury?

THE COURT: Okay. Hold that thought. I want to hear from Mr. Gallagher.

MR. GALLAGHER: Thank you, Your Honor. May I just speak from here?

THE COURT: You may. You can even be seated.

MR. GALLAGHER: All right. Thank you.

Your Honor, this is absolutely not forum shopping. We've

asked the Court in the first instance to enforce the arbitration provisions in the employment agreement and that would require transfer to an arbitrator.

You know, in the alternative we asked for the Court to strike the jury demand. But if the Court gives full effect to the Court of Appeals decision in the Romney case, then the appropriate thing for the Court to do would be to compel arbitration.

We've also in our briefing suggested to the Court that the threshold issue before the Court is this arbitration issue, and if the Court grants arbitration as a threshold issue, it would not be necessary or even appropriate for the Court then to reach the summary judgment motions.

So we would suggest that this threshold issue is the issue the Court should rule on first, and if the Court is inclined to compel arbitration, then it would not be necessary to reach the other claims. That would be appropriate for the arbitrator.

THE COURT: All right. Thank you, sir. Your response?

MR. BLANKENSHIP: Your Honor, in April they asked for a bench trial and they've continued to ask for a bench trial. And this concept, which is one line in the conclusion of their reply should be stricken where they ask this Court to basically go ahead and compel arbitration and not rule on the motions.

That was not in their motion. That was not once did the summary judgments even mention the arbitration agreement. And it should be stricken. And as we put in our brief, you can't raise new issues in reply.

So they're even here asking for that relief properly. It's not okay to basically do what I think happened here, Your Honor, is realize that this is a pretty good case and that there's exposure, so now we want to arbitrate. And it happened to some extent when -- and let me tell you what happened after the Romney decision.

They served written discovery on February 24, 2015. Plaintiff filed his jury demand on this court on February 26th without objections. Plaintiff filed a second amended complaint with this court on March 9th. Defendants filed their answers to the second amended complaint on March 16th. The parties entered into a stipulated protective order in this court on March 17th.

THE COURT: And I apologize. The decision came in on February 17th. I misspoke when I said March 15th before. I remember now it was February 17th of this year when the Court of Appeals decision came down.

So please go ahead. I do apologize for misstating the date.

MR. BLANKENSHIP: So after February 16th --

THE COURT: Seventeenth.

MR. BLANKENSHIP: Seventeenth when the decision came down, we did all these things plus the parties entered into a stipulated protective order with this court on March 17th.

Plaintiff deposed Kurt Schley on March 17th. Plaintiff deposed Dana James on March 18th. This is the president of the hospital. This is the clinic manager. Plaintiff deposed Dean Field, the former FMG president and the head of nephrology on March 18th. And on March 19th, Plaintiff served his first requests for admission on March 19th, which Defendants answered on April 20th. Plaintiff deposed Marla Fredericks on March 20, 2015.

So, I mean, that is, we've already disclosed experts, at least our side has, prior to this. And so we've got a case where we took or defended 15 depositions and we stipulated to a continuance and agreed to a trial date. And now they've filed four summary judgment motions, each separately.

And at no point did the defendants move to stay the proceedings so the Court can rule on any motion to compel arbitration. They could have asked the Court to stay the proceedings until the Court of Appeals ruled. Merely a stay would have been possible. And Defendants have litigated and are continuing to litigate this case in court. They want a bench trial.

And what they've put in the one line in reply of conclusion saying the Court shouldn't rule on the summary judgment is I

think a little bit disingenuous after we basically have moved on issues like affirmative defenses and they haven't come up with evidence. They now want us to what, start over with respect to summary judgment.

MR. WOODS: Your Honor, if I may approach to hand up in rebuttal to opposing counsel's claim that they asked for arbitration or in the alternative to strike the jury demand and have a bench trial, let me just pass up their original motion. You can look. The motion itself, the caption says the opposite, and on page one it says the opposite. It's simply disingenuous.

THE COURT: Well, Counsel, I believe that I'm looking at that. I actually have that pleading right here in front of me, right here, looking at it. Thank you.

MR. WOODS: Thank you, Your Honor.

THE COURT: Okay.

MR. WOODS: So they can't flip on it.

THE COURT: Thank you, Mr. Woods. And please keep us all honest and make sure that you continue to do that. But okay, I don't need any more argument.

I'm going to rule as follows. I don't think you're forum shopping. You've been assigned to me and that's the way it is. But I do think that you can't have it both ways. I think when you make a request and it's your request that you want a judge trial or, in the alternative it said, the

defendants request this matter be submitted to arbitration. Arbitration's either an exclusive remedy or it isn't. And you've waived it.

So I think you've waived your right to arbitrate and I'll rule that way.

I'll reserve ruling on the constitutionality, because I think I'm covered by the Court of Appeals decision on that issue, unless there's a different appellate ruling. So I'm not going to rule on that.

The third issue becomes whether or not the plaintiff is entitled to a jury trial or a judge trial. And I'll rule today on that, but I want to hear some of the other arguments first. And then I'll come back to that at the very end. I have some, I made some notes on that issue. So we'll talk about that in a little bit.

But I believe that by requesting the either/or, you've waived it. And the Court of Appeals may think I'm wrong, but I don't think so. Because you're claiming on the one hand before the Court of Appeals that arbitration was the exclusive remedy. And then you can't have it both ways. So you've waived. All right. So much for that.

Now let's talk about the summary judgment motions. And Mr. Blankenship, you have made a number of motions. And the defense has made a number of motions. And I've read them all over. And a lot of the evidence is the same for several

different motions, although there is clearly different tactics and different statements.

So I've got your original summary judgment motion here and your reply. And you are requesting four things it's my understanding. First of all, you're requesting that the defendant, FMG, should be held liable as a matter of law for the tort of wrongful discharge of Dr. Anel. Two, you're asking that the defendants, you're asking for me to rule that the defendants willfully withheld wages of Dr. Anel. Third, you are asking me to rule that Dr. Anel is not required to seek or accept employment greater than 50 miles from his Gig Harbor residence. And fourth, you're asking me to dismiss some of the affirmative defenses pled by the defendants and in specific, numbers one, three, five, six, seven, eight, nine, and fifteen.

I would tend to argue and I would like to, if the defense has a response to this, please let me know. But there's a case that you cited that ruled in another matter that there was a 75-mile boundary that the terminated employee was not required to seek or accept employment greater than 75 miles from his residence. And that'll be my ruling in this case, 75 miles.

MR. BLANKENSHIP: Thank you, Your Honor.

THE COURT: So I'll grant your motion in part. I'll change the mileage.

MR. BLANKENSHIP: Thank you, Your Honor.

THE COURT: If they have something different, but I believe that case is right on point and I believe that case should govern my ruling. I've looked at the case and I think it is consistent. So I don't need to hear any argument about that.

But now the first, second affirmative defenses. And some of the affirmative defenses I think are some of the same defenses pled or moved for by the defense in their motions for summary judgment. At least we can talk about it then I suppose.

But why don't you talk to me about why you think FMG should be held liable as a matter of law for the tort of wrongful discharge of Dr. Anel? And why don't you also tell me about why you think I should rule that the defendants willfully withheld wages from Dr. Anel.

MR. BLANKENSHIP: I can do that, Your Honor. May I address some litigation issues just in general as well?

THE COURT: Yes. Yes.

MR. BLANKENSHIP: May I approach?

THE COURT: Yes.

MR. BLANKENSHIP: I'm going to hand you the --

THE COURT: Do they have a copy of what you're handing me?

MR. BLANKENSHIP: I'm going to hand them a copy as well. This is the pattern instruction for mitigation. And we briefed this specifically with mitigation. But the

defendants' mitigation affirmative defense should just be stricken because under Burnside and Hennings Center World Com, which makes actually even -- under those cases you must, it's the burden of proof for the defendant and they have to show that there were openings in comparable positions available for the plaintiff elsewhere after he was terminated.

And what that requires is actual jobs that he could have applied for that are substantially equivalent. And that means that they have to show that it's the same type of job, a nephrology job. And they haven't presented any evidence whatsoever --

THE COURT: Do you think they have to show that he had director positions available to him?

MR. BLANKENSHIP: They haven't shown any of that. They haven't presented any --

THE COURT: No, do you define the same or similar job as a job not only as a staff nephrologist, but also as a director of a nephrology department or clinic?

MR. BLANKENSHIP: I think yes, that would be substantially equivalent. And they haven't even presented any evidence of any open jobs outside, especially outside of the 75 miles. And they're opposition to our motion in general is based on a argument. And they argued about mitigation. And they cited to Dr. Anel's deposition, but nowhere did they show --

THE COURT: You mean inside the 75 miles? I think you --

MR. BLANKENSHIP: Inside the 75 miles.

THE COURT: Yes.

MR. BLANKENSHIP: Thank you, Your Honor. But nowhere have they presented the open positions, which is required in the pattern instruction. They need to show that there were openings in comparable positions available for plaintiff elsewhere after Defendant terminated him.

And the second part is they have to show that Plaintiff used reasonable care and diligence in seeking those openings. But the case law says you don't have to even look for work, because it's their affirmative defense. And there are cases that we've cited where people didn't look at all and actually the Labriella case is an example of that exactly, where they could not find that, where they didn't meet their burden of proof showing that there was an actual job that he qualified for.

And you know Burnside basically states, "To satisfy its burden defendant must show there were suitable positions available and that Plaintiff failed to use reasonable care and diligence in seeking them." They can't meet the first prong or the second prong. I mean, Dr. Anel's gone beyond what he has to do in mitigation. He's flown all over the country to try to find other work. But they can't show a comparable job within the 75 miles. There's not a single job

they've pointed out.

And the way it's supposed to be done and I've tried cases where it's done is they actually show the open positions and say, "This was one he didn't even apply for and he was available for it."

And the point of the summary judgment is to eliminate these issues at trial. They've had plenty of time on that issue and they have no evidence of mitigation, period, within that 75 mile range. And the jury shouldn't, the time to come up for it is now, not between now and trial.

THE COURT: And which affirmative defense is that number?

MR. BLANKENSHIP: That's mitigation.

THE COURT: I'm sorry. Failure to mitigate. All right.

MR. BLANKENSHIP: Yes, Your Honor. And it's right there in the instruction and if you even look at the comments with the cases, it cites Burnside and these cases that we cite.

THE COURT: All right. Thank you. Go ahead and address your summary judgment motions.

MR. BLANKENSHIP: Sure. All right, Your Honor, typically when we move for summary judgment in a wrongful discharge case, we typically move on adequacy and jeopardy. Because those are important issues. And jeopardy and clarity. And those are important issues for the Court to rule as a matter of law that there's clarity and jeopardy.

Here the defendants did not oppose clarity, because they

couldn't. There's a clear public policy to pay employees wages for work they did. In the Hume case, the Supreme Court looking at adequacy and jeopardy and all of the Gardener elements, concluded that if you fire someone for requesting wages, that is a legitimate, bona fide wrongful discharge. And that's the clarity element.

And that doesn't require us to evaluate the employer's conduct at all. It simply identifies the policy at stake. So as a matter of law, with the cases that we cite with respect to Hume, and the citations to this important public policy, which is contained in 49.52 and 49.48, prove that we've met the clarity element.

The jeopardy element, which they also didn't oppose, is also established as a matter of law. And especially here -- they didn't oppose this, but here they admit that Dr. Anel reasonably believed that he was requesting wages and that he was owed compensation. And that is good enough under a number of cases, like Ellis v. City of Seattle, where somebody thought the fire alarm wasn't working and they fired him for it and he was wrong. Danny v. Laidlaw is another recent Supreme Court case.

So Dr. Anel engaged in conduct directly relating to the Washington public policy by protesting defendants' withholding of earned wages. And so the first prong, it's undisputed that Anel protested against Defendants' illegal

withholding of wages. Whether or not it's true or not true, and we believe it very much is, he engaged in conduct that directly relates to the public policy in this case.

Defendants have admitted that Dr. Anel reasonably believed he was owed wages and that he protested not being paid. Dean Field, the decision maker who personally fired Dr. Anel, acknowledged in writing that he understood Anel's valid "frustration about 22 months of service without compensation" and said defendants would have to work to "re-earn Anel's trust after failing to pay him for so long."

Field admitted in his deposition that Dr. Anel fought for wages and that "he believed" that they were owed to him. President Schley, who thought Anel had the personality of a whistleblower, also admitted that Anel fought back when Defendants questioned the hours he had billed. And that Dr. Anel would explain how he had actually performed all the work on the timesheets. Oh, and insist on being paid for his work.

These are all undisputed in the record. Dr. Gill testified that Dr. Anel fought for wages of others. And he said that he and Dr. Anel discussed the unpaid wages and that Dr. Anel clearly said he believed it was illegal for Defendants to withhold those wages. And in fact, Dr. Gill said that he was too afraid to challenge Defendants when they illegally underpaid him for two months after seeing what happened to

Dr. Anel. And that there was an atmosphere of fear, that's his words. And then he felt like he was "walking on eggshells." His words.

So Dr. Anel very much opposed this wrongful withholding of wages. And Defendants can't deny it.

And also as a matter of law, other enforcement mechanisms are inadequate. And they haven't shown otherwise. Hume established this, plus there are no effective measures to promote this policy. None of the Washington wage statutes provide for back pay, front pay, injunctive relief, emotional distress, or compensatory damages.

And for the most part the statute merely allows employees to collect only wages they rightfully earned and attorney's fees. And in some cases double damages.

Moreover, Chapters 49.48 and RCW 49.52 do not include any anti-retaliation provisions. So even that statute fails to afford the employee of any relief. It just sanctions the employer. And that doesn't do anything for the employee. And what that means is Dr. Anel is necessary for enforcement. Recognition of the importance of employees by the Supreme Court is broad and in the Burlington case, where the Supreme Court holds and our Supreme Court has held similarly, Title VII depends on the cooperation of employees willing to file complaints and act as witnesses. They are the vanguard. He was the vanguard. He was a director, he did his job, and he

objected to wages and they fired him for it.

And although they didn't get into the issue of adequacy, the Supreme Court has shown, and Roberts v. Dudley is a very good example of this, that in that case with respect to employer with less than the statutory eight employees, the Supreme Court in Roberts v. Dudley properly said that "the plaintiff had properly stated a cause of action for the tort of wrongful discharge for reporting sexual harassment and subsequently suffering retaliation, despite the fact the Washington law against discrimination is significantly broader than the wrongful discharge."

Plus the WLED contains the anti-retaliation provisions with comprehension damages. And there's none of that here. Moreover, Smith v. Bates Technical College, in a wrongful discharge case, the Court indicated that it saw, "No justified reason," to deny Plaintiff, "The opportunity to recover damages for emotional distress, thereby immunizing the alleged tortious conduct of wrongful error simply because her administrative and contractual remedies may partially compensate her wrongful discharge."

So that's a case where there was even a statute in place that just didn't have adequate remedies. Here we have no discharge remedies, but one of the strongest states in the union as far as employee rights, a long, proud history.

The Cutney case certainly did not overrule any prior

Supreme Court holdings and that case was a very different case where it involved WISHA as the public policy, which was stipulated. And it has an anti-retaliation provision that includes significant remedies. And it requires the Department of Labor to investigate and they're required to bring suit if they find that there is a claim.

So and the employee can also independently bring suit. So this wouldn't apply in Cutney, but most importantly, the court's decision in 2013, June, right about when we took these cases basically -- at least the other Franciscan case, Peel came down and stated that Cutney is not inconsistent with past Supreme Court wrongful discharge holdings.

So it's improper to view Cutney as the court said, "As overruling anything." So Hume is still in effect.

So the clarity element is a pure question of law and the jeopardy element is uncontested. So the Court at a minimum should find that there's a clear public policy and terminating Dr. Anel jeopardized that policy.

But causation here, unlike many cases --

THE COURT: What are the facts that you think are not in dispute to show that Dr. Anel was terminated because his wages had been withheld? I mean, they say in their response that -- I pulled it up here because I wanted to ask you, "Plaintiff argues that Dr. Field testified that Plaintiff was fired because he wouldn't let go of the unpaid wages.

Dr. Field's testimony" -- and this is on page five of their response, "Dr. Field's testimony that Plaintiff wouldn't let go about compensation was not an admission that Plaintiff was fired for a protected activity. When Dr. Field met with the plaintiff in October 2013 to give him notice of his termination, issues about compensation may have been one of the examples discussed with the plaintiff."

And then they talk about -- I know it's page 184 of Field's deposition. I know that it's toward the end of his deposition. And your argument in your response or reply was that he was given an opportunity to reverse himself. But we really need to take a look at the beginning of his deposition.

But isn't that an issue of fact? I'm struggling with this, whether or not it's an issue of fact. I'm struggling with that very thing. I'm not really struggling with the jeopardy and clarity issues, because quite frankly my initial reading and their response was consistent with your position.

But don't we have an issue of fact here as to why he was fired?

MR. BLANKENSHIP: I don't think we do, Your Honor.

THE COURT: Why?

MR. BLANKENSHIP: Well, number one, no reasonable jury could find otherwise. The fact finder need only find that the protected activities were a substantial --

THE COURT: If there is a reasonable jury. It might just be a reasonable judge.

MR. BLANKENSHIP: Or reasonable judge, which is what we have here.

THE COURT: Sorry, I just had to throw that out there.

MR. BLANKENSHIP: No, I know. And so basically under Mackay versus Acorn Custom Cabinetry, it's clear that -- first of all, let me just address (inaudible) before I get there. They argue this. I mean, their whole response brief is argument. You don't have a declaration from Dean Field saying, "What I meant to say here was." I mean, you know --

THE COURT: We do have inconsistent portions of depositions though. I went back and looked at some of those. And it seems to me that some of that is somewhat inconsistent. And I think you'd have to agree with that.

MR. BLANKENSHIP: I think if -- I don't think that what they cited to shows anything other than if they're frustrated with his demands for wages, that would still be firing him for his wages. But you've got to look at the weight of the other evidence here, and that's why --

THE COURT: Well, they would argue that he's incompetent and that's why they fired him. He wasn't, didn't do what he was supposed to do or whatever. And they argue Stark and the federal rules and everything. But we can talk about that later, that's a different issue.

Let's talk about whether or not there is an issue of fact as to why he was fired.

MR. BLANKENSHIP: I don't think there is. I mean, undisputed admission by a party deponent when Dr. Anel says that when he protested the nonpayment of wages by trying to resign, President Spare threatened to fire him. And Dean Field suggested the firing because he wasn't "understanding why he couldn't be compensated the way he believed he should be."

I mean, that's -- and you know and then Scribner is the other case that came down recently, like Mackay, that said you only need to find one reason among the other reasons. What if we put it in these terms. What if we --

THE COURT: What is the one reason you think that you have?

MR. BLANKENSHIP: What's that?

THE COURT: What's the strongest reason that you have?

MR. BLANKENSHIP: That they fired --

THE COURT: To be consistent with the Scribner case?

MR. BLANKENSHIP: Would be that they admitted firing him because, you know, he was talking about his compensation, he didn't understand why he couldn't be compensated the way he believed he is. Kurt Schley testified that they did, in fact, fire Dr. Anel because of disputes with timesheets.

I mean, you know, how many of these people have to say it before it becomes obvious? Dean Field fired Dr. Anel, told

Anel that he was being fired because defense executives were upset that Dr. Anel couldn't let go of the wage dispute. I mean, I mean, let's put it in terms, let's say it was because he was Chinese, you know. He kept complaining about being treated differently for being Chinese. And he just couldn't let go over not being treated differently because he was Chinese.

If you put it in terms like race discrimination or race retaliation, it becomes real clear that we have an admission that a substantial factor, which is what the test is under Mackay for wrongful discharge, a substantial factor here was him requesting wages. There might be other factors and the jury instruction says under substantial factor that it doesn't have to be the main reason or even the only reason. It just has to play a part in the decision. Clearly it played a part in their decision.

THE COURT: Okay. I've got your argument. Let me hear from the defense. I want them to address your first two requests, and that is that the defendants should be held liable as a matter of law for the tort of wrongful discharge of Dr. Anel. And the defendants willfully withheld wages from the plaintiff. You didn't really address that, Mr. Blankenship, but your pleadings certainly did plenty.

And I think that there's been enough admission from the defense. I'd like to hear what you have to say about that.

And I want to make sure that you're Mr. Murray, right?

MR. MURRAY: Yes, Your Honor.

THE COURT: All right. Thank you, sir.

MR. MURRAY: Thank you.

Your Honor, just to --

THE COURT: Excuse me just a minute.

MR. MURRAY: Sure. Thank you.

THE COURT: Go ahead.

MR. MURRAY: If I may address the issue of causation, Your Honor. On the issue of causation, I agree that the testimony is not favorable for the plaintiff's position that there is no issue in dispute about causation.

THE COURT: I didn't say it was unfavorable. I just wondered if there was an issue of fact. That's all I said.

MR. MURRAY: Sure. As Your Honor knows, on summary judgment, any issues of fact should be viewed with a favorable light towards the nonmoving party. Dean Field's testimony about the let go statement was anything but clear. It was extremely vague and there is no direct admission anywhere in any of the record evidence that anyone from Franciscan fired Dr. Anel for his protesting of wages. There is no scintilla of actual record evidence that supports that.

What Mr. Blankenship failed to admit in any of his presentation was what the real overriding justification, which we have set out in our brief, was. Under federal law,

Stark lobby and the kickback statute, the put more regulations --

THE COURT: Isn't that a issue or the subject of another summary judgment later on?

MR. MURRAY: It is, and I think it also helps explain some of these issues. Physician compensation in the United States is one of the most highly regulated aspects of healthcare. A physician has to be paid fair market value. If they're paid anything beyond that, the hospitals can find themselves at risk of violating the statutes, which have serious sanctions that can dovetail --

THE COURT: Isn't that about referrals, though? Aren't we talking about a federal law to protect Medicare and Medicaid from fraud, what they're trying to do is make sure the physicians don't refer patients to a healthcare facility where they're basically going to get a cutback or some kind of extra compensation and, therefore, be able to milk Medicare?

I mean, isn't that what that's all about? And I remember the old Medicare scandals that came out years ago.

MR. MURRAY: Sure.

THE COURT: And they tried to change that so it wouldn't happen. And isn't that the reason for that law? And is there any evidence to indicate that that was the case with Dr. Anel? I didn't see any evidence. I mean, I'll get right

down to the nitty gritty of that. It seemed to me those arguments were somewhat specious.

MR. MURRAY: Okay. Let me address the Stark applicability.

So Stark and the anti-kickback statute are designed to prevent abuse in the Medicare system. Dialysis, it's undisputed it is a highly Medicare heavy paid system. Dialysis patients are usually on Medicare.

THE COURT: Well, it's usually older people and I agree. It's usually, it's very federally funded heavy.

MR. MURRAY: Sure. So when a physician has any sort of financial relationship with a healthcare entity, such as Dr. Anel with any of the Franciscan entities, and that entity is enrolled in Medicare, which is the case here, those regulations and laws automatically apply.

If $1 is paid to a physician that is beyond their market value, or which includes any compensation for services that are unverifiable, they find themselves to be exposed to the Stark law. That is why there is direct guidance from the Department of Health and Human Services to have verifiable services on timesheets.

Submitting a timesheet, logging however many hours you log, isn't enough. They have to be verifiable services. That is why it's undisputed that in this case there were checks and balances to assure that the reported services were verifiable and that compensation would be appropriate.

In a very small percentage of the hours that were reported by Dr. Anel, there were some write-offs and that goes to his unpaid wage claim, saying, "You inappropriately wrote down some time," I think it was about 42 and change hours over the course of his entire directorships.

One of the major issues was he was withholding timesheets. The statement earlier about the 22 --

THE COURT: Isn't a fact that he only withheld that once, and isn't it a fact that he turned them in actually within a reasonable period of time close to the deadline that they were due and it was only on one occasion, like, the 12th of the month or something?

I mean, I read over all of that and I went back and looked at it again, and isn't it just one time and isn't it he said it was in protest of the Franciscan Group withholding his wages? That's what he's arguing.

MR. MURRAY: His argument is he did it one time.

THE COURT: Did he do it more than once?

MR. MURRAY: Yes, he did --

THE COURT: I didn't see that in your brief or in the plaintiff's brief.

MR. MURRAY: So the one time that he did it was he submitted in lump sum 22 months of timesheets, which goes to the statement earlier of why there was an issue about --

THE COURT: So he withheld for 22 months is what you're

saying?

MR. MURRAY: On one directorship. Now, right before he was terminated in September, he was hand delivered a written warning and this was for timesheets for on-call coverage. He had to submit timesheets for a number of different -- for compensation. Which as the hospital --

THE COURT: Okay. I apologize. I misunderstood.

MR. MURRAY: Sure.

THE COURT: That when he handed those in it was 22 months. I know he had three different directorships, but 22 months he handed in all at once; is that true?

MR. MURRAY: He handed 22 months of medical directorship timesheets.

THE COURT: From one of the clinics?

MR. MURRAY: From one of the clinics, correct. And there's a dispute over the existence of another director --

THE COURT: So some of them were 22 months behind, is that what you're saying?

MR. MURRAY: I'm sorry?

THE COURT: Some, therefore, were 22 months behind; is that correct?

MR. MURRAY: Yes. Yes, because there was no -- he just wasn't submitting them. And then there was, he was actually personally counseled by Kurt Schley in February of 2013 about his untimely submission of timesheets, which is memorialized

in his written warning that was given to him that he personally signed, where he said, "I understand these are the expectations of me," in September of 2013 before he was terminated.

In that instance, he had submitted six months' worth of on-call timesheets tardy. This made it extremely difficult for the hospital to go back and verify that the time that was being submitted and invoiced for compensation was legitimate. This is a huge compliance concern. And in some of the briefing it's been suggested that Stark arguments and the hospital's concerns over physician compensation is borderline frivolous. Compliance issues is actually a direct quote out of the written warning.

It's hard to imagine that a hospital is not concerned with the manner in which they pay their physicians, especially medical directors under various exceptions in Stark. Stark requires if you're going to have a financial relationship with a patient, in order for that physician to refer any patients, Medicare patients, to the facility, it has to follow the safe harbor. Those safe harbors include it has to be fair market value for verifiable services.

THE COURT: All right. Let me ask you this. Do you deny that the defendants willfully withheld wages from the plaintiff?

MR. MURRAY: Yes. There is a bona fide dispute over the

withholding of --

THE COURT: No, I didn't say how much. I said the fact that the defendants willfully withheld wages from the plaintiff.

MR. MURRAY: The defendants withheld wages from the plaintiff, but there's a dispute over whether they were even owed, which is a threshold issue on a wage claim. He has to prove that they were owed to him. And the problem with the wage claim is there's a dispute that the wages that were written down, the 42 hours that were written down, were actually owed to him. They were marked down because they couldn't be verified.

One of these issues was chart reviews. You know, there's a significant amount of testimony about medical records that weren't expected to or it wasn't something that they would go on their own to do chart reviews on their own without ever providing any work product. Sure, chart reviews are good to make sure of the patient care quality and all of that. But there was never any work product.

There are a number of different issues and I'm not going to burden the Court by going through everything in our briefing because the Court's been given a lot on paper.

THE COURT: Thank you. I have been. Lots of trees gave up their all for this case.

Let me stop you here.

MR. MURRAY: Sure. Thank you, Your Honor.

THE COURT: Because I've actually I want to try and go through this in an expeditious but fair way. And I think I've heard enough to make rulings on some of these. And so I want to do that now so that we can proceed to some of the other issues.

So on the issue of whether or not the defendant should be held liable as a matter of law for the tort of wrongful discharge of Dr. Anel, I believe there are issues of fact. And, therefore, I'm going to deny that motion for summary judgment.

However, I don't know exactly why he was terminated. I think that there's strong evidence to suggest he was terminated in part for his continual complaining about not being paid for the time. And if that is indeed a reason for his termination, and it's determined to be a reason for his termination by a trier of fact, then that is clearly a wrongful discharge pursuant to Washington State law. I have no problem at all with that.

So a trier of fact has to determine the exact reason for his termination. If one of the reasons or if it was a factor in his termination that the complaints for wages withheld, that is a protected activity pretty clearly and it would then constitute wrongful termination period.

So it's a narrow issue. It's an issue a trier of fact has

to determine, because I do think that there is some factual dispute over the circumstances of his termination. I do think there's strong evidence to suggest that that was a reason. But there's also some evidence on the other side to suggest that perhaps it wasn't.

So I want to find out or have a jury find out or whatever. So we'll talk about that in a little bit. But so I'm narrowing the issue there, but I'm not awarding your motion for summary judgment.

MR. BLANKENSHIP: But, Your Honor, we did prevail on clarity and jeopardy?

THE COURT: I'm sorry?

MR. BLANKENSHIP: You're finding though as a matter of law that --

MR. WOOD: On clarity and jeopardy?

THE COURT: Yes. Yes.

MR. BLANKENSHIP: Thank you, Your Honor.

THE COURT: Yes.

MR. WOOD: Thank you.

THE COURT: But the reason for his discharge is still an issue of fact.

And the second issue that the defendants willfully withheld wages from the defendant [sic], yes, they did. Period. How much is a different issue. I think what Counsel is arguing is that they had a right to withhold them, but I think some

were clearly withheld. I don't know how much it was, I have no idea. I certainly didn't understand from reading over the briefs that 22 months were withheld, or 22 months of billing was submitted all at once. That would make a difference to me.

MR. MURRAY: Your Honor, if I may? Sorry to interrupt --

THE COURT: But it's clear to me from the facts, from the uncontroverted facts, that there were some wages that were withheld from Dr. Anel. Period. All right.

MR. MURRAY: I'm sorry. It is undisputed --

THE COURT: You can go ahead and make your record, Counsel.

MR. MURRAY: It is undisputed that he actually, after the submission of those 22 months, was paid his contractual maximum amounts for those time periods.

THE COURT: But he was a director of three different clinics. There were a number of wages. He started complaining early on. He complained for 22 months or whatever about all of this. And although I think that the defendant has an issue as to how much and the fact that some of those were adjusted rightfully, nevertheless, I believe that there is ample evidence to support a conclusion that some wages were wrongfully withheld. Willfully withheld, which is what I've been asked to find and what I do find.

MR. MURRAY: And, Your Honor, if I just may make a little bit more of a record?

THE COURT: Yes, sir.

MR. MURRAY: And ask for some clarification.

THE COURT: Absolutely.

MR. MURRAY: There are two prongs to his wage claim. One he is arguing that he held a "quality medical directorship," which he was not paid for. The second prong is that he was not paid for, which I was discussing earlier, the written down hours, the 42.6 I think hours that were written down off of his submitted timesheets.

The quality medical directorship is genuinely disputed. There is no written contract involved in that. The only evidence that has been presented in the briefs is Dr. Anel's testimony and declaration that he was promised this other position that he was never paid for.

And I would like the Court to please clarify its ruling on the unpaid wage claim, if it was just for the 42 hours that were submitted in timesheets that were marked down? Or if it has anything to do with the quality directorship, because that's a completely separate issue that we haven't discussed yet.

THE COURT: All right. Thank you, Mr. Murray. Mr. Blankenship, do you want to respond to that before I do?

MR. BLANKENSHIP: Sure. No reasonable jury could find that they withheld the quality directorship information. I read to you, Your Honor, Dean Field saying, "We haven't paid you

for 22 months. We have to regain your trust." That's quality directorship money that he admitted that they owed.

We absolutely dispute this contract maximum. They took his time --

THE COURT: But that's disputed. So the issue is I believe that some of that money was clearly willfully withheld that he was entitled to. I don't know how much.

MR. BLANKENSHIP: From the quality directorship --

THE COURT: It's in dispute. I think what I'm focused on is the directorship money.

MR. BLANKENSHIP: Okay. And so your ruling if I understand it is Dr. Anel prevails under 49.52 that wages were willfully withheld and the jury will determine what the source of those wages were.

THE COURT: Yes.

MR. BLANKENSHIP: Is that right?

THE COURT: Yes.

MR. BLANKENSHIP: Thank you, Your Honor.

MR. MURRAY: And the existence of the quality directorship? Because that's --

THE COURT: I believe that the wages were connected to the directorships. And that he was entitled to be compensated something for those directorships. And that that was withheld. All right?

And I don’t think that that's really controverted. I

really don't. I read over as many of these depositions as I could get my way through and I don't think it has been. So that's what my ruling is.

Affirmative defenses. Let's go through the affirmative defenses. I'm a lot more confused about some of those.

Mr. Murray, I'm going to ask you some questions about that. Let me get to my notes here.

MR. MURRAY: Yes, Your Honor.

THE COURT: And, Mr. Murray, I'm going to point you to page 21 of the plaintiff's Motion for Partial Summary Judgment. And beginning on line 11 and ending on line 15, because you have that look on your face. And so I want you to understand the reason for my ruling. And it's pretty well summarized right there and I really want you to -- because I don't want there to be any misunderstanding. And my job here is to try and be as clear as I can.

But here and let me just quote from that Plaintiff's motion, again, page 21, beginning on line 11, concluding on line 15: "Here a reasonable jury must find that defendants intentionally withheld wages Dr. Anel had earned, given that decision makers like Schley and Fredericks admit they intentionally withheld Dr. Anel's pay. Defendants even signed off on Anel's timesheets, yet crossed off his time without telling him and paid him reduced wages." I agree with that.

And you made your argument. But that's basically where I'm coming from. Okay?

Now, let's go to -- I mean, it’s not okay. I know that. But all right.

The eight affirmative defenses that Mr. Blankenship argues. And maybe what I'll do is if you want to just respond from the table there, so you can have everything in front of you. He doesn't really lay them out as well as I would like. So I want him to answer my questions and then I want you to respond. Let's talk about each one really quickly. All right. Thank you, sir.

Mr. Blankenship, the affirmative defenses which apparently only took up one or two pages of your initial motion.

MR. BLANKENSHIP: Part of that, Your Honor, was to try to stay within 24 pages, which we understood was the limit for all.

THE COURT: Which all of you have clearly failed to do, but that's okay. Creative litigation. Go ahead?

MR. BLANKENSHIP: I addressed the mitigation issue and I don't know if you need any more from that, but I’m going to let Mr. Woods address the other.

THE COURT: Well, I've ruled on the mitigation issue already.

MR. BLANKENSHIP: Okay.

THE COURT: So and I think that the case law supports a

conclusion that 75 miles is the appropriate amount under the situation here. And I'll stick with that ruling.

MR. BLANKENSHIP: And with respect to them in general not having a mitigation defense because they didn't come up with specific jobs under the WPIC that requires them to actually show that there were specific jobs available?

THE COURT: Okay, I've got that argument. I want to hear Mr. Murray respond.

MR. BLANKENSHIP: Okay.

THE COURT: Thank you. Mr. Murray?

MR. MURRAY: Yes, Your Honor.

THE COURT: You can sit, sir, if you like. I really appreciate you're being old school. Thank you for the respect. I really do appreciate that.

MR. MURRAY: Yes, Your Honor.

THE COURT: You may not feel that way about my decisions, but I really do appreciate it. But just feel comfortable and just tell me: what evidence do you have, what information do you have that this is a proper affirmative defense?

MR. MURRAY: Yes, Your Honor. There's actually an abundance of failure to mitigate evidence from Dr. Anel's testimony. He specifically testified he stopped looking for work six months ago. He just outright stopped looking for employment, full-time employment, six months ago. That in and of itself right there is a failure to mitigate. He

wasn't even looking for positions.

THE COURT: Was that in part because of his allegations that his reputation and ability to obtain outside employment was being damaged by your client? I mean, that's his allegation. I'm not making a ruling whether that's true or not.

MR. MURRAY: Sure.

THE COURT: I'm just telling you that that's his allegation.

MR. MURRAY: I think that that goes to whether or not a fact finder will find that there is a failure to mitigate or not. At this stage, at the summary judgment stage, there's sufficient evidence for this defense to be allowed to be presented at trial. For evidence of it to be presented at trial. Whether he can -- and which we'll carry the burden on. But if he is able to defeat that at trial, so be it. But at this stage, there's sufficient evidence for this to proceed.

Your Honor pointed out a very, very insightful note. The entire affirmative request for summary judgment in the motion was totally without any substance. It was a blanket assertion of summary judgment against eight affirmative defenses, without any discussion whatsoever of evidence or the law on them.

THE COURT: I did notice that, Counsel.

MR. MURRAY: So I don't think that the plaintiff has carried its burden at a summary judgment standard of showing Your Honor that they're entitled to any summary judgment on anything but what Your Honor has already ruled on, which was the only part that was actually analyzed, the mile radius issue.

In regards to failure to mitigate, Dr. Anel --

THE COURT: And I'm just trying to be consistent with other case law.

MR. MURRAY: Sure.

THE COURT: That's all I'm trying to do here.

MR. MURRAY: Absolutely.

THE COURT: And that way it gives you some boundaries that I think that the courts would uphold. And that's why I'm ruling that way.

All right. Thank you. I appreciate that. Mr. Woods, I guess it's your turn.

MR. WOODS: Yes, Your Honor.

MR. BLANKENSHIP: May I say something about failure to mitigate, Your Honor?

THE COURT: I don't know. I mean, no.

MR. BLANKENSHIP: Okay.

THE COURT: I've heard enough.

MR. BLANKENSHIP: Thank you, Your Honor.

THE COURT: Mr. Woods?

MR. WOODS: Yes, Your Honor. First of all to respond to defense counsel's claim that there is no law supporting the requests to dismiss the affirmative defenses. That's simply false. On page 21 of Plaintiff's --

THE COURT: Well, here. Here. Wait, wait. Tell me which affirmative defense. Because you've just blanketly thrown out eight affirmative defenses.

MR. WOODS: Sure.

THE COURT: What affirmative defense are we talking about now?

MR. WOODS: Well, so first of all I'd like to respond in general to Counsel's claim. When dealing with summary judgment, a party moves for summary judgment to dismiss another party's claim that they bear the burden of proving. It is enough on summary judgment to point out that there is a lack of evidence to support that claim.

On page 21 of Plaintiff's Motion for Partial Summary Judgment, lines 21 through 23, we cite Burnside and Sias v. City Demonstration Agency. They hold exactly this: that the defendants bear the burden of proving -- excuse me. I apologize.

At page 23, lines 2 through 7. Defendant has the burden of proof on the issues of his affirmative defense. That's bedrock law, Your Honor, citing Olpinski and Locke v. City of Seattle. And a party is entitled to summary judgment if it

can show there is an absence of evidence to support the nonmoving party's case. That's Stanfield, citing Young v. Key Pharmaceuticals.

So the law is that Plaintiff does not have to point out specific evidence that disproves the defendants' affirmative defenses. Rather, the defendants failed to present evidence in support of those affirmative defenses. And, in fact, I note that Defendants have withdrawn affirmative defenses No. 1, No. 5, No. 8, and No. 15. So there's no dispute that there is a lack of evidence to support those.

THE COURT: Well, then you only have four left.

MR. WOODS: And I will turn to --

THE COURT: Affirmative defense No. 3.

MR. WOODS: Defense No 3 is the mitigation defense, Your Honor.

THE COURT: Okay. Number six --

MR. WOODS: And again, the defendants have not presented evidence that there were jobs available.

THE COURT: We've heard mitigation. Number six?

MR. WOODS: I apologize, Your Honor. Finding the exact issues here.

THE COURT: I'll tell you what. It's a lot of stuff here and I appreciate --

MR. WOODS: Okay. Yes. And, Your Honor --

THE COURT: Wait, wait. You've got to learn, Mr. Woods, at

a young age you don't interrupt the Court.

I'm going to take a 10-minute break and when I come back we'll plod our way through the rest of this. Okay?

MR. WOODS: Yes, Your Honor.

THE COURT: And what I want when I get back, Mr. Woods, is you tell me what Affirmative Defense No. 6 is; No. 7, and No. 9. Those are three we have left. And then we'll get on to the defendants' motions. Okay?

MR. WOODS: Yes, Your Honor.

THE COURT: And then you tell me why each one -- I understand what the law is. I'm well aware of that. But it's okay. I appreciate your argument. I just want you to hone in on the real issue here and why you think they haven't made any showing at all.

And I'll acknowledge that No. 1, 5, 8, and 9 are withdrawn. And we've already argued on No. 3, which is the failure to mitigate. Okay?

MR. BLANKENSHIP: Thank you, Your Honor.

THE COURT: So I'll be back in 10 minutes. Thank you.

THE CLERK: Please rise.

(Recess)

THE COURT: Thank you. I know that was a long 10 minutes. Please be seated.

All right. Mr. Woods, you are on the hot seat.

MR. WOODS: Thank you, Your Honor. One other thing I would

like to point out is that there are three defenses listed in Affirmative Defense No. 7 and defendants have also withdrawn the laches defense from No. 7.

THE COURT: Okay. Thank you. Let's go to six first, okay?

MR. WOODS: Yes, Your Honor.

THE COURT: What is six?

MR. WOODS: Six is the defense that third parties could be liable for Dr. Anel's damages. In their response brief, Defendants did not claim any third parties could be liable for damages related to the wrongful discharge claims, the willful withholding of wage claims, the defamation claims, or the tortious interference claims.

So I would argue that those issues are admitted and the only contention from defendants is that the malicious prosecution damages could have been caused by the police or the prosecutor in that case. That is the only argument that was made by the defendants in their response to summary judgment.

The defendants cited no law that suggests the police or the prosecutors could be liable for damages in the malicious prosecution case. And indeed, there is immunity, absolute immunity --

THE COURT: Well, it's technically immunity, but that doesn't mean that they can't be liable. They just can't be prosecuted. So I understand.

Mr. Murray, would you agree that with the exception of the police and prosecuting attorney, you didn't respond as to any other third parties who could be liable?

MR. MURRAY: Your Honor, the way we framed it in the brief is how we would present the third party issue at trial.

THE COURT: Well, I think you can present issues about the police and prosecutor.

MR. MURRAY: Sure.

THE COURT: But you obviously don't have any other third parties. And so we'll narrow the issue there. I'll grant part of your motion and that is I'll grant all your motion as to any other third parties, potential third parties, with the exception of the police and prosecutor. And their immunity from lawsuit doesn't necessarily mean that they can't plead them as an affirmative defense, because they can.

So you can certainly use that. And just because they can't be sued doesn't mean that they can't have done something wrong.

MR. WOODS: Thank you, Your Honor.

THE COURT: All right. So now we're on to No. 7.

MR. WOODS: Yes, Your Honor.

THE COURT: And you've indicated already that the defense of laches basically has been withdrawn.

MR. WOODS: Yes, Your Honor.

THE COURT: All right.

MR. WOODS: In defendants' response brief, they withdrew it.

THE COURT: Good, because I never really understood that in law school very well anyway. So I'm really glad I don't have to rule on that. I appreciate withdrawing it.

MR. WOODS: Yes, Your Honor. So the remaining --

THE COURT: That and negative pregnants and all those other kinds of things that we all learned our first year and we kept looking at each other wondering what in the world they meant.

Now, I realize my first year, we actually had running water and electricity when I was in law school. I mean, I know it was a long time ago. But so.

Mr. Madden, don't say anything. I think you were after me.

MR. MADDEN: That's for sure.

THE COURT: What year?

MR. MADDEN: Seventy-eight.

THE COURT: Yeah, you were. Thank you for the kindness. I appreciate it. UW?

MR. MADDEN: No, no. Boston.

THE COURT: Oh, so sorry.

MR. MADDEN: It felt a long time ago.

THE COURT: All right. So laches is withdrawn. And tell me now about the other parts of Affirmative Defense No. 7?

MR. WOODS: Yes, Your Honor. The remaining claims, or

defenses I should say, for Affirmative Defense No. 7 are waiver and estoppel.

Again, the defendants did not claim in their response brief that these would apply to all of the claims. They only argued that this could apply to the willful withholding of wage claim. They did not argue that it applied to wrongful discharge, malicious prosecution, tortious interference, or the defamation claims.

THE COURT: Okay. Let me ask, Mr. Murray, the estoppel part of your affirmative defense, doesn't that really apply to how much the wages were, rather than any of the other claims?

MR. MURRAY: I'll stand up.

THE COURT: Whatever you want to do, sir.

MR. MURRAY: Your Honor, the waiver and estoppel issue goes directly to the heart of what we were discussing earlier on whether there is any validity to the plaintiff's assertion that he held a quality medical directorship, in addition to the medical directorships in which he had a signed, written contract.

The signed, written contracts that he executed specifically contained integration clauses saying what an integration clause says, "This supersedes any and all prior oral agreements or promises," or anything of that nature.

And so we've asserted the waiver and estoppel defense on

the quality medical directorship issue, saying that he is estopped from asserting that based upon what he specifically signed in his contracts, that he waived any alleged, unsubstantiated oral promise by signing integration clauses as well.

THE COURT: Thank you. Mr. Woods, your response?

MR. WOODS: Yes, Your Honor. Two things. First of all, the defendants do not cite any law that this issue would constitute waiver or estoppel.

But beyond that and more importantly, the integration clauses in question have nothing to do with the quality medical directorship. What they cite is an integration clause in a contract with Franciscan Health System from two months before the quality directorship verbal contract was entered into. And it is bedrock, first year law school law, Your Honor, that an integration clause does not have any preclusive effect on entering into future contracts. It has no impact on future contracts.

The other two integration clauses they referred to are integration clauses contained within contracts with FMG, Franciscan Medical Group, not Franciscan Health System. And they occurred much later in 2012 after Dr. Anel had already stopped performing and resigned from the quality directorship.

So again, integration clauses from those contracts have no

effect on a three-year prior contract with another company.

THE COURT: I'm going to rule, deny your motion at this time, without prejudice for you to raise it at a later time after you fully brief the issue. There's not enough briefing for me to be able to rule on that particular legal issue, Counsel. And so you can bring that up at a later time.

So it's denied without prejudice.

MR. WOODS: And, Your Honor, I would --

THE COURT: And there are a number of other claims and Affirmative Defense No. 7, which sounds like the only thing we're really left with is waiver estoppel.

MR. WOODS: Yes, Your Honor. And I would ask if Your Honor is ruling that waiver and estoppel, that it would be granted as to waiver and estoppel for the other claims, the wrongful discharge, malicious prosecution --

THE COURT: I don't have enough information before me to do that. I'll deny it without prejudice, the entire waiver estoppel claim. And then you can bring a motion and outline all the different claims and what you think it doesn't apply to and what you think it does apply to and why. And then they can respond.

MR. WOODS: Thank you, Your Honor. And I would ask if you are hereby granting leave to file a dispositive motion on this, since the deadline for filing dispositive motions will have passed already?

THE COURT: I am.
MR. WOODS: Thank you, Your Honor.
THE COURT: And we'll talk about a timeframe as soon as we're done.
MR. WOODS: Thank you.
THE COURT: What's our trial date, October what?
MR. BLANKENSHIP: Twelfth, Your Honor.
MR. MURRAY: Twelfth.
THE COURT: Twelfth. Today is and we'll just talk about at timeframe right now. Today is the 21st of August. If you're going to file any more dispositive motions, they have to be filed on the 4th and a response should be by the 16th of September. Reply by the 21st.
And do we have any time on the 25th of September, Lisa? Probably not. Okay. What about the 24th? Why don't we tentatively, subject to your guys' calendars, you're really busy and I know that especially the guys from Colorado, we can change it. But let's tentatively try and set a date if we're going to have any other additional dispositive motions, so that at least you have a time reserved.
We have a very, very busy trial calendar. And so let's look at 1:30 on the 24th, I'll special set it. I don't like doing that, but I will.
MR. WOODS: Thank you, Your Honor.
THE COURT: And so if there's any motions left that we

haven't ruled on or what have you, again, I'm trying my best, but I really want more briefing on this issue.

MR. WOODS: Understood, Your Honor.

THE COURT: All right. So now Affirmative Defense, I think we're down to No. 9, aren't we?

MR. MURRAY: Yes, Your Honor.

MR. WOODS: Yes, Your Honor.

THE COURT: What is No. 9, Counsel?

MR. WOODS: That is the unclean hands defense.

THE COURT: What is No. 9?

MR. WOODS: That is the unclean hands defense, Your Honor.

THE COURT: Go ahead, give me a brief summary of your argument?

MR. WOODS: Yes, Your Honor. Again, this is not asserted as to all of the claims. It's not asserted as to any of the post-termination claims: malicious prosecution, tortious interference, or defamation. And would argue that on that basis the motion for summary judgment should be granted as to those issues.

As to the pre-termination claims, Defendants rely solely on the claim that Dr. Anel somehow committed timecard fraud, yet they cite no admissible evidence in support of this claim. The three people whose testimony they cite, or the two people whose testimony they cite are Mr. Schley and Mr. Field, and they both admitted in their depositions they lacked personal

knowledge of this issue and were relying on hearsay statements from other people.

Given the lack of admissible evidence under CR 56(e), this claim must be dismissed.

THE COURT: All right. Thank you. Mr. Murray, what is your argument on the unclean hands? First of all, do you agree that there's no evidence to suggest that unclean hands actually attaches to any of the post-termination claims?

MR. MURRAY: Your Honor, we were only asserting the unclean hands defense as to the termination and the wage claim.

THE COURT: That's what I thought.

MR. MURRAY: Yes. So yes, I agree.

THE COURT: So the motion as far as the post-termination is clearly granted. There's no opposition.

MR. WOODS: Thank you, Your Honor.

THE COURT: Make sure that's in an order.

So let's talk about the pre-termination claims.

MR. MURRAY: Yes, Your Honor.

THE COURT: And the unclean hands. How do you respond to Mr. Wood's argument?

MR. MURRAY: Yes. It would have been nice if there was any discussion about why they were seeking summary judgment for it in their brief, other than the --

THE COURT: Well, I agree with that. So I'm going to stop you right now.

I'm going to deny, but you can bring it same as affirmative defense on No. 7.

MR. MURRAY: Thank you.

THE COURT: I agree with you. I don't feel comfortable making a ruling without seeing more in front of me. Don't reinvent the wheel, but make in concise but give me something in writing. And then give them an opportunity to respond. And we'll go from there.

And if you guys can't make it up from Colorado, then we'll try and schedule it for the following week. Let's see, I set it for the 24th. The following week I'm here, so we could do something that following week.

I'm gone, there is a judicial conference that begins on Sunday, the 4th and goes the 5th, 6th, and 7th. And then I'm out of town. So we're going to have to delay this trial one day. I'm out of town. I don't get back until late on the evening of the 12th. And I'll be here on the 13th.

So trial will actually begin on the 13th rather than on the 12th.

MR. WOODS: Yes, Your Honor.

THE COURT: And I apologize to everybody, but I want to tell you far enough in advance. I've had a personal leave planned for a number of months now actually, since April. So you guys will find me in a very crappy mood if I don't get a chance to go.

MR. WOODS: Understood, Your Honor.

THE COURT: So --

MR. GALLAGHER: Your Honor, if I might address the hearing that we talked about on September 24th?

THE COURT: Yes, sir.

MR. GALLAGHER: I have committed to an event the evening of September 24th in Denver.

THE COURT: That's fine. Let's try and set it sometime close to the 24th but after the 24th. It's going to have to be on a weekday, because every Friday we're full. We are just jammed. We've got over 600 cases assigned to us, and so we have summary judgments and motions starting at 8:30 in the morning and going until 4:30 every single Friday. Plus we have sentencing calendars three out of five Fridays every afternoon, and those usually take up the whole afternoon.

So we're busy down here in Kent. So you know if we can do it Tuesday afternoon or Wednesday afternoon, the following week, that works for you guys and you guys. That is fine. But get together and figure it out. And then let Lisa know what day works and we'll try and just reserve it for you.

MR. WOODS: Thank you, Your Honor.

MR. MADDEN: Your Honor, it'll facilitate the scheduling if the Court might excuse me, because I’m going to be in trial in front of Judge Robinson downtown starting on the 14th. I'd be willing to bow to out of state counsel.

THE COURT: I will. I will assume that hac pro vice is okay.

MR. MADDEN: Thank you, Your Honor.

THE COURT: And thank you, Counsel. You are more than welcome to be here when you can be here. I can call my dear friend, Judge Robinson, and make all kinds of excuses for you if you'd like. But I don't think she'll be probably happy.

MR. MADDEN: It's a med mal case with all witnesses from out of the state, if not out of the country. So it's not the best case to interrupt.

THE COURT: Doesn't sound like it.

MR. MADDEN: No. Thank you, Your Honor.

THE COURT: But it's the kind of case that Judge Robinson would love to hear.

MR. MADDEN: I understand the judicial priorities.

THE COURT: Good. I won't take that away from her. She's a very dear friend.

All right. So seven and nine we're going to talk about subsequently, all right?

MR. WOODS: Yes, Your Honor.

THE COURT: So I think that there are some questions of fact on failure to mitigate. I'm not going to grant that.

Number two is withdrawn apparently. Let me go back and make sure. Yup. Two wasn't the issue, I'm sorry. Number five. One, five, eight, and fifteen are withdrawn, so we're

just talking about failure to mitigate, which is three.

MR. WOODS: Yes, Your Honor.

THE COURT: And I believe there's issues of fact there. So I'll deny that.

MR. BLANKENSHIP: But, Your Honor, you're sticking with the ruling of 75 miles, right?

THE COURT: Yes.

MR. BLANKENSHIP: Okay.

THE COURT: Yes. I've already ruled on that one.

MR. BLANKENSHIP: All right.

THE COURT: And seven and nine we have to determine at a later time. Six I've already ruled on. Okay.

So, Mr. Blankenship, you need to prepare an order summarizing all the rulings that we've had so far. And I know your staff's been taking notes back there and Mr. Wood's been carefully doing that. You can also get a copy of the CD from the clerk if you need to go through and listen to all of our pearly words of wisdom.

MR. BLANKENSHIP: We intend to do that, Your Honor. Thank you.

MR. GALLAGHER: Absolutely, Your Honor.

THE COURT: Like to have an order please, if I could, before the 4th of September when I'm scheduled to be gone for four days. So that means you've got really if you could get me an order by the -- today's the 21st, by the 31st I would

be much appreciative. That way I could go back and look at my notes while they're fresh in my mind and make sure that I agree with it.

Make sure that Counsel, and Counsel, if you don't agree with his order, then send me a separate order by the same date so that I can look at both orders and make a decision. Okay?

MR. BLANKENSHIP: Thank you, Your Honor.

THE COURT: All right. Now we've gotten through a good portion of what we needed to do, but now we have Defendants' Motion for Summary Judgment Against Wrongful Termination and Wage Claims. Defendants' Motion for Summary Judgment Against Plaintiff's Tortious Interference Claim. Defendants' Motion for Summary Judgment Against Plaintiff's Malicious Prosecution Claim. And Defendants' Motion for Summary Judgment Against Plaintiff's Defamation Claim.

And some of the material that the plaintiff provided in support of their motions is duplicative and applies to some of these as well. And I think I've looked at all of these.

Let me try and first of all, Mr. Murray, I'll put you on the hot seat, if you would, sir. I've already tried to narrow the -- I've already ruled that some wages were withheld, and so I think the first motion is pretty much already decided, which is that there are issues of fact for a jury or judge to determine concerning the plaintiff's

wrongful termination and wage claims. I think we've already ruled on that haven't we, I mean, basically?

MR. MURRAY: Your Honor, the plaintiff's motion did not address at all one of the requisite elements of the overriding justification issue, which was actually the focus of our motion. And we did say that we contested the other issues, which the Court has addressed: the clarity, the jeopardy, and the causation issues.

But in order for --

THE COURT: I've ruled on clarity and jeopardy. I've only indicated that, I believe, that there are some factual disputes or issues concerning the remaining issue.

MR. MURRAY: Yes, Your Honor. I apologize. Not ruled on them, addressed.

In order for the claim to be viable, there has to be an inability of the defendants to show that an overriding justification existed. And the issues about the timesheets; the inability to get them submitted timely; to have verifiable services, has been extensively briefed.

THE COURT: But don't you think that there are issues of fact present? I mean, it seems to me if I ruled one way and denied their motions and indicated what I did orally, my feeling is that there is some testimony on the part of some of the folks that you have identified in your material as to other reasons for termination. And I would be, I don't think

there's any way in the world that this isn't an issue that should be submitted to the trier of fact. I mean, on both sides.

And so I have a hard time, I want to try and cut through the issues that I want to talk about. But I have a hard time making a ruling in your favor on this issue, because I think it's a factual dispute that needs to be determined. Why exactly he was terminated probably is something that the finder of fact needs to figure out. Hearing the testimony, live testimony, because there are so many conflicting statements and arguments. There's no way in the world that this is ripe for summary judgment.

So I just really believe that and I want to make sure that you understand why. I mean, there's too many issues of fact here that people are contradicting each other and one person's saying, "No, he wasn't at this meeting and he billed for it and it was improper billing practices. And he was basically trying to cheat us out of money." And the other people are saying, "No, that's not true."

I mean, I don't know. And I certainly can't make that decision on a summary judgment basis. Has to be a trier of fact.

So I'm going to rule on your Motion for Summary Judgment Against Plaintiff's Wrongful Termination and Wage Claims is denied, because there are issues of fact present that must

resolved by a trier of fact.

The second Motion for Summary Judgment Against Plaintiff's Tortious Interference Claim, go ahead, Mr. Murray?

MR. MURRAY: Your Honor, if I may, just for the record, on the wrongful termination claim I understand the Court's finding that there's a genuine issue of material fact.

Just for the record, I would like to note that the notice of the written warning that was tendered to Dr. Anel a month prior to his termination was specific for delays in professional charges and untimely submission of timesheets.

THE COURT: I understand that. And I don't think they dispute that fact, not from what I gathered.

MR. MURRAY: Mm-hmm.

THE COURT: But there's so many other facts here and so many other witnesses who are saying different things, that I can't make a decision on that issue.

MR. MURRAY: Understood, Your Honor.

THE COURT: All right. So now the tortious interference claim?

MR. MURRAY: Yes, Your Honor. The tortious interference claim, Plaintiff threw a wide net early in the case and I think it's --

THE COURT: And if you want to talk about all three of these, because in a way they're a little bit related, the post-termination claims.

MR. MURRAY: Sure.

THE COURT: All three of them.

MR. MURRAY: They have some overlapping facts and then some very distinct facts.

THE COURT: Right. I agree.

MR. MURRAY: On the tortious interference claim, I think I'll go through. We tried to crystalize the issues in our reply on pages 14 through 18 as to what Plaintiff has put forth as what the basis of his claim is.

The first is an issue about an alleged interference with his ability to obtain subleasing for office space for his Key Nephrology practice. We raised in the motion that to the extent there was any alleged interference with an entity's leasing of an office space, that that entity should be the one that asserts the claim, not Dr. Anel in his individual capacity.

Aside from the standing issue, there are two entities that he claims that were interfered with, Multicare and Pulmonary Consultants. But as we said --

THE COURT: And those are the places where he was trying to rent?

MR. MURRAY: Correct, correct. So Dr. Anel was in the process of trying to secure a subleased area just to open up his own practice. And during his deposition he was specifically asked about these issues, and he testified that

the regional director or manager for Multicare had told him that their leadership decided, essentially have a change of heart. And that they weren't going to lease to independent physicians. And that he only suspects that one or all of the defendants, it's unclear which defendant he's alleging it against, interfered with that somehow.

It's suspicion, speculation, there's no actual evidence of it. And what someone from Multicare said to him is also inadmissible hearsay.

So there's really no record evidence that could support, admissible evidence that could support that there was any interference, even in the light most favorable to him.

On the Pulmonary Consultants side, the only evidence that he's been able to set forth was that someone told an executive or the chief medical officer, Dr. Adams, someone told him that someone had interfered with the lease. Or that he said that Franciscan wouldn't like it if you lease to Dr. Anel. It's double hearsay. It's someone from somewhere else telling him that Dr. Adams said something.

So there's no admissible evidence to support that. Again, it's also based on just I would say suspicion.

If we get into the next category -- do you want me to take these one by one, or do you want me to address all of the tortious interference together?

THE COURT: I think you should address all of them.

MR. MURRAY: Okay.

THE COURT: But I'm with you on page 7 of your brief right now.

MR. MURRAY: Okay.

THE COURT: And so we can go to the next one.

MR. MURRAY: Okay. Well, let me address the next one I have is employment applications. I'm looking at my --

THE COURT: Okay. Right.

MR. MURRAY: So the interference with Dr. Anel's employment applications, he has been applying for part-time positions around the country for locum tenens, these are locum tenens positions. And he's alleging that he hasn't been able to secure some of those because the hospital, or someone from one of the defendants, Dr. deLeon, was sending responses to those inquiries in which he says there was no basis to include information about the internal peer review allegations being unfounded.

And first, there's no evidence that he didn't secure any of those positions. There's no evidence that any of those entities that received the communications actually told him, "We're not going to hire you because we received this." There's no evidence that there was actually a reasonable fruition of gaining employment with those entities.

But more importantly, hospitals are required by Washington statute to respond to inquiries from other healthcare

facilities asking about the employment status or verification of someone who's applying for a position with them.

And the statute, which is 70.41.230(4) provides immunity for that. It's actually an essential process for healthcare entities that privilege and credential providers to contact the other facilities where that provider has been employed or worked at, ask, "Have they ever been subject to discipline? Have they ever been investigated? Do they have any issues?" Those types of questions. And receive an appropriate response. And there's statutory immunity for that.

I would note, for the record, Plaintiff does not address the statutory immunity question in their response brief at all, and I would say it's been confessed. There's no rebuttal to the statutory immunity issue.

All we received were allegations that there was a shocking desire to ruin his reputation. But when you actually look at Dr. Deleon's responses, he even, you know, this is noted in our reply brief, on some of those responses where it was more, instead sending a letter, there's a check the box category. It asked, I'll paraphrase, "Is this physician respected amongst administration or providers or staff?" And he said, "Yes." And then he also checked the box, "I have no reservation of recommending him for this position," type answers.

It doesn't mesh with their theory that Dr. deLeon's trying

to sabotage him. He's actually recommending him. But by statute he's providing the required information, which is immune from civil liability for a healthcare entity to provide information about a provider to another healthcare entity.

So I think the Dr. deLeon response letter is a meritless argument for tortious interference. The next --

THE COURT: Let me ask. Let's stop right now, because there's more to it obviously. But I want to hear Mr. Blankenship's or Mr. Wood's response to the first two, which is interference with his ability to be able to rent space at a lower amount. Eventually, he did get space, but it was at a higher amount. And the deLeon letter and whether or not it's statutorily, what he did was statutorily required. So go ahead?

MR. WOODS: Yes, Your Honor. Well, I'll start with the immunity issue. It is incorrect to say that Plaintiff did not respond to that in Plaintiff's response brief. In fact, Plaintiff pointed out on page 38 of the response brief that the only law Defendants cited for this proposition is RCW 70.41.230(4), but that that statute does not require telling potential employers that someone was investigated for alleged harassment and then acquitted of the charge.

MR. MURRAY: And, Your Honor, I apologize. They do address it in two sentences in their 96-page brief.

THE COURT: Well, I had seen it also, but there's a lot of material here. So no, you don't need to apologize. I appreciate your candor. Thank you.

Mr. Woods, what exactly is it that you think that Dr. deLeon did which justifies your claim?

MR. WOODS: Dr. Anel applied for positions at various hospitals. Those hospitals sent a specific letter that requested the exact information that is required to be disclosed in RCW 70.41.230. Those requests, consistent with that statute, did not ask if he had been investigated. They asked if discipline had been imposed against him, which it was not.

There was a box that had to be checked in numerous of these forms. The box was, "Yes, these things have occurred." And after yes, it said, "If so, please explain." And the other box was no. Dr. deLeon checked the box no every time, because the information requested and required to be produced under this statute had not happened.

Nevertheless, he went out of his way to draft an explanation of the fact that Dr. Anel had been investigated for harassing a coworker, information that was not requested and not required. And as Dr. Anel testified in his deposition, right after that happened, suddenly several of these places did, in fact, stop returning his phone calls, places that had been discussing his schedule so he could come

out to do work. And instead, all of the sudden, they simply ceased contact with him.

Circumstantial evidence on summary judgment is admissible and is just as powerful at summary judgment as a lot of forms of direct evidence. Dr. Anel has presented enough evidence from which a reasonable jury could find --

THE COURT: Okay. Wait, wait, wait. I don't need to have the basic arguments. I want to know about the tenant, the rent. You addressed the statutory argument on Dr. deLeon. Tell me about the tenant argument that he's just made.

MR. WOODS: Yes, Your Honor. Well, that information is not hearsay, it's not offered for the truth of the matter. It would be, if somebody from Multicare, for example, had said, "We denied you this lease because we were told to deny it by the Franciscan Group." That's not what they said, so we're not offering it for the truth of the matter.

What we're offering that testimony for is to show that they gave a false reason, creating suspicious circumstances for the denial of the lease.

THE COURT: Well, that's not enough though, on a claim.

MR. WOODS: No, it's not enough, Your Honor.

THE COURT: You have to tell me, what information, what evidence do you have to support your claim?

MR. WOODS: Right. So what happened is Dr. Anel was told by Multicare that they were denying him the lease because

they will not give that space to any third parties. And they immediately rented that same space to a third party.

At the same time, the defendants' managers and executives were emailing each other, saying, "Hey, Dr. Anel's trying to open a space here at Multicare. That's right across the street. We need to meet. We need to figure out how to deal with this." They're contemporaneous emails from the defendants' executives saying, "We need to make sure that there's not a "avalanche" of patients. If one patient leaves for Anel, there will be "an avalanche.""

So the timing of these issues, along with the suspicious circumstances, does provide circumstantial evidence in support of the claims.

THE COURT: Are you prepared to offer any evidence that there was contact between the defendant and Multicare?

MR. WOODS: Well, we are prepared to offer the circumstantial evidence that we've identified, Your Honor.

THE COURT: I understand your argument that all of this was a conspiracy from the defendant against your client. There's got to be some evidence here, Counsel. And I'm having a hard time thinking that you have enough evidence to show that the defendant did something, affirmatively did something, which is what you have to show, to prevent your client from leasing space.

I don't see any evidence. I mean, I understand the

arguments and I understand the circumstantial, but I don't see any evidence to indicate that that occurred.

So that limited summary judgment motion is going to be granted. I don't see any evidence. I don't think there's any facts.

So now, the deLeon issue, not granted. I think that there's evidence there to indicate that Dr. deLeon went out of his way, arguably went out of his way, to tell the other side stuff that wasn't required by the statute.

MR. WOODS: Thank you, Your Honor.

THE COURT: And stuff that may not have been true.

In your brief, Mr. Woods, I just want to point out to you that, it may be a very small point, but nevertheless, it's a point that I simply want you to be aware of for the future. When you say that your client was "acquitted," the prosecutor dropped charges. That's not the same as acquitted. Acquitted means going to trial and actually having a jury or a judge rule in your favor. Therefore, you are acquitted, you are not guilty.

He never got that far. The prosecutor dropped charges for lack of evidence. That's different. And it may be a small point, it may not matter in the grand scheme of things, because it doesn't really affect your argument about what Dr. deLeon did. But it does affect the facts.

MR. WOODS: And I apologize for the confusion there, Your

Honor. What we intended to say was that he had been acquitted of the charge before the medical executive committee, which is what one of the executives testified about.

THE COURT: Which is different than what you said. Yes.

MR. WOODS: That is what we intended. So I apologize for that confusion.

THE COURT: All right. Well, yeah, they said it hadn't been proved.

MR. MURRAY: Your Honor, may I address a couple points real quick?

THE COURT: Sure.

MR. MURRAY: Thank you. The deLeon letters, Dr. Anel specifically testified in his deposition that there was actually nothing in those letters that was untrue. They were actually true statements. The letters are specific as to, as Mr. Woods pointed out, the hospital policy violations and the peer review/medical executive committee investigation, which was what Dr. deLeon was referencing to these inquiring entities.

I do want to just note for the record that on page ANE00384, which we cited in our reply brief on page 16, there is a form like this and it says, "Has the practioner ever been subject to or considered for disciplinary action?" Yes was checked. It said, "See below," and the exact same

statement or almost word verbatim statement that is included in all of Dr. deLeon's responses is provided.

So there is evidence that the hospital was being specifically inquired as to had Dr. Anel ever been considered for disciplinary action. He appropriately checked the yes box, provided a summary as to why he was investigated, and that it was unproven.

And then on the same form it says, "Is the practioner respected by colleagues, administration, and ancillary staff?" Yes. And then he checked, "I recommend without reservation for appointment/reappointment."

In Dr. deLeon's statements, he's not going out of the way to prevent him from getting a position. He's without reservation recommending him for the position.

THE COURT: Well, Counsel, I'm not disagreeing with what you just pointed out to me. You've made your record. I think there's some issues of fact here that a trier of fact's just going to have to sort through.

It may very well be that they find that on this particular claim there's not sufficient evidence. But I do think, as you have argued to me an hour ago, I need to take the inference in a light most favorable to the nonmoving party. And I will on this one.

MR. MURRAY: Understood, Your Honor. Thank you.

THE COURT: All right.

Now let's go to the next title or heading you have is "Seeking Employment." And former patients. And alleged interference with medical treatment and denying Plaintiff the right to conduct business at Defendants' facilities.

When I read over all the material that was submitted on these issues, I honestly felt there were issues of fact here that would prevent me, for the same reasons that I've indicated on the first one, prevent me from ruling one way or the other on summary judgment.

Former patients, if they bring up some former patients as they've indicated, then there might be an issue of fact here. There was one person that they cited in their brief. Well, they're going to have to present that evidence. But again, all inferences in their favor at this point. So I'm going to deny that.

Alleged interference with medical treatment in denying Plaintiff the right to conduct business at the defendants' facilities, there was an incident that they reported in their brief that talked about a nurse or someone from the hospital telling the staff not to give someone dialysis, who was a patient of Dr. Anel's. And I don't know if that happened or not, but they say it did.

And your response to that? Because if it did happen, boy, that's number one, a pretty serious offense. And number two, certainly supports their claim.

MR. MURRAY: Sure. If I may go back to their response brief, Your Honor, on the solicitation or the patient issue. And then also this issue about the Group Health patient.

They tendered a significant number of witness declarations, which we pointed out in our combined reply brief, as factual support. As essentially the cornerstone of their factual support in opposition to the motions on the tort claims.

And those declarations, this was also the subject of some of the surreply briefing, in our view were completely, utterly, purposely withheld --

THE COURT: Which I signed an order and I'm sure you all got yesterday.

MR. MURRAY: Yes.

THE COURT: I've had enough briefing.

MR. MURRAY: Sure.

THE COURT: And so I said, "No surreply."

MR. MURRAY: No surreply. But the declarations were attached to the opposition to the summary judgment.

THE COURT: Yes, they were. And I actually read them.

MR. MURRAY: And those declarations, the contents of them are actually plagued with a lot of inadmissible opinion, hearsay, lack of foundation, lack of personal knowledge. But the more troubling aspect is we had specific discovery requests during formal discovery asking for statements from witnesses, asking for documents specific to claims, asking

about anything. And we inventoried this in our reply brief.

And the disclosure, the existence of witness declarations, was actually never even made. It was never included in a privilege log. We got boilerplate objections that said, "We won't produce attorney/client privilege or work product," kind of things like that.

And now they've asserted the work product doctrine as a justification for never giving us witness declarations, trying to use the privilege as a sword and a shield, saying, "We didn't have to disclose these to you, but now we're going to use them against you on summary judgment."

And that is completely against the jurisprudence on privilege. You can't use privilege as a shield and a sword. And that's exactly what they did. They hid the ball from us. They withheld declarations that they've had for over a year. And then attached them onto the summary judgment brief.

And we ask that the Court just not consider them in ruling on the motions.

THE COURT: All right. Thank you. Your response, Counsel?

MR. WOODS: Yes, Your Honor. So I actually have several responses.

THE COURT: And I'm familiar with the Hickman case. I teach it in my class at Seattle U. So I know what it says.

MR. WOODS: Okay. Additionally, it is incorrect for Defendants to say that we just made boilerplate objections.

I drafted the objections, I specifically wrote in there that we were denying to produce statements because they were protected by work product. Defense counsel never conferred with us, never filed a motion with the court on that issue.

THE COURT: Mr. Murray, you'll get a chance.

MR. MURRAY: During depositions, defense counsel confirmed that they were not personally representing numerous employees of the defendants, and yet they still instructed --

THE COURT: That's not his issue. His issue is you hid them and then you used them. So shield and sword. And it seems to me that that has some merit.

MR. WOODS: We're not using them as a shield and a sword. We're not trying to --

THE COURT: Well, you sure as heck used them as a sword.

MR. WOODS: Well, so first of all, well, the work product doctrine is not a privilege. Case law about the attorney/client privilege shield and sword does not address the work product doctrine. The work product doctrine can be waived at any time simply by intentionally turning over information that had been protected by the work product doctrine.

Witness statements again, witness information cannot simply be stricken without going through the testimony. I won't get into that, given that you are well aware of that, Your Honor. And Plaintiff was not using these as a sword. Plaintiff

chose to withdraw the work product doctrine protection when the defendants raised issues. These are not being used as a sword. These are being used to present admissible evidence to this Court.

If this Court would like, we can recontact all of the witnesses and have them sign something new at this point. But Defendants were well aware of all of these witnesses. They were listed, nine of the ten witnesses, were listed in witness disclosure forms. And the tenth was identified by the defendants' witnesses during depositions. That's how we learned about the witness, Ali Subleet Yanez (sp).

So Defendants knew about all of these witnesses. In numerous interrogatory answers, Plaintiff explained how their testimony would relate to defamation claims or to tortious interference claims or things of that nature. The defendants had every opportunity to depose these people or to contact them. They chose not to. There is no law that they cite that would allow these witness statements, admissible evidence, to be rejected and stricken.

THE COURT: All right. Mr. Murray, your response?

MR. MURRAY: Yes, thank you, Your Honor.

I think Mr. Woods' characterization of this as evidence settles the issue that it's not work product. These weren't attorney notes from a --

THE COURT: Well, it's evidence now. And the issue is --

MR. MURRAY: It's a sword.

THE COURT: Whether or not it was work product earlier.

MR. MURRAY: Sure.

THE COURT: But it's clearly evidence now.

MR. MURRAY: And the suggestion that Ms. Ramirez-Yanez only came to light during the depositions this spring is essentially belied by the fact that her declaration's signed March 22, 2014. So it was after the lawsuit was filed, but well before any of these depositions were taken.

These were relevant, discoverable, sworn statements made under oath that should have been produced. It's not work product. These weren't interview notes from counsel that would be work product. They weren't attorney's notes. These were sworn statements made under the penalty of perjury that they obtained for no other purpose than to use in litigation. You don't obtain a sworn statement from a witness unless you're going to use it for some reason.

And the suggestion that they disclosed them by a vague objection that we're not producing anything under the work product doctrine is also unsupported, because they didn't list it on a privilege log. They produced privilege logs, but we didn't get a privilege log that listed all these witnesses declarations. They were completely hidden and then when the time was right, they were attached to a summary judgment brief.

It's shield and sword. There's no other way to explain it.

THE COURT: Well --

MR. WOODS: And, Your Honor, I do have --

THE COURT: I don't want to hear any more.

MR. WOODS: Oh, sorry.

THE COURT: I have some mixed emotions, to be honest with you. It kind of smells a little. I don't like it.

I do believe that the Hickman case, which is the U.S. Supreme Court case that directly effects the definition of work product, clearly defines work product. And this clearly work product.

It is material that was prepared in anticipation of litigation. Whether it's in the form of a declaration or notes taken by a staff member or a lawyer doesn't really seem to matter to the Hickman court. And so it's work product. That's pretty clear from the definition that we get out of Hickman.

But now it's not. It's now evidence. So the issue is whether or not it can, if there's prejudice to the defendants by the late disclosure. Because there was late disclosure.

I like to think that every case we have and every trial we have is a search for the truth, regardless of what that might be. And I've always felt and my judicial philosophy is to allow facts to come into play so that the trier of fact can ultimately decide what's right and what's wrong.

And so I'm going to let it in. I'm going to also, however, indicate that I'll reserve the issue of terms. If there are added expenses or added problems that the defendants face because of the late disclosure of these witnesses, then you may bring a motion before me and I'll seriously consider the imposition of terms. Because I do think it's late.

But I also believe that we're here to try and figure out what happened. And if these witnesses assist in that process, then it's appropriate. So that'll be my ruling.

And as far as, Mr. Murray, as far as your tortious interference claim, I think that the -- I've already talked about the ones that I don't think are supported. I don't think that the rent thing is supported. I'll grant your motion on that.

I think that the other issues as to tortious interference, there's some facts there. They have to produce facts. They can't produce hearsay, that's not going to be admissible. Period. But I do think that there's an issue that I have as to whether or -- and I have this feeling that it's just something a trier of fact needs to determine. So I'll deny the rest of that motion.

As to the malicious prosecution claim --

MR. GALLAGHER: Your Honor, may I interject for just a second?

THE COURT: Yes, sir.

MR. GALLAGHER: With regard to the witnesses who were disclosed in the declarations, in furtherance of the Court's belief that the trial process is a search for the truth, now that we have the benefit of these work product affidavits that have been disclosed, we would like to ask the Court for leave to be able to depose these witnesses.

THE COURT: Absolutely. Absolutely, every one of them.

MR. GALLAGHER: All right. Thank you.

THE COURT: And again, if there are delays which cause you something that you think is an unfair expense, you may, I'll reserve the issue of the imposition of terms.

MR. GALLAGHER: Thank you.

THE COURT: Because of the late disclosure of witnesses. Because it was after the discovery cutoff, there's no doubt about that.

All right. But they can use them.

Now the malicious prosecution claim is the next one and it seems to me that that is, there's just so many facts in dispute about that, that there's one witness from the hospital whose actions in particular appear to be in issue. And then what was told to the police officers and what was told to the prosecutor and what happened, that should be pretty easily proven or disproven by their testimony.

So I'm going to deny that. I think there's an issue of fact.

MR. MURRAY: Your Honor, if I may address the issue of statutory immunity?

THE COURT: Yes. Oh, that doesn't apply to you guys. It applies to the prosecutor and to the cops, but not to you.

MR. MURRAY: The statutory immunity I'm referring to is RCW 4.24.510, which allows civil immunity from cases like this, where an individual provides information to law enforcement or a governmental agency --

THE COURT: You're talking about the second anti-SLAPP statute?

MR. MURRAY: Yes, yes, Your Honor. The one that was not addressed by Davis.

THE COURT: The one that wasn't held unconstitutional?

MR. MURRAY: Correct.

THE COURT: By the State Supreme Court?

MR. MURRAY: Yes.

THE COURT: I don't think it applies. I really don't. I looked at it, I read the statute. I just, I don't think it is required in this case. I just don't believe it is.

And it says, you have it cited on page 11 of your brief and I'm looking at it right here, "A person who communicates a complaint or information to any branch or agency, federal or state, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization."

If the complaint was something that was, if there were misrepresentations made, I don't think the statute applies. And I don't think it was meant to shield someone from making a grossly negligent or a misrepresentative complaint. And I don't know if that's the case or not here, but that's the allegation.

MR. MURRAY: And, Your Honor, just so I can make a record. The Bailey case, the Bailey v. State case that we cited in our briefing specifically acknowledged that the legislature removed the good faith requirement earlier in the 2000's from the statute, such that if you provide information to law enforcement that there's no good faith requirement. So I just wanted to make a record for that.

So if you provide information that's inaccurate, you know, there's a lot of accusations coming at us from the other side. But, you know, at the thrust of it all, they're saying that we provided misinformation to the police.

Well, that falls squarely within the statute, when you provide information to a detective who asks for information during a pending investigation and you cooperate. The fact actually has gone undisputed that everything the detective testified to, no one's come forth, the plaintiff has not presented any evidence to rebut what the detective testified to.

The detective testified that he conducted an

independent investigation. Everything he asked for was given to him. He made his own decisions. He actually viewed information provided to him as not the truth, because he was being objective and doesn't base his entire investigation on what someone else did in an internal hospital investigation, or what someone gives to them. He has to apply his own detective skills, which this detective had 30 years of law enforcement experience, in assessing whether he thought there was probable cause.

He testified he believed there was probable cause. He testified that he thought it was appropriate to refer the case to the prosecutor. And if he didn't believe there was -- all cases get referred to the prosecutor, but if he thought there was a reason why he needed to address something with the prosecutor about probable cause, he would have told him. Because he wouldn't want an injustice to be done to Dr. Anel.

That has all gone unrebutted. So the suggestion that has been put forth in the briefing that we were trying to conspire and get Dr. Anel charged goes against everything that the detective testified to, as a representative of the Gig Harbor Police Department in his Rule 30(b)(6) deposition.

And then the prosecutor did his own thing. There's no evidence that anyone from any of the defendants ever spoke to

the prosecutor. They only spoke with the police department. And that falls squarely within the protections and, I might add, that probable cause is an absolute defense to a malicious prosecution claim. And there is no evidence that rebuts the detective's testimony that he believed, as a man of reasonable caution with 30 years of law enforcement experience, believed that there was probable cause.

Now, whether or not the claim got dismissed later or there wasn't a basis for it, that's an issue for whether or not, beyond a reasonable doubt, he would have been convicted. But the detective believed, based upon everything he saw in his independent objective investigation, probable cause existed.

And I would suggest to this Court that a detective with 30 years law enforcement experience is man of reasonable caution in conducting a criminal investigation.

THE COURT: All right. Thank you. Mr. Woods?

MR. WOODS: Yes, Your Honor. Plaintiff's opposition brief already addressed every point that was just made by defense counsel. I would point out that in Bender, which is controlling law, the court specifically rejected the notion that a police officer or prosecutor's individual opinion over whether there was probable cause matters at all. It is a fact question for a jury. In fact, it makes no sense to say that if law enforcement thought there was probable cause --

THE COURT: No, I want you to address the issue here. The

issue is whether or not the anti-SLAPP statute applies to the facts of this case.

MR. WOODS: Yes, Your Honor. The one case that the defendants cited was not in the context of a malicious prosecution claim.

THE COURT: But you indicated in your brief that this statute is unconstitutional. But isn't it the other statute that was ruled unconstitutional by the State Supreme Court?

MR. WOODS: The other statute was ruled unconstitutional. The grounds for which that unconstitutionality finding was made would apply to a judge making any kind of ruling that applies the anti-SLAPP immunity under the remaining statute without sending it to a jury. Because there are questions of fact.

That is the exact, exact basis that Davis overruled RCW 4.24.525 as unconstitutional was because it required factual determinations by a court, not by the jury. Thus violating Washington's Constitution Article One, Section 21. There are inherent fact questions before anti-SLAPP immunity under RCW 4.24.510 can be applied, such as whether there was a communication that meets a reasonableness standard, if it's reasonably of interest to authorities. That kind of reasonableness standard is inherently a jury question.

The same thing with the portion of the statute that requires a determination as to whether the defendant acted

with bad faith. That is inherently a jury question --

THE COURT: Tell me a bit more about that, because Counsel argues that this was not a bad faith requirement basically.

MR. WOODS: Bad faith is an issue that applies, that must be decided if there is a factual determination that communications were made to a government official that were of reasonable interest to that official, then there must be a factual determination as to whether the comments were made in bad faith or not. If they were made in bad faith, there is no award of statutory damages and attorney's fees. So that absolutely is part of --

THE COURT: But does the anti-SLAPP statute that has not been ruled unconstitutional as yet, so let's put that aside for the time being.

Let's assume just for argument's sake that 510, which hasn't been ruled on, is not adjudged by our State Supreme Court to be unconstitutional. So let's assume that it's still a viable statute for the purposes of this case.

Let's furthermore assume that you can show, just for argument's sake, that you can show that there was bad faith on the part of the defendant in making the report to the police officers. Does it matter under the anti-SLAPP? He says it doesn't. Does it matter?

MR. WOODS: It does matter under --

THE COURT: Where?

MR. WOODS: Additional language in Davis, which states that misuse of the criminal justice system to improperly essentially target a person, is and always has been an actionable tort. That is malicious prosecution. That is exactly what a malicious prosecution claim is.

And this wasn't some stray comment in a random case that had nothing to do with the anti-SLAPP. This was a comment in a case that found that the other anti-SLAPP statute itself was unconstitutional. The issue of RCW 4.24.510 was simply not before the Court. However, in the context of anti-SLAPP, the Washington Supreme Court unanimously held that this type of claim is and always will be actionable. And again --

THE COURT: I'll read over Davis. I'm not going to rule, I'll reserve ruling. I'll read on Davis and I'll send you an email indicating to you what my ruling is on the constitutionality of 510 as -- or its applicability. More appropriately, its applicability in this particular instance, when there are factual disputes as to whether or not there was bad faith here in reporting the claim. There are factual disputes. I believe that.

So in that regard the motion for summary judgment is denied, but there may very well be, he argues that it doesn't matter at this point in time, because the anti-SLAPP statute wasn't complied with. I have to read the Davis case again. I read it when it first came out, but I did not read it in

that context, because I didn't have any anti-SLAPP cases at that time. So --

MR. BLANKENSHIP: Your Honor, just for context, basically all we have to show is that they provided false information to the police in order to encourage a false prosecution.

THE COURT: I'll read the case, Counsel, and then I'll let you know.

MR. BLANKENSHIP: What's that? But it's not just that case. It's also the other cases that we cited.

THE COURT: I understand what you cited.

MR. BLANKENSHIP: All right. Okay.

THE COURT: I want to read the case.

MR. WOODS: Yes. And, Your Honor, I would just additionally respond that we're not talking about bad faith. We're talking about whether false --

THE COURT: Malicious prosecution.

MR. WOODS: We're talking about for the anti-SLAPP whether a false statement made to police is something that is of reasonable interest to the police. In fact, it is a crime under the criminal code, to make false or misleading statements to public officers.

THE COURT: Well --

MR. WOODS: To public officials.

THE COURT: All right. That's not before me. I understand. However, there is a different motion before me

that is certainly related to this, Plaintiff's Motion for Spoliation Sanctions Against the Defendants. I'm reserving ruling on that, because I don't have enough evidence to make a ruling right now. I want to hear more.

I understand the videos, you're talking about the videos that would have shown Dr. Anel leaving the lounge, employee lounge, at certain times during the days in question; is that not correct?

MR. BLANKENSHIP: Yes, Your Honor. It involves both the videos that they actually cherry picked and just got videos showing Dr. Anel sometimes coming in once, coming in and coming out. And then the badge swipes, where they literally just saved badge swipes when Dr. Anel came in. For example, one day the only badge swipe they preserved was a badge swipe of Dr. Anel coming in.

In my supplemental declaration where we finally talk about withholding witnesses and we would certainly reserve, would like the ability to file motions for terms on the issues with respect to witnesses with defendants, but on the issues of these hard drives that were basically withheld until after discovery cutoff, we were able to uncover the Ellen Hardin was on the computer, or appears to be on the computer, logging into her other things, and Ms. Latvin testified, the head of HR, head of the investigation, that she was nowhere near the computer at that time.

So basically the only thing that would have, I think we've given enough information to show Your Honor that they clearly destroyed evidence. Because they literally at the time they grabbed the badge swipe information, they could have saved it all. At the time they put the videos just of Dr. Anel entering the room, and he could have walked out two minutes later, they basically at the time they did that, they could have preserved it.

Meanwhile, I'm having conversation with Mike Madden about the NEC and the other litigation going on with Dr. Anel. His law firm's drafting declarations for Vicki Latvin and the antiharassment hearing. I'm basically dealing with all of these issues, completely hot issue.

And we even filed a lawsuit. And yet they allow these videos to be destroyed, they allow these videos to be destroyed that would have shown when other people entered and left the room. For example, we know that Ellen Hardin was there --

THE COURT: Okay. I'm reserving ruling.

MR. BLANKENSHIP: Okay. Thank you, Your Honor.

MR. MURRAY: I was going to ask, Your Honor, if you're taking argument on this issue?

THE COURT: I'm reserving ruling.

MR. MURRAY: Thank you.

THE COURT: And you've only got six minutes left. I have

another case involving several thousand pages this afternoon at 1:30, so six minutes is it.

So the spoliation, that ruling is reserved for further argument and for the trial. There may very well be a motion that you can bring, Counsel, at the conclusion of your case that you're allowed to do.

Okay. I have a couple more here. A malicious prosecution claim, I think that there's issues of fact here and I'm going to have to make a ruling on the anti-SLAPP statute, which I will do. And I'll get that out to you hopefully by Monday. I need to read the Davis case and I'll do my best.

Number six, it's my number six, Defendants' Motion for Summary Judgment Against the Plaintiff's Defamation Claim. Mr. Murray, make your record, but I find that there are sufficient facts present to deny that.

MR. MURRAY: Yes, Your Honor.

THE COURT: That's an issue to be determined by a jury.

MR. MURRAY: Thank you, Your Honor, I appreciate the opportunity to address it.

The defamation claim has been narrowed down to three alleged statements by two different managers employed by some of the defendants to staff members.

THE COURT: Right. I read the brief.

MR. MURRAY: You read it? Okay.

THE COURT: Yes.

MR. MURRAY: So for purposes of the record, the three employee-to-employee communications that are alleged, which are also contested, would fall within the -- they weren't published to a third party for purposes of defamation. They were intracorporate communications. It's essentially the hospital speaking with itself. It’s not publishing it to a third party for purposes of defamation.

Next, the qualified privilege for a common interest statement, Ms. O'Kane's alleged statement of saying, "Dr. Anel threatened to kill Dr. Gill," well, if you know that was ever truly made and she said that as a manager to a staff member, that would be a common interest statement, because she was in charge of overseeing the workplace. And a threat to the workplace is --

THE COURT: Kind of depends on the circumstances surrounding the statement, who is was made to, what the situation was. It may be, but at this point in time, I can't rule on that.

MR. MURRAY: And then the statements by Ms. Janes, Dana Janes, to staff that apparently an opinion statement that Dr. Anel's a criminal. Well, one, there were criminal charges filed so there is an issue.

THE COURT: And I must admit to you I found that to be really offensive.

MR. MURRAY: Mm-hmm.

THE COURT: And I know that there were charges, but that doesn't mean that someone's a criminal.

MR. MURRAY: Sure.

THE COURT: And it kind of depends on the context in which it was said.

MR. MURRAY: Sure.

THE COURT: And what the circumstances were and who it was said to. So I, at this point in time, I find that there are facts sufficient to let a trier of fact decide if that's a valid claim or not.

MR. MURRAY: Thank you, Your Honor.

And just to note for the record, Dana Janes did testify that she did not make that statement.

THE COURT: Thank you, sir.

MR. MURRAY: Yes. Thank you.

THE COURT: All right. So those are denied, the anti-SLAPP issue I will resolve by a separate email. When you get that email, then draft the motions that apply to what we've decided so far please. Or draft the orders I mean.

There is Plaintiff's motion to seal certain exhibits to Mr. Blankenship's declaration. Is there any opposition to that? It seems to me that you all know what needs to be sealed and what doesn't need to be sealed.

MR. GALLAGHER: Your Honor, no opposition to that.

THE COURT: All right. I'll grant the motion.

MR. MURRAY: I'm sorry, Your Honor, we did file an opposition on some of them.

THE COURT: I know you did, but I couldn't understand what you were really opposing.

MR. MURRAY: We would ask that the medical executive committee exhibits that are specific to the minutes from the meetings and the correspondence within the medical executive committee be sealed. Those fall within the peer review and quality assurance privileges.

THE COURT: What about all of the other stuff?

MR. MURRAY: The other stuff we noted that we did not oppose the other. I think we had nonopposition to half, and then opposition on the peer review quality assurance privileged documents.

THE COURT: Mr. Blankenship, my practice has always been to seal those kind of things.

MR. BLANKENSHIP: Well, the reason I don't think -- the medical executive committee meetings, the reason I think that's important is just partially for his career. I mean, it shows that he was exonerated --

THE COURT: At this point in time, I'll seal them. It's subject to review during the course of the trial.

MR. BLANKENSHIP: Thank you, Your Honor.

THE COURT: But it's always been my practice to seal those kinds of things, because I think there's some case law to

support that. And I've actually had it ruled against me by a judge years ago. I think the judge was right.

So I'll seal it now, but if you can show me something as we proceed along this journey, then let me know. All right?

I don't want to do something that's going to damage his career, but by the same time, I think as a general rule those things are sealable.

All right. Now there's also a motion to seal the exhibits to the Declaration of Paul Woods. I'm going to at this point in time again, we'll seal that now, but once the spoliation issue is resolved, I'll revisit that issue. Because it may very well not be sealed at that point in time.

But right now yes, because I haven't ruled on the spoliation issue and won't until the close of the plaintiff's case.

Now, jury trial or judge trial? That's the last issue I think that I have to resolve. Jury trial. I believe that there's a constitutional right to a jury trial. I believe that Washington State especially, many, many, many times, the Supreme Court is our state has always, always leaned toward people's right to a jury trial. And I can't find anything that I think applies to this case that would go against that.

And I must admit to you, I'd kind of like to try it myself, and I think it'll be much more difficult to have a jury trial than it would to have a judge trial. But I think you're

entitled to a jury trial. That's my ruling.

I think that covers all the issues. I assume I'll probably see you before the 13th of October in some form toward the end of September. I'm going to sit down and get ready for my next case. Thank you all for your time. Have a nice day.

MR. BLANKENSHIP: Thank you, Your Honor.

MR. GALLAGHER: Thank you, Your Honor.

MR. MURRAY: Thank you, Your Honor.

MR. WOODS: Thank you, Your Honor.

THE CLERK: Please rise.

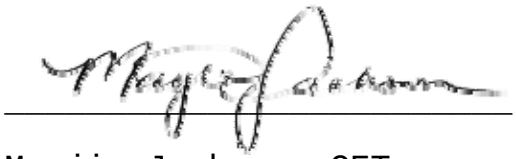
(Conclusion of hearing)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of September, 2015.



Marjie Jackson, CET

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