

**FILED**

**MAY 31 2011**

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

**No. 295907**

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**GASTON CORNU-LABAT,**

**Plaintiff/Respondent,**

**v.**

**HOSPITAL DIST. #2 GRANT COUNTY,  
d/b/a QUINCY VALLEY HOSPITAL,**

**Defendant/Appellant.**

---

**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION**

The unrefuted facts in this case epitomize the circumstances when an investigation by a committee of a hospital regarding the competency of a physician should be privileged. Written concerns were raised that the Plaintiff was incompetent to practice medicine. The concerned healthcare providers requested that he be immediately suspended from providing patient care at Quincy Valley Medical Center (hereinafter "QVMC"). The medical staff of the hospital, which is a regularly constituted committee at QVMC, delegated the investigation of these allegations to three qualified people, two of whom were non-physicians. If the proceedings related to this investigation conducted are not privileged, it is difficult to perceive what would qualify for the privilege.

The trial court's ruling in this case invalidates the privilege associated with the proceedings of corrective action plans in most hospitals in this state as well as the nation. Quincy Valley Medical Center adopted a corrective action plan which is similar to the corrective action plans of most hospitals in this state as well as the nation. Those corrective action plans were developed to specifically

comply with federal and state statutes creating an immunity for those involved in the corrective action process as well as mandating the that proceedings of such a process are privileged. The trial court's elimination of this privilege will mean that people will be hesitant to raise issues regarding the competency of healthcare providers. Such a result is detrimental to the safety of patients in hospitals in this state as well as the nation.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred in ruling that RCW 4.24.250 could not apply if non-physicians were involved in the investigation of an alleged incompetent physician.
- B. The trial court erred by failing to recognize the broad privilege created by RCW 70.44.062(1).
- C. The trial court erred in failing to enforce the Plaintiff's promises and agreements.
- D. The trial court erred in failing to recognize a hospital may have more than one "quality improvement committee."

- E. The trial court erred in denying QVMC's Motion for Summary Judgment.
- F. The trial court erred in granting the Plaintiff's Motion for Summary Judgment.
- G. The trial court erred in denying QVMC's Motion for Reconsideration.

**III. ISSUES PERTAINING TO  
ASSIGNMENTS OF ERRORS**

- A. What standard of review applies?
- B. In this non-litigation context, should the statutory peer review and quality assurance privileges be liberally construed rather than strictly construed?
- C. Does the trial court's initial ruling and unrefuted facts conclusively establish the applicability of the privilege provided by RCW 4.24.250?
- D. Does QVMC's corrective action plan, which is similar to the corrective action plans in most hospitals in the United States, qualify for the privilege created by RCW 4.24.250?

- E. Does a non-physician's participation in a corrective action plan proceeding prevent the privilege contained in RCW 4.24.250 from applying?
- F. May a hospital have multiple "quality improvement committees"?
- G. If QVMC is not entitled to dismissal of this matter as a matter of law, are there factual issues precluding the entry of summary judgment in favor of the Plaintiff?
- H. Does the broad privilege created for public hospital districts pursuant to RCW 70.44.062(1) apply to public records requests?
- I. Did the Plaintiff contractually agree that the records requested were privileged?

#### **IV. STATEMENT OF THE CASE**

##### **A. SUBSTANTIVE FACTS**

###### **1. General Factual Background**

QVMC is a public hospital district formed pursuant to RCW Chapter 70.44 located in Quincy, Washington. It is a relatively small hospital and at the time relevant to this matter had only six

members on its medical staff. (CP 210). Also, because of its small size, it did not have what is commonly known as a medical executive committee. Instead, the medical staff was a committee as a whole and typically participated in all significant action at the hospital. (CP 210; 593; 597). The medical staff at QVMC, as a committee of the whole, meets on a regular basis. One function of the medical staff at QVMC is to review competency concerns regarding physicians that have staff privileges at the hospital. (CP 210; 593; 596).

QVMC employed Dr. Gaston Cornu-Labat, the Plaintiff. The Plaintiff was also on the medical staff of QVMC. As part of the Plaintiff's employment, and in order to become a member of the staff at QVMC, the Plaintiff executed a number of documents. In these documents the Plaintiff agreed that he would abide by the terms of the Bylaws and also that corrective action proceedings and peer review proceedings were privileged and confidential. (CP 194; 196; 199; 591).

QVMC, as part of its governing policies, adopted what is known as a corrective action plan. QVMC's corrective action plan

is contained in Article VIII of its Bylaws. (CP 148-56). Hospitals have implemented corrective action plans to qualify for the immunity and privileged provisions created by federal and state law. See 42 U.S.C. § 1112 et seq., RCW 4.24.250. Hospitals have essentially adopted a uniform corrective action plan both in the state of Washington and nationally. (CP 543; 548-54; 564; 568-72; 404-06; 409-12; 423-27; 456-60; 489; 491-94).

There are certain elements generally common in all corrective action plans. There are as follows:

- A. A person makes a complaint, usually a written complaint, regarding a healthcare practitioner and that there is a concern that the conduct of that practitioner may jeopardize patient safety;
- B. A committee, typically what is known as the MEC, makes a decision to investigate the concern;
- C. The conduct of the investigation is delegated to one or more persons, sometimes referred to as an ad hoc committee, and frequently involving non-physicians; (CP 409-10; 423; 436; 457; 487; 491);

D. Based upon the investigation committee's report, a decision is made whether further action should be taken against the healthcare provider. Certain action will trigger a right to a fair hearing. (CP 418; 429-30; 445-46).

This is exactly the procedure that occurred here. (CP 185-87; 207-10; 371; 587-88; 592-94; 596-98). As will be demonstrated below, Washington statutes specifically decree investigations conducted under such a policy are privileged even though non-physician investigators are involved.

## **2. Facts Related to Alleged Intoxication**

In late July, 2010, Mehdi Merred, the Hospital Administrator at QVMC, received reports from several people that the Plaintiff had a strong odor of alcohol when he was called to the hospital to see a patient late in the evening. (CP 208). The Plaintiff himself requested that this matter be immediately investigated. (CP 208).

Dr. Vance, as acting president of the medical staff, conducted an immediate investigation pursuant to Article VIII(2) of the

Bylaws. (CP 148). Mr. Merred also assisted him as authorized by Article X, Section 4, Subparagraph (a)(1) of the Bylaws. (CP 157).

The medical staff also has authority to issue rules and regulations pursuant to Article XIV of the Bylaws. (CP 167). The medical staff, in coordination with the administrator, adopted several rules and regulations, one of which was the disruptive physician policy. In the disruptive physician policy the medical staff delegated to the president of the medical staff and the administrator the authority to investigate matters that fall within that policy. (CP 285-87).

Dr. Vance and Mr. Merred interviewed several people regarding the claim of intoxication. They also interviewed the Plaintiff. As part of the Plaintiff's interview, he was informed that the investigation was conducted pursuant to Article VIII and the disruptive physician policy. The Plaintiff did not object to the confidentiality of the investigation or voice any concern or comment that he did not believe it was privileged and confidential. (CP 187; 190; 208).

Dr. Vance and Mr. Merred concluded at the end of the investigation that there was insufficient evidence to support the allegation of intoxication. (CP 208). Plaintiff was provided a letter confirming that the investigation had been completed and there was no evidence that he was intoxicated. (CP 42).

**3. Facts Related to Alleged Incompetency Investigation**

On or about July 23, 2009, QVMC received some extremely alarming information regarding Dr. Cornu-Labat. Two separate healthcare providers were extremely concerned about the Plaintiff's conduct and its impact on patient safety. They requested that his privileges be immediately suspended and that he be prevented from providing any patient care. (CP 185-86; 208).

QVMC did not immediately suspend the Plaintiff. Instead, the entire medical staff, except the Plaintiff, met to decide whether the provisions of Article VIII of QVMC's Bylaws relating to corrective action should be implemented and an investigation commenced. This meeting took place on July 27, 2009, and everyone in attendance was informed that the meeting was conducted pursuant to Article VIII of the QVMC Bylaws. (CP 186-

87; 207-09; 587; 593-94; 597-98). The medical staff unanimously decided to conduct an investigation regarding the allegations relating to the Plaintiff. (CP 204; 587; 593; 597).

The medical staff delegated to three persons the responsibility to conduct the investigation. This included Dr. Vance, the Vice-President of the medical staff and the person who acts as the president of the medical staff when the then president was not available, Mehdi Merred, the Administrator of the hospital, and Anthony Gonzalez, one of the members of the Board of Directors of the hospital district. As part of the investigation the three investigators conducted interviews. (CP 186-87; 208-09; 587-88).

Article VIII of QVMC's Bylaws provide that the healthcare provider being investigated may be interviewed. On August 4, 2009, the three investigators interviewed the Plaintiff. At the commencement of the interview, the Plaintiff was specifically informed that the investigation was being conducted pursuant to Article VIII of the QVMC Bylaws and that the investigation was considered privileged and confidential. Plaintiff at the time never

objected that the proceedings were privileged or confidential or that they were conducted pursuant to Article VIII. (CP 187; 192).

The three investigators completed their investigation. They did not make a recommendation that would trigger the fair hearing process delineated in Article IX of the QVMC Bylaws. Their findings were reported to the medical staff. The medical staff held a meeting on September 1, 2009 to discuss the outcome of the investigation. Dr. Cornu-Labat was present when the members of the medical staff informed him of the outcome of the investigation and recommendations made. (CP 588; 594; 598).

The Plaintiff in his briefing and in his summary judgment argument spent a great deal of time discussing facts and other issues that primarily occurred after September 1, 2009. Those facts and issues are totally irrelevant to the issue presented to the trial court and this Court. Thus, QVMC will not waste this Court's time by addressing these irrelevant facts.

**B. PROCEDURAL FACTS**

On or about July 29, 2009, the Plaintiff potentially made a request for records under the Public Records Act. QVMC

immediately responded to that request and contended that the material requested was privileged, although admittedly the specific statutory privilege claim was probably not correct. (CP 36; 39).

On or about August 11, 2009, a lawyer on behalf of the Plaintiff made a request for records pursuant to RCW 42.56. (CP 45). Counsel on behalf of QVMC immediately contacted the lawyer representing the Plaintiff to respond to the request and to attempt to resolve the matter. Counsel for QVMC informed Plaintiff's then counsel that the material requested was statutorily privileged. Thereafter, QVMC was informed that the Plaintiff would deal directly with QVMC's attorney and the attorney that drafted the August 11, 2009 request would no longer be involved. (CP 117).

On or about August 26, 2009, a different lawyer on behalf of the Plaintiff sent a new request for public records. (CP 119-23). Once again, an attorney on behalf of QVMC immediately responded to this request. Once again the attorney for QVMC informed the Plaintiff's new attorney that the records requested were privileged. The Plaintiff's new attorney agreed on behalf of the Plaintiff that

there was no intent to proceed with the Plaintiff's public records request. (CP 125).

The Plaintiff potentially made a new request for public records on or about January 5, 2010. (CP 50). Again, QVMC immediately responded to this request. (CP 60).

The Plaintiff apparently retained a third lawyer to address this issue. That lawyer, the present law firm, commenced this action on or about March 10, 2010 without any additional notice. (CP 1-8). The Plaintiff conducted no discovery. Soon after the Plaintiff filed the action, both parties moved for summary judgment. (CP 15-29; 89-90).

Plaintiff's Summary Judgment Motion failed to address the key issues in this matter and the issues presented here. Plaintiff's Summary Judgment Memorandum demonstrates a misunderstanding of what occurred in this matter. The Plaintiff's Summary Judgment Motion fails to understand that the proceedings conducted at issue were pursuant to Article VIII of QVMC's Bylaws. (CP 20-29).

Moreover, that Article IX does not necessarily come into play in a corrective action proceeding. Article IX only becomes

applicable if the investigation leads to certain recommendations. (CP 148; 151). Those recommendations were not made and thus there was no right to a hearing and Article IX did not apply.

QVMC's Summary Judgment Motion was based on primarily four arguments. The four arguments were that the information requested was privileged pursuant to RCW 4.24.250, the information requested was privileged pursuant to RCW 70.44.062, the information was privileged because Plaintiff had contracted, agreed and consented that the material was privileged, and finally the information was privileged pursuant to RCW Chapter 70.41 and most particularly RCW 70.41.200. (CP 102-112; 270-81; CP 313-25; RP 17-33).

It should be emphasized that the Plaintiff never refuted several arguments presented by QVMC or raised only perfunctory arguments. The Plaintiff also admitted that at minimum there were factual issues presented. The Plaintiff never responded to the argument regarding the applicability of RCW 70.44.062(1). (CP 226-47; 305-09).

The Plaintiff also did not raise any serious arguments regarding the fact that the Plaintiff had contractually agreed that the information was privileged and confidential. The Plaintiff devoted only a few sentences to this issue and those sentences did not address it or seriously contest QVMC's arguments. (CP 243-44).

Finally, the Plaintiff submitted no affidavits or any material to refute the facts presented by QVMC regarding the process that they followed in investigating the Plaintiff's conduct. The Plaintiff submitted no facts to contest that QVMC's medical staff is a committee of the whole and a regularly constituted committee. The Plaintiff admitted that at a minimum there were factual issues. (CP 240).

It is also important to emphasize an argument that the Plaintiff never asserted. The Plaintiff never asserted that the privilege provided by RCW 4.24.250 is not applicable if non-physicians participated in the process. (CP 15-29; 226-47; 305-09). In fact, the Plaintiff almost entirely ignored the provision of RCW 4.24.250 and devoted little argument to it.

The hearing for the parties' cross-Motions for Summary Judgment occurred on July 6, 2010. At the oral arguments, the Plaintiff continued to fail to refute several arguments raised by QVMC. (RP 2-16). Although the Plaintiff at no time addressed the applicability of RCW 70.44.062, the trial judge did. The trial judge realized that it was a very broad statute that was applicable to the facts presented before it. (RP 28). The trial judge took the matter under advisement.

The trial judge issues a Letter Opinion dated September 4, 2010. The court in its Letter Opinion indicated it was granting the Plaintiff's Motion for Summary Judgment. The primary reason explained by the judge in his Letter Opinion for granting the Plaintiff's Motion was the trial judge's opinion that because non-physicians were involved in the investigation process, the "peer review" privilege created by RCW 4.24.250 could not apply. (CP 370-75). It should once again be emphasized the Plaintiff never raised this specific argument nor did the trial judge raise it prior to his Letter Opinion. Thus, prior to the trial judge's Letter Opinion,

QVMC did not have the opportunity to address this misconstruction of RCW 4.24.250.

Prior to the entry of any written order, QVMC moved for reconsideration. QVMC submitted additional information. This additional information primarily consisted of the fact that hospitals in the state of Washington, as well as nationally, routinely conduct corrective action or peer review proceedings by utilizing non-physicians. (CP 381-498).

The trial court denied the Motion for Reconsideration. The trial court issued another Letter Opinion. (CP 600-01). The court entered a written order granting the Plaintiff's Summary Judgment on November 29, 2010. (CP 612-15). QVMC timely filed a Notice of Appeal.

## **V. ARGUMENT**

### **A. ISSUE 1 – REVIEW OF THIS MATTER IS DE NOVO**

This Court reviews de novo summary judgment motions engaging in the same inquiry as the trial court. Rounds v. Nelcor Puritan Bennett, 147 Wn. App. 155, 161, 194 P.3d 274, rev. denied, 165 Wn.2d 1047 (2009). Summary judgment is appropriate only

where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). Moreover, appeals under the Public Disclosure Act are de novo. Zink v. City of Mesa, 140 Wn. App. 328, 166 P.3d 738 (2007).

Finally, statutory construction is a question of law reviewed de novo. Plemmons v. Pierce County, 134 Wn. App. 449, 140 P.3d 601 (2006). The primary issues in this case involves interpretation of Washington statutes and applying the essentially undisputed facts.

**B. ISSUE 2 – THE PRIVILEGE STATUTES SHOULD BE LIBERALLY CONSTRUED IN THIS CONTEXT**

There is no question that in the context of litigation, typically in a medical malpractice case, the hospital privilege statutes are strictly construed. See Lowy v. Peace Health, 159 Wn. App. 715, 247 P.3d 7 (2011). This is because the broad scope of discovery is involved in those cases and the evidence may be very relevant to the plaintiff's case against a physician.

The same considerations do not apply in this type of action. The broad scope of discovery is not at issue here. There is no personal injury lawsuit. The statutes in this situation are not in

derogation of the common law. At common law, a physician was not entitled to review records generated in investigations regarding that physician. This is obviously still the case in the majority of hospitals in the state of Washington that are not public hospital district hospitals.

Thus, QVMC contends that RCW 4.24.250, 70.44.062(1) and 70.41.200 should be liberally constructed in this situation. The strong policy created by these statutes to protect patient safety and the integrity of the process outweighs the physician's simple curiosity. See, Morgan v. Peacehealth, Inc., 101 Wn. App. 750, 14 P.3d 773 (2001); Colwell v. Good Samaritan Community Health Care, 153 Wn. App. 911, 225 P.3d 294 (2009).

**C. ISSUE 3 – THE TRIAL JUDGE’S RULING CONCLUSIVELY DEMONSTRATES THE RCW 4.24.250 PRIVILEGE APPLIES**

The undisputed facts in this case demonstrate that RCW 4.24.250 applies. It is further emphasized by the trial court's Letter Opinion in this case which mirrors the language of that statute.

RCW 4.24.250 provides in pertinent part:

(1) Any healthcare provider as defined in RCW 7.70.020(1) and (2) who, in good faith, files charges or

presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or a hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care. . . . The proceedings, reports and written records of such committees or boards, or of a member, employee, staff person or investigator of such committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, . . . .

A review of this statute indicates there are certain criteria that must be present before the statute applies. They are as follows:

1. A healthcare provider makes a written claim or presents evidence that another healthcare provider is incompetent to practice or has exhibited gross misconduct;
2. The written claim or evidence is presented to a regularly constituted board of a hospital whose duty it is to evaluate the competency and qualifications of the healthcare providers, including the duty to limit the extent of practice of such person at a hospital or before a regularly constituted committee of a hospital whose duty it is to review and evaluate the quality of patient care;
3. The proceedings, reports and written records of the committee are privileged; and

4. Moreover and significantly, the proceedings, reports and written records of a member, employee, staff person or investigator of such a committee are privileged.

Significantly, RCW 4.24.250 does not use the term “peer review.” The statute nowhere states that if the complaints are against a physician, only physicians can be members of the committee, an employee of the committee, a staff person of the committee, or investigator of the committee.

We now must analyze the unrefuted facts as evidenced by the trial court’s Letter Opinion and compare them to the terms of the statute. The unrefuted facts, also evidenced by the trial court’s opinion, are as follows (we have inserted numbers in the court’s findings which correspond with the criteria articulated in RCW 4.24.250):

In July and August, 2009, (1) two members of the medical staff submitted written complaints about plaintiff to the hospital administration. Each recommended that he be suspended . . . .

The second complaint alleged unprofessional conduct, . . . .

In response to the unprofessional conduct allegations, CEO Merred and Vice Chief Vance met (2) with the entire medical staff (except Plaintiff) to determine if an

investigation should be conducted. (3) The medical staff authorized an investigation. (4) The three investigators reviewed the complaints on August 3, 4 and 5. (CP 371).

Thus, the trial court's written opinion outlining the facts in this case demonstrate conclusively that RCW 4.24.250 applies. The trial court's review of the facts demonstrates that each of the criteria of RCW 4.24.250 are met.

To fully analyze the applicability of RCW 4.24.250 we should review the criteria in more detail. We should also review them in reference to all of the undisputed facts.

1. **Written Complaint or Evidence Regarding Incompetency or Gross Misconduct**

(a). **Intoxication Allegation**

There can be no serious argument that a claim that a physician was intoxicated while providing patient care constitutes gross misconduct. It is difficult to perceive what other type of action could be more gross misconduct than being intoxicated while providing medical services.

**(b). Unprofessional Misconduct Claim**

The two complaints made by healthcare providers were that the Plaintiff should be immediately suspended and prohibited from providing patient care. There can be no dispute that this is a claim of incompetency. These two medical staff members in good faith believed that the Plaintiff was incompetent to provide patient care and needed to be immediately suspended.

**2. Presented to a Regularly Constituted Review Committee of a Hospital**

**(a) The QVMC Medical Staff**

The QVMC medical staff is undoubtedly a regularly constituted committee. (CP 210; 586-87; 592-93; 596-97). Some of the functions of the QVMC medical staff are to evaluate the competency and qualifications of healthcare providers. It also has the authority to limit the extent of practice of such persons at a hospital. Moreover, one of its duties is also to review and evaluate the quality of patient care. (CP 134; 136; 148-50; 210; 586-87; 592-93; 596-97).

(b) **The Medical Staff Authorized the Alleged Intoxication Investigation**

A review of the records and undisputed facts demonstrates that the review of the allegations of intoxication were conducted in part pursuant to QVMC's policy "Dealing with disruptive behavior among healthcare petitioners." This is one of the medical staff's policies at QVMC and is approved by the medical staff. (CP 285-87). In that policy, the medical staff delegates to the hospital administrator and chief of staff the responsibility to do investigations and make recommendations under the policy. (CP 165; 285-86).

(c) **The Medical Staff Authorized the Unprofessional Conduct Investigation**

It is even more clear that the unprofessional conduct allegation was conducted by the medical staff. The medical staff met on July 27, 2009. The medical staff unanimously agreed that the Plaintiff should be investigated and delegated the investigation to three people, Dr. Vance, Mr. Merred, and Mr. Gonzalez. (CP 209; 587-88; 593-94; 597-98).

3. **The Privilege for Proceedings, Reports and Written Records of Such Committees or Investigators of Such Committee**

Contrary to the trial court's ruling, RCW 4.24.250 does not mandate that the investigation of a physician only be done by other physicians. The statute specifically contemplates and authorizes that the investigation be done by people other than physicians. The pertinent language of the statute is: "The proceedings, reports, and written records of such committees or boards, or member, employee, staff person, or investigator of such committee or board, . . . ." RCW 4.24.250(1) (emphasis supplied). Accordingly, the statute specifically authorizes and contemplates that people other than physicians will be involved in the process including people delegated the responsibility to investigate the allegations.

This is exactly what happened in this case. The disruptive conduct policy approved by the medical staff and authorized by the medical staff delegates investigations to, in this case Dr. Vance and Mr. Merred. They primarily investigated the intoxication issue. The medical staff at the July 27, 2009, meeting specifically delegated the

responsibility of the investigation related to incompetence to three people.

Consequently, the unrefuted facts demonstrate that the requirements and criteria of RCW 4.24.250 have been met in this case. Accordingly, pursuant to RCW 42.56.380(1)(c), the information requested is exempt under the Public Records Act. See Gautreaux v. Chattonooga-Hamilton County Hospital Authority, 2010WL 2593613 (Tenn. App. 2010).

The Plaintiff really never argued the provisions of RCW 4.24.250 because the Plaintiff's attention was directed elsewhere. The Plaintiff spent a great deal of time arguing that QVMC did not exactly comply with its Bylaws. However, this focus of the Plaintiff is misdirected. As the trial judge correctly noted, the issue is not whether there was strict compliance with the hospital's Bylaws, the issue was whether the requirements of RCW 4.24.250 were satisfied. (CP 375). As established above, they were.

Nevertheless, it cannot be disputed that QVMC conducted the investigations pursuant to Article VIII of its Bylaws and under the disruptive conduct policy. (CP 186; 207-08; 587-88; 597). There

was complete compliance with the disruptive physician policy and there was substantial compliance with Article VIII. All provisions of Article VIII were met except compliance with the 14-day time period. It should be noted that this was the middle of summer and the peak of vacation time. (CP 148; 587-88; 593-94). Courts interpreting analogous issues require only substantial compliance, not strict compliance. See, e.g., Smith v. Ricks, 798 F. Supp. 605, 610-11 (N.D. Ca. 1992); Fobbs v. Holy Cross Health System Corp., 789 F. Supp. 1054 (E.D. Ca. 1992), affirmed, 29 F.3d 1439, cert. denied, 115 S.Ct. 936 (1993); Colwell v. Good Samaritan Community Health Care, 153 Wn. App. 911, 225 P.3d 294 (2009).

Perhaps a good way to analyze this issue is to view it from another perspective. If the Plaintiff was being sued for medical malpractice for acts occurring in late July of 2009, there is no question that the Plaintiff and his lawyer would vehemently object to the plaintiff in a medical malpractice action seeking and obtaining information regarding these investigations.

**D. ISSUE 4 – THE INFORMATION PLAINTIFF REQUESTED IS CONFIDENTIAL PURSUANT TO RCW 70.44.062**

**1. Background**

As noted above, QVMC is a public hospital district hospital. There are several such hospitals in the state. Generally, these hospitals are located in rural areas and are the smaller hospitals in the state. Public hospital district hospitals constitute a minority of hospitals in the state of Washington. (CP 406). Consequently, Washington's Public Disclosure Act is not applicable to the majority of hospitals in the state of Washington. A physician working at a majority of the hospitals in the state of Washington would have no right to request the information at issue here.

**2. The Broad Provisions of RCW 70.44.062(1) Mandate that the Information Request is Confidential**

Perhaps recognizing the unique position that public hospital district hospitals possess in the state of Washington, the legislature has created a confidentiality and privilege statute for these entities. The privilege is contained in RCW 70.44.062.

Subparagraph 1 is particularly relevant to the issues here. It is submitted that this provision creates a privilege in addition to the privilege created by RCW 4.24.250 and 70.41.200. This statute provides in pertinent part:

(1) All meetings, proceedings, and deliberations of the board of commissioners, its staff or agents, concerning the granting, denial, revocation, restriction or other consideration of the status of clinical or staff privileges of a physician . . . . shall be confidential . . . .

RCW 70.44.062(1) (emphasis supplied).

The unrefuted facts in this case once again demonstrate that the provisions of RCW 70.44.062(1) have been met. Pursuant to the QVMC Bylaws, the medical staff and administrator are staff or agents of the board of commissioners. (CP 134-37; 141-43; 148-49; 186; 210). The investigations in question concern the potential revocation or restriction of the Plaintiff's staff privileges. (CP 148-56; 285; 287).

The provisions of RCW 70.44.062(1) apply in this case. Thus, the information requested by the Plaintiff here was confidential and was not subject to disclosure.

It is important to emphasize that the Plaintiff never raised any argument disputing the applicability of this provision nor of its consequences. Moreover, the trial court failed to address it in its initial written Letter Opinion. This is despite the fact that the trial court agreed that the language applied and had broad application. The trial court did briefly address it in its written Letter Opinion relating to the Motion for Reconsideration but did not provide QVMC any opportunity to address the court's comments. (CP 600).

3. **RCW 70.44.062(1) Qualifies for the "Other Statute" Exemption**

RCW 42.56.070(1) provides in pertinent part:

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

(Emphasis supplied).

This exemption is broadly known as the "other statute" exemption.

The "other statute" exemption incorporates into the Act other laws that exempt or prohibit disclosure of specific information or records. . . . In other words, if such other statutes mesh with the Act, they operate to

supplement it. . . . Thus, if another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement. The rule applies only to those exemptions explicitly identified in other statutes; this language does not allow a court to ‘imply exemptions but only allow specific exemptions to stand’ . . . .

Progressive Animal Welfare Society v. University of Washington,  
125 Wn.2d 243, 261-62, 884 P.2d 592 (1994).

RCW 70.44.062(1) qualifies for this exemption. It has an explicitly identified exemption because it states that such proceedings and deliberations “shall be confidential.” Thus, this is a specific exemption and not an implied exemption. Moreover, it meshes with the Public Records Act and therefore it acts to supplement it. See Deer v. Department of Social & Health Services, 122 Wn. App. 84, 93 P.3d 195 (2004).

E. **ISSUE 5 – ONE FUNCTION OF THE QVMC MEDICAL STAFF IS AS A “QUALITY IMPROVEMENT COMMITTEE”**

QVMC respectfully submits that the trial court and the Plaintiff have misconstrued QVMC’s argument regarding RCW 70.41.200. The trial court incorrectly concluded that QVMC did not

contend RCW 70.41.200 applied. (CP 374-75). Plaintiff made similar arguments and contentions. Confusion arises because QVMC never alleged that its quality improvement committee had involvement in the allegations that the Plaintiff was incompetent to practice medicine. QVMC does have such a committee. (CP 256; 264).

The record is clear that QVMC investigated the Plaintiff pursuant to Article VIII of the Medical Staff Bylaws and the disruptive physician policy. (CP 190; 192; 593). However, it is important to emphasize this does not mean that RCW 70.41.200 and the privilege provided by that statute do not apply. A hospital can have multiple “quality improvement committees” or can have subcommittees of a “quality improvement committee” and still qualify for the privilege under RCW 70.41.200. In other words, at any hospital there may be multiple committees of the hospital that qualify as a “quality improvement committee” and a hospital is not limited to having one such committee. (CP 420; 444; 474; 484; 487; 489).

Review of RCW 70.41.200 also reveals that there may be multiple committees at a hospital that qualify as quality improvement committees under that statute. First, there is nothing in the statute that states there may be just one committee. In particular, RCW 70.41.200(4) demonstrates there may be multiple such committees.

Furthermore, materials originally submitted by the Plaintiff demonstrate that the medical staff at QVMC acts as a quality improvement committee as that term is used in RCW 70.41.200. One of the documents submitted by the Plaintiff is QVMC's organizational quality plan. (CP 253-61). That document specifically identifies the medical staff is a separate component of the hospital's quality plan. It identifies that the medical staff's function is primarily to do what is commonly referred to as peer review. (CP 57).

This distinction at QVMC is further identified in other policies of the hospital. The policy entitled "Quality Improvement Plan Description" identifies that "[q]uality improvement is

accomplished in the facility in two general areas (peer review and QI committee).” (CP 264).

The main criteria for a committee of the hospital to qualify as a quality improvement committee pursuant to RCW 70.41.200 is that the responsibility of the committee is to review services at the hospital in order to improve the quality of medical care and to prevent medical malpractice. RCW 70.41.200(1)(a). This is exactly the function of the medical staff at QVMC. “Because it is recognized that the medical staff is responsible for the quality of medical care in the hospital . . . .” (CP 134). There is no question in the QVMC Bylaws that the medical staff as a whole acts as a quality improvement committee. (CP 136; 148; 159-60).

Thus, the provisions of RCW 70.41.200(3) apply. This section mandates that the information created in these investigations conducted on behalf of the medical staff are privileged. This also qualifies for the exemption in RCW 42.56.380(1)(4).

F. **ISSUE 6 – AS A MATTER OF PUBLIC POLICY, A PHYSICIAN WITH STAFF PRIVILEGES AT A HOSPITAL SHOULD BE BOUND BY HIS OR HER AGREEMENT REGARDING CONFIDENTIALITY**

1. **Plaintiff's Relationship With the Hospital**

There is a unique and extraordinary set of facts presented in this case. This is not an ordinary citizen requesting records from a public entity. Plaintiff had a special relationship with the hospital. Plaintiff was a physician at the hospital. In order to be a physician at the hospital he had to have staff privileges at the hospital and had to agree to all provisions of the Bylaws and other rules and regulations of the hospital. (CP 196; 142). By seeking and thereafter being granted privileges to practice medicine at QVMC, the Plaintiff agreed that all the information at issue in this proceeding was privileged and confidential. (CP 165-66). Confidentiality is a paramount concern of any hospital because of medical records, healthcare-patient relations, and review and credentialing of physicians.

QVMC also employed the Plaintiff. (CP 198-200). As part of his employment with QVMC, the Plaintiff not only agreed to be bound by the Bylaws, but also executed other agreements whereby

he agreed that the material at issue here was privileged and confidential. (CP 194; 591).

It is important to note how broad the statements are regarding confidentiality. Moreover, by signing some of these agreements, the Plaintiff specifically acknowledged and agreed that the material at issue here was confidential pursuant to the statutes addressed herein, RCW 4.24.250 and 70.41.200.

QVMC relied upon Plaintiff's promises, acknowledgements and agreements. It is important to note that the Plaintiff would not have been granted privileges at QVMC nor been employed if he would not have agreed to the confidentiality of the information at issue here.

2. **Policy Considerations Weigh Heavily in Favor of the Confidentiality of this Material**

In the not so remote past, there was no mechanism to promote the safety of patients at hospitals by eliminating incompetent physicians. The concept of what is known as corrective action, peer review, quality improvement, and quality assurance developed so that there was a process where incompetent physicians, or physicians suffering from temporary problems were limited or prohibited from

providing patient care. One of the cornerstones of the development of this policy was that individuals could raise concerns regarding healthcare providers and investigations could be conducted without the fear that the anonymity of people making complaints and the documents generated would be available outside of the process itself. This allowed a candid flow of information and allowed people to raise concerns without the fear that there may be retaliation for their acts.

Here, because the Plaintiff agreed, promised, and acknowledged that the materials were confidential, there are several legal theories that mandate the confidentiality of this material. The primary ground is simple contract law.

We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein.

National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 913, 506 P.2d 20 (1973). Earlier in the Opinion, the Supreme Court succinctly and eloquently stated: “The whole panoply of contract

law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.” Id. at 912-13

Under well-recognized contract principles, the Plaintiff should be prohibited from now seeking the information that the trial court ordered be produced. There are strong policy reasons why that information should be protected. Moreover, the Plaintiff should be bound by his agreement, promises and contract and not allowed to ignore and breach those agreements.

Moreover, the rule of law known as equitable estoppel applies here. For that doctrine to apply, three elements must be present:

It must be shown that (1) the conduct, acts, or statements by the parties to be estopped are inconsistent with the claim afterwards asserted by that party; (2) the party asserting estoppel took action in reasonable reliance upon the conduct, act, or statement; and (3) the party asserting estoppel would suffer injury if the party to be estopped were allowed to contradict the prior conduct, act, or statement.

Sorenson v. Pyeatt, 158 Wn.2d 523, 538-39, 146 P.3d 1172 (2006).

There can be no question that all three elements are present here. QVMC relied upon the Plaintiff’s promises, agreements, and acknowledgements. The Plaintiff would not have been granted the right and privilege to practice at QVMC nor would QVMC have

employed him absent the Plaintiff's unambiguous agreement. QVMC may have simply summarily suspended the Plaintiff had it known the Plaintiff would breach his promise and agreement. QVMC clearly relied upon Plaintiff's conduct and promises.

To now allow the Plaintiff to break and breach those promises would cause great injury to QVMC. The biggest injury, not only to QVMC but to all public hospital district hospitals in the state of Washington, is that the process needs to be confidential so it works properly and is not put in jeopardy. The other obvious damages are potential monetary damages should Plaintiff be allowed to recover statutory penalties under the Public Records Act.

## **VI. CONCLUSION**

It is unrefuted in this case that legitimate concerns were raised that Plaintiff engaged in the gross misconduct of being intoxicated while providing patient care and was so incompetent his privilege to see patients should be immediately suspended. The regularly constituted committee at the hospital, the hospital's medical staff, delegated the investigation of these serious charges to a number of investigators to conduct the investigation. This is a

textbook example of proceedings and materials that are privileged. There are strong public policy reasons for this. These far outweigh any arguments in support of providing this material to the Plaintiff. The decision of the trial court should be reversed and this Court should rule that summary judgment should have been entered in favor of QVMC. Alternatively, at a minimum, there are factual issues that need to be resolved and this matter should be remanded for further proceedings to resolve these factual issues.

Respectfully submitted this 27 day of May, 2011.

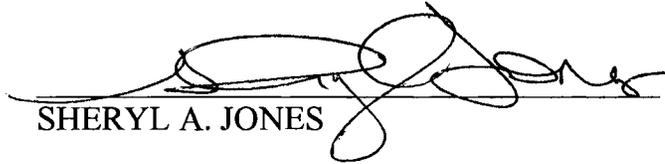
  
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**CERTIFICATE OF SERVICE**

I, SHERYL JONES, declare under penalty of perjury of the laws of the state of Washington, that on the 27<sup>th</sup> day of May, 2011, I deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing APPELLANT'S OPENING BRIEF to the following:

**Counsel for Defendant/Plaintiff:**

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SHERYL A. JONES