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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.**

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**APPELLANT'S REPLY BRIEF**

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## **I. INTRODUCTION**

The issues presented in this appeal are really quite simple. RCW 4.24.250 and the cases interpreting it, primarily Anderson v. Breda, demonstrate that the information at issue here is privileged simply if it is established that the information was generated for a regularly constituted committee or board of the hospital whose duty it was to review and evaluate the quality of patient care or the competency of staff members. The overwhelming and unrefuted evidence conclusively satisfies this simple requirement.<sup>1</sup> Thus, the information sought by the Plaintiff is privileged.

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<sup>1</sup> See CP 186-87; 209; 586-87; 592-93; 596-97. As Dr. Vance testified in his Declaration:

7. Due to the seriousness of these allegations (allegations that Dr. Cornu-Labat should be immediately suspended and not allowed to see patients), Mr. Merred and I met with the entire medical staff (excepting Dr. Cornu-Labat) in accordance with the hospital Bylaws, presented the allegations and asked whether an investigation should be conducted.

8. The medical staff unanimously agreed that an investigation was appropriate and authorized it. Accordingly, on behalf of the medical staff, Mr. Merred, one of the members of the Board of Commissioners Anthony Gonzalez, and I conducted a confidential peer review investigation . . . . (CP 209, lines 8-21).

Similarly, another member of the medical staff testified in his Declaration as follows:

At Quincy Valley Medical Center, the medical staff is one of the committees of the hospital . . . . The medical staff at Quincy Valley Medical Center meets on a regular basis. The medical staff as a whole is responsible for conducting review of a physician's conduct and the concerns a physician's conduct may impact patient safety. This process is what some may refer to as peer review.

As QVMC pointed out in its initial brief, the Plaintiff at the trial court level raised factual allegations that were not relevant. (Appellant's Brief at 11). However, the Plaintiff again in his brief raises issues not pertinent to the appeal. (Respondent's Brief at 5; 10-11). QVMC feels compelled to address these issues.

The Court can take judicial notice that conduct of the Respondent Dr. Cornu-Labat has been reviewed by the State of Washington Department of Health through its Medical Quality Assurance Committee Agency. This review essentially vindicated the process and requirements that QVMC imposed upon the Plaintiff. The Medical Quality Assurance Committee has concluded that it was appropriate for QVMC to refer the Plaintiff to the impaired physician program. The Medical Quality

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(3) There was a meeting of the medical staff on July 27, 2009. I was in attendance at the meeting. The purpose of that meeting was to address concerns raised about the conduct of Dr. Gaston Cornu-Labat. A decision was made by the medical staff at that meeting that an investigation would be conducted pursuant to Article VIII of the Medical Staff Bylaws and pursuant to the hospital policy known as "Dealing With Disruptive Behavior Among Healthcare Providers." The medical staff as a committee of the whole concluded that they should proceed and review Dr. Cornu-Labat's conduct pursuant to the provisions of the Bylaws in that policy. It was decided the medical staff would conduct the review. However, to do a fair and reasonable review, an investigation had to be conducted. The medical staff designated Dr. Vance, who was acting Chief of Staff because the investigation involved Dr. Cornu-Labat. The medical staff also designated administrator Mr. Mehdi Merred and a member of the Board of Commissioners to conduct its investigation. The purpose of this group was to investigate this matter on behalf of and at the request of the medical staff so that the medical staff could obtain sufficient information to make an informed decision . . . .  
(CP 592, lines 33-34; CP 593, lines 4-24; see also Declaration of Dr. Klingner, CP 597, lines 5-34).

Assurance Committee has further concluded it was improper for the Plaintiff not to follow that recommendation. Because of that, the Medical Quality Assurance Committee has suspended the Plaintiff's medical license.

## **II. REPLY TO PLAINTIFF'S ARGUMENTS**

### **A. THE PLAINTIFF SHOULD NOT BE ALLOWED TO RAISE ISSUES FOR THE FIRST TIME IN THIS APPEAL**

The Plaintiff in his Brief filed in this matter raises a number of arguments that were never raised at the trial court level. As the Plaintiff properly points out in his brief, QVMC relied primarily at the trial court level and at the time of this appeal on the provisions of RCW 4.24.250. However, at the trial court level, the Plaintiff failed to address the statute in any detail. (CP 15-29; 226-47; 305-09). It is unrefuted that the Plaintiff never asserted the argument that in all phases of a corrective action or quality review investigation of a physician that only physicians can be involved in order for RCW 4.24.250 to apply.

QVMC based another one of its primary arguments upon RCW 70.44.062. Plaintiff submitted absolutely no response to that argument. (CP 226-47; 305-09). Furthermore, the Plaintiff did not fully address the argument that he was bound by the Bylaws and his contractual agreement. (CP 243-44).

“Generally, appellate courts will not entertain issues raised for the first time on appeal. . . . The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. . . . Similarly, we do not consider theories not presented below.” Wilson and Son Ranch LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470 (2011). See RAP 2.5(a); Bundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 191 P.3d 879 (2008).

As this court recently observed in Wilson and Son Ranch LLC, it is unjust and prejudicial to allow a party to raise arguments and theories for the first time on appeal. This is because the other party at the trial court level did not have an opportunity to address those arguments and theories and to make a record if appropriate. Id. at 304-05. See, Homeowners Ass’n v. Stratford, 161 Wn. App. 249, 257-58 (2011).

**B. THERE ARE COMPETING POLICY CONSIDERATIONS INVOLVED**

There is an issue of first impression present by this case. The appellate courts of Washington have never been presented with the issue of a physician at a public hospital district hospital requesting the records relating to an investigation of that physician’s conduct. There are competing strong public policies involved in such circumstances. On the one hand, as the Plaintiff appropriately points out, there are strong policy

arguments for the disclosure of public records. See Progressive Animal Welfare Soc. v. University of Washington, 114 Wn.2d 677, 790 P.2d 604 (1990).

On the other hand, there are strong public policy justifications for the Washington quality assurance privileges. (RCW 4.24.250, 70.41.200 and 70.41.230). The purpose of these privileges is to promote the safety and welfare of patients of healthcare providers. It allows the process to proceed in a confidential fashion so people can be open and candid in discussing the healthcare provider's ability to practice without the fear this information will become known. If the information is disclosed, the people providing open and candid information potentially will be the subject of retaliation.

In the circumstances of this specific case, when these two competing policy interests are placed upon the balance of justice, the balance weighs heavily in favor of the corrective action and quality assurance privileges. One reason for this is that this case does not involve a concerned member of the public seeking to obtain information concerning a public hospital district. This case involves a physician that was the subject of the corrective action procedure and had involvement in the procedure. People involved in the investigation are legitimately

concerned that he is attempting to obtain the name of people that raised concerns about his competency so he can retaliate against them.

Tennessee appears to be one of the few jurisdictions that have addressed the interplay of a public records act statute and a quality assurance privilege statute. Gautreaux v. Chattanooga-Hamilton County Hospital, 210 WL 2593613 (Tenn. App. 2010). In Gautreaux, the Tennessee Court of Appeals addressed whether documents privileged pursuant to a quality assurance or peer review privilege should be produced pursuant to a public records act statute. The Tennessee Court of Appeals ruled that the records were privileged and were not subject to disclosure pursuant to the public record act statute. Id.

It is true that the Washington appellate courts have addressed the Washington statutory quality assurance privileges and held it should be strictly construed in specific situations. However, in all those cases, there was actually civil litigation involved and the plaintiff was attempting to obtain evidence to support its case in the civil litigation. Obviously, the policy considerations are very different in those cases. See Coburn v. Seda, 101 Wn.2d 270, 677 P.2d 173 (1984); Anderson v. Breda, 103 Wn.2d 901, 700 P.2d 737 (1985); Lowy v. Peace Health, 159 Wn. App. 715, 247 P.3d 7 (2011).

C. **INVESTIGATIONS WERE CONDUCTED ON BEHALF OF THE MEDICAL STAFF – A REGULARLY CONSTITUTED COMMITTEE**

1. **Established Facts**

The Plaintiff asks this Court to ignore unrefuted facts. The record cannot be more clear that both investigations were authorized by the medical staff and conducted on behalf of the medical staff. (CP 185-92; 209-11; 586-88; 592-94; 596-98).

The Plaintiff appears to be making the argument that the medical staff at Quincy Valley Medical Center is not a regularly constituted committee. Such a claim is puzzling in light of the fact the Plaintiff offered no evidence whatsoever to demonstrate it is not a regularly constituted committee. On the other hand, substantial evidence was submitted demonstrating in fact it is a regularly constituted committee and that one of its functions was peer review and/or quality care review. (CP 210; 586-87; 592-93; 596-97).

2. **These Established Facts Mandate The Application of RCW 4.24.250**

The real crucial issue in this case is whether the medical staff at Quincy Valley Medical Center was a regularly constituted review committee or board of the hospital. The other critical issue is whether the investigations in question were conducted by the authority of the medical

staff. Resolution of those two issues in the affirmative mandates the application of RCW 4.24.250 and a ruling that the documents at issue are privilege.

A review of the case law construing RCW 4.24.250 establishes these issues in QVMC's favor. The cases the Plaintiff cites to this Court to support its argument that RCW 4.24.250 does not apply in this case are actually supportive of QVMC's position. These cases are primarily Coburn v. Seda, 101 Wn.2d 270, 677 P.2d 173 (1984); Anderson v. Breda, 103 Wn.2d 901, 700 P.2d 737 (1985); and Adcox v. Children's Orthopedic Hospital, 123 Wn.2d 15, 864 P.2d 921 (1993). We will address these cases in chronological order.

The actual holding in Coburn v. Seda, 101 Wn.2d 270, 677 P.2d 173 (1984) was that the privilege may apply. However, the court concluded there was not sufficient evidence presented whether the committees in question were regularly constituted committees. Id. at 279).

The important holding of the Supreme Court in Coburn is that in making a determination whether a privilege applies the court should consider all relevant evidence. The court stated:

In making this determination (determination whether the committee is a regularly constituted committee), the trial court may wish to consider, in addition to other relevant evidence, the guidelines and standards of the joint commission on the accreditation of hospitals and the

bylaws and internal regulations of Kadlec Hospital. These materials may aid the trial court in ascertaining the organization and function of the committee as well as whether it is 'regularly constituted.'

Id. at 278.

Thus, under that holding the bylaw provisions from other hospitals in the state of Washington are relevant to this inquiry. Moreover, here QVMC submitted its Bylaws and internal policies. This was not done in any of the other cases that Plaintiff relies upon. QVMC's Bylaws and internal policies demonstrate that in fact provisions of the statute are met and that the medical staff is a regularly constituted committee whose duty it is to evaluate the competency and qualifications of members of the medical staff and to evaluate the quality of patient care. (CP 136-39; 148-51; 159-63; 186-210; 587-93; 597).

As noted above, relevant evidence that should be considered in this case is the bylaws from other hospitals in the state of Washington. Those bylaws reveal that QVMC's corrective action procedure contained in Article VIII of its Bylaws is essentially a uniform procedure used by all hospitals. (CP 148-49; 408-98). It is not a procedure unique to QVMC. The only difference is that at QVMC, because of its small size, the whole medical staff is involved in the corrective action process rather than a subcommittee of the medical staff such as a medical executive committee

or credential committee. (CP 587). There can be no dispute that both investigations were done in part pursuant to QVMC's corrective action plan, Article VIII. (CP 186-87; 190; 192; 210; 587; 593). Furthermore, the relevant evidence demonstrates this is how quality assurance reviews are done by regularly constituted committees throughout the state. (CP 408-98).

The Coburn decision is also important because it has excellent language describing the strong policy purpose for the quality review process. The Coburn court quoted with approval language from another case which states:

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluations of clinical practices is a *sine qua non* of adequate hospital care . . . Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.

Id. at 275, quoting from Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249, 250 (D.D.C. 1970), affirmed 479 F.2d 970 (D.C. Cir. 1973).

The decision in Anderson v. Breda, 103 Wn.2d 901, 700 P.2d 737 (1985) is also supportive of QVMC's position in this case. The actual holding in Breda is simply that the ultimate decision of a hospital

committee to limit, restrict or revoke a physician's privileges is not privileged pursuant to the statute although the proceedings are. Id. at 907.

The Breda case points out that whether the privilege of RCW 4.24.250 applies is a simple issue. There are only two components that must be met. The Breda court held:

Application of RCW 4.24.250 is only appropriate when two components are present. First, RCW 4.24.250 is only applicable if the information sought has been generated in a regularly constituted committee or board of the hospital whose duty it is to review and evaluate the quality of patient care or the competency and qualification of members of the profession. . . . In determining whether a hospital committee is properly classified as a regularly constituted review committee, the organization and function of the committee may be examined in light of the guidelines and standards of accreditation bodies, and the organizational precepts of the hospital itself . . . .

The second component is that only the proceedings, reports and written records of such regularly constituted committees are immune from discovery.

Id. at 905-06 (citations omitted). (The second component is not applicable here).

Breda is also important because it clarifies that not only the report of proceedings of the committee itself are privileged, but also the reports of agents of the committee. "Second, the statute makes privileged (or protects from discovery) the 'proceedings, reports, and written records' of quality review committee proceedings, along with the records of

committee members and agents.” Id. at 904-05. (Emphasis supplied).

Thus, the Breda court clearly recognized the quality review committee could delegate part of its function to agents and reports generated by the agents would also be privileged.<sup>2</sup>

Thus, pursuant to the Coburn and Breda decisions, the key issue is whether reviews were conducted by a regularly constituted committee or board of the hospital whose duty is to review and evaluate the quality of patient care or the competency or qualifications of medical staff members. QVMC undisputedly established those elements. The evidence submitted on these issues was overwhelming. (CP 186-87; 209-10; 586-87; 592-94; 596-98).

Perhaps the most succinct un rebutted and conclusive evidence on this issue is contained in the Declaration of B. Mark Vance, M.D. Dr. Vance was acting as the Chief of Staff during these investigations. Dr. Vance states in his Declaration:

I can attest that the investigations were conducted according to the hospital Bylaws. The medical staff, acting as a peer review body, authorized the investigations, and

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<sup>2</sup> Even the decision in Adcox v. Children’s Orthopedic Hospital, 123 Wn.2d 15, 864 P.2d 921 (1993) is supportive of QVMC’s position. The holding in Adcox regarding the quality assurance review simply found that the hospital produced no evidence that at the time of the investigation it had in place a regularly constituted review committee. Id. at 32. This is not the case here. QVMC has produced a plethora of evidence on the issue that the medical staff at QVMC was a regularly constituted review committee at the time of this investigation. (CP 134; 136; 139; 148-49; 159; 163; 186; 210).

the investigations were carried out by members of the medical staff and the Board of Commissioners.

Because of its small size, the hospital has no executive committee. The medical staff is a committee of the whole. The medical staff itself reviews appointments, and all peer review is done by the medical staff.

(CP 210, lines 11-16, 24-26. Also, dispositive of this issue is CP 593, lines 11-34, CP 597, lines 11-34).

QVMC submits that the facts related to the issue were not rebutted and that it produced conclusive evidence to establish the facts necessary for the privilege to apply. Thus, this Court should reverse the trial court and grant judgment in favor of QVMC. However, if this Court is not willing to make that ruling, at a very minimum, the case should be remanded because there are material issues of fact relating to these issues. Of course, all facts and reasonable inferences from those facts must be construed in a light most favorable to QVMC. Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); Leaverton v. Surgical Partners, 160 Wn. App. 512, 517, 248 P.3d 136 (2011).

**D. RCW 4.24.250 DOES NOT REQUIRE THAT ONLY PHYSICIANS BE INVOLVED IN THE INVESTIGATION OF OTHER PHYSICIANS**

The sole basis for the trial court's decision that RCW 4.24.250 did not apply was the trial court's *sua sponte* ruling that under a "peer review" proceeding only physicians can be involved in the investigation of other

physicians. The Plaintiff, after not raising this issue at the trial court level, now attempts to argue in support of the court's ruling.

However, in all due respect, the trial court's ruling, and the Plaintiff's belated arguments in support of that argument, make no common sense and are not practical. It is not realistic to expect that only physicians can be involved in all aspects of an investigation involving serious concerns about a physician's competency. It is necessary for several people to be involved in the investigation and initial decision-making process so there are some differing opinions involved. A busy practicing physician cannot do all the interviews of witnesses, obtain from medical records potentially all pertinent records relevant to the case, review those records, and do all the other things that may be necessary in an investigation involving serious concerns about a physician's ability to provide safe patient care.

This Court in interpreting RCW 4.24.250 "must also avoid constructions that yield unlikely, absurd, or strained consequences." City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009); Olympic Tug & Barge, Inc. v. Washington State Department of Revenue, \_\_\_\_ Wn. App. \_\_\_\_, \_\_\_\_ P.3d. \_\_\_\_ (WL 3795759 2011). With all due respect, the interpretation of the statute as the trial court suggested, and is now belatedly argued by the Plaintiff, will lead to absurd and unlikely

consequences. It has been demonstrated that many hospitals in their corrective action plans involve non-physicians in the process. Almost all corrective action plans that result in a fair hearing involve non-physicians because the governing board of the entity is involved in that decision. (CP 404-98; 541-43; 562-64). A ruling that only physicians can be involved in reviewing competency concerns of a physician in order for the privilege of RCW 4.24.250 to apply would essentially mean that the privilege does not apply to the process many hospitals in the state of Washington follow. This would not be a proper construction of RCW 4.24.250

The Plaintiff has cited no cases that support this theory. QVMC is aware of no case from any jurisdiction in the United States that has rendered such a rule of law. Significantly, such a ruling ignores the plain and unambiguous language of RCW 4.24.250. The statute states in pertinent part:

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 . . . . (Emphasis supplied).

The statute clearly contemplates and authorizes the use of non-physicians as staff personnel and investigators of a committee or board.

“Statutes that are clear and unambiguous do not need interpretation . . . .” “Statutes must be interpreted and construed so that all language

used is given effect, with no portion rendered meaningless or superfluous.” Cortez-Kloehn v. Morrison, 162 Wn. App. 166, 170, 252 P.3d 900 (2011) (citations omitted). As noted above, the Washington Supreme Court in Anderson v. Breda, 103 Wn.2d 901, 700 P.2d 737 (1985) recognized that the privilege afforded by RCW 4.24.250 not only extends to committee members but also agents of the committee. Id. at 904-05.

A ruling that RCW 4.24.250 applies only if a physician is reviewing another physician does not give effect to the plain and unambiguous language of the statute and renders a portion meaningless. The portion of that statute that declares as privileged records generated by staff members, employees, and investigators of a committee establishes that non-physicians can be involved in a review of a physician and the reports and documents generated by these non-physicians are likewise privileged.

**E. THE PRIVILEGE IN RCW 70.44.062 APPLIES AND PROVIDES ADDITIONAL GROUNDS TO SUPPORT QVMC’S DECISION**

It is initially important to emphasize that the Plaintiff does not contest and apparently concedes that RCW 70.44.062(1) falls under the “other statute exemption.” This exemption is created by RCW

42.56.070(1). Thus, the only issue for this Court to decide is whether the exemption created by RCW 70.44.062 applies here.

The Plaintiff for the first time in this appeal raises a number of arguments as to why this statute should not apply. In making these arguments, the Plaintiff has ignored or misapplied the records and facts in evidence in this matter.

The Plaintiff first claims that the hospital board was not involved in these investigations. This ignores the unrefuted facts. “The Board of Commissioners was involved in the two investigations conducted of Dr. Cornu-Labat.” (CP 186; 210). This factual issue was never contested. Also, one of the members of the Board of Commissioners was involved not only because he was a State Patrol Officer, but because he was a member of the Board of Commissioners. (CP 209; 587; 593; 597).

The Plaintiff knows very well that Mr. Gonzalez was involved because he was a member of the Board of Commissioners. The contemporaneous records which include a recording of the meeting of August 4, 2009 demonstrate this. The Plaintiff was present at that meeting. Statements made at that meeting included: “We are the team investigating the complaint. Dr. Vance being the Vice-Chief of Medical Staff, Anthony Gonzalez representing the Board of Commissioners, Chair of Personnel Committee . . . . (CP 192). (Emphasis supplied).

The Plaintiff then makes the unsupported argument that the statute only applies to formal commissioners meetings. Again, this ignores the rules of statutory construction and the plain and unambiguous language of the statute. These rules have been addressed above. The statute clearly applies to all meetings, proceedings, and deliberations not only of the Board of Commissioners but of its staff or agents. Clearly, this statute is not limited to formal meetings of the Board of Commissioners.

The Plaintiff then proceeds to make the argument that the hospital administrator or superintendent is not an agent of the Board of Commissioners of the public hospital district. This ignores the Washington statute that creates public hospital districts that provides that the Board of Commissioners hire and oversee the actions of the hospital administrator or superintendent. RCW 70.44.060(10) and 70.44.070. These statutes demonstrate in fact the superintendent or administrator of a public hospital district hospital is the agent of the Board of Commissioners. Moreover, this is established by the hospital Bylaws. (CP 134-35).

The statute provides that the meetings of the staff or agents of the Board of Commissioners “concerning the granting, denial, revocation, restriction, or other consideration of the status of the clinical or staff privileges of a physician or other healthcare provider shall be

confidential.” (Emphasis supplied). Plaintiff attempts to argue that the investigation and meetings here did not concern the granting, denial, revocation, restriction or other consideration of the Plaintiff’s clinical or staff privilege status. This ignores the clear language of Article VIII, the provision of the Bylaws that the medical staff was utilizing. Subparagraph 5 of that provision states:

The action of the medical staff on request for corrective action may be to reject, modify or approve the request for corrective action. Corrective action may be to issue a warning, a letter of admonition, or letter of reprimand, to impose terms of probation or requirement of consultation, to recommend reduction, suspension or revocation of privileges.

These meetings obviously did concern the status of the Plaintiff’s clinical or staff privileges. (CP 148). Alternatively, unresolved material factual issues exist and remand to resolve these issues would be appropriate.

**F. THIS COURT SHOULD ENFORCE PLAINTIFF’S AGREEMENTS**

Once again, the Plaintiff does not fully or accurately address QVMC’s argument that the agreements the Plaintiff specifically made should be enforced. The Plaintiff only refers to his employee agreement and contends that it only prohibits him from disclosing confidential information. The Plaintiff then makes the argument that he is really not

disclosing any confidential information. He is simply seeking confidential information from the hospital. (Plaintiff's Brief at 39).

This argument once again completely ignores one of the specific agreements made by the Plaintiff. That agreement was that he be bound by the Bylaws. (CP 196; 199). The bylaws do not merely state that members of the medical staff must keep information confidential. The Bylaws are much broader.

The pertinent Bylaw provision is Article XIII. It is very broad.

One of the pertinent provisions is subparagraph 1 that provides:

That any act, communication, report, recommendation, or disclosure, with respect to any such member (member of the medical staff), performed or made in good faith and without malice, and at the request of an authorized representative of these or any other healthcare facilities, for the purpose of achieving and maintaining quality patient care in this or any other healthcare facility, shall be privileged to the fullest extent permitted by law.

As one can see, this is a very broad provision. There are other very broad provisions in Article XIII. (CP 165-66).

The Plaintiff also states he made his request as a member of the public. However, Plaintiff was not merely a member of the public. At the time he made his requests, he was under contract with Quincy Valley Medical Center and he was also a member of the medical staff of the hospital and subject to its Bylaws. (CP 187-88; 588-89). This Court will

be setting extremely bad public policy if it were to allow physicians and other members of the hospital medical staff to ignore with impunity their promises that information generated in the hospital, including information about a member of the medical staff's ability to provide safe patient care, is strictly confidential.

**G. THE PRIVILEGE PROVIDED BY RCW 70.41.200**

Again, the cases relied upon by the Plaintiff that have addressed the issue of the Washington Statutory Quality Review Privilege is in the context of civil medical malpractice litigation are supportive of QVMC's position. Those cases demonstrate that QVMC should produce its Bylaws and other policies and procedures in order to demonstrate that the privilege created by RCW 70.41.200 applies. This has been accomplished in this case. (CP 132-76; 253-67; 285-87).

These Bylaws and policies establish the medical staff as a whole is a quality improvement committee. One of its functions at the hospital is to review the services rendered in the hospital both retrospectively and prospectively in order to improve the quality of medical care to a patient and to prevent medical malpractice. See, RCW 70.41.200(1)(a). (CP 134; 136-37; 148-50; 163; 255-57; 259-264; 266-67). This is perhaps emphasized by statements appearing in the policy entitled "Quincy Valley

Medical Center Organizational Quality Plan.” (CP 253-61). This statement states:

All information related to organizational performance improvement activities performed by the medical staff or hospital personnel in accordance with this plan are confidential and protected by WAC (sic. RCW) 70.41.200 and the Federal Health Care Quality Improvement Act of 1986.

(CP 259).

**H. THERE WAS NO WAIVER**

Plaintiff contends that QVMC’s submission of documents to support pleadings where QVMC vehemently asserted that a privilege existed somehow waived the privilege. Such an argument makes no logical sense. “A party against whom waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his action must have been inconsistent with any intent other than to waive it.” Spokane County v. Specialty Auto, 115 Wn.2d 238, 248, 103 P.3d 792 (2004). “Waiver is the ‘intentional abandonment or relinquishment of a known right.’ . . . It must be shown by ‘substantial evidence’ of unequivocal acts or conduct showing intent to waive, ‘and the conduct must also be inconsistent with any intention other than to waive.’” Guillen v. Pierce County, 127 Wn. App. 278, 285, 110 P.3d 1184 (2005) (citations omitted). Finally, “[i]mplied waiver will not be inferred; the party claiming waiver

must present unequivocal acts or conduct that show an intent to waive.”  
Vehicle/Vessel LLC v. Whitman Cty., 122 Wn. App. 770, 778, 95 P.3d  
394 (2004).

Submitting documents in support of pleadings where a party vehemently is asserting a privilege is certainly inconsistent with the intent to waive that privilege. The plaintiff has not submitted any substantial evidence of QVMC’s unequivocal acts or conduct demonstrating intent to waive the privilege. The Plaintiff’s argument that there has been a waiver is untenable.

However, the Plaintiff’s admission that he received all documents by the time of the hearing has important ramifications. All claims for penalties and fees should terminate as of that date, July 6, 2010.

### **III. CONCLUSION**

QVMC submitted undisputed facts demonstrating that the privilege provided by RCW 4.24.250 applies in this case. The medical staff at QVMC was a regularly constituted committee with one of its functions being to evaluate the quality of patient care or the competency of members of the medical staff. The medical staff requested that the Plaintiff be investigated. The information sought was generated on behalf of the medical staff and thus was generated in a regularly constituted committee.

The necessary elements of RCW 4.25.250 have been established and the privilege applies.

Thus, this Court should reverse the decision of the trial court. Alternatively, at a minimum, this case should be remanded to the trial court to resolve the factual issues regarding the applicability of RCW 4.24.250 and other privilege issues presented in this case.

Respectfully submitted this 26<sup>th</sup> day of September, 2011.

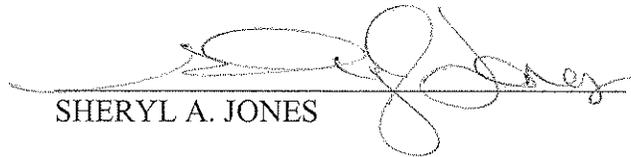
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**CERTIFICATE OF SERVICE**

I, SHERYL JONES, declare under penalty of perjury of the laws of the state of Washington, that on the 26<sup>th</sup> day of September, 2011, I sent via facsimile and deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing APPELLANT'S REPLY BRIEF to the following:

**Counsel for Defendant/Plaintiff:**

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SHERYL A. JONES