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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 294153

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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DIANA P. SMIGAJ, M.D. and CASCADE WOMEN'S HEALTHCARE  
ASSOCIATES, P.L.L.C., Appellants,

v.

YAKIMA VALLEY MEMORIAL HOSPITAL ASSOCIATION, RICHARD W.  
LINNEWEH, JR., an individual, RICHARD W. LINNEWEH, JR. and JANE DOE  
LINNEWEH, JR., a marital community, ROGER ROWLES, M.D., an individual,  
CARL OLDEN, M.D., an individual, and CARL OLDEN, M.D. and JANE DOE  
OLDEN, a marital community, Respondents.

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REPLY BRIEF OF APPELLANTS

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**A. Because The Professional Review Action Was Based On Dr. Smigaj's Competence and Professional Conduct, RCW 7.71.030 Does Not Apply To This Lawsuit.**

Dr. Smigaj has not invoked RCW 7.71.030. But neither has she ever asserted that it is "optional." Rather, RCW 7.71.020/HCQIA and RCW 7.71.030 are mutually exclusive. RCW 7.71.020/HCQIA provides limited immunity for "professional review actions," which are actions by a professional review body "based on the competence or professional conduct of an individual physician." By contrast, RCW 7.71.030 establishes an exclusive cause of action for any action by a professional peer review body "that is found to be based on matters not related to the competence or professional conduct of a health care provider." RCW 7.71.020 and 7.71.030 are mutually exclusive because an action cannot be "based on the competence of an individual physician" and simultaneously "not related to the competence or professional conduct" of the physician.

When a health care entity takes adverse action against a physician's privileges based on "competence or professional conduct," it must report the action to the National Practitioner Data Bank. 42 U.S.C. § 11133. When determining whether its action is based on a physician's competence or not based on a physician's competence, health care entities utilize HCQIA's definitions; as the legislative history states, "the Committee has carefully delineated circumstances which would not be considered to be based on competence or

professional conduct.”<sup>1</sup> Health care entities utilize the National Practitioner Data Bank Guidebook to determine which actions are based on competence or conduct as opposed to those that are not. *See* CP 3984 (appendix). Finally, health care entities utilize case law; courts broadly construe the phrase “based on the competence or professional conduct of an individual physician.” *See* App. Br., n. 10.

In *Morgan v. Peacehealth, Inc.*, the hospital suspended a physician’s privileges because “he failed to obtain evaluation and counseling.”<sup>2</sup> The court held “the review action was related to Morgan’s professional conduct,” and hence Morgan “has no action for injunctive relief” under RCW 7.71.030.<sup>3</sup> The physician in *Plaskon v. Public Hospital Dist. No. 1 of King County* was denied privileges to perform ear, nose, and throat surgery because he had not performed ENT surgery in years.<sup>4</sup> The defendants invoked RCW 7.71.030, arguing it provided the physician’s exclusive remedy. The court rejected the “exclusive remedy” argument because “the decisions appear to have been based on plaintiff’s competence.” In this appeal, respondents ignore the *Plaskon* opinion, because they, like the defendants in *Plaskon*, are the only ones interjecting RCW 7.71.030.

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<sup>1</sup> H.R. Rep. 99-903, 1986 U.S.C.C.A.N. 6384, 6404; see 42 U.S.C. § 11151(9)(A)-(D). Thus, RCW 7.71.030 is not a “nullity.”

<sup>2</sup> 101 Wn.App. 750, 771, 14 P.3d 773 (2000).

<sup>3</sup> *Id.* at 787.

<sup>4</sup> 2007 WL 4165271 \*3 (W.D. Wash. 2007).

By contrast, the physician in *Cowell v. Good Samaritan Community Health Care* sought injunctive relief under RCW 7.71.030, and also damages for defamation, tortious interference, breach of contract, and violations of the Consumer Protection Act.<sup>5</sup> Dr. Cowell's privileges were suspended because she "practiced outside the scope of her privileges," failed to meet the standard of care in various cases, and "failed to comply with her commitments to have her procedures videotaped."<sup>6</sup> The hospital's action was based on Dr. Cowell's competence or professional conduct, which explains why the superior court denied relief under RCW 7.71.030. The superior court (and the appellate court) dismissed Dr. Cowell's damages claim by applying RCW 7.71.020/HCQIA, not because RCW 7.71.030 provided an exclusive remedy.<sup>7</sup>

In *Perry v. Rado*, Dr. Perry conceded that "the actions of the professional review body" were "based on matters not related to [his] competence or professional conduct."<sup>8</sup> As a result, the superior court held that RCW 7.71.030 provided Dr. Perry's exclusive cause of action. The court of appeals, citing Dr. Perry's concession, affirmed.<sup>9</sup> But *Perry* does not hold that RCW 7.71.030 can be invoked by a defendant when a professional review action was based on the

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<sup>5</sup> 153 Wn.App. 911, 923, 225 P.3d 294 (2009).

<sup>6</sup> 153 Wn.App. at 922.

<sup>7</sup> 153 Wn.App. at 918 and at 924.

<sup>8</sup> 155 Wn.App. 626, 636.

<sup>9</sup> 155 Wn.App. 626, 636. The hospital suspended Dr. Perry's privileges because he participated in a bowel repair for which he lacked privileges and violated a performance improvement agreement. 155 Wn.App. at 633. In other words, the court should have declined Dr. Perry's concession because the hospital's action was based on his competence or professional conduct.

physician's competence or professional conduct. *Perry v. Rado* can be distinguished by Perry's concession. Still, the *Perry* opinion cannot be reconciled with *Morgan, Plaskon, and Cowell* because the court barred most of Dr. Perry's claims based on RCW 7.71.030, but then also applied RCW 7.71.020/HCQIA to dismiss Dr. Perry's claim for relief under RCW 7.71.030. In *Morgan, Plaskon, and Cowell*, the court objectively characterized the review body's action, then only applied RCW 7.71.020/HCQIA because the disciplinary actions were based on the physician's competence or conduct.

Here, the PQAC and Dr. Padilla based their action on Dr. Smigaj's competence and professional conduct. Dr. Smigaj's allegation that respondents manipulated the process does not change an objective characterization of Dr. Padilla's action. "The court looks at the actions themselves to determine whether they meet the statutory definition of 'professional review action.'"<sup>10</sup> Judge Cooper's initial ruling (CP 193) was correct: RCW 7.71.030 is triggered by "the action taken by a professional review body," and it does not apply to this case, in which the professional review body's action was based on Dr. Smigaj's competence and professional conduct.

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<sup>10</sup> *Ryskin v. Banner Health, Inc.*, 2010 WL 464871 \*11 (D. Colo. 2010); see also *Manion v. Evans*, 1991 WL 575715 \*9 (N.D. Ohio) (Ad Hoc Committee was engaged in "professional review action" even though physician asserted that action was motivated by anticompetitive animus).

**B. Dr. Conner's Expert Witness Opinion Exceeds The Quantum Of Evidence Needed To Rebut A Presumption By A Preponderance.**

1. The Quantum Of Evidence Necessary To Rebut A Statutory Presumption By A Preponderance Is Exceeded By Admissible Expert Witness Testimony.

HCQIA initially required "clear and convincing evidence" to rebut the presumption; Congress shrunk the quantum of evidence so that the "presumption is to be overcome by a preponderance of the evidence."<sup>11</sup> The court cannot "weigh the evidence with respect to whether, if true, it is of sufficient weight to justify the suspension."<sup>12</sup> Rather, this court's *de novo* review must construe "all facts and inferences in the light most favorable" to Dr. Smigaj.<sup>13</sup>

Two Washington Product Liability Act cases demonstrate the quantum of evidence sufficient to rebut a presumption (by a preponderance) that a product's useful safe life is twelve years. In *Morse v. City of Toppenish*, the injury occurred fourteen years after delivery but the plaintiff introduced expert witness testimony that the diving board's useful safe life exceeded fifteen years. Division III of the Court of Appeals reversed summary judgment, holding the expert testimony sufficient to rebut the presumption: "The Orphan affidavit created a question of fact."<sup>14</sup> In *Pardo v. Olson & Sons, Inc.*,<sup>15</sup> the Ninth Circuit similarly reversed a

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<sup>11</sup> 132 Cong. Rec. No. 141 (10/14/1986) at page H9958-59.

<sup>12</sup> *Summers v. Ardent Health Svcs., LLC*, 226 P.3d 20, 25 (N.M. Ct. App. 2010) (affirming superior court's denial of summary judgment).

<sup>13</sup> *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010).

<sup>14</sup> 46 Wn.App. 60, 66, 729 P.2d 638 (1987).

summary judgment because expert testimony rebutted the statutory presumption.<sup>16</sup> Admissible expert witness testimony is sufficient to rebut a statutory presumption where the quantum of proof is preponderance of the evidence.<sup>17</sup>

2. Because He Is Highly Qualified And His Opinions Are Rooted In The Facts Of The Case, A Reasonable Juror Could Accord Dr. Conner's Uncontroverted Expert Testimony Substantial Weight.

Respondents assert that Dr. Conner's testimony includes "inadmissible legal opinions." Resp. Br., p. 40. Respondents cite *Hiskey v. Seattle*, a personal injury action. The plaintiff's expert testified "in essence . . . that Seattle Stage was negligent in breaching a duty of care owed" to a stagehand.<sup>18</sup> Because the expert's testimony conflicted with the Restatement of Torts and asserted a legal duty where none existed, the court disregarded the expert's "legal conclusions."<sup>19</sup> Respondents also cite *Terrell C. v. DSHS*, another personal injury lawsuit. The plaintiff's expert testified that "DSHS social workers had a duty to warn Terrell of the risks posed by the neighbor children."<sup>20</sup> The court determined that no statute or common law principle established a duty to warn, and affirmed the superior

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<sup>15</sup> 40 F.3d 1063, 1068 (9<sup>th</sup> Cir. 1994).

<sup>16</sup> 40 F.3d 1063, 1068 (9<sup>th</sup> Cir. 1994).

<sup>17</sup> See also *Moringa v. Vue*, 85 Wn.App. 822, 830, 935 P.2d 637 (1997) (statutory presumption of consent rebutted by testimony establishing patient's lack of capacity – summary judgment reversed), and *State v. Holley*, 75 Wn.App. 191, 200, 876 P.2d 973 (1994) (statutory presumption that defendant signing guilty plea received required admonishments rebutted by testimony – superior court reversed).

<sup>18</sup> 44 Wn.App. 110, 113, 720 P.2d 867 (1986).

<sup>19</sup> 44 Wn.App. at 113.

<sup>20</sup> 120 Wn.App. 20, 30, 84 P.3d 899 (2004).

court's exclusion of the opinion: "Experts may not offer opinions of law in the guise of expert testimony."<sup>21</sup>

By contrast, Washington courts routinely admit expert testimony that applies existing legal standards while giving an opinion rooted in the facts of the case. *Brevio v. City of Aberdeen* was a case where the court affirmed the admission of expert testimony that a barrier was an "inherently dangerous condition."<sup>22</sup> In *Aubin v. Barton*, the superior court excluded the testimony of a certified public accountant on grounds that the "characterization of stock options is a legal question."<sup>23</sup> The court of appeals reversed, finding the exclusion of the expert's testimony erroneous.<sup>24</sup> In *Morton v. McFall*, a medical malpractice case, the court reversed a refusal to admit expert testimony: "the internist had sufficient expertise to demonstrate familiarity with the medical problem at issue and gave an opinion rooted in the facts of the patient's treatment. . . ."<sup>25</sup>

The opinions in *Sugarbaker v. SSM Health Care* and *Poliner v. Texas Health Systems* are distinguishable because the experts only addressed the underlying medical care, not the four HCQIA elements.<sup>26</sup> In *Meyer v. Sunrise*

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<sup>21</sup> 120 Wn.App. at 30.

<sup>22</sup> 15 Wn.App. 520, 528, 550 P.2d 1164 (1976).

<sup>23</sup> 123 Wn.App. 592, 604, 98 P.3d 126 (2004).

<sup>24</sup> 123 Wn.App. at 609-10.

<sup>25</sup> 128 Wn.App. 245, 247, 115 P.3d 1023 (2005); *see also Hall v. Sacred Heart Med. Center*, 100 Wn.App. 53, 60, 995 P.2d 621 (2000).

<sup>26</sup> *Sugarbaker*, 190 F.3d 905, 914 (8<sup>th</sup> Cir. 1999) (expert testified that "the doctors reached an incorrect conclusion on a particular medical issue"); *Poliner v. Texas Health Systems*, 537 F.3d 368, 379 (5<sup>th</sup> Cir. 2008) ("testimony of other doctors of a different view from the peer reviewers").

*Hospital*, the court distinguished *Brown v. Presbyterian Healthcare Services* because “Dr. Brown was able to produce significant evidence to support her allegations that information submitted by the defendants in her medical review process was false or misleading. . . . In other words, the defendants in *Brown* had conspired to manufacture allegations of improper behavior by Dr. Brown so as to put Dr. Brown out of business.”<sup>27</sup> The facts of this case are similar to those in *Brown*, and because HCQIA elements are evaluated objectively, the *Brown* decision is better reasoned than *Meyer*.<sup>28</sup> Based on Dr. Conner’s detailed, authoritative, and uncontroverted expert testimony, a reasonable jury could conclude that respondents failed to establish one or more HCQIA elements and are not entitled to immunity. CP 392-431; *see also* CP 3523-3526.

**C. A Reasonable Juror Could Infer That Respondents Failed To Satisfy HCQIA’s Immunity Provisions From Respondents’ Manipulation Of The PQAC, Including Supplying False Information And Making Belated Accusations.**

1. Evidence That The Defendants Interfered In The Peer Review Process, Manipulated The PQAC, Spoliated Evidence, And Altered Meeting Minutes Rebutts The Presumption.

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<sup>27</sup> *Meyer v. Sunrise Hosp.*, 117 Nev. 313, 323-24, 22 P.3d 1142 (Nev. 2001), citing *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324 (10<sup>th</sup> Cir. 1996).

<sup>28</sup> The court in *Meyer* weighs the evidence (“Absent evidence that an evaluation was misleading, false or otherwise defective, a dispute between experts over the standard of care of the decision to impose discipline is insufficient to overcome the presumption...”). 22 P.3d 1142, 1149-50. The *Meyer* decision cannot be reconciled with the principle that a conflict in expert witness testimony creates an issue of material fact. *Sears, Roebuck & Co. v. General Services Admin.*, 553 F.2d 1378, 1382 (D.C. Cir. 1977).

After Kay Anyan read to Dr. Padilla from her handwritten notes on September 4th, Dr. Padilla “requested that all the materials regarding this matter be gathered in a file in Medical Staff Services.” CP 1871. Ms. Anyan subsequently shredded all her notes. CP 1104. After learning of her suspension, Dr. Smigaj and her attorneys requested the September 3rd PQAC minutes four times. CP 687 (litigation hold letter). Before producing the minutes, Memorial’s attorneys altered them to assert that Dr. Smigaj “may place patients at risk.” CP 3110. Respondents argue that they have an “innocent explanation” for Ms. Anyan’s shredding four sets of notes, Ms. Johnson’s deleting electronic notes from five PQAC meetings, and Memorial’s attorneys altering minutes of nine meetings. Resp. Br., at p. 42. But Memorial’s policies required it to retain “physician peer review and credentialing information” “permanently” and prohibited employees from destroying electronic notes until final meeting minutes were approved.<sup>29</sup> Respondents also argue that their interference, spoliation, and alterations are irrelevant. Yet, “experience has demonstrated that men who have meritorious causes do not generally resort to bribery and spoliation to maintain them, but that such conduct is the resort of those who are conscious that the truth, if all is told, will not aid them.”<sup>30</sup> Respondents do not distinguish *Trevino v.*

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<sup>29</sup> CP 3191, 1333. *Cf. Veit v. Burlington Northern Santa Fe Corp.*, 150 Wn.App. 369, 387, 207 P.3d 1282 (2009) (documented theft of laptop two years before lawsuit was “satisfactory explanation”).

<sup>30</sup> *State v. Constantine*, 48 Wash. 218, 222, 93 P. 317 (1908).

*Ortega*, in which spoliation created a presumption against the spoliator, enabling the nonspoliating party to survive summary judgment.<sup>31</sup> Whether respondents manipulated in bad faith or negligently, reasonable jurors could infer the action was not in furtherance of quality health care and was not warranted.

2. Respondents' Brief Makes New, Unsupported Allegations That Were Never Considered By The PQAC Or Dr. Padilla.

Respondents' Brief is laced with unsupported allegations that were never mentioned during the summer of 2008; e.g., respondents contend "The Committee members reasonably believed that Dr. Smigaj's failures to attend to high-risk obstetrical patients posed a risk to hospital patients if an immediate suspension was not imposed." (Resp. Brf. pp. 36-37) The only mention of a delay in seeing a patient is the JA case that was resolved in July. Other than this, there is no mention of a concern about a *repeated* failure to attend promptly to high risk patients. CP 655-57. This is based on false statements Respondents inserted into their brief.<sup>32</sup> Another completely unsupported accusation is that Dr. Smigaj

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<sup>31</sup> 969 S.W.2d 950, 960 (Tex. 1998); see also *Baxley v. Hakiel Indus., Inc.*, 282 Ga. 312, 647 S.E.2d 29 (Ga. 2007) (reversing summary judgment because defendant spoliated evidence).

<sup>32</sup> In footnote 26 on page 26 of their Brief, Respondents wrote: "Dr. Johns testified that these high-risk patients who were not initially seen by Dr. Smigaj were, in his opinion, part of a larger pattern of Dr. Smigaj's failure to see high-risk obstetrical patients in a timely fashion as occurred with the case of the 16-year-old high-risk patient the committee reviewed in 2008." *This is completely false.* Dr. Johns did not testify about patients "WHO WERE INITIALLY NOT SEEN" or "PART OF A LARGER PATTERN." (CP 2105-06) Respondents added these phrases. Furthermore, Dr. Johns made no statement in either his deposition or declaration about "not initially seeing three high-risk patients in November and December 2004." Similarly, footnote 27 on page 27 contains a blatant lie: "She was seen by one of Dr. Smigaj's nurse midwives but not by Dr. Smigaj until December 20, 2004" implying that the patient was not seen by Dr. Smigaj for 7 days. None of the record citations support this false statement. Finally, there are no record citations to support

“violated multiple hospital medical staff rules, regulations and policies.” This issue was never raised in 2008. Other such allegations include “poor practice patterns;” Dr. Engelhardt admitted the only “pattern” was that they had to review so many cases; otherwise, she conceded there was no “pattern” of not seeing patients in a timely manner, or lack of surgical skills, or failing to correctly manage hypertensive patients in the cases that Dr. Rowles presented to the PQAC on September 3, 2008. CP 1260-61. Respondents keep coming up with new allegations to try to persuade the court that Dr. Smigaj is somehow a “bad doctor” despite evidence that showed she is actually one of the best in Yakima.

**D. A Reasonable Jury Could Conclude That Neither Dr. Padilla Nor The PQAC Undertook A Reasonable Effort To Obtain The Facts (42 U.S.C. § 11112(a)(2))**

“To be honest with you, I think the – on September 4th, there wasn’t enough written information for the MEC to come in and review.” (Dr. Padilla; CP 1660).

Appellants’ opening brief outlined numerous infirmities in Dr. Padilla’s and the PQAC’s efforts to obtain the facts. (pp. 31-36). Respondents do not controvert the infirmities, such as the PQAC’s failure to utilize objective standards or medical literature, interview department chair Dr. Harrington or any other doctors or nurses, review Dr. Smigaj’s re-privileging applications or even

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Respondents assertion on page 30, “That the decision to temporarily suspend Dr. Smigaj’s privileges was based on “immediate” as well as long-standing concerns about Dr. Smigaj’s clinical judgment and in particular, her repeated failure to attend promptly to high-risk patients,” nor could there be because the record clearly reflects the latter was never considered by the PQAC. It was created by Respondents to try to justify what they did in the summer of 2008.

find out how many disruptive physician reports there were or what they were about before using them as a basis for suspension.<sup>33</sup> Instead, respondents argue that given “the totality of the process,” they made a “reasonable effort to obtain the facts, not a perfect effort.” Resp. Br., p. 31. This misconstrues Dr. Smigaj’s burden and it fails to view “the facts in the light most favorable to plaintiff.”<sup>34</sup>

Respondents do not distinguish *Ritten v. Lapeer Regional Medical Center*, in which the court denied summary judgment to the hospital’s CEO and its Board of Directors.<sup>35</sup> The CEO was presented with two opposite opinions but “made no apparent effort to resolve this dilemma. *Id.* “A trier of fact could find that this was not a reasonable investigation of the facts under the circumstances.” *Id.* The Board did not pursue “seemingly obvious questions” based on quantitative data and it failed to ensure that the external reviewer received and reviewed “fetal heart monitoring strips that might have supplied the missing justification for vacuum deliveries in some cases.”<sup>36</sup>

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<sup>33</sup> App. Br., pp. 32-36; see also CP 397-399. Respondents continue to assert that Dr. Smigaj did not properly manage a 2007 hemorrhage patient (JS). Resp. Br., p. 29. But testimony establishes that Dr. Olden lied to the PQAC when he told them he had interviewed Dr. Nadig, Dr. Nadig was not critical of Dr. Smigaj when he gave deposition testimony, and the PQAC never interviewed Dr. Nadig, any other doctor or nurse, or any blood bank personnel. CP 711, 1512-14, 412-14.

<sup>34</sup> *Stratienko v. Chattanooga-Hamilton County Hosp. Auth.*, 2008 wl 4191275 \*4 (E.D. TN 2008).

<sup>35</sup> 611 F.Supp.2d 696, 720 (E.D. MI 2009). In the instant case, appellants did not sue the volunteer PQAC members or Dr. Padilla. Rather, appellants sued Memorial and its highly compensated personnel who manipulated the PQAC and Dr. Padilla by supplying false evidence, making unfounded allegations, and covering up their actions.

<sup>36</sup> 611 F.Supp. 696, 722. See also *Stratienko v. Chattanooga-Hamilton County Hosp. Auth.*, 2008 WL 4191275 \*4 (E.D. Tenn. 2008) (issue of fact precluded summary judgment).

What is more, the authorities cited by respondents support Dr. Smigaj's argument. In *Morgan v. Peacehealth*, the court identified substantial infirmities with the hospital's investigation, including the failure to conduct interviews or investigate disruptive physician complaints.<sup>37</sup> Still, the court held that Dr. Morgan waived his right to complain because he "declined to cooperate in the investigation by failing to undergo evaluation." *Id.* The investigation in *Cowell*, passed muster because the peer review body analyzed Dr. Cowell's privilege applications, requested items from Dr. Cowell (videotapes of her procedures), interviewed "several physician and nurses," and read the external reviewers' written reports.<sup>38</sup> *Egan v. Athol Memorial Hosp.* and *Fobbs v. Holy Cross Health System Corp.* also involved investigators who received and reviewed written documentation from external reviewers.<sup>39</sup>

Respondents assert the PQAC "sought additional records from outside the hospital when appropriate." Resp. Br., p. 32. But Dr. Smigaj's summary suspension was based in part on her alleged failure to "admit patient [WC] at the time of her initial visit for blood pressure management." CP 576. Dr. Smigaj told the PQAC twice that she recommended hospitalization to WC and "documented this discussion in my office chart notes." CP 606, 652. Yet Dr. Rowles falsely

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<sup>37</sup> 101 Wn.App. 750, 770, 14 P.3d 773 (2000).

<sup>38</sup> 153 Wn.App. 911, 932-33, 225 P.3d 294 (2009).

<sup>39</sup> *Egan v. Athol Memorial Hosp.* 971 F.Supp. 37, 40 ( D. Mass. 1997); *Fobbs v. Holy Cross Health System Corp.*, 789 F.Supp. 1054, 1057 (E.D. CA 1992).

accused Dr. Smigaj on September 3rd of failing “to admit patient at the time of her initial visit for blood pressure management.” CP 656, 689. The patient chart reads: “I encouraged [patient WC] to be hospitalized for blood pressure management and she stated absolutely not.” CP 610. During his deposition, when Dr. Tomlinson first saw the chart, he found no fault with Dr. Smigaj.<sup>40</sup>

Respondents assert the PQAC “obtained external reviews of the three 2008 cases” and “provided Dr. Smigaj with the written report it did receive.” Resp. Br., p. 33. Respondent’s assertions are unsupported by their citations.<sup>41</sup> The PQAC never spoke with Dr. Tomlinson about the WC or LH cases, never obtained, reviewed, or gave Dr. Smigaj any of Dr. Tomlinson’s written reports.<sup>42</sup> CP 1123, 1128-29, 3263 (¶ 4). The PQAC reviewed Dr. Conner’s reports rejecting their identified concerns, but as in *Ritten*, the PQAC took no steps to resolve the discrepancy between Dr. Conner’s written reports and what Dr. Rowles and Ms. Anyan insisted Dr. Tomlinson was saying. *Cf.* CP 594-97, with

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<sup>40</sup> 611 F.Supp.2d 696, 722. *See also Stratienco v. Chattanooga-Hamilton County Hosp. Auth.*, 2008 WL 4191275 \*4 (E.D. Tenn. 2008) (issue of fact precluded summary judgment under § 11112(a)(2)). CP 1853; CP 2629 (PQAC member admitting that chart “would have been helpful”).

<sup>41</sup> CP 1853; see also CP 2629 (PQAC member admitting that patient chart “would have been helpful”).

<sup>42</sup> Dr. Conner and Dr. Tomlinson performed objective, expert reviews of all three 2008 cases. Dr. Conner’s reports disagreed with the PQAC’s concerns and in no way supported suspension. The PQAC never explained why they ignored or rejected his evaluations or why they did not review Dr. Tomlinson’s reports.

CP 649; 655, and CP 1135.<sup>43</sup> If the PQAC had reviewed Dr. Tomlinson's written reports, it would have uncovered Dr. Rowles's and Ms. Anyan's misleading statements.<sup>44</sup>

The PQAC had one compilation of benchmarking data. CP 624. Dr. Smigaj delivered more babies with fewer complications, even though her medical practice involved more high risk pregnancies. CP 624, 416 ("her practice was in line with or exceeded departmental norms"), 1598-99. Nevertheless, the PQAC took no steps to investigate the discrepancy between the quantitative data and Dr. Rowles's subjective opinions; the MEC, finding no "metrics with regard to C-section rate, death rates, infection, bleeding, Apgar scores that would fall below the standard," unanimously reversed Dr. Padilla's action. CP 1538, 1621, 2088.

Finally, the PQAC did not investigate Dr. Rowles' belated accusation that Dr. Smigaj performed "an elective induction on an unripe cervix." CP 656. Although Dr. Padilla relied on that accusation when suspending Dr. Smigaj's privileges, neither the PQAC, Dr. Padilla, nor Dr. Tomlinson investigated the

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<sup>43</sup> CP 2397-98 (Ms. Anyan received Dr. Tomlinson's JA report on August 6th), 2435-38 (Dr. Tomlinson's report), 2734 (PQAC listened orally to Dr. Tomlinson), 2736 (PQAC heard hearsay report from Dr. Rowles about Tomlinson's WC opinion).

<sup>44</sup> Dr. Tomlinson was asked, "Did you ever tell Ms. Anyan that in your opinion Dr. Smigaj's care in the LH case fell below the standard of care"? Answer: "No." CP 1863. Ms. Anyan was asked, "[Did] Dr. Tomlinson [tell] you that Dr. Smigaj fell below the standard of care in the care that she provided to LH?" Answer: "He did not tell me that." Question: "Okay, what did he say?" Answer: "He told me that the patient – Dr. Tomlinson shared that substandard care was provided to this patient. He noted that prior to Cytotec confirmation [of] fetal position should be done." Question: "So he may have been faulting the nursing staff?" Answer: "Yeah. I never said Dr. Smigaj." CP 1135.

validity of the accusation because Dr. Rowles first raised it in the evening on September 3rd!<sup>45</sup> In his report, Dr. Conner explains how Dr. Rowles' own deposition testimony disproves the allegation. CP 417 (lines 11-16). A reasonable jury could conclude that neither Dr. Padilla nor the PQAC made a reasonable effort to obtain the facts of the matter before September 4, 2008.

**E. No Presumption Applies to 42 U.S.C. § 11112(c) and Issues of Material Fact Preclude Summary Judgment As To Whether An "Investigation" Was Conducted Or Any Person Was In "Imminent Danger."**

By not contesting appellants' argument, respondents concede that they did not satisfy the adequate notice and hearing requirement in § 11112(a)(3). *Cf.* App. Br., pp. 36-42 with Resp. Br., pp. 34-37. Instead, respondents contend they fulfilled either the "investigation" or "emergency" exceptions contained in 42 U.S.C. § 11112(c). They do not refute appellants' argument that no presumption applies to § 11112(c).<sup>46</sup> Accordingly, they have the burden of establishing the absence of any material fact with regard to this element.

The "investigation" exception. Complying with § 11112(a)(3) is excused "in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to

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<sup>45</sup> CP 576; *Cf.* CP 650 (8-29-08 minutes) with 656 (9-3-08 minutes). *See also* CP 3266 ¶ 12). At the eleventh hour, Dr. Rowles also asserted that Dr. Smigaj should have used Piper Forceps to deliver LH. CP 1742. Dr. Smigaj could not rebut the accusation and Dr. Tomlinson did not evaluate it because it was never communicated to either of them. CP 1742-1744, 655.

<sup>46</sup> App. Br., p. 40, n. 66; *Harris v. Bradley Memorial Hosp. and Health Center*, 2005 WL 1433841 \*6 (Conn. Super. 2005); Conn Sup. Ct. R 5-9 (citation to unpublished opinions permitted). The plain language of § 11112(c) does not contain a presumption.

determine the need for a professional review action.” 42 U.S.C. § 11112(c)(1)(B). Under Memorial’s Fair Hearing Plan, an investigation is conducted by the Department Chair or an *Ad Hoc Investigative Committee* which cannot include competitors. It includes interviewing the physician and “persons with information relevant to the request” and preparing a “report including its recommendation for resolution.” CP 527. The PQAC members all described their investigation as *complete* and admitted that the PQAC performed no investigation following their September 3rd meeting. CP 1199, 1258-59, 1624, 1711. Ms. Anyan and Memorial’s lawyer both admitted that no investigation occurred between September 4th and 16th. CP 1138, 1395.<sup>47</sup> Ms. Anyan’s assembling materials afterwards that the PQAC could have and should have obtained beforehand is not an “investigation,” especially when Ms. Anyan admits she shredded other materials during the same time period. CP 1104. In fact, Dr. Padilla had already determined the need for a professional review action when he signed the summary suspension letter dated September 4th. CP 576. Thus, any “investigation” was not to determine the need for a professional review action. Respondents have not established as a matter of law that § 11112(c)(1)(B) applies.

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<sup>47</sup>Similarly, Drs. Cooper and Padilla, the medical staff vice president and president, and Dr. Harrington, the OB/Gyn department chair, all testified that they were not aware of any investigation between the September 4 summary suspension and the September 16th MEC meeting. CP 1152, 1659, 1283.

Health Emergency Exception. HCQIA excuses compliance with § 11112(a)(3) “where the failure to take such an action may result in an imminent danger to the health of any individual.” 42 U.S.C. § 11112(c)(2). This requires some evidence of urgency if not an outright emergency. As a former President of the Medical Staff testified, “summary suspension is a drastic measure which is justified only when a doctor presents an imminent danger to patient health and/or safety; that is to say, poses such an imminent, serious harm to patients that the physician’s privileges must be suspended immediately before any notice or hearing. Typically, these events include alcoholism, drug abuse, a patient death caused by gross negligence, repeated disruptive behavior, or physical violence to another person. To my knowledge, routine quality of care issues identified by the Perinatal Quality Assurance Committee at the hospital have never been used as the basis for a summary suspension.” CP 452. There was no evidence even close to this in Dr. Smigaj’s case.

Dr. Padilla understood the PQAC’s activities during the summer of 2008 to be ordinary peer review, not corrective action. CP 1663, 1646. He did not undertake his own evaluation on September 4th because, as an ER doctor, he “can’t critique practice in obstetrics.” CP 1667. From Dr. Rowles, Dr. Padilla learned that the PQAC thought “to use their words, that she – not necessarily imminent risk or imminent danger, but was a risk to patients that she cares for.”

CP 1656, 1823.<sup>48</sup> PQAC member Dr. Engelhardt, confirmed the absence of any imminent danger: “There wasn’t a precipitating event right before that [September 3] 2008 meeting. There had been a number of cases and a cumulative review that culminated with the decision in September to suspend privileges.”<sup>49</sup>

The summary suspension letter asserts that “failure to initiate an immediate precautionary suspension may result in an imminent danger to the health and/or safety of any individual.” CP 576. But Ms. Anyan and Memorial’s attorneys drafted the letter containing the emergency language before summoning Dr. Padilla to the hospital.<sup>50</sup> Finally, Dr. Conner concluded “it is my opinion that no reasonable person could conclude that Dr. Smigaj’s practice could result in imminent danger to the health and safety of any individual.” CP 414. The

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<sup>48</sup> On September 4th, “most” of what Dr. Padilla learned was from “Ms. Anyan reading from some notes” and listening to Dr. Rowles. CP 1669; 1869. When Dr. Padilla later reviewed Drs. Smigaj, Conner, and Tomlinson’s written submissions, he conceded the absence of any imminent danger to patient safety. CP 1667-68, 1666 (Tomlinson’s concerns “minor”), 1664. Neither Dr. Harrington or the MEC concluded that Dr. Smigaj might present any imminent threat to patient safety. CP 1283-84, 1286, 1310.

<sup>49</sup> CP 1210, 1264. Dr. Rowles selects cases for the PQAC to review and, he has never presented one of his own cases to the committee for review, notwithstanding the fact that some patients in his practice have experienced brain damage and death. CP 1706-1707; 1709; 1757. Inevitably, Dr. Smigaj would appear unfavorably compared to Dr. Rowles! Rowles conceded that he knowingly violated Memorial’s peer review policy. CP 1769, 1707, 1709; *see also* 420-21 (evidence of other practitioners treated more favorably than Smigaj). Nevertheless, Dr. Rowles collected \$30,940 from Memorial for his PQAC work for April-December 2008. CP 1702.

<sup>50</sup> CP 3270, 1650, 1100. Two weeks later, Memorial’s attorney or Ms. Anyan inserted language tracking HCQIA’s emergency clause into the MEC’s September 16th meeting minutes. CP 1394-95, *see also* CP 661 (redlined version showing suggested insertion).

“emergency” exception did not excuse respondents failure to comply with § 11112(a)(3) as a matter of law.<sup>51</sup>

**F. A Reasonable Jury Could Conclude That Neither Dr. Padilla Nor The PQAC Had A Reasonable Belief That A Summary Suspension Was Warranted Or In Furtherance Of Quality Health Care.**

Dr. Smigaj is not asking the court to re-weigh the evidence. Instead, she introduced evidence from which a jury could find, by a preponderance, that no reasonable person could believe that a summary suspension was justified at the time (§ 11112(a)(4)) or was in furtherance of quality health care (§ 11112(a)(1)). The summary suspension letter identifies “disruptive practitioner reports” and “poor clinical judgment” in three cases. CP 576.

Disruptive Physician Reports. The PQAC never reviewed them and its members did not even know how many there were or what they said. CP 1170, 1681, 2639. One was stale, one was trivial, and one did not concern Dr. Smigaj. CP 411-412. No reasonable person could objectively believe that one stale and one trivial report, which no one read, justified a summary suspension.

The JA Case. Dr. Smigaj did not initially see patient JA in a timely manner on February 26, which she conceded. CP 572. Because she agreed to see all transfer patients within an hour, PQAC members (and Dr. Tomlinson) agreed the issue was resolved. CP 571, 1850, 1228. Ms. Anyan stated at an August

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<sup>51</sup> *Ritten*, 611 F. Supp. 2d 696, 721; *Harris*, 2005 WL 1433841 \*6 (Conn.Super. 2005), *aff'd in part, rev'd in part*, 2010 WL 1850309 \*12 (Conn. 2010) (“summary suspension must be justified by a sense of urgency”).

2008 meeting that the PQAC “does not feel that they can defend removal or privileges because of this one case.” CP 667; see also CP 2618. A reasonable jury could conclude that no reasonable person could believe that an event on February 26th, resolved to the PQAC’s satisfaction in July, warranted a summary suspension of Dr. Smigaj’s privileges in September.

The LH Case. Dr. Padilla’s letter identified “failure to document cervical examination and fetal presentation” and “performing an elective induction on an unripe cervix.” CP 576. Written documentation provided to the PQAC on August 28th established that Dr. Smigaj documented the presentation and cervical exam. CP 593, 409. Dr. Tomlinson agreed that fetal position “can and frequently is done by the nursing staff.” CP 601. Dr. Rowles conceded that the Memorial nursing staff customarily does so and Dr. Tomlinson’s written report on LH does not conclude that Dr. Smigaj rendered substandard care. CP 1740-41, 409. Ms. Anyan conceded that Dr. Tomlinson never said Dr. Smigaj rendered substandard care to patient LH, yet that is what she implied when she presented his remarks to the PQAC on September 3. *Cf.* CP 1135; 655. As to the undisclosed assertion of an unripe cervix, the cervix was not unripe. CP 409.

The WC Case. Dr. Padilla’s letter states that Dr. Smigaj failed to “admit patient at the time of her initial visit for blood pressure management” and failed to “determine stability for transfer.” CP 576. Dr. Smigaj told WC she should be hospitalized but WC refused, so Dr. Smigaj documented the refusal, and

successfully managed WC's blood pressure on an outpatient basis. Dr. Smigaj told the PQAC about her advice and WC's refusal. CP 606, 652. Thus, the first allegation is false. As to the second allegation, Dr. Tomlinson did not believe that Dr. Smigaj had provided WC substandard care. CP 598-600; 1855. Because both allegations are false, a jury could conclude that no reasonable person could objectively believe that the allegations justified a summary suspension.

Respondents also assert that the summary suspension can be justified based on a "combination of these factors." Resp. Br., p. 40. The compilation of "previous quality concerns" was never delivered to the PQAC. CP 647. Dr. Smigaj was never informed that old cases were being reviewed, and never given an opportunity to explain (1) despite the "extended proctoring" Mr. Linneweh subjected her to in 1995 and 1997, no proctoring physician ever found anything unacceptable about her management of high-risk obstetrical patients;<sup>52</sup> (2) Dr. Rowles' account of her alleged failure to manage her midwives in 1999 and 2004 was materially inaccurate; or (3) Dr. Rowles' criticism of her management of the hemorrhage case in 2007 was contradicted by authoritative texts and by Dr.

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<sup>52</sup>Mr. Linneweh admitted that he treated Dr. Smigaj differently than any other physician who has practiced in Yakima: "Dr. Smigaj is the only individual that I have been put in the position where I had to look at whether or not we needed to take actions over and above what the perinatal group has done." CP 1498. (emphasis added) Indeed, he personally initiated earlier reviews of Dr. Smigaj in 1995, 1997 and again in 2008, when he met with Dr. Olden and Memorial's attorneys on June 16, was copied on Dr. Rowles' letter of July 16, met with Memorial's attorney before the July 30 PQAC meeting, and personally attended the final PQAC meeting on September 3, 2008. (CP570; 3146-47; 655)

Nadig.<sup>53</sup> In the unredacted version of the November 21st PQAC minutes, Dr. Olden revealed the reason that Memorial did not want a fair hearing: “[O]ur expert wouldn’t commit to substandard care. Fair hearing not enough substance to back up possible issues.” CP 670. A reasonable juror could infer from respondent Olden’s admission that Tomlinson wouldn’t commit to substandard care and that Dr. Smigaj would be exonerated in a fair hearing that no reasonable person would objectively believe a summary suspension was warranted.

**G. The Superior Court Erred By Dismissing The Defamation Claim.**

The trial court dismissed Dr. Smigaj’s defamation claim because she “has not advanced any falsity, let alone damages” relating to respondents’ September 25, 2008 letter to Group Health. CP 3608. But the summary suspension disclosed in the letter would damage any doctor’s reputation. CP 1232, 1294, 1653. And the letter falsely implies that there were valid reasons for the suspension. CP 3326-3330. Even Mr. Linneweh admits that the letter would cause its recipient concern. CP 3090-91, 1481. Respondents assert that “Washington does not

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<sup>53</sup> Respondents’ claim that “those present or assisting” in the JS hemorrhage case were critical of Dr. Smigaj and that “those who assisted her” said she had “neither the skills nor knowledge to address bleeding of this nature” (Brief, pp. 27; 29) is an outright lie. Respondents never mention who “those present or assisting” are nor could they. In fact, the evidence showed that the PQAC never interviewed anyone who was involved in the case other than Dr. Smigaj before her privileges were suspended in 2008. No one who was involved in the case during the operation ever complained about Dr. Smigaj’s performance. CP 1512-13. The citations on p. 27 and p. 29 of Respondents’ brief do not support their claim, and Dr. Rowles’ testimony after he denied under oath that he ever spoke with Dr. Nadig or anyone else about the case impeaches his own credibility. CP 1717 v. CP 1801. Dr. Nadig, the surgeon who assisted Dr. Smigaj testified he never criticized Dr. Smigaj’s performance, was never critical of her surgical knowledge or skills, and never spoke with Dr. Rowles about the case. CP 1512-13.

recognize defamation by implication” and Dr. Smigaj released respondents from her defamation claim.”<sup>54</sup> But Washington “has recognized ...defamation by implication.”<sup>55</sup> And no “release” applies because the letter was drafted in bad faith.<sup>56</sup> Dr. Smigaj has identified eight other statements that defamed her.<sup>57</sup> Respondents did not address these statements.<sup>58</sup> A reasonable juror could conclude that one or more of the statements constituted defamation.

#### **H. The Court Should Reverse The Attorney Fee Award, Vacate The Judgment, and Deny Attorney Fees on Appeal.**

If the court reverses the CR12(c) judgment, the attorney fee award and judgment must be vacated. Even if the court were to affirm a dismissal based on RCW 7.71.030, the statute’s plain language does not allow a defendant to recover attorney fees after invoking it.<sup>59</sup> The superior court’s conclusion that respondents are entitled to fees under HCQIA is reviewable *de novo*.<sup>60</sup> Respondents, citing *Johnson v. Nyack Hospital* and *Cowell*, seek review of the attorneys’ fee award under an abuse of discretion standard.<sup>61</sup> But *Cowell* simply cites *Johnson*, which

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<sup>54</sup> *Resp. Br.*, 45 n 38. The “common interest privilege” argument was not raised below (CP 4316-4318, 4607-4612) and is therefore waived. RAP 2.5; *State v. Larson*, 88 Wn.App. 849, 852, 946 P.2d 1212 (1997); *State v. Tyler*, 138 Wn.App. 120, 129, 155 P.3d 1002 (2007).

<sup>55</sup> *Mohr v. Grant*, 153 Wash.2d 812, 823, 108 P.3d 768 (2005).

<sup>56</sup> CP 3330; RCW 70.41.230(4)(protecting information provided in good faith).

<sup>57</sup> CP 3320-3321; *App. Br.*, 46-47.

<sup>58</sup> *Resp. Br.*, 43-45.

<sup>59</sup> *App. Br.*, at 48, n. 80. Respondents do not contest this argument.

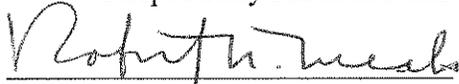
<sup>60</sup> *Hulbert v. Port of Everett*, 159 Wn.App. 389, 406, 245 P.3d 779 (2011), citing *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 147, 859 P.2d 1210 (1993) (A decision to award fees is reviewed *de novo*.); *Schlener v. Allstate Ins. Co.*, 121 Wn.App. 384, 388, 88 P.3d 993 (2004)

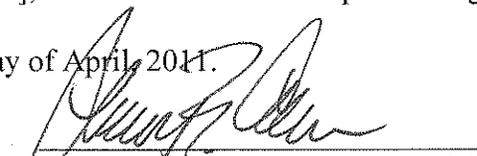
<sup>61</sup> *Brief of Respondents*, 46 n. 39, citing *Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2nd Cir. 1992); *Cowell*, 153 Wn. App. at 943.

is inapposite because it addresses a district court's discretion under Title VII.<sup>62</sup> If respondents have not satisfied HCQIA's standards, they are not entitled to fees under § 11113. Even if respondents are immune, Dr. Smigaj's claims were not "unfounded and unreasonable."<sup>63</sup> Dr. Smigaj only sued paid hospital personnel who interfered in the peer review process, provided false and misleading information to the PQAC, and then tried to cover their tracks. The superior court committed an error of law when it concluded that Dr. Smigaj's lawsuit was unfounded and unreasonable.<sup>64</sup> Because the superior court did not mention or discuss the evidence introduced by Dr. Smigaj, this appeal is not unfounded and the court should not award attorney fees.<sup>65</sup>

This court should reverse the 12(c) order dismissing the Complaint and the order granting summary judgment [CR 3610-3612], vacate the attorney fee award [CP 3985-3992] and judgment [CP 3993-95], and remand for further proceedings.

Respectfully submitted this 18th day of April, 2011.

  
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Attorney for Appellants

  
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Attorney for Appellants

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<sup>62</sup> 153 Wash.App. at 943 n. 55, citing *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 473 (6th Cir. 2003), citing *Johnson*, 964 F.2d at 123.

<sup>63</sup> CP 3969 n. 2. The trial court did not conclude Dr. Smigaj's claims were "frivolous" or "in bad faith," or that her "conduct during the litigation" supports a fee award.

<sup>64</sup> CP 3613-3621 (superior court's memorandum decision); CP 392-447, 3523-3551, 602-605 (expert testimony supporting Dr. Smigaj's claims).

<sup>65</sup> See *Cowell*, 153 Wash.App. at 943 (affirming summary judgment and superior court fee award but denying fees on appeal).

# APPENDIX

**Table E-3. Determining Reportable Actions for Clinical Privileges**

Action	Reportable
Based on assessment of professional competence, a proctor is assigned to a physician or dentist for a period of more than 30 days. The practitioner must be granted approval before certain medical care is administered.	Yes
Based on assessment of professional competence, a proctor is assigned to supervise a physician or dentist, but the proctor does not grant approval before medical care is provided by the practitioner.	No
As a matter of routine hospital policy, a proctor is assigned to a physician or dentist recently granted clinical privileges.	No
A physician or dentist voluntarily restricts or surrenders clinical privileges for personal reasons; professional competence or professional conduct is not under investigation.	No
A physician or dentist voluntarily restricts or surrenders clinical privileges; professional competence or professional conduct is under investigation.	Yes
A physician or dentist voluntarily restricts or surrenders clinical privileges in return for not conducting an investigation of professional competence or professional conduct.	Yes
A physician's or dentist's application for medical staff appointment is denied based on professional competence or professional conduct.	Yes
A physician or dentist is denied medical staff appointment or clinical privileges because the health care entity has too many specialists in the practitioner's discipline.	No
A physician's or dentist's clinical privileges are suspended for administrative reasons not related to professional competence or professional conduct.	No
A physician's or dentist's request for clinical privileges is denied or restricted based upon assessment of clinical competence as defined by the hospital.	Yes

### Examples of Reportable and Non-Reportable Actions

**Example 1:** A physician member of a hospital medical staff wishes to perform several clinical tests and procedures, but does not have the appropriate clinical privileges. The physician applies for an expansion of clinical privileges. The physician's Department Head and the Medical Staff Credentials Committee find that, based on their assessment of the physician's demonstrated professional performance, the physician does not have the clinical competence to perform the additional tests and procedures, and they recommend denial of the request for expanded clinical privileges. The hospital's governing body reviews the case, affirms the findings and recommendations, and denies the

physician's request for expanded clinical privileges for reasons relating to professional competence.

The action is reportable because the denial of privileges adversely affects the clinical privileges of the physician for longer than 30 days.

Whether particular actions are reportable to the NPDB is often best determined by examining a hospital's medical staff bylaws, rules, and regulations with regard to provisions defining who is empowered to take a professional review action, what constitutes a professional review action that adversely affects the clinical privileges of a practitioner, and how that action relates to professional competence or professional conduct.