

NO. 85382-7

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SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 40909-7-II)
(Clark County Superior Court Cause No. 09-2-02453-1)

**DOUGLAS FELLOWS as Personal Representative
of the Estate of JORDAN GALLINAT**

Petitioner,

vs.

**DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHINSON, M.D.
AND SOUTHWEST WASHINGTON MEDICAL CENTER,**

Respondents.

**PETITIONER FELLOW'S ANSWER TO BRIEF OF
AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR
JUSTICE FOUNDATION**

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I. INTRODUCTION

Under Washington law, a hospital's initial credentialing records for a physician who has been granted medical staff privileges are original source documents that every hospital is required by statute to create and maintain as part of its administrative records. Any credentialing records that the hospital subsequently creates and maintains for the physician in the regular course of its business (for example, records reflecting that a physician already on the medical staff later obtained or voluntarily relinquished privileges to perform other in-hospital procedures such as vacuum extractor deliveries) also are original source, administrative documents.

Under *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 (1991), a hospital's original source credentialing records are not covered by the "peer review" privilege in RCW 4.24.250(1) or the "quality improvement" privilege in RCW 70.41.200(3) and therefore, are discoverable.

When a hospital's administrator, executive committee, or entity other than its quality improvement committee takes action to terminate or restrict a physician's privileges, that entity's information and documents concerning

the termination or restriction are non-privileged and discoverable under *Anderson v. Breda*, 103 Wn.2d at 907-08.

When the actions of a hospital quality improvement committee result in the termination or restriction of a physician's privileges, the committee's written records, findings and reports (but not the testimony or record of proceedings before the committee) are discoverable under RCW 70.41.200(3)(d), which provides for disclosure of "the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions."

II. ARGUMENT

A. The Legal Standards And Burden Of Proof For Health Care Discovery Privileges And Exceptions Thereto.

Petitioner Fellows/Gallinat agrees with the Washington State Association for Justice Foundation ("WSAJ Foundation") that: (1) a treating physician's credentialing records are non-privileged, original source documents that are discoverable in a malpractice action, *WSAJ Foundation Brief at 11-16*; (2) quality improvement committee records involving periodic review of a physician's medical care under RCW 70.41.200(1)(b) and © are privileged, unless the committee's review results in a termination or restriction of privileges; *Id. at 15*; and (3) RCW 70.41.200(3)(d) allows

broad discovery of information and documents that are relevant to a hospital's termination or restriction of a physician's privileges. *Id. at 10-11*.

This is because: (1) the quality improvement privilege in RCW 70.41.200(3) is in derogation of the common law and must be strictly construed and limited to its purposes, *Coburn v. Seda*, 101 Wn.2d at 277, *Lowy v. Peacehealth*, 159 Wn. App. 715, 723, 247 P.3d 7 (2011); (2) as a statutory exception to a privilege, RCW 70.41.200(3)(d) must be broadly construed in favor of discovery, *State v. Kane*, 101 Wn. App. 607, 612, 5 P.3d 741 (2000); (3) there is no common law medical review privilege, *Coburn, supra* at 279; (4) CR 26(b)(1) provides for broad discovery of all information and documents that are "relevant, non-privileged and reasonably calculated to lead to admissible evidence"; and (5) the burden of proving that particular documents are privileged from discovery is on the party asserting the privilege. *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985); *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 31, 864 P.2d 921 (1991); *Dreiling v. Jain*, 151 Wn.2d 900, 916, 93 P.3d 861 (2004).

Despite the trial court's June 21, 2010 discovery order, which required SWMC to "certif[y] that the files were reviewed and that any documents under the exceptions in RCW 70.41.200(3) and [70.41.230](5) were produced or do not exist", CP 417-18, SWMC still has not identified the

information and documents that are relevant to its decision to terminate Dr. Moynihan's operative vaginal delivery privileges. Nor has SWMC disclosed if the relevant information and documents were created, collected and maintained by its quality improvement committee or by another entity.¹ SWMC also has not met its burden of proving that the records, findings and reports of its quality improvement committee, Executive Committee, or any other committee that was involved in restricting Dr. Moynihan's privileges are immune from discovery under RCW 70.41.200(3)(d).

B. When An Entity Other Than A Quality Improvement Committee Restricts Or Terminates A Physician's Privileges, Its Records Are Discoverable.

According to the Department of Health, SWMC's Executive Committee took corrective action to restrict Dr. Moynihan's privileges:

On or about September 17, 1997, the executive committee of Southwest Washington Medical Center (SWMC), located in

¹See ¶¶ 3-4 of the Declaration of Cindy Eling, which tries to conflate SWMC's Executive Committee, quality improvement committee, credentialing committee, and Quality Standards Committee into a single "regularly constituted quality improvement committee":

"3. ... The regularly constituted hospital quality improvement committee of which the credentials committee was a part, maintained the hospital's credentials files for the physicians and were created specifically for and collected and maintained by the peer review committee.

"4. The credentialing committee, and its files, are part of the Medical Staff Executive Committee and the Quality Standards Committee." CP 550.

Vancouver, Washington, initiated a corrective action resulting in exclusion of operative vaginal delivery privileges of the Respondent [Moynihan]. This action was based on a review by the committee of two of Respondent's cases. CP 91.

In *Anderson v. Breda*, 103 Wn.2d at 907-08, this Court said:

[I]f the final decision to restrict, revoke, or suspend a physician's hospital privileges is made by an administrator or entity other than a peer review committee, the records of that entity or individual are discoverable to the extent they do not contain the record of a quality review committee.

Under *Anderson*, all information and documents created or collected by SWMC's Executive Committee or any entity other than its quality improvement committee that are relevant to the termination of Dr. Moynihan's operative vaginal delivery privileges are discoverable.

C. When A Quality Improvement Committee Restricts or Terminates A Physician's Privileges, RCW 70.41.200(3) Creates A Testimonial Privilege For Its Proceedings, But No Privilege Attaches To Its Written Records, Reasons, Findings Or Reports.

When the Legislature enacted RCW 4.24.250(1) in 1976, it protected from discovery:

[t]he proceedings, reports, and written records of such committees... 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.

In *Anderson v. Breda*, this Court identified the following limitations on the privilege in RCW 4.24.250(1):

[T]he fact that a physician's privileges are restricted, suspended or revoked is not properly subject to the protections of the statute ...

...[O]nly the proceedings, reports and written records of such regularly constituted committees are immune from discovery.... At most, petitioners [malpractice plaintiffs] are deprived only of the opportunity to examine the record of testimony which was given at the committee proceedings and the findings of the committee.

Id. at 906.

When the Legislature enacted RCW 70.41.200(3) in 1986, it preserved RCW 4.24.250(1)'s testimonial privilege for quality improvement committee proceedings:

...[N]o person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee.

RCW 70.41.200(3). This testimonial privilege reaffirms the goal of promoting "open discussion during committee investigations" and the "candor and ... constructive criticism thought necessary to effective quality review." *See Anderson*, 103 Wn.2d at 907; *Coburn*, 101 Wn.2d at 275.

RCW 70.41.200(3)(d) incorporates *Anderson's* ruling that "the fact that a physician's privileges are restricted, suspended or revoked is not properly subject to the protections of the statute." 103 Wn.2d at 907. But RCW 70.41.200(3)(d) further limits the scope of the quality improvement

privilege by allowing discovery of “the specific restrictions imposed, if any and the reasons for the restrictions” on a physician’s privileges. The “specific restrictions imposed ... and the reasons for the restrictions” are embodied in the quality improvement committee’s findings and reports. Since a quality improvement committee’s reasons, findings or reports that result in the termination or restriction of a physician’s staff privileges are not privileged under RCW 70.41.200(3)(d), or RCW 70.41.230(5)(d) (which contains identical language), or the common law, it follows that the committee’s written records on which its findings and reports are based also are non-privileged and discoverable under RCW 70.41.200(3)(d).

The statements in *Anderson* that “only the proceedings, reports and written records of such committees... and “the findings of the committee” are immune from discovery, 103 Wn.2d at 906, are dicta that have been superseded by RCW 70.41.200(3)(d)’s directive that “the specific restrictions imposed, if any and the reasons for the restrictions” are discoverable. *Anderson’s* dicta do not govern cases like this one where the hospital terminated or restricted a physician’s privileges pursuant to its authority under RCW 70.41.²

²*Anderson* held that the defendant physician was required to answer discovery about whether his hospital privileges had been terminated. 103 Wn.2d at 903, 908. It did not consider whether RCW 4.24.250(1) would

By allowing a malpractice plaintiff to discover “the specific restrictions imposed, if any and the reasons for the restrictions”, RCW 70.41.200(3)(d) also supersedes this Court’s conclusion in *Coburn* that:

The discovery protection granted hospital quality review committee records, like work product immunity, prevents the opposing party from taking advantage of a hospital’s careful self-assessment.

101 Wn.2d at 274.³ In enacting RCW 70.41.200(3)(d) in 1986, the Legislature struck a balance in which disclosure of the reasons why a hospital restricts or terminates a physician’s privileges takes precedence over a hospital’s interest in withholding its quality improvement committee records from discovery for its own self-assessment and litigation purposes.

Petitioner agrees with WSAJ Foundation that discovery of the quality improvement committee records themselves is necessary, and that it would be contrary to law to allow a hospital “to become the sole arbiter of how the

preclude discovery of peer review committee records under RCW 4.24.250(1)’s exception for “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.” for , if the hospital had in fact terminated the physician’s privileges. *Id.* at 103, n.1.

³*Coburn* also is distinguishable because it did not involve a termination or restriction of the defendant physician’s privileges and did not address whether the privilege in RCW 4.24.250(1) would apply to the records of a hospital review committee in civil malpractice “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.”

reasons for the restrictions are characterized.” *WSAJ Foundation Brief at 19*. In *Anderson*, this Court held that “*the records ... of that final decision to restrict, revoke, or suspend a physician’s hospital privileges... by an administrator or entity other than a peer review committee [such as SWMC’s Executive Committee]...are discoverable.*” 103 Wn.2d at 907, (emphasis supplied). It follows that SWMC’s quality improvement committee’s written records, reasons, findings and reports regarding its termination of Dr. Moynihan’s privileges, rather than its characterization of those records, are discoverable under RCW 70.41.200(3)(d).

SWMC’s disobedience of the trial court’s June 21 order to “certif[y] that the files were reviewed and that any documents under the exceptions in RCW 70.41.200(3) and [70.41.230](5) were produced or do not exist”, CP 417-18; its conflation of its Executive Committee, quality improvement committee, credentialing committee and Quality Standards Committee into a single “regularly constituted quality improvement committee” to avoid producing the non-privileged Adverse Action Report that its Executive Committee sent to the Department of Health, CP 96, 550; and its lawyers’ initial decision not to look in Dr. Moynihan’s file for the records restricting his hospital privileges, 6/21 RP 19, and later decision only to look for those records in Dr. Moynihan’s credentialing file, where they do not exist, rather

than in the hospital's investigation file or quality improvement file where they do exist, 8/27 RP 63-64, amply demonstrate why SWMC's actual reasons for restricting Dr. Moynihan's privileges are better determined from its contemporaneous records and reports than from any legal filter.

D. The Quality Improvement Statutes Identify The Information And Documents A Hospital Is Required To Maintain To Credential Health Care Providers Or Terminate Their Privileges.

Hospitals are required to create, collect or maintain the following information and documents when they grant, restrict or terminate privileges:⁴

(1) the physicians' "applications for staff membership or professional privileges", RCW 70.43.010;

(2) the credentialing records required by RCW 70.41.230 for a hospital to comply with its duty under RCW 70.41.200(1)(b) and © to periodically "evaluat[e] staff privileges of all persons who are employed or associated with delivering health care services in the hospital";

(3) "information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients", RCW 70.41.200(1)(e)⁵;

⁴These statutes appear in the Appendix.

⁵RCW 70.41.200(1)(f) requires hospitals to "maint[ain]... relevant and appropriate information gathered pursuant to (a) through (e) of this

(4) the hospital's "written records of decisions to restrict or terminate privileges of practitioners", RCW 70.41.220;

(5) the "records of committee decisions in which a physician's privileges are terminated or restricted", RCW 70.41.200(6);

(6) a "report to the department [of Health] when the practice of a health care practitioner...is restricted, suspended, limited, or terminated based upon a conviction, determination, or finding by the hospital that the health care practitioner has committed an action defined as unprofessional conduct under RCW 18.130.180", RCW 70.41.210.

E. RCW 70.41.220 Does Not Preclude Discovery Of Records A Hospital Is Required to Maintain To Document Its Termination of Staff Privileges.

RCW 70.41.220 requires hospitals to "keep written records of decisions to restrict or terminate privileges of practitioners" and make the records available to the hospital's board. The statute further provides that "all information so gained shall remain confidential in accordance with RCW 70.41.200 and 70.41.230 and shall be protected from the discovery process." RCW 70.41.220's confidentiality and discovery protections are limited to information and documents that are privileged under RCW 70.41.200 and

subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital."

70.41.230. They do not apply to the original source credentialing records for Jordan Gallinat's treating physicians, which are not privileged under RCW 70.41.200(3) and 70.41.230(5); or to information and documents evidencing SWMC's Executive Committee's decision to restrict Dr. Moynihan's privileges, which are non-privileged under *Anderson, supra*; or to the written records, findings and reports of SWMC's quality improvement committee, which are non-privileged under RCW 70.41.200(3)(d).

F. The Credentialing and Privileging Records That Are Discoverable In This Lawsuit.

Based on the foregoing, petitioner Fellows/Gallinat asks the Court to rule that the following information and documents are discoverable:

1. SWMC's initial credentialing records for Jordan Gallinat's treating physicians and any subsequent credentialing records concerning their medical staff privileges that were created in the regular course of SWMC's business. These original source credentialing records, which SWMC was required by statute to collect and maintain, are outside the discovery protections in RCW 4.24.250(1), 70.41.200(3) and 70.41.230(5).

2. All records of SWMC's Executive Committee, administrator and any entity other than its quality improvement committee concerning the decision to terminate or restrict Dr. Moynihan's privileges. These records, which include the Adverse Action report the Executive Committee filed

against Dr. Moynihan with the Department of Health, *see* CP 96 and Dr. Moynihan's letter responding to SWMC's charges, *id.*, are non-privileged and discoverable under *Anderson v. Breda*, 103 Wn.2d at 907-08.

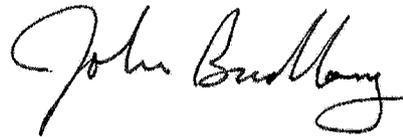
3. All records of SWMC's quality improvement committee regarding the restriction of Dr. Moynihan's privileges. These written records, which are discoverable under RCW 70.41.200(3)(d), include: (1) all complaints, incident reports, records, findings and reasons that SWMC's quality improvement committee created, collected or maintained concerning the restriction of Dr. Moynihan's privileges or his decision to relinquish his privileges; (2) any other reports concerning Dr. Moynihan that SWMC sent to its board or any other agency or entity pursuant to RCW 70.41.210, 70.41.220 or 70.41.200(6) that are relevant to SWMC's claims that Dr. Moynihan engaged in "unprofessional conduct in violation of RCW 18.130.180(4) and (11)" *see* CP 92; and (3) the medical records the quality review committee considered in OB Cases 1 and 2, with patient identification information redacted for OB Case 1, *see* CP 96.

IV. CONCLUSION

Petitioner respectfully asks the Supreme Court to reverse the decisions of the trial court and to remand with directions that defendant Southwest Washington Medical Center be required to produce the records identified in §F above.

RESPECTFULLY OFFERED this 3rd day of May, 2012.

THE BUDLONG LAW FIRM

A handwritten signature in black ink, appearing to read "John Budlong". The signature is written in a cursive, flowing style.

John Budlong, WSBA #12594

Attorneys for Petitioner Douglas
Fellows/Jordan Gallinat

APPENDIX

4.24.250. Health care provider filing charges or presenting evidence--Immunity--Information sharing

(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. For the purposes of this section, sharing information is presumed to be in good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading. 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).

(2) A coordinated quality improvement program maintained in accordance with RCW 43.70.510 or 70.41.200, a quality assurance committee maintained in accordance with RCW 18.20.390 or 74.42.640, or any committee or board under subsection (1) of this section may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a coordinated quality improvement committee or committees or boards under subsection (1) of this section, with one or more other coordinated quality improvement programs or committees or boards under subsection (1) of this section for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and

documents disclosed by one coordinated quality improvement program or committee or board under subsection (1) of this section to another coordinated quality improvement program or committee or board under subsection (1) of this section and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (1) of this section and by RCW 43.70.510(4), 70.41.200(3), 18.20.390(6) and (8), and 74.42.640(7) and (9).

70.41.200. Quality improvement and medical malpractice prevention program--Quality improvement committee--Sanction and grievance procedures--Information collection, reporting, and sharing

(1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:

(a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. The committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures;

(b) A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;

© The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital;

(d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice;

(e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients including health care-associated infections as defined in

RCW 43.70.056, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;

(f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital;

(g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention, infection control, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of malpractice claims for staff personnel engaged in patient care activities; and

(h) Policies to ensure compliance with the reporting requirements of this section.

(2) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. Any person or entity participating in a coordinated quality improvement program that, in substantial good faith, shares information or documents with one or more other programs, committees, or boards under subsection (8) of this section is not subject to an action for civil damages or other relief as a result of the activity. For the purposes of this section, sharing information is presumed to be in substantial good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading.

(3) Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the

identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

(4) Each quality improvement committee shall, on at least a semiannual basis, report to the governing board of the hospital in which the committee is located. The report shall review the quality improvement activities conducted by the committee, and any actions taken as a result of those activities.

(5) The department of health shall adopt such rules as are deemed appropriate to effectuate the purposes of this section.

(6) The medical quality assurance commission or the board of osteopathic medicine and surgery, as appropriate, may review and audit the records of committee decisions in which a physician's privileges are terminated or restricted. Each hospital shall produce and make accessible to the commission or board the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section. Failure of a hospital to comply with this subsection is punishable by a civil penalty not to exceed two hundred fifty dollars.

(7) The department, the joint commission on accreditation of health care organizations, and any other accrediting organization may review and audit the records of a quality improvement committee or peer review committee in connection with their inspection and review of hospitals. Information so obtained shall not be subject to the discovery process, and confidentiality shall be respected as required by subsection (3) of this section. Each hospital shall produce and make accessible to the department the appropriate records and otherwise facilitate the review and audit.

(8) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee or a peer review committee under RCW 4.24.250 with one or more other coordinated quality improvement programs maintained in accordance with this section or RCW 43.70.510, a coordinated quality improvement committee maintained by an ambulatory surgical facility under RCW 70.230.070, a quality assurance committee maintained in accordance with RCW 18.20.390 or 74.42.640, or a peer review committee under RCW 4.24.250, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section, RCW 18.20.390 (6) and (8), 74.42.640 (7) and (9), and 4.24.250.

(9) A hospital that operates a nursing home as defined in RCW 18.51.010 may conduct quality improvement activities for both the hospital and the nursing home through a quality improvement committee under this section, and such activities shall be subject to the provisions of subsections (2) through (8) of this section.

(10) Violation of this section shall not be considered negligence per se.

70.41.210. Duty to report restrictions on health care practitioners' privileges based on unprofessional conduct--Penalty

(1) The chief administrator or executive officer of a hospital shall report to the department when the practice of a health care practitioner as defined in subsection (2) of this section is restricted, suspended, limited, or terminated based upon a conviction, determination, or finding by the hospital that the health care practitioner has committed an action defined as unprofessional conduct under RCW 18.130.180. The chief administrator or executive officer

shall also report any voluntary restriction or termination of the practice of a health care practitioner as defined in subsection (2) of this section while the practitioner is under investigation or the subject of a proceeding by the hospital regarding unprofessional conduct, or in return for the hospital not conducting such an investigation or proceeding or not taking action. The department will forward the report to the appropriate disciplining authority.

(2) The reporting requirements apply to the following health care practitioners: Pharmacists as defined in chapter 18.64 RCW; advanced registered nurse practitioners as defined in chapter 18.79 RCW; dentists as defined in chapter 18.32 RCW; naturopaths as defined in chapter 18.36A RCW; optometrists as defined in chapter 18.53 RCW; osteopathic physicians and surgeons as defined in chapter 18.57 RCW; osteopathic physicians' assistants as defined in chapter 18.57A RCW; physicians as defined in chapter 18.71 RCW; physician assistants as defined in chapter 18.71A RCW; podiatric physicians and surgeons as defined in chapter 18.22 RCW; and psychologists as defined in chapter 18.83 RCW.

(3) Reports made under subsection (1) of this section shall be made within fifteen days of the date: (a) A conviction, determination, or finding is made by the hospital that the health care practitioner has committed an action defined as unprofessional conduct under RCW 18.130.180; or (b) the voluntary restriction or termination of the practice of a health care practitioner, including his or her voluntary resignation, while under investigation or the subject of proceedings regarding unprofessional conduct under RCW 18.130.180 is accepted by the hospital.

(4) Failure of a hospital to comply with this section is punishable by a civil penalty not to exceed five hundred dollars.

(5) A hospital, its chief administrator, or its executive officer who files a report under this section is immune from suit, whether direct or derivative, in any civil action related to the filing or contents of the report, unless the conviction, determination, or finding on which the report and its content are based is proven to not have been made in good faith. The prevailing party in any action brought alleging the conviction, determination, finding, or report was not made in good faith, shall be entitled to recover the costs of litigation, including reasonable attorneys' fees.

(6) The department shall forward reports made under subsection (1) of this section to the appropriate disciplining authority designated under Title 18 RCW within fifteen days of the date the report is received by the department.

The department shall notify a hospital that has made a report under subsection (1) of this section of the results of the disciplining authority's case disposition decision within fifteen days after the case disposition. Case disposition is the decision whether to issue a statement of charges, take informal action, or close the complaint without action against a practitioner. In its biennial report to the legislature under RCW 18.130.310, the department shall specifically identify the case dispositions of reports made by hospitals under subsection (1) of this section.

(7) The department shall not increase hospital license fees to carry out this section before July 1, 2008.

70.41.220. Duty to keep records of restrictions on practitioners' privileges--Penalty

Each hospital shall keep written records of decisions to restrict or terminate privileges of practitioners. Copies of such records shall be made available to the board within thirty days of a request and all information so gained shall remain confidential in accordance with RCW 70.41.200 and 70.41.230 and shall be protected from the discovery process. Failure of a hospital to comply with this section is punishable by [a] civil penalty not to exceed two hundred fifty dollars.

70.43.010. Applications for membership or privileges--Standards and procedures

Within one hundred eighty days of June 11, 1986, the governing body of every hospital licensed under chapter 70.41 RCW shall set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges.

RCW 70.41.230. Duty of hospital to request information on physicians granted privileges

(1) Prior to granting or renewing clinical privileges or association of any physician or hiring a physician, a hospital or facility approved pursuant to this chapter shall request from the physician and the physician shall provide the following information:

- (a) The name of any hospital or facility with or at which the physician had or has any association, employment, privileges, or practice;
- (b) If such association, employment, privilege, or practice was discontinued, the reasons for its discontinuation;
- (c) Any pending professional medical misconduct proceedings or any pending medical malpractice actions in this state or another state, the substance of the allegations in the proceedings or actions, and any additional information concerning the proceedings or actions as the physician deems appropriate;
- (d) The substance of the findings in the actions or proceedings and any additional information concerning the actions or proceedings as the physician deems appropriate;
- (e) A waiver by the physician of any confidentiality provisions concerning the information required to be provided to hospitals pursuant to this subsection.

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 40909-7-II)
(Clark County Superior Court Cause No. 09-2-02453-1)

**DOUGLAS FELLOWS as Personal Representative
of the Estate of JORDAN GALLINAT**

Petitioner,

vs.

**DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHINSON, M.D.
AND SOUTHWEST WASHINGTON MEDICAL CENTER,**

Respondents.

DECLARATION OF SERVICE

**John Budlong
WSBA #12594**

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**Attorneys for Petitioner
Douglas Fellows/Jordan Gallinat**

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date an original and/or copy of Petitioner Fellow's Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation was sent via e-mail and/or by legal messenger/first class mail for filing with the court identified below and delivered to the following attorneys for Respondents:

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DATED this 3rd day of May, 2012.

By: 
TOVE ROGERS

OFFICE RECEPTIONIST, CLERK

To: Tove Rogers
Cc: 'John Budlong'; 'Tara L. Eubanks'; 'Debra Watt'
Subject: RE: Fellow, et al. v. Moynihan, et al. ; Supreme Court No. 85382-7

Rec. 5-3-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tove Rogers [<mailto:tove@budlonglawfirm.com>]
Sent: Thursday, May 03, 2012 2:54 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'John Budlong'; 'Tara L. Eubanks'; 'Debra Watt'
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Re: **Fellows, et al., v. Moynihan, et al.**
Supreme Court No. 85382-7
Court of Appeals No. 40909-7-II
Clark County Superior Court No. 09-2-02453-1

Attorney: **John Budlong, WSBA #12594**
Attorney for Petitioner

The following documents are attached for filing-

1. Petitioners Fellow's Answers to Brief of Amicus Curiae Washington State Association for Justice Foundation; and,
2. Declaration of Service.

Thank you,

Tove Rogers, Legal Assistant

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