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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**

GASTON CORNU-LABAT,

Plaintiff/Appellee,

v.

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

Defendant/Appellant.

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

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I. INTRODUCTION

Rarely, if ever, is there an appeal from a summary judgment where both parties agree the facts are undisputed and the law to be applied to the undisputed facts has already been clarified by the Washington Supreme Court. This is such a case.

The Supreme Court's opinion in Cornu-Labat v. Hospital District No. 2 Grant County, 177 Wn.2d 221, 298 P.3d 741 (2013) where Quincy Valley Medical Center ("QVMC") was found to be the prevailing party mandates resolution of this case in favor of QVMC. Plaintiff seeks disclosure through the Public Records Act ("PRA") of hospital records generated during two investigations into his competency as a physician while at QVMC in 2009. The Cornu-Labat decision establishes that the investigative records Plaintiff requested are exempt from disclosure both under RCW 4.24.250 and RCW 70.44.062. The trial court misinterpreted the Supreme Court's directive and thus failed to apply the law. The decision of the trial court should be

reversed and this Court should remand with instruction to the trial court to enter summary judgment in favor of QVMC.

In analyzing the issues presented here there are some points that should be kept in mind. First, one of the issues presented in both investigations was whether Plaintiff's privileges should be summarily suspended. Thus, both hearings involved issues relating to his privileges. The second thing to keep in mind is that both investigations were formal investigations where formal minutes were prepared. This was not an impromptu meeting between hospital officials where notes were scribbled on a napkin.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of March 28, 2014, denying QVMC's Motion for Summary Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court err by denying summary judgment where there are no material disputes of fact and no dispute as to what law applies? [Assignment of Error 1.]

- B. Are the records from both investigations exempt from disclosure under RCW 4.24.250 when it is indisputable that the investigations were prepared for a regularly constituted committee? [Assignment of Error 1.]
- C. Are the records from the first investigation exempt from disclosure under RCW 70.44.062 when it is indisputable that the records were generated during confidential meetings of agents of the QVMC board concerning Plaintiff's clinical staff privileges? [Assignment of Error 1.]

IV. STATEMENT OF THE CASE

This case involves attempts by Plaintiff Dr. Gaston Cornu-Labat through various PRA requests to obtain records of two investigations into his conduct and competency while he was employed by QVMC. QVMC contends these records are exempt from disclosure under RCW 4.24.250 and RCW 70.44.062. This case has been pending since 2009. It has already been appealed and the Supreme Court has already addressed and clarified the law that is dispositive of this matter. The Supreme Court ruled that those statutes can provide an exemption, and remanded to allow the trial court to determine their application based on the established facts.

The following is a summary of the relevant established facts. Plaintiff did not dispute these facts at the trial court level, and in fact conceded there are no disputed facts. (CP 643).

A. Background Facts Relating to the Hospital

QVMC is a public hospital district. (CP 771). The hospital is very small. (CP 609, 616). It has a Board of Commissioners (the “Board”) and a Medical Staff. (CP 616, 771). At the time of the events pertinent to this case, the Medical Staff consisted of four physicians with voting rights and two nonvoting ARNP’s. (CP 616). It should be noted that the three physicians other than Plaintiff submitted unrefuted declarations to support the hospital’s summary judgment motion. (CP 603-606, 608-611, 613-617).

Because the Medical Staff is so small, QVMC does not have a specific executive or credentialing committee, as do larger hospitals. (CP 609, 616). Instead, the entire Medical Staff is a committee of the whole: it performs itself the functions that an executive or credentialing committee would perform at a larger

hospital, such as reviewing appointments and conducting peer review/quality improvement where it reviews the conduct of physicians and any concerns about physicians that can impact patient safety. (CP 609, 616, 770). That is an undisputed fact. Indeed, the Supreme Court recognized that “the entirety of the medical staff performs the functions that a committee of this sort [*i.e.*, an executive or credentialing committee] would perform at a larger hospital.”). Cornu-Labat, 177 Wn.2d at 234. In other words, the Medical Staff as a whole operates as the credentialing/medical executive committee. That is a crucial fact in this case.

It should also be noted that the Board is also involved in the appointment, peer review, and privileging process at QVMC, and is ultimately responsible for final decisions regarding the privileging or disciplining of Medical Staff members. (CP 616, 771).

QVMC’s Bylaws govern the Medical Staff. (CP 132-134). It is undisputed that the Medical Staff is a regularly constituted

committee at QVMC. The Medical Staff meets on a regular basis. (CP 609). One of the duties of the Medical Staff is to evaluate the competency and qualifications of Medical Staff members, such as Plaintiff, and review and evaluate the quality of patient care. (CP 134, 136, 148-150, 609).

The Supreme Court has already established that the Medical Staff at QVMC is a regularly constituted committee:

Because QVMC is a small district hospital, it does not have a specific executive or credentialing committee. Instead, the entirety of the medical staff performs the functions that a committee of this sort would perform at a larger hospital. The medical staff meets on a regular basis. One of the duties of the medical staff under the QVMC bylaws is to evaluate the competency and qualifications of medical staff members.

Cornu-Labat, 177 Wn.2d at 234 (emphasis added).

QVMC has an Administrator. In 2009 (and at present) the Administrator was Mehdi Merred. (CP 636). The Administrator is “appointed by the [QVMC] Board [of Commissioners] to act in its behalf.” (CP 135). The Bylaws also state that the Medical

Staff is hired by the Board and subject to its ultimate authority. (CP 134).¹ There is no dispute in this regard.

It should also be noted that the Board, Administrator, and the Medical Staff are all jointly responsible for and interact with each other in regard to quality assurance matters at the hospital:

[I]t is recognized that the Medical Staff is responsible for the quality of medical care in the hospital and must accept and discharge this responsibility, subject to the ultimate authority of the District's Governing Body, and that the cooperative efforts of the Medical Staff, the Administrator and the Governing Body are necessary to fulfill the District's obligation to its patients.

(CP 134).

QVMC has several mechanisms for dealing with unprofessional or disruptive behavior among members of the Medical Staff. One such mechanism is through Article VIII of the Bylaws. Article VIII delineates a formal procedure for corrective or disciplinary action. (CP 148-150).

¹ The relevant portions of the Bylaws are discussed at length in QVMC prior submissions, if the Court should like to review them. (CP 98-102, 136-176).

Important to this appeal, Article VIII(2)(a) authorizes the Chief of the Medical Staff and the Administrator to work in conjunction to summarily suspend a physician's privileges. (CP 149). This is also a critical fact relevant to the investigations that took place.

Another mechanism is QVMC's disruptive physician policy. (CP 273-275). This policy authorizes the Administrator or Chief of Staff to unilaterally conduct investigations on behalf of the Medical Staff, and take corrective action relating to a physician's privileges, including revoking or suspending a physician's privileges as a penalty for violating the policy. (CP 273-275). It is undisputed the Medical Staff approved the policy. Thus, the policy is the product of a regularly constituted committee. This fact cannot be disputed.

There is no dispute that QVMC conducted the subject investigations pursuant to both mechanisms. This is established by several unrefuted declarations. (CP 609, 637-638). Perhaps more significantly, this is established by the contemporaneous

meeting minutes created long before the commencement of this litigation. (CP 774, 777).

It should be emphasized that these facts are established by everyone that participated in the process. (CP 185-88, 207-11, 529-32, 535-38, 539-42). Plaintiff never disputed or contested the factual statements in these various declarations. Thus, the facts established therein are unrefuted and verified for this appeal.

B. Background Facts Relating to the Investigations

Plaintiff is a physician. (CP 669). QVMC employed Plaintiff as a surgeon between 2007-2010. (CP 644). In July-August, 2009, Plaintiff was the subject of several complaints by different members of the Medical Staff. (CP 770). The complaints expressed serious concerns as to Plaintiff's competency and ability to practice medicine, and resulted in two corrective action investigations. (CP 636-638, 770). These concerns were so serious that members of the Medical Staff

requested the immediate temporary suspension of Plaintiff's active clinical privileges at QVMC. (CP 770-771).

At the time of the investigations Plaintiff was serving as Chief of the Medical Staff, Mehdi Merred was the Administrator, and Dr. Mark Vance was the Vice-Chief of the Medical Staff. (CP 613, 636).² The latter two individuals are important because they were involved in both investigations.

1. The First Investigation—Alleged Intoxication

The first investigation arose from a complaint that Plaintiff was intoxicated while on his rounds at the hospital on July 23, 2009. (CP 637). This was obviously a serious complaint because it involved concerns for patient safety. (CP 637).

Plaintiff requested an immediate investigation. (CP 637). Pursuant to that request, and because the complaint involved patient safety, Dr. Vance (as acting Chief of the Medical Staff)³

² The Bylaws use the terms "President" and "Vice-President" of the Medical Staff (CP 157-158). Other documents and testimony use the terms "Chief" and "Vice-Chief." (CP 588, 613). These terms are interchangeable. For continuity, the terms "Chief" and "Vice-Chief" are used throughout.

³ Dr. Vance as Vice-Chief assumed the duties of the Chief (then Plaintiff) pursuant to Article X(4)(b)(2) of the Bylaws, since Plaintiff was under investigation and unable to act as President. (CP 158).

conducted a corrective action investigation on July 24, 2009 pursuant to Article VIII of the Bylaws and the disruptive behavior policy. (CP 637). As acting Chief of the Medical Staff, Dr. Vance was clearly acting as an agent of the Medical Staff.

Mr. Merred assisted Dr. Vance as authorized by Article X of the Bylaws, which provides that the Administrator and Chief of the Medical Staff shall coordinate in issues of concern to the hospital. (CP 237, 273-274). Those facts cannot be reasonably disputed.

The investigation was conducted in a series of formal meetings and interviews. (CP 637). The corrective action committee composed gathered sensitive information and interviewed five witnesses, including Plaintiff, on July 24, 2009. (CP 614, 637). The corrective action committee advised Plaintiff that his interview was conducted in accordance with Article VIII of the Bylaws and the disruptive behavior policy. (CP 637).

The committee concluded there was insufficient evidence to support the allegation of intoxication. (CP 614, 681). Because

the investigation concluded in Plaintiff's favor, there was no need for further investigation. (CP 681).

The investigation was conducted in formal meetings by staff and/or agents of the QVMC Board. It was not the result of casual discussions among the members of the Medical Staff. The corrective action committee kept formal minutes of all meetings. (CP 638, 775, 777). It should be emphasized that these are the only documents from this investigation—formal transcribed minutes. The formal meetings specifically concerned the status of Plaintiff's clinical privileges at QVMC. (CP 638). One purpose of the investigation was to determine if Plaintiff's privileges should be immediately limited, restricted, or revoked pursuant the disruptive physician policy and Article VIII of the Bylaws in light of the seriousness of the allegations made against him. (CP 638).

2. The Second Investigation—Alleged Incompetency

The second investigation occurred between August 3-5, 2009. (CP 615). It arose after complaints were made to

Mr. Merred regarding Plaintiff's competency to practice medicine and his behavior at work, and again raising patient safety concerns. (CP 614-615, 638). Again, the complaints were so serious the members of the Medical Staff who reported them requested the immediate suspension of Plaintiff's clinical privileges. (CP 638). Thus, there is no question the complaints, and ensuing investigation, clearly involved Plaintiff's privileges.

For the second investigation, Dr. Vance and Mr. Merred met with the entire Medical Staff. (CP 599, 615, 638). On July 27, 2009, the Medical Staff authorized Mr. Merred, Dr. Vance, and Mr. Anthony Gonzalez, the Board Commissioner in charge of personnel, to conduct an investigation. (CP 599, 615, 638). It is undisputable that Mr. Merred, Dr. Vance, and Mr. Gonzalez acted as the Medical Staff's agents. Thus, that is not an issue.

There is no dispute that the Medical Staff unanimously authorized the investigation. Indeed, it is worth noting that the Supreme Court actually recognized that "[t]he medical staff authorized an investigation." Cornu-Labat, 177 Wn.2d at 227-

28. Again, it is not disputable that the Medical Staff is a regularly constituted committee at QVMC.

The corrective action investigation team interviewed Plaintiff on August 4, 2009. (CP 777). The corrective action investigation team advised him that the interview was conducted in accordance with Article VIII of the Bylaws and the disruptive behavior policy. (CP 777).

As with the first investigation, the investigators and medical staff agents concluded there was insufficient evidence of unprofessional conduct to warrant suspension of Plaintiff's privileges. The investigation findings were reported to Plaintiff at a meeting of the Medical Staff on September 1, 2009. (CP 605). The investigation did not result in a recommendation that Plaintiff's privileges be suspended, limited or revoked. However, because the complaints raised significant concerns about Plaintiff's competency and patient safety, QVMC referred

Plaintiff to the Washington Physician's Health Program. (CP 290, 615).⁴

C. Summary of Procedural History

Beginning on July 29, 2009, Plaintiff filed a series of information requests under the PRA, seeking disclosure of the records relating to the two investigations. QVMC denied these requests based on privilege. On March 8, 2010, Plaintiff filed this lawsuit, seeking an order requiring QVMC to disclose the records and requesting penalties and attorney fees. (CP 4-8).

Both parties moved for summary judgment. (CP 15-29, 91-113). QVMC claimed RCW 4.24.250 exempts the records from disclosure because they were prepared for and maintained by a regularly constituted corrective action committee. (CP 105-107). It also argued that they are exempt as meetings of a public

⁴ Plaintiff in his briefing at the trial court level expended 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 appeal, and are accordingly not addressed. It is also important to note that since there was no decision to restrict or limit the Plaintiff's privileges, the fair hearing provisions of Article IX were not triggered. Finally, it is also important to emphasize that the Supreme Court perfunctorily rejected Plaintiff's argument that strict compliance with Article VIII and the disruptive physician policy was a prerequisite. Cornu-Labat, 177 Wn.2d at 234.

hospital district board or its agents concerning the status of a health care provider's clinical privileges under RCW 70.44.062. (CP 103-104).

The trial court granted Plaintiff's motion for summary judgment on September 4, 2010. It *sua sponte* determined that non-physicians could not participate in the "peer" review process. (CP 358, 365). QVMC appealed. (CP 546). This issue had not been raised or briefed by either party.

The Supreme Court reversed the trial court's ruling in 2013 and also ruled on the issues of whether RCW 4.24.250 and RCW 70.44.062 applied, finding that those statutes could apply. Cornu-Labat, 177 Wn.2d 221. The Supreme Court ruled the trial court failed to adequately determine whether RCW 4.24.250 applied and failed to actually address whether RCW 70.44.062 applied. Id. at 234, 239. The Supreme Court determined QVMC the prevailing party.

On remand, QVMC filed for summary judgment, arguing that the undisputed record establishes that both investigations

were prepared for a regularly constituted committee (Medical Staff) and are exempt under RCW 4.24.250. (CP 574-578). It argued further the records are exempt pursuant to RCW 70.44.062 because they were generated during confidential meetings of agents of the Board concerning Plaintiff's clinical staff privileges. (CP 571-574).

Critically, QVMC submitted a new declaration from Mehdi Merred establishing that both investigations were formal meetings by staff or agents of the Board and were not the result of casual discussions among the members of the Medical Staff, and further establishing that the formal meetings in both investigations concerned the status of Plaintiff's clinical privileges at the hospital. (CP 636-639). This declaration further emphasized information required by the Supreme Court's clarified statement of the law. The Plaintiff submitted no new information.

Plaintiff failed to dispute any of the facts submitted by QVMC. (CP 643-664). Indeed, Plaintiff actually agreed there are

no material facts in dispute. (CP 643). He instead argued that RCW 4.24.250 does not exempt the requested records because the procedures in Article VIII of the Bylaws were not followed. (CP 655-656). Plaintiff also argued that RCW 70.44.062 does not apply. (CP 658-660).

The summary judgment hearing occurred on November 26, 2013. (RP 1). Despite the absence of any disputed facts, the trial court found unresolved questions of material fact despite the complete absence of such evidence provided by Plaintiff. (RP 9). The Court issued a letter opinion denying both summary judgment motions, (CP 413-17), and entered an order on March 28, 2014. (CP 418-420).

QVMC'S appeal followed. (CP 421).

D. Summary of Undisputed/Undisputable Facts

To assist the Court in understanding the factual background and making its ruling, the following is a summary of the undisputed and undisputable facts established in this case that mandate summary judgment in the hospital's favor:

No.	Undisputed/Undisputable Fact
1	The Medical Staff is a regularly constituted committee.
2	The Medical Staff meets on a regular basis.
3	One of the duties of the Medical Staff is to evaluate the competency and qualifications of physicians.
4	Mr. Merred was Administrator at the time of both investigations.
5	Dr. Vance was acting chief of the Medical Staff at the time of both investigations.
6	Both investigations were conducted pursuant to the disruptive physician policy and Article VIII of the Bylaws.
7	The disruptive physician policy delegates to the Administrator and the chief of staff the power to conduct investigations on its behalf, including taking corrective action relating to a physician's privileges, such as revocation or suspension of staff privileges.
8	Mr. Merred conducted the first investigation as the Administrator, and Dr. Vance assisted him as the acting chief of the Medical Staff.
9	The first investigation concerned Plaintiff's clinical staff privileges.
10	The only documents from the first investigation are transcribed formal minutes.
11	The Medical Staff unanimously authorized the second investigation by Mr. Merred, Mr. Gonzales, and Dr. Vance acting as its agents and investigators.
12	The second investigation concerned Plaintiff's clinical staff privileges.
13	The corrective action investigation team kept formal meeting minutes of both investigations.

14	The purpose of the investigations was to determine if Plaintiff's active clinical privileges should be limited, restricted, or revoked in light of the seriousness of the allegations made against him.
15	Both investigations were formal meetings by staff or agents of the QVMC Board of Commissioners. They were not the result of casual discussions among the members of the medical staff.
16	Mr. Merred, Anthony Gonzalez, and Dr. Vance were agents and investigators of QVMC.

V. ARGUMENT

A. Standard of Review

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 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 PRA are reviewed *de novo*. Zink v. City of Mesa, 140 Wn. App. 328, 166 P.3d 738 (2007). Statutory construction is

also a question of law reviewed *de novo*. Plemmons v. Pierce County, 134 Wn. App. 449, 140 P.3d 601 (2006).

B. Summary of Statutory Provisions Authorizing the Withholding of the Requested Records

1. RCW 4.24.250 Provides An Exemption from the Public Records Act

As the Supreme Court emphasized in Cornu-Labat, “Hospital internal review mechanisms are critical to maintaining quality health care.” Cornu-Labat, 177 Wn.2d at 230. Review mechanisms are important because they encourage candor and constructive criticism “necessary to effective quality review” in the medical field. Anderson v. Breda, 103 Wn.2d 901, 905, 700 P.2d 737 (1985). “Acknowledging this, the Legislature created an exemption from the PRA for ‘[i]nformation and documents created specifically for, and collected and maintained . . . by a peer review committee under RCW 4.24.250.’” Cornu-Labat, 177 Wn.2d at 230 (quoting RCW 42.56.360(1)(c), which incorporates RCW 4.24.250 into the PRA).

RCW 4.24.250 exempts from PRA disclosure investigations into a physician's competency and qualifications.

In relevant part, RCW 4.24.250 provides as follows:

(1) Any health care 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 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 and any person or entity who, in good faith, shares any information or documents with one or more other committees, boards, or programs under subsection (2) of this section, shall be immune from civil action for damages arising out of such activities The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020(1) and (2).

RCW 4.24.250 (emphasis added.)

RCW 4.25.250 is a relatively simple statute to apply. The Supreme Court in Cornu-Labat clarified how RCW 4.25.250 is applied. The Supreme Court held that that RCW 4.24.250 has only two simple requirements:

- The committee in question is must be “a regularly constituted committee or board of [the] hospital”; and
- The committee’s duty must include reviewing and evaluating the quality of patient care.

Cornu-Labat, 177 Wn.2d at 233. See also Coburn v. Seda, 101 Wn.2d 270, 277, 677 P.2d 173 (1984).

That is all the statute requires. Trial courts should broadly consider all “relevant evidence” in making this determination. Coburn, 101 Wn.2d at 278.

RCW 4.24.250 extends to “the records of committee members and agents.” Anderson, 103 Wn.2d at 905. It covers investigations that include physicians as well as non-physicians: “Mr. Merred, as an officer of the hospital, and Mr. Gonzalez, as one of its directors, could contribute to a ‘peer review body of health care providers.’” Cornu-Labat, 177 Wn.2d at 232.

The Supreme Court has already held that the records created for the investigations here are exempt as long as Dr. Vance, Mr. Merred, and Mr. Gonzalez were acting as agents of “a regularly constituted review committee:

We remand for determination of whether a regularly constituted peer review committee was involved in the Cornu–Labat investigation but note that this committee may include nonphysicians If there is sufficient evidence Dr. Vance, Mr. Merred, and Mr. Gonzalez were acting as agents of “a regularly constituted review committee or board of a . . . hospital whose duty it is to evaluate the competency and qualifications of members of the profession,” then the records created specifically for, and collected and maintained by that committee, are exempt.

Id. at 234-35 (emphasis added).

It is conclusively established and unrefuted that Dr. Vance, Mr. Merred and Mr. Gonzalez were conducting the investigation as agents of a regularly constituted review committee. Thus, the Supreme Court’s opinion mandates that this privilege applies. Because the privilege applies, the records of the investigations are exempt from disclosure, and the trial court should have granted summary judgment on that basis.

2. RCW 70.44.062 Provides An Exemption from the Public Records Act

The Supreme Court acknowledged in Cornu-Labat that RCW 70.44.062 provides another basis for withholding the requested records. The Supreme Court held that the confidentiality provision in RCW 70.44.062(1) grants public hospital districts a privilege. Id. at 238. RCW 70.44.062(1) provides:

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 the clinical or staff privileges of a physician or other health care provider as that term is defined in RCW 7.70.020, if such other providers at the discretion of the district's commissioners are considered for such privileges, shall be confidential and may be conducted in executive session: PROVIDED, That the final action of the board as to the denial, revocation, or restriction of clinical or staff privileges of a physician or other health care provider as defined in RCW 7.70.020 shall be done in public session.

RCW 70.44.062(1) (emphasis added).

RCW 70.44.062 is also a relatively simple statute to apply. The Supreme Court has helpfully clarified how one determines if RCW 70.44.062 applies to these meetings minutes. “[T]he minutes of a formal meeting of the board’s staff or agents that concerned the status of Dr. Cornu–Labat’s clinical privileges may be withheld under RCW 70.44.062(1).” Cornu-Labat, 177 Wn.2d at 239. “[T]he trial court should decipher if any of the withheld records constitute proceedings of the board of a public hospital district or its staff or agents concerning the status of a physician’s clinical privileges under RCW 70.44.062.” Id. at 241. If the records “embody a formal meeting of the board’s staff or agents concerning the status of Dr. Cornu-Labat’s clinical privileges,” they are exempt. Id.

Thus, QVMC needs to make only three simple showings:

- The requested records “constitute proceedings of the board of a public hospital district or its staff or agents;”
- The records are formal records; and
- The records “concern[] the status of a physician’s clinical privileges”

Id. at 239, 241.

As shown below, this exemption applies to the first investigation in this case because it was conducted by agents of the QVMC Board, concerned Plaintiff's clinical privileges, and was embodied in formal records. Because the privilege applies, the formal records of the investigation are exempt from disclosure and the trial court erred in failing to grant summary judgment on that basis. Moreover, it also applies to the second investigation.

C. The Trial Court Erred in Misinterpreting the Supreme Court's Holding in Cornu-Labat and in Failing to Follow the Supreme Court's Ruling

The trial court mistakenly assumed the Supreme Court remanded because it found unresolved questions of fact after reviewing the declarations QVMC submitted. (CP 787-788). The trial court denied summary judgment on the basis that QVMC

did not submit new evidence resolving the alleged disputes of fact. (CP 788-789).⁵

The trial court's misread the Supreme Court's opinion. The Supreme Court did not hold that there were questions of fact whether Dr. Vance, Mr. Merred, and Mr. Gonzalez were acting as agents of a "regularly constituted committee." The issue the Supreme Court addressed was very limited. That issue was whether non-physicians can be involved in a review of a physician. The Supreme Court remanded because the trial court's ruling denying QVMC's first summary judgment motion was incorrectly premised on the presence of non-physicians in the investigations.

Because the trial court's opinion focused on the use of non-physicians, it never addressed whether the investigators were agents of the Medical Staff. This conclusion is apparent in the following statement:

⁵ QVMC actually submitted an additional declaration that covered all issues. (CP 636-639). As with all other declarations submitted by QVMC, Plaintiff did not refute it.

The trial court made insufficient findings of fact regarding the applicability of RCW 4.24.250 to the review procedure utilized by QVMC because the court's ruling hinged on the fact that the committee included nonphysicians. We remand for determination of whether a regularly constituted peer review committee was involved in the Cornu-Labat investigation but note that this committee may include nonphysicians. The trial court should consider the hospital's bylaws and internal regulations in making this determination. If there is sufficient evidence Dr. Vance, Mr. Merred, and Mr. Gonzalez were acting as agents of "a regularly constituted review committee or board of a . . . hospital whose duty it is to evaluate the competency and qualifications of members of the profession," then the records created specifically for, and collected and maintained by that committee, are exempt.

Cornu-Labat, 177 Wn.2d at 234-35 (internal citations omitted) (emphasis added).

The Supreme Court remanded to allow the trial court to review the issue as to whether RCW 4.24.250 applies based upon the established facts, which it had previously failed to do. The Supreme Court did not hold that the evidence before the trial court left factual questions unresolved as to RCW 4.24.250's application.

Likewise, the Supreme Court did not find questions of fact whether RCW 70.44.062 protects the withheld records as formal meeting minutes of the Board. Again, the Supreme Court remanded because the trial court never addressed RCW 70.44.062 at all in its 2010 opinion: “Because the trial court did not address RCW 70.44.062(1) in its letter opinion, factual issues remain.” Cornu-Labat, 177 Wn.2d at 239. The Supreme Court’s meaning is clear.

The Supreme Court remanded to allow the trial court to address legal and factual issues it failed to address previously. It nowhere stated issues of fact preclude application of RCW 70.44.062 (or RCW 4.24.250) based upon the known facts, which is what the trial court erroneously concluded.

In short, the trial court erred in misapplying Cornu-Labat’s directives by interpreting them as finding questions of fact. However, no disputes of material fact exist. As noted below, the uncontroverted facts establish that the records from both investigations are exempt. Plaintiff submitted no countervailing

facts in response to QVMC's Motion and in support on his Cross-Motion.

D. The Trial Court Erred in Denying QVMC's Motion for Summary Judgment Where the Established Facts Show the Records from Both Investigations Are Exempt from Disclosure

1. RCW 70.44.062 Exempts the Records

The only documents QVMC is trying to protect from the first investigation are the formal minutes of the meetings. (CP 637). The only documents from the second investigation are formal minutes and the original requests for corrective action. The established facts leave no reasonable dispute that RCW 70.44.062 exempts those formal records from disclosure.

As noted, the Supreme Court held that the hospital must make only three simple showings for the exemption to apply: "the minutes of a formal meeting of the board's staff or agents that concerned the status of Dr. Cornu-Labat's clinical privileges may be withheld under RCW 70.44.062(1)." Cornu-Labat, 177 Wn.2d at 239.

The first showings is made. It is undisputable that the investigations were conducted by staff and/or agents of the QVMC Board. Dr. Vance and Mr. Merred conducted the first investigation. Board member Mr. Gonzalez joined them in the second. Mr. Merred was the Administrator at that time. (CP 636). The Bylaws state that the Administrator is “appointed by the Board to act in its behalf.” (CP 135). Moreover, it is undisputed that Dr. Vance was acting as the Chief of the Medical Staff in place of Plaintiff, who was under investigation. The Medical Staff is hired by the Board and subject to its ultimate authority. (CP 134). Thus, there is no doubt the investigation was conducted by agents/members of the Board.

The second showing is also made. The investigations clearly involved Plaintiff’s clinical privileges. The evidence as established by the testimony of Mr. Merred overwhelmingly proves they were so related. (CP 636-639). Per Mr. Merred and others, the purpose of both investigations was to determine if Plaintiff’s active clinical privileges should be limited, restricted,

revoked, or even immediately suspend pursuant to the terms of the disruptive physician policy and Article VIII of the by-laws in light of the seriousness of the allegations made against him. (CP 638). Included in the determination was whether his privileges should have been immediately suspended pursuant to those provisions:

The formal meetings in both investigations concerned the status of Dr. Cornu-Labat's clinical privileges at the hospital. The whole purpose of the investigations was to determine if Dr. Cornu-Labat's active clinical privileges should be limited, restricted, or revoked pursuant to the terms of the disruptive physician policy and Article VIII of the by-laws in light of the seriousness of the allegations made against him. Included in the determination was whether his privileges should have been immediately suspended pursuant to those provisions.

(CP 638).

Critically, Plaintiff has never offered any facts disputing those statements or showing that the formal meetings did not relate to Plaintiff's clinical staff privileges.

It is clear that Mr. Merred and Dr. Vance had the authority to suspend the privileges. Article VIII(2)(a) of the Bylaws

authorizes the Chief of the Medical Staff and the Administrator to work in conjunction to summarily suspend a physician's privileges. (CP 149).

Finally, the third showing is made. It is clear that the records are formal records of meetings of the Board's agents and/or staff. "RCW 70.44.062(1) speaks to formal meetings and proceedings of the board or its agents, not casual discussions among those subject to the board's direction." Cornu-Labat, 177 Wn.2d at 239 (contrasting public meetings open to the public with closed meetings where only members may attend).

The records sought are minutes from formal interviews of personnel with knowledge of the intoxication allegations. Formal meetings were convened for the investigation and formal minutes were kept of all meetings conducted by the corrective action investigation teams. (CP 638, 775, 777). A secretary or scribe was present because of the formality and prepared formal minutes. It is difficult to imagine what greater evidence there could be that these were formal meetings than the fact that formal

minutes were kept. Indeed, Plaintiff did not provide any evidence to the trial court showing that these were not “minutes of a formal meeting of the board’s staff or agents that concerned the status of Dr. Cornu–Labat’s clinical privileges.”

Because the showings required under RCW 7.44.062 are made, the trial court should have ruled that the exemption applies to the formal meeting minutes of the investigations as a matter of law. Its failure to do so was obvious error.

2. RCW 4.24.250 Exempts the Records from Both Investigations

As noted, the Supreme Court held that RCW 4.24.250 only has two components that must be present for the exemption to apply: (1) the committee in question must be “a regularly constituted committee or board of [the] hospital,” and (2) the committee’s duty must include reviewing and evaluating the quality of patient care:

We remand for determination of whether a regularly constituted peer review committee was involved in the Cornu–Labat investigation but note that this committee may include nonphysicians If there is sufficient evidence Dr. Vance, Mr. Merred, and

Mr. Gonzalez were acting as agents of “a regularly constituted review committee or board of a . . . hospital whose duty it is to evaluate the competency and qualifications of members of the profession,” then the records created specifically for, and collected and maintained by that committee, are exempt.

Id. at 234-35 (emphasis added). See also Coburn, 101 Wn.2d 270; Anderson, 103 Wn.2d 961.

The established facts overwhelmingly satisfy these two components and should have resulted in summary judgment in QVMC’s favor. These were either facts that Plaintiff did not dispute or facts that the Supreme Court itself established.

It is undisputable that the whole Medical Staff at QVMC is a regularly constituted committee. Plaintiff provided no evidence it is not, and the Supreme Court unquestionably concluded it is a regularly constituted committee. Cornu-Labat, 177 Wn.2d at 234 (“ . . . whether the QVMC officials that investigated Dr. Cornu–Labat were acting as agents of a regularly constituted committee (the medical staff)”) (emphasis added).

The Supreme Court recognized that because QVMC is a small district hospital, the entirety of the medical staff performs the function of an executive or credentialing committee. Cornu-Labat, 177 Wn.2d at 234. The Supreme Court established that “[t]he medical staff meets on a regular basis.” Id. Thus, the first component of the Cornu-Labat test is overwhelmingly met.

The second component is also met. One of the Medical Staff’s duties is to review and evaluate the quality of patient care and to evaluate the competency and qualifications of healthcare providers. (CP 134, 136, 148-150, 609, 616, 770). The Supreme Court recognized that “[o]ne of the duties of the medical staff under the QVMC bylaws is to evaluate the competency and qualifications of medical staff members.” Cornu-Labat, 177 Wn.2d at 234. Plaintiff submitted no evidence to the trial court disputing that fact.

Thus, there is no question the Medical Staff meets the elements of RCW 4.24.250. Accordingly, the sole remaining question is whether the investigation was conducted by its

agents. There is no dispute Mr. Merred and Dr. Vance conducted the first investigation. (CP 637). It is undisputed both were agents of the Medical Staff at that time. Dr. Vance was the acting Chief of the Medical Staff. (CP 613-614). It cannot be seriously contended that he was not the Medical Staff's agent.

Mr. Merred was also acting as its agent. Mr. Merred is QVMC's Administrator. (CP 636). The first investigation was conducted in part pursuant to QVMC's disruptive physician policy issued and approved by the Medical Staff. (CP 637). The policy authorizes Mr. Merred to conduct investigations and take correction action relating to a physician's privileges. (CP 273-275). The policy provides for revocation or suspension of a physician's privileges as one of the penalties for violating the policy. Thus there is no question that it involves reviewing and evaluating the quality of patient care.

RCW 4.25.250 also exempts the records from the second investigation. Mr. Merred as the Administrator, Dr. Vance as acting president of the Medical Staff, and Mr. Gonzalez as a

Board commissioner conducted the second investigation. (CP 638). It is undisputed that prior to the investigation the entire Medical Staff (with the exception of Plaintiff) met to discuss whether an investigation should be conducted. Plaintiff never disputed that the Medical Staff unanimously authorized those three persons to conduct the investigation.

Moreover, the Supreme Court established that the Medical Staff authorized the investigation. The Supreme Court commented on the investigation as follows: “In response, Dr. Vance and Mr. Merred met with the entire medical staff to determine if an investigation should be conducted. The medical staff authorized an investigation. It was led by Mr. Merred, Dr. Vance, and Mr. Anthony Gonzalez, the board commissioner in charge of personnel.” *Id.* at 227 (emphasis added).

Again, there is no question that the whole Medical Staff at QVMC is a regularly constituted committee. Because Dr. Vance, Mr. Merred, and Mr. Gonzalez were acting as agents of the Medical Staff in an investigation that involved Plaintiff’s clinical

privileges, all components of RCW 4.24.250 are clearly established.

Because there is sufficient evidence Dr. Vance, Mr. Merred, and Mr. Gonzalez were acting as agents of “a regularly constituted review committee or board of a . . . hospital whose duty it is to evaluate the competency and qualifications of members of the profession,” therefore the records created specifically for, and collected and maintained by that committee, are exempt as a matter of law. RCW 4.24.250(1); Cornu-Labat, 177 Wn.2d at 235.

Based on the established facts, the trial court should have found that the records created for the investigations are exempt as a matter of law under RCW 4.24.250 and granted summary judgment to QVMC.

VI. CONCLUSION

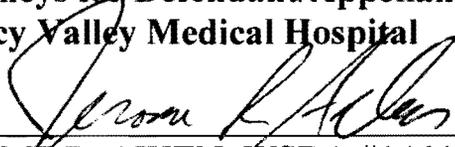
The trial court erred by denying QVMC’s summary judgment motion in the absence of any material disputes of fact. The established facts, and the Supreme Court’s decision

favorable to QVMC in Cornu-Labat, mandate summary dismissal of Plaintiff's claims. RCW 4.24.250 exempts materials relating to both investigations from disclosure because the investigations were conducted by agents of a regularly constituted committee whose duty included assessing physician competence.

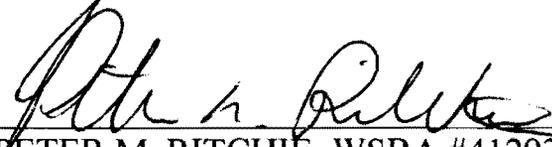
In addition, RCW 7.44.062 exempts the formal minutes from both investigations because they were the result of a formal investigation conducted by agents of the hospital board. This Court should remand to the Grant County Superior Court with directions to grant QVMC's Motion for Summary Judgment.

Respectfully submitted this 22 day of September, 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:

For Plaintiffs: Mr. David S. Mann Gendler & Mann, LLP 936 N. 34th St., Suite 400 Seattle, WA 98103	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input type="checkbox"/> via e-mail <input type="checkbox"/> via hand delivery
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DATED this 22nd day of September, 2014 at Yakima, Washington.



SHERYL A. JONES