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

**No. 324362**

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

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**GASTON CORNU-LABAT,**

Respondent

v.

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

Petitioner

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**DEFENDANT QUINCY VALLEY HOSPITAL'S  
REPLY BRIEF**

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## **I. INTRODUCTION**

The overwhelming laudatory goal of a peer review/quality assurance privilege is to promote patient safety. One of the cornerstones of that beneficial philosophy is that the identity and allegations of the healthcare provider raising patient safety concerns about another healthcare provider should be carefully safeguarded. This makes only common sense because a healthcare provider would be reticent to make allegations against a fellow healthcare provider if her or his identity and allegations were obtainable. The person making such allegations would potentially be ostracized and also subject to retribution. It is precisely this type of information that the plaintiff requests you to divulge thus undermining the foundation of this socially beneficial privilege.

One of the crucial issues in this case involves the interpretation of RCW 42.24.250. Through a series of cases commencing with the 1984 case of Coburn v. Seda, 101 Wn.2d 270, 677 P.2d 173 (1984), and including the Supreme Court's decision in this case, the Washington Supreme Court has provided guidance to Washington hospitals regarding how they can establish the privilege provided by that statute. Based upon this guidance, Quincy Valley Medical Center

(hereinafter “QVMC”) has presented at various stages of these proceedings at least one declaration from five different individuals. These are all of the individuals involved in the two investigations with the exception of the Plaintiff. QVMC also presented a complete set of the hospital bylaws, hospital policies, declarations from individuals involved in the peer review process at other hospitals, and portions of bylaws from various other Washington hospitals. In response to this overwhelming evidence the Plaintiff really has presented nothing other than an affidavit containing his version of the facts submitted early on in the proceedings. Accordingly, the Plaintiff’s contention that QVMC has not satisfied its burden in this case is untenable and the evidence it has presented to support its position is insurmountable.

As established by previous briefing, this appeal involves two investigations. For the convenience of the Court the first one will be referred to as the “intoxication investigation” and the second will be referred to as the “unprofessional conduct investigation.” The policy titled “Dealing with Disruptive Behavior Among Healthcare Practitioners,” CP 273-75, shall be referred to as the “Disruptive Practitioner Policy.”

## II. REPLY TO PLAINTIFF'S ARGUMENT

### A. Plaintiff's Misstatement of the Facts Need to be Addressed

In all due respect, the Plaintiff's reply brief contains many factual inaccuracies. In this section we will clarify some of the significant incorrect factual contentions of the Plaintiff.

In several locations in the Plaintiff's reply brief the Plaintiff states that the people involved in the two investigations did not have the power to immediately suspend the Plaintiff's privileges and that type of action would ultimately have to rest with the Board of Commissioners. (Plaintiff's Brief at 10, 11). That contention is patently incorrect and ignores the unambiguous language of Article VIII of the Bylaws and the Disruptive Behavior Policy which categorically empower the individuals involved in the process that right. A portion of Article VIII states:

The president of the medical staff, the administrator, or his designee . . . shall each have the authority, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the privileges of a member, and such summary suspension shall become effective immediately upon imposition. (CP 149). (Emphasis supplied).

The Disruptive Behavior Policy provides in pertinent part:

The administrator will address disruptive behavior by healthcare providers with privileges. A single egregious incident, . . . may result in immediate suspension of . . . medical staff membership.

...

A single incident of egregiously disruptive behavior or repeated incidents of disruptive behavior shall result in an investigation. Disciplinary action up to suspension without pay may be appropriate pending this process. (CP 273). (Emphasis supplied).

The Plaintiff states at Page 29 of the reply brief that there was no written request for the unprofessional conduct investigation. Plaintiff is well aware that that representation is wrong. “Two separate members of the QVMC medical staff made written requests for corrective action.” (CP 185). (Emphasis supplied).

Plaintiff represents in his reply brief that QVMC did not reply to the Plaintiff’s second and third public records requests and QVMC did not indicate the privilege it was relying upon until after litigation commenced. (Plaintiff’s Brief at 8, 28). Again, this is completely wrong. Plaintiff’s lawyers that were involved in the second and third requests were immediately contacted to discuss the Plaintiff’s request. They were notified that there were statutory privileges that applied

that exempted the information requested by the Plaintiff. (CP 117, 125). Provided this information, they elected not to proceed.

The Plaintiff states at Page 30 of his brief that he was not provided an opportunity to be interviewed by the medical staff as part of the unprofessional conduct investigation. This again is wrong. There was a meeting of the whole medical staff and Dr. Cornu-Labat was invited to that meeting and allowed an opportunity to make a presentation. (CP 531).

Plaintiff at times questions whether the investigations were conducted under the Disruptive Practitioner Policy or Article VIII of the Medical Staff Bylaws. There is no question about this. Both investigations were conducted under both procedures. In other words, the medical staff and Board of Commissioners through its agents conducted the intoxication investigation under both the Disruptive Practitioner Policy and Article VIII and did the same for the unprofessional conduct investigation. (CP 186-87, 190, 191, 530, 536, 540, 637, 638).

At Pages 6 and 7 of Plaintiff's brief, the Plaintiff once again refers to information that is completely irrelevant to this proceeding. It is unclear what Plaintiff attempts to establish by raising this

information that is inappropriate. In response to this inappropriate material, it is important to emphasize that the Washington Department of Health through the Medical Quality Assurance Commission became involved in this matter. The Medical Quality Assurance Commission validated every action taken by Quincy Valley Medical Center and sanctioned the Plaintiff.

Finally, Plaintiff raises some issue regarding which privilege QVMC is relying upon for the investigations. It has been QVMC's position from the outset of this matter and continues to be its position to this day that both the privilege created by RCW 4.24.250 and the privilege created by 70.44.062 apply to both the intoxication investigation and the unprofessional conduct investigation. This Court should deny the Plaintiff's request under both of these privileges.

**B. QVMC'S Medical Staff is a Regularly Constituted Committee Whose Duty it is to Evaluate the Quality of Patient Care**

Amazingly, Plaintiff still unpersuasively attempts to argue that QVMC's medical staff is not a regularly constituted committee of the hospital whose duty it is review and evaluate the quality of patient

care. There can be no question that in fact it is such a committee. (CP 134, 136, 159, 163, 186, 210, 529-30, 535-36, 539-40).

The undisputed fact that the medical staff at QVMC is a regularly constituted committee of the hospital whose duty it is evaluate the quality of patient care inevitably leads to the ultimate ruling that the privilege created by RCW 4.24.250 exempts the documents related to both investigations. Both investigations were done under the auspices and directions of QVMC's medical staff. When the people conducting the investigation were initially deciding whether to summarily suspend the Plaintiff's privileges, they were acting as agents of the QVMC medical staff according to rules and policies mandated by that regularly constituted committee. (CP 209-10, 530, 536, 540, 636-38).

**C. Plaintiff Advocates to Promote Form Over Substance**

The Plaintiff's primary mantra from the commencement of this sojourn through this appeal is that since QVMC did not precisely follow every procedure and step of Article VIII there can be no privilege. This is also the primary argument the Plaintiff presented to the Supreme Court. Thus, resolution of that argument is a simple

matter here. The Supreme Court summarily rejected that argument. “[E]xact compliance with either policy is not pertinent to this case, . . . .” Cornu-Labat v. Hospital Dist. No. 2 Grant County, 177 Wn.2d 221, 234, 298 P.3d 741 (2013). See also, Smith v. Ricks, 798 F.Supp. 605, 610-11 (N.D. CA (1992)); Colwell v. Good Samaritan Community Healthcare, 153 Wn. App. 911, 225 P.3d 294 (2009). The only issues actually presented is whether the criteria of the two statutes are met. Reference to the bylaws and policy are of assistance in this analysis but precise compliance is unnecessary.

Moreover, the Plaintiff’s argument is nonsensical. Plaintiff argues that Article VIII cannot apply to the intoxication investigation because the Plaintiff was not allowed the opportunity to speak to the entire medical staff. Of course he was not allowed to speak to the entire medical staff. After a rapid and thorough investigation that the Plaintiff initiated by requesting it he was exonerated because the investigators concluded that there was not sufficient evidence. There was no reason or purpose to finish the procedures outlined in Article VIII and it would have been a total waste of time and resources. It is well recognized that the law does not require a party to do a useless

act. University Properties, Inc. v. Moss, 63 Wn.2d 619, 622, 388 P.2d 543 (1964).

**D. QVMC Produced Overwhelming Evidence Establishing the Privileges**

In an act of bravado, the Plaintiff argues that QVMC did not produce sufficient evidence to satisfy its burden establishing the privileges of RCW 4.24.250 and 70.44.062. The truth is that QVMC produced an avalanche of evidence to support the privileges.

Following the guidance of the Supreme Court as established in the cases of 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), QVMC produced a plethora of evidence to support application of the two privileges. QVMC produced declarations from every member that participated in the investigations with the exception of the Plaintiff, the complete Medical Staff Bylaws, policies and procedures from the hospital, declarations from persons from other hospitals, and examples of bylaws from other Washington hospitals. (CP 132-68, 185-88, 207-11, 270-75, 529-32, 535-38, 539-42, 391-486, 636-40).

The Supreme Court in Coburn v. Seda, 101 Wn.2d 270, 677 P.2d 173 (1984) stated that a hospital could submit all relevant evidence to support application of the privilege. Id. at 278. QVMC did just that and presented overwhelming evidence to support the privilege.

It is important to emphasize that the Plaintiff produced nothing to contradict or rebut any of this evidence. The only information produced by the Plaintiff was his own declaration at the very commencement of the case. His declaration does not refute, rebut, or address any of the factual statements contained in the materials submitted by QVMC. (CP 30-34). QVMC did indeed establish its burden and then some.

**E. Salutory Policy Considerations Decree Application of the Privileges Here**

This case epitomizes the sound justification for the application of these privileges in the area of healthcare. Legitimate and serious concerns were raised that a physician was not competent to practice and presented a substantial danger to patient safety. It is essential that there is a privilege mechanism for exhaustively investigating such concerns in an open and candid manner. This is only accomplished if

the identity of the persons bringing these concerns to light and the investigation of those concerns are privileged and confidential. Can you imagine how difficult it would be for a nurse to reveal legitimate concerns about a supervising physician if the nurse's identity and concerns raised were not privileged and confidential?

Hospital internal review mechanisms are critical to maintaining quality healthcare. . . . “Candid and conscientious evaluation of clinical practice is a sine qua non of adequate hospital care.” . . . . ‘[E]xternal access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review.’

Cornu-Labat v. Hospital Dist. No. 2 Grant County, 177 Wn.2d 221, 230, 298 P.3d 741 (2013).

The purpose of . . . RCW 4.24.250 . . . is to allow hospitals to effectively and candidly evaluate information concerning the hospital's experience and staff expertise in order to improve the quality of services it provides.

Fellows v. Moynihan, 175 Wn.2d 641, 649, 285 P.3d 864 (2012).

The goal and fundamental purpose of the statute is open discussion during committee investigations . . . . The purpose of this statute is to keep peer review studies, discussions and deliberations confidential.

Anderson v. Breda, 103 Wn.2d 901, 907, 700 P.2d 737 (1985).

It is critical for the safety of patients at QVMC as well as all hospitals in the state that the privilege be recognized here in support of this beneficial policy.

**F. Records of the Intoxication Investigation are Privileged**

**1. RCW 4.24.250 applies and exempts the records sought**

The intoxication investigation in part was performed utilizing Article VIII of the Medical Staff Bylaws. They were not conducted under the Administrator Bylaws or the Board of Commissioner Bylaws, but the Medical Staff Bylaws.

The Medical Staff Bylaws were adopted by the medical staff. (CP 167). The medical staff in those bylaws delegated authority and provided a mechanism for conducting investigations at their request and under their authority. In Article VIII, Section 2, the medical staff as a regularly constituted committee delegated authority to the president of the medical staff and/or the administrator to take actions immediately to summarily suspend a physician. One of the purposes of the intoxication investigation was to determine if the Plaintiff's privileges should be immediately suspended pursuant to this provision. (CP 208, 638).

As unequivocally established above the medical staff is a regularly constituted committee whose duty it is to evaluate the competency and qualifications of physicians. The medical staff through the Medical Staff Bylaws authorized Mr. Merred and Dr. Vance as acting president of the medical staff to investigate the Plaintiff and decide whether his privileges should be summarily suspended. In doing this investigation, these two individuals were acting as agents of the medical staff because they were following the medical staff's written policies and directives. These two individuals acting as agents for the medical staff conducted an investigation and created and collected records for the medical staff. The privilege of RCW 4.24.250 applies and the Plaintiff is not entitled to obtain the records and investigation material collected and generated pursuant to that investigation. Cornu-Labat v. Hospital Dist. No. 2 Grant County, 177 Wn.2d 221, 235, 298 P.3d 741 (2013).

Moreover, one of the guidelines the investigators were adhering to when conducting the intoxication investigation was the Disruptive Practitioner Policy. That policy specifically provides that the chief of staff should be involved in the investigation. The chief of staff acts as the administrative official of the medical staff. (CP 157).

Thus, he is acting on behalf of the medical staff. In other words, the medical staff is conducting the investigation through the chief of staff. It is also important to point out this policy requires that the meetings be documented in writing. (CP 275).

**2. RCW 70.44.062(1) applies and exempts the records sought**

At the outset of this discussion it is important to emphasize that the Plaintiff has mischaracterized the holding of the Supreme Court related to RCW 70.44.062. The Plaintiff represents in his brief on several occasions that the Supreme Court in interpreting this statute ruled that it applies only if two components are met. Those components being: “(1) the records are ‘the minutes of a formal meeting of the board staff or agents that concern the status of Dr. Cornu-Labat’s clinical privilege’; and (2) are not records ‘generated during the general investigation into Dr. Cornu-Labat’s alleged misconduct.’” Although the first component is correct, the second clearly is not.

The Supreme Court alluded that if a staff person or agent of the Board of Commissioners was conducting an informal investigation the privilege may not apply. The undisputed facts in this case

demonstrate that was not the case here. The intoxication investigation was a formal investigation conducted pursuant to two different written guidelines. It was conducted pursuant to the Disruptive Practitioner Policy as well as Article VIII. There were only formal meetings conducted. The people being interviewed were informed of the purpose of the investigation and under what authority it was being conducted. Only formal minutes were collected and maintained. (CP 186-87, 190, 192, 530, 637).

The Supreme Court actually ruled that the privilege of RCW 70.44.062 applies if three requirements are met. Those three requirements as applicable to this case are as follows: (1) the requested records constitute proceedings of the Board of Commissioners, staff or agents; (2) the records are formal records or minutes; and (3) the meeting and records concern the status of the Plaintiff's clinical privileges. *Id.* at 239.

Those requirements are met. The Plaintiff does not dispute that Mr. Merred and Dr. Vance were staff or agents of the Board. The records at issue are minutes from a formal meeting. These meetings concerns Plaintiff's clinical privileges and whether those privileges

should be immediately suspended or that a request for suspension or revocation occur through a more deliberate process.

It is illogical to argue that formal investigatory meetings concerning a healthcare provider's privileges are not privileged under this statute. Arguably, the policy reasons that support the privilege under this statute are identical to those that support the privilege under RCW 4.24.250. The frank, open, and candid discussions that occur during the formal investigatory process would be stifled if the privilege was not recognized.

**G. Records of the Unprofessional Conduct Investigation are Privileged**

**1. RCW 4.24.250 applies and exempts the records sought**

The same analysis of this statute contained above regarding intoxication investigation applies equally here. But there is even additional evidence and perhaps more compelling evidence that supports application of the statutory privilege for this investigation. In addition to the medical staff authorizing it through the Disruptive Practitioner Policy and Article VIII of the Medical Staff Bylaws, the medical staff formally met and specifically authorized it. (CP 209-10,

530, 536-37, 540-41, 636-38). It appointed three investigative agents of the medical staff.

Thus, the unrefuted evidence is that “. . . Dr. Vance, Mr. Merred, and Mr. Gonzales were acting as agents of a ‘regularly constituted review committee or board of (the) hospital . . . whose duty it (was) to evaluate the competency and qualifications of members of the profession.’” *Id.* at 235. Thus, the records created by their investigation are exempt pursuant to RCW 4.24.250.

**2. RCW 70.44.062 applies and exempts the records sought**

The records generated as part of the unprofessional conduct investigation are also privileged pursuant to RCW 70.44.062. These documents constitute proceedings of the staff or agents of the Board of Commissioners. “QVMC’s bylaws state that the hospital administrator (Mr. Merred) is ‘appointed by the board to act on its behalf’ and that the medical staff is hired by the board and subject to its ultimate authority. . . . A member of the board, Mr. Gonzalez, was active in (this) investigation. *Id.* at 238.

Pursuant to RCW 70.44.062, records generated during formal meetings held by staff persons or agents of the Board concerning the

revocation restriction or other consideration of the status of the Plaintiff's staff privileges are exempt and privileged. One of the key terms in the statute is "concerning." It is appropriate we look to the common dictionary definition for that term. Cornu-Labat v. Hospital District No. 2 Grant County, 177 W.2d 221, 231, 298 P.3d 741 (2013). The definition of concern is: "to pertain or relate to; be of interest or importance to; affect." The American Heritage Dictionary 275 (New College Edition 1976). The proceedings of the three agents of the board related to the unprofessional conduct investigation concerned the revocation or restriction or other consideration of the Plaintiff's clinical staff privileges. The whole purpose of the proceedings was to determine first whether the Plaintiff's privileges should be summarily suspended. Secondly, whether the privilege should be revoked or restricted after additional processes were followed.

### **III. CONCLUSION**

The facts and circumstances surrounding this matter epitomize the type of proceedings and documents that should be privileged. Serious and extremely significant concerns were raised about a physician at the hospital that significantly impacted patient safety. Individuals acting on behalf of the board and medical staff conducted

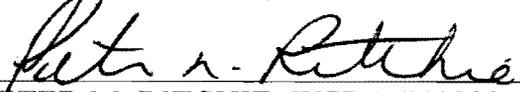
formal investigation into these patient safety issues. Formal minutes were maintained of this review process. It is essential for the proper functioning of QVMC, as well as all hospitals in the state of Washington, that the identity of people providing information, and the information gathered and collected be privileged so that there can be candid and open discussions related to the competency of healthcare providers. Both RCW 4.24.250 and 70.44.062 were promulgated in part to enhance and support this praiseworthy public policy.

QVMC has overwhelmingly established that the criteria of both statutes are met and that they apply. Thus, the information sought by the Plaintiff is exempt from disclosure under the Public Record Act and is privileged. This Court should rule that summary judgment should have been granted in favor of QVMC and dismiss this matter.

Respectfully submitted this 16 day of December, 2014.

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**CERTIFICATE OF TRANSMITTAL**

I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

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DATED this 17<sup>th</sup> day of December, 2014 at Yakima, Washington.

  
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SHERYL A. JONES