

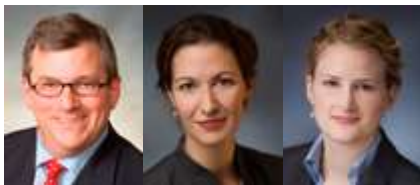


The Voice

And The Defense Wins

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With claims of \$1 million at stake, DRI members [Richard Whittemore](#), [Jamie Pfeiffer](#) and [Evelyn Winters](#), of **Bullivant Houser Bailey PC**, recently won summary judgment motions in the Superior Court of Benton County, Washington, in two related cases involving an anesthesiologist, his former practice, and a patient and her husband.

At issue in the first case was whether the anesthesiology practice was vicariously liable for the intentional acts of a practice member accused of fondling an anesthetized patient during surgery. In the second case, the accused physician, who had resigned when the accusations were raised, claimed he was entitled to 90 days' notice under his physician services contract, and asked the court for 90 days' lost wages, benefits, and premiums for his insurance coverage, and his attorneys' fees and costs under Washington's wrongful discharge and wage withholding statutes.

The doctor was disciplined by the medical board for this conduct, though he adamantly denied that he did anything inappropriate. He maintained that his motivation was only to confirm the identity of the patient based on whether or not she had breast implants. Plaintiffs (the patient and her husband) argued that because the doctor disputed that the touching was for a prurient purpose, a reasonable jury might conclude that his conduct amounted merely to negligence and thereby attach liability to the practice for the actions of its agent.

Using the plaintiffs' own expert testimony, the defendant established that even if the fondling was not s*xually motivated, the doctor's conduct was not medically necessary to the administering of anesthesia during surgery. The anesthesiology practice argued that it could not be held vicariously liable for its agent's conduct, which was admittedly intentional and outside the scope of what was required to perform his job, even if it was purportedly intended to serve a legitimate medical purpose. Benton County Superior Court Judge Vic L. VanderSchoor agreed with defendant and granted summary judgment in its favor, denying plaintiff's claims.

The doctor subsequently sued the practice, claiming that he was effectively forced to resign and constructively discharged. The court agreed with defendants that the doctor's resignation was voluntary, even though it was made in the context of a possible termination. The court also determined that the doctor's conduct amounted to gross misconduct, which triggered an automatic-termination clause in the contract, making notice unnecessary, and dismissed his claims in their entirety.

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