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SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 40909-7-11)
(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
BRIEF OF APPELLANT FELLOWS

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ORIGINAL

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I. INTRODUCTION

In a medical negligence and corporate negligence lawsuit, does the “peer review” privilege in RCW 4.24.250(1) or the “quality improvement” privilege in RCW 70.41.200(3) shield from discovery a hospital’s credentialing, privileging and personnel records for its medical staff?

May a hospital avoid producing evidence, which is discoverable under RCW 70.41.200(3)(d), that a physician’s “staff privileges were terminated or restricted, including the specific restrictions imposed if any and the reasons for the restrictions”, by certifying that the evidence does not exist in its credentialing files without investigating or disclosing if the evidence exists in its investigation files?

The answer to these questions must be “no” because (1) a hospital’s credentialing, privileging and personnel records relating to a physician’s staff privileges are not privileged under RCW 4.24.250(1) or RCW 70.41.200(3); and (2) discovery of “terminated or restricted... staff privileges” under RCW 70.41.200(3)(d) extends to all of a hospital’s files and records, not just to records in its credentialing files.

II. STATEMENT OF THE CASE

A. Jordan Gallinat's Birth Injuries.

This is a medical negligence lawsuit involving birth injuries that Jordan Gallinat sustained at Southwest Washington Medical Center in Vancouver, Washington on September 17, 1996. CP 1-6. After defendant Daniel Moynihan, M.D., a family practitioner, made several unsuccessful attempts to deliver Jordan with the hospital's vacuum extractor, Jordan developed a subgaleal hemorrhage and fetal anoxia. CP 88-89, 92, 97. Jane Ahearn, M.D., an obstetrician, was summoned to the hospital to deliver Jordan by emergency C-section. CP 22, 97. Defendant Susan Hutchinson, M.D., a pediatrician, participated in Jordan's resuscitation. CP 298.

Jordan's doctors say the subgaleal hemorrhage caused hypovolemic shock and hypoxia, which resulted in irreversible bilateral renal cortical necrosis, liver and renal failure, and anoxic hepatitis. CP 88-89. They predict Jordan will develop end-stage renal failure within the next two decades which will require chronic dialysis or a kidney transplant and risks of graft failure or the high mortality rates associated with long-term dialysis. *Id.*

The hospital granted Dr. Moynihan staff privileges as a family medicine practitioner in 1993. *App. A* at 2. As a result of Jordan's case ("OB Case 2") and a previous obstetrical case ("OB Case 1"), the hospital's

Executive Committee “initiated a corrective action resulting in exclusion of [Dr. Moynihan’s] operative vaginal delivery privileges” and filed an Adverse Action Report against him with the Department of Health. CP 96.

The Department of Health alleged that after Dr. Moynihan admitted Jordan’s mother (“Patient Two”) to the hospital for an “at term” delivery, he “unsuccessfully attempted to effectuate delivery by vacuum extraction [and] after several failed attempts...”, called in “an obstetrical consultant [Dr. Ahearn]... who performed an emergency C-section. [Dr. Moynihan] breached the community medical standard of care in his treatment of Patient Two.” CP 92. The Department of Health charged Dr. Moynihan with “incompetence, negligence or malpractice which result[ed] in injury to a patient” and “violation of health agency rules.” *Id.* In response to these charges and corrective actions, Dr. Moynihan stipulated to give up his in-hospital obstetrics and postpartum privileges. CP 96-100.

B. The Trial Court Denied Discovery Of The Hospital’s Credentialing, Privileging And Personnel Records And Declined To Require The Hospital To Produce Evidence Relating To Its Termination Or Restriction Of Dr. Moynihan’s Staff Privileges.

In June 2009, Jordan Gallinat filed a complaint alleging medical negligence against Dr. Moynihan and Dr. Hutchinson and medical and corporate negligence against Southwest Washington Medical Center. CP 1-6.

In March 2010, Gallinat moved to compel discovery of the hospital's credentialing, privileging and personnel records for Drs. Moynihan, Ahearn and Hutchinson, including its records relating to its termination or restriction of Dr. Moynihan's staff privileges. CP 21-46. In response to the motion, the hospital's lawyer filed a declaration stating that "Defendant SWMC has (sic) a regularly constituted quality improvement/peer review committee in 1996 and 1997." CP 269.

Based on this declaration, the trial court on May 4, 2010 denied the motion to compel production of the hospital's credentialing and privileging files "except to the extent that the information and materials fall within the exceptions to the privilege described in RCW 70.41.200(3) and 70.41.230(5)."¹ CP 284-85. The trial court ordered the hospital to "file a certification that all of the credentialing and privileging materials sought are covered by the privilege or by the attorney-client privilege or work product doctrine." *Id.*

In response to the May 4 order, the hospital's lawyer filed a "certification" that the information and documents in the hospital's

¹RCW 70.41.200(3)(d) and .230(5)(d) permit discovery "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."

credentialing files were “protected by the quality assurance and quality improvement statutes and the work product doctrine,” CP 294-95, but the hospital did not produce its records documenting that Dr. Moynihan’s “staff privileges were terminated or restricted... or the reasons for the restrictions.”

On May 24, 2010, Gallinat moved for in camera review of the hospital’s credentialing, privileging and personnel records. CP 309-325. On June 21, the trial court denied in camera review and declined to have the records filed under seal for appellate review. CP 417-19. Instead, it ordered that “SWMC’s counsel will file within two weeks a certification that the files were reviewed and that any documents under the exemptions in RCW 70.41.200(3) and (5) were produced or do not exist.” *Id.*

On June 25, 2010, Gallinat filed a notice for discretionary review of: the May 4 Order denying discovery of the credentialing and privileging files, the May 27 Order denying reconsideration, and the June 21 Order denying in camera review. CP420-438.

In response to the June 21 order, the hospital’s lawyer filed a declaration that “none of the credentialing files [for Drs. Moynihan, Ahearn or Hutchinson] contain information or items that fall under the exceptions (allowing disclosure) under RCW 70.41.200(3) and RCW 70.41.230(5)” or contain any “information about the restriction or revocation of any of the

above physicians' clinical or staff privileges." CP 443-44. After the hospital did not produce documents relating to its termination or restriction of Dr. Moynihan's operative vaginal delivery privileges, Gallinat on July 28, 2010 moved to enforce the May 4 and June 21 Orders. CP 508-22.

At the August 17, 2010 hearing on Gallinat's motion to enforce, the hospital's lawyer stated "I have never seen...that stuff related to termination of ... Dr. Moynihan's privileges... in any of the stuff that I've reviewed", but admitted she had not looked at the hospital's investigation file or any other file that documented the termination or restriction of Dr. Moynihan's staff privileges and had not determined if such a file existed. 8/27/10 RP at 63-64. The hospital's lawyer further stated "when I read his motion [to enforce the May 4 and June 21 Orders], it just didn't click with me" that Gallinat was seeking "files regarding terminating, restricting [Dr. Moynihan's] privileges." *Id.* at 69.

The trial court denied the motion to enforce its May 4 and June 21 Orders, ruling that they only pertained to the hospital's privileging and credentialing files, and that the hospital had complied with them. CP 582-84; 8/17/10 RP at 76-77. The trial court apparently felt the hospital did not need to produce the RCW 70.41.200(3)(d) evidence relating to its termination or

restriction of Dr. Moynihan's privileges, if it was contained in its investigation file or any other file than its credentialing file. *Id.*

On August 23, 2010, Gallinat amended his notice for discretionary review to include the trial court's August 17, 2010 Order. CP 587-92.

On August 30, 2010, the Court of Appeals commissioner ruled that the trial court "committed obvious error" under *Coburn v. Seda*, 101 Wn.2d 270, 276-77, 677 P.2d 173 (1984), *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985), and *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 31, 864 P.2d 921 (1991) by "accepting SWMC's counsel's representation that SWMC had a regularly constituted review committee in 1996 or 1997 when OB Cases 1 and 2 were reviewed"... "because she had no personal knowledge about whether SWMC had a quality improvement committee in 1996 or 1997." *App. A* at 6-7. But the Commissioner denied discretionary review, ruling that the declaration of hospital employee Cindy Eling "seems to have met the evidentiary standard set forth in *Coburn*, *Anderson* and *Adcox*" for denying discovery of the hospital's credentialing and privileging records. *Id.* at 7. The Eling declaration states:

Defendant SWMC had a regularly constituted quality improvement/peer review committee at least as far back as 1993 or 1994.... 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.

CP 549-51.

On November 9, 2010, Division Two of the Court of Appeals denied Gallinat's motion to modify the commissioner's ruling. *App. A* at 10. This Court granted direct discretionary review.

III. ARGUMENT

A. **A Hospital's Credentialing, Privileging and Personnel Records Are Relevant On A Medical Negligence Claim and Necessary For A Corporate Negligence Claim.**

In *Pedroza v. Bryant*, 101 Wn.2d 226, 233-34, 677 P.2d 166 (1984), this Court adopted the doctrine of corporate negligence under which hospitals are responsible for ensuring:

... the professional competence of all physicians and dentists who are members of the hospital's medical staff. The standards place particular emphasis on the appointment/reappointment process, delineation of clinical privileges, and periodic appraisals of each physician staff member... The standards could be valuable as a measure against which the hospital's conduct is judged to determine if the institution is meeting its duty of care to patients.²

Two years later in 1986, the Legislature enacted RCW 70.43.010 which requires hospitals to "set standards and procedures to be applied by the

²Quoting from Koehn, "Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence?", 32 Rutgers L.Rev. 342, 376-77 (1979).

hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges.”

Under the doctrine of corporate negligence, a hospital owes a patient independent legal duties ... “(2) to furnish the patient supplies and equipment free of defects; (3) to select its employees with reasonable care; and (4) to supervise all persons who practice medicine within its walls.” *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991). Petitioner claims the hospital was corporately negligent in not having procedures for using its vacuum extractors and for allowing Dr. Moynihan to use a vacuum extractor to deliver Jordan when Dr. Moynihan was not competent to use one. Petitioner does not know if Dr. Moynihan had credentials or privileges to perform vacuum extraction deliveries at the hospital because the trial court denied discovery of his credentialing, privileging and personnel records.

A corporate negligence claim against a hospital can only be established by medical expert evidence. *Ripley v. Lanzer*, 152 Wn. App. 296, 324-25, 215 P.3d 1020 (2009). Gallinat’s standard of care expert R. Mize Conner, M.D. testified that a hospital’s credentialing, privileging and personnel records usually contain evidence of a physician’s prospective qualifications for hospital privileges, which typically are kept separate from records of a hospital quality review committee’s retrospective review of a

medical incident involving the physician. CP 398-401. To meet *Ripley's* medical expert testimony requirement, Gallinat needs Dr. Conner to review the hospital's credentialing and privileging records so he will be able to testify whether Dr. Moynihan negligently exceeded his professional training, competence or hospital privileges in using a vacuum extractor to deliver Jordan and whether the hospital was corporately negligent in allowing Dr. Moynihan to perform unsupervised deliveries with its vacuum extractor.

B. Credentialing, Privileging and Personnel Records Are Not Exempt From Discovery Under The "Peer Review" Privilege In RCW 4.24.250(1).

The "peer review" privilege in RCW 4.24.250(1) applies to the "proceedings, reports, and written records" of "a regularly constituted review committee" of a "hospital whose duty it is to evaluate the competency and qualifications of members of the profession." RCW 4.24.250(1) provides:

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....

This Court has ruled that this privilege must be "strictly construed [in favor of discovery] and limited to its purposes", *Coburn*, 101 Wn.2d at 276, of... "keep[ing] peer review studies, discussions, and deliberations confidential", *Anderson*, 103 Wn.2d at 907. The privilege only applies to

“retrospective review” of patient care, not to “current care.” *Coburn*, 101 Wn.2d at 278. It does not apply to hospital administrative records:

[T]he discovery immunity does not embrace the files of the hospital administration. ... These administrative records are discoverable to the extent they do not contain the record of immune proceedings.

Anderson, 103 Wn.2d at 906.

A hospital’s credentialing, privileging and personnel records are administrative records, not the record of immune proceedings. They contain “information from original sources” that was generated in the physicians’ medical schools and medical practices outside of SWMC’s review committee meetings. *Coburn* holds such records are not privileged, and hospitals may not obstruct their discovery by assigning review committees to generate, collect or maintain them:

The statute may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings. ... For example, any information from original sources would not be shielded merely by its introduction at a review committee meeting.

101 Wn.2d at 277.

Under *Coburn* and *Anderson*, a hospital’s credentialing and privileging records are not privileged under RCW 4.24.250(1) because they are “files of the hospital administration”, 103 Wn.2d at 906, involving “information generated outside review committee meetings”, 101 Wn.2d at 277, not “retrospective review” of medical services, 101 Wn.2d at 278; 103

Wn.2d at 906, and are outside the statutory purpose of “keep[ing] peer review studies, discussions, and deliberations confidential.” 103 Wn.2d at 907. Moreover, the “peer review” privilege in RCW 4.24.250(1) does not apply *at all* to “actions [like this one] 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.” *Coburn*, 101 Wn.2d at 273.

C. Credentialing, Privileging And Personnel Records Are Not Exempt from Discovery Under The “Quality Improvement” Privilege In RCW 70.41.200(3).

The “quality improvement” privilege in RCW 70.41.200(3) provides:

(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... or discovery or introduction into evidence in any civil action....

In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), this Court ruled that a hospital’s credentialing and privileging records are non-privileged, and it is an abuse of discretion to deny their discovery:

The issue before us is whether the Court of Appeals erred in affirming a trial court’s decision disallowing evidence and limiting discovery by the plaintiffs on the issue of whether a hospital negligently granted privileges to two doctors who, according to the plaintiffs, were unqualified to recognize or treat their daughter’s serious neurological condition. We reverse the Court of Appeals and remand the case for trial on that issue....

[W]e are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue....

Id. at 486, 497.

Contrary to respondents' contention, *Burnet's* holding that hospital credentialing files are discoverable does not merely address limitations on discovery of credentialing records imposed as a sanction for violation of a discovery order. *Burnet* also must contemplate RCW 4.24.250(1) and RCW 70.41.200(3) because this Court would not have ordered discovery of the treating physicians' credentialing records—whether in connection with sanctions or otherwise—if they were privileged under these statutes.

In *Lowy v. Peacehealth*, 159 Wn. App. 715, 247 P.3d 7 (2011), Division One held that *Coburn* “mandate[s] that the statute [RCW 70.41.200(3)] be strictly construed and limited to its purposes”, *id.* at 723,..., that it “may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings”, *id.* at 721, ... and “that information from original sources ‘would not be shielded merely by its introduction at a review committee meeting.’” *Id.* at 721-22. Respondents' argument that the rules in *Coburn* and *Anderson* do not apply to the “quality improvement” privilege in RCW 70.41.200(3) is contrary to *Lowy*.

Moreover, the Legislature's requirement in RCW 70.41.200(1)(a) that hospitals review their services "both retrospectively and prospectively" does not indicate an intent to exempt credentialing and privileging records from discovery. RCW 70.41.200(1)(a), (b) and (c) all refer to having a quality improvement committee periodically "review" the delivery of in-hospital health care services. This merely reflects a legislative intent to have past hospital services reviewed with an eye toward improving future hospital services. The phrase "review... retrospectively and prospectively" in RCW 70.41.200(1)(a) does not say or imply that RCW 70.41.200(3) exempts credentialing and privileging records from discovery.

In 1971, the legislature enacted RCW 4.24.250 whose "peer review" privilege limitations were defined in *Coburn* in 1984 and in *Anderson* in 1985. "The legislature is presumed to be familiar with its own prior enactments and also with judicial decisions on the subject." *Daly v. Chapman*, 85 Wn.2d 780, 782, 539 P.2d 831 (1975). If the Legislature did not want the rules in *Coburn* and *Anderson* to apply to the "quality improvement" privilege, it could have said so when it enacted RCW 70.41.200 in 1986, but did not. Instead, as the Court of Appeals said in *Lowy*, "[t]he primary purpose of the chapter [RCW 70.41] is to 'promote safe and adequate care of individuals in hospitals through the development,

establishment and enforcement of minimum hospital standards for maintenance and operation.’ RCW 70.41.010.” 159 Wn. App. at 719. That purpose is furthered, not hindered, by *Coburn* and *Anderson*, which make hospital administration and original source records like a physician’s credentials and privileges discoverable, and by RCW 70.41.200(3)(d), which requires “disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions...” There is no indication in the legislative history or statutory text that the Legislature in enacting RCW 70.41.200 disagreed with or intended to overrule *Coburn* and *Anderson*.

Under *Coburn*, *Anderson* and *Burnet*, credentialing records are discoverable because the privileges in RCW 4.24.250(1) and RCW 70.41.200(3) are both concerned with promoting “candor and... constructive criticism thought necessary to effective quality review”, 101 Wn.2d at 275, not with a physician’s prospective qualifications to deliver a particular kind of health care service.

In *Coburn*, *Anderson* and *Adcox*, this Court applied the rule of strict construction because of the policy favoring discovery and the recognition that quality review statutes are in derogation of that policy. This Court recently underscored the importance of discovery in *Putman v. Wenatchee Valley*

Medical Center, 166 Wn.2d 974, 216 P.3d 374 (2009) as part of the constitutional right of access to courts. Since the credentialing and privileging records at issue here involve the physicians' prospective qualifications to perform vacuum extraction deliveries and neonatal resuscitation, the privilege in RCW 70.41.200(3) does not apply.

D. Under RCW 4.24.250(1) and RCW 70.41.200(3)(d), Evidence Relating To The Termination Or Restriction Of Staff Privileges Is Discoverable.

By legislative policy, the "peer review" and "quality improvement" privileges do not apply in civil malpractice actions arising out of the termination or restriction of medical staff privileges or prevent discovery of the specific restrictions imposed and the reasons for the restrictions. RCW 4.24.250(1) says the "peer review" privilege does not apply to "...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 70.41.200(3)(d) says the "quality improvement" privilege "...does not preclude:... (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..."

In *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989), the Court of Appeals said that, at least in the insurance context, the phrase “arising out of” is to be broadly construed:

The phrase “arising out of” is unambiguous and has a broader meaning than “caused by” or “resulted from.” *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, 14 Wash. App. 541, 543, 543 P.2d 645 (1975), review denied, 87 Wash.2d 1003 (1976). It is ordinarily understood to mean “originating from”, “having its origin in”, “growing out of”, or “flowing from”. *Avemco Ins. Co. v. Mock*, 44 Wash. App. 327, 329, 721 P.2d 34 (1986).

Since this civil action originates or flows from the hospital’s termination or restriction of Dr. Moynihan’s operative vaginal delivery privileges based on this case and “OB Case 1”, the hospital’s records relating to the termination or restriction of his privileges, the specific restrictions imposed, and the hospital’s reasons for the restrictions are discoverable.

The trial court ordered SWMC’s counsel to certify “that any documents under the exemptions in RCW 70.41.200(3) and RCW 70.41.230(5) were produced or do not exist.” CP 284-85, 417-19. But when Gallinat moved to enforce the orders, the trial court ruled that SWMC’s counsel had complied with them by only looking for the records in the hospital’s credentialing files, which do not contain them, and by not looking for the records in the hospital’s investigation files, which do contain them.

In *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 585-86, 220 P.2d 191 (2010), this Court held that in responding to discovery, a party must search *all* of its files; it may not look only in its files that do not contain the requested records and avoid looking in its files that do contain the records:

A corporation must search all of its departments, not just its legal department, when a party requests information about other claims during discovery. Here Hyundai searched only its legal department. Hyundai's counsel told the trial court that in response to request for production 20, Hyundai's search "was limited to the records of the Hyundai legal department" and that "no effort was made to search beyond the legal department, as this would have taken an extensive computer search." CP at 5319. As the trial court correctly found, "[t]here is no legal basis for limiting a search for documents in response to a discovery request to those documents available in the corporate legal department. ...

In *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 347, 352, 858 P.2d 1054 (1993), this Court sanctioned a defendant and its lawyer for not identifying or producing "smoking gun" documents discussing the dangers of the drug theophylline, which Fisons maintained in its "Regulatory File" rather than in its product file, ruling that their discovery responses were "misleading" and remanding to impose appropriate sanctions "to deter, to punish, to compensate and to educate." *Id.* at 352, 356.

In *Magana* and *Fisons*, this Court made it crystal clear that discovery is not a shell game in which a defendant can avoid discovery of relevant, non-

privileged evidence by having its lawyers look for it in files where it does not exist and not look for it in files where it does exist. In *Magana*, this Court ruled:

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054 (citing *Holbrook v. Weyerhaeuser Co.*, 118 Wash.2d 306, 315, 822 P.2d 271 (1992)). “A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is ‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard’ to the supported facts, adopts a view ‘that no reasonable person would take.’” *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006)....

Id. at 582-83. Under *Magana*, *Mayer* and *Fisons*, the trial court abused its discretion by applying the wrong legal standard in ruling that SWMC complied with the May 4 and June 21, 2010 discovery orders by only looking in its credentialing files for evidence that Dr. Moynihan’s staff privileges had been terminated or restricted and the reasons therefor, and by not looking in its investigation files where that evidence is located.

IV. CONCLUSION

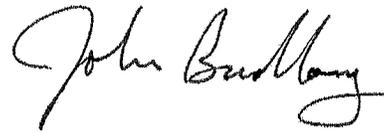
Petitioner respectfully asks the Court to reverse the decisions of the trial court and to remand with directions to order defendant Southwest Washington Medical Center to produce its credentialing, privileging and personnel records for Jordan Gallinat’s treating physicians, including its

records of terminating or restricting Dr. Moynihan's operative vaginal delivery privileges.

RESPECTFULLY OFFERED this 27th day of October, 2011.

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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.

APPENDICES

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APPENDIX A

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

Petitioner,

v.

DANIEL J. MOYNIHAN, M.D.,
KATHLEEN HUTCHINSON, M.D.,
and SOUTHWEST WASHINGTON
MEDICAL CENTER,

Respondents.

No. 40909-7-II

RULING DENYING
DISCRETIONARY REVIEW

Douglas Fellows, as the Personal Representative of the Estate of Jordan Gallinat (Gallinat), seeks discretionary review of the trial court's orders denying his motion to compel discovery of credentialing and privileging files maintained by Southwest Washington Medical Center (SWMC) and denying his subsequent motions for reconsideration and for *in camera* review. Concluding that Gallinat has not shown that discretionary review is appropriate, this court denies review.

Gallinat was born at SWMC on September 17, 1998. A vaginal delivery was first attempted by Daniel Moynihan, M.D., a family practitioner. After Dr. Moynihan made a number of attempts to deliver Gallinat using a vacuum extractor, Jane Ahearn, M.D., was summoned to SWMC to deliver Gallinat by emergency Caesarian section. Kathleen Hutchinson, M.D., a pediatrician, cared for Gallinat after his delivery. Gallinat suffers from kidney damage which his doctors attribute to hemorrhage and anoxia that Gallinat suffered during and following his delivery.

SWMC had granted Dr. Moynihan staff privileges as a family medicine practitioner in 1993. In 1997, as a result of the Gallinat case and of another obstetrics case, the Executive Committee of SWMC withdrew Dr. Moynihan's vaginal delivery privileges pending his taking additional training and pending having his deliveries proctored by another physician. Dr. Moynihan elected not to seek renewal of his delivery privileges.

In 2009, Gallinat sued Dr. Moynihan, Dr. Hutchinson and SWMC, alleging medical negligence. He also alleged that SWMC was negligent in its selection and supervision of medical personnel. As part of discovery, Gallinat requested from SWMC "the complete credentialing files" for Drs. Moynihan, Hutchinson and Ahearn. Mot. for Disc. Rev., Appendix at 45. SWMC objected, stating that "the documents sought are protected by the peer review privilege afforded under RCW 4.24.250 and RCW 70.41.200." Mot. for Disc. Rev., Appendix at 45. Gallinat then moved to compel disclosure of the files, challenging whether the

files fell within the protection of RCW 4.24.250 or RCW 70.41.200. The trial court concluded that the files "are privileged as described in RCW 70.41.200 and RCW 70.41.230." Mot. for Disc. Rev., Appendix at 2. It denied the motion to compel and ordered SWMC to "file a certification that all of the credentialing and privileging materials sought are covered by the privilege, or by the attorney-client privilege or work product doctrine." Mot. for Disc. Rev., Appendix at 2. SWMC's counsel then filed a declaration stating:

I received the credentialing files for [Drs. Moynihan, Hutchinson and Ahearn] from Southwest Washington Medical Center and these files have been reviewed and analyzed. . . . I certify that the information and documents contained in the credentialing files are protected by the quality assurance and quality improvement statutes and the work product doctrine.

Mot. for Disc. Rev., Appendix at 100-01.

Gallinat's subsequent motion for reconsideration was denied. Gallinat then moved to have the trial court engage in an *in camera* review of the files to determine whether they fell within the protection of RCW 70.41.200. The trial court denied that motion, ruling that "SWMC's counsel will file within two weeks a certification that the files were reviewed and that any documents under the exceptions of RCW 70.41.200(3) and (5) were produced or do not exist." Mot. for Disc. Rev., Appendix at 6. The court also ruled that it:

accept[ed] SWMC's counsel's representation that SWMC had a regularly constituted review committee in 1996 or 1997 when OB Cases 1 and 2 were reviewed, but records or evidence which show the formation and existence of the committee are not privileged and should be produced.

Mot. for Disc. Rev., Appendix at 9-10.

Gallinat seeks discretionary review of the trial court's orders. This court grants discretionary review only when:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

First, Gallinat argues that the trial court committed obvious error, or so far departed from the accepted and usual course of judicial proceedings as to call for review by this court, when it ruled that the credentialing files fell within the privilege contained in RCW 70.41.200(3) based on SWMC's counsel's certification that the files fell within the privilege. It contends that the trial court had a duty, under ER 104(a)¹ to determine for itself whether the files fell within the privilege.

¹ "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . ." ER 104(a).

As a hospital licensed in Washington, RCW 70.41.200(1)(a) requires SWMC to have a "quality improvement committee." RCW 70.41.200(3) provides in pertinent part that:

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.²

Statutes that create privileges such as that contained in RCW 70.41.200(3) are in derogation of the common law and the policy favoring discovery and so must be construed strictly. *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 31, 864 P.2d 921 (1991); *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985); *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984) (all interpreting RCW 4.24.250, which creates a similar privilege against discovery of hospital peer review committees). Each of these decisions discussed what a hospital needed to present in order to gain the protection of the privilege. In remanding to the trial court to determine whether Kadlec Hospital had "a regularly constituted committee . . . whose duty it is to review and evaluate the quality of patient care," as required to fall within the privilege granted in RCW 4.24.250, the *Coburn* court stated:

² RCW 70.41.230(5) contains the same privilege against discovery.

the trial court may wish to consider, in addition to other relevant evidence, the guidelines and standards of the Joint Commission on Accreditation of Hospitals and the bylaws and internal regulations of Kadlec Hospital. These materials may aid the trial court in ascertaining the organization and function of the committee as well as whether it is "regularly constituted."

101 Wn.2d at 278. See also *Anderson*, 103 Wn.2d at 905-06. And in holding that Children's Hospital had not shown that RCW 4.24.250 privileged the records sought by the plaintiff's, the *Adcox* court noted that "[t]he Hospital never presented any of its bylaws or internal regulations; never referred to the standards and guidelines of relevant accreditation bodies; and never even identified the committee members or the procedures involved in reviewing hospital care in 1984." *Adcox*, 123 Wn.2d at 31-32.

In this case, the trial court concluded that the files sought by Gallinat fell within the privilege provided by RCW 70.41.200(3). In order for that privilege to apply, SWMC must demonstrate that those files had been created for a "quality improvement committee." RCW 70.41.200(3). In determining that SWMC had such a committee, the trial court "accept[ed] SWMC's counsel's representation that SWMC had a regularly constituted review committee in 1996 or 1997 when OB Cases 1 and 2 were reviewed." Mot. for Disc. Rev., Appendix at 9-10. While this court has no reason to disbelieve SWMC's counsel's representation, that representation does not appear to meet the evidentiary standard set forth in *Coburn*, *Anderson* and *Adcox*, because she had no personal knowledge about whether SWMC had a quality improvement committee in 1996 or 1997. As such,

the trial court appears to have committed obvious error in accepting that representation in reaching its conclusion that RCW 70.41.200(3) applied.

However, that conclusion does not end this court's inquiry. Gallinat must also show that further proceedings are useless. And further proceedings, namely Gallinat's Motion to Enforce Court Orders and for CR 37 Evidentiary Hearing, have resulted in SWMC submitting evidence, in the form of a Declaration of Cindy Eling, that SWMC had a quality improvement committee in 1996 and 1997. Thus, SWMC now seems to have met the evidentiary standard set forth in *Coburn, Anderson and Adcox*, such that the trial court's ruling no longer rests solely on SWMC's counsel's representation. Gallinat has not shown that discretionary review is appropriate under RAP 2.3(b)(1). Nor has he shown that the trial court's ruling is the result of a departure from the accepted and usual course of judicial proceedings as to call for review by this court, so he has not shown that discretionary review is appropriate under RAP 2.3(b)(3).

Gallinat also argues that the trial court committed obvious error, or so far departed from the accepted and usual course of judicial proceedings as to call for review by this court, when it denied his motion to compel without having first reviewed SWMC's credentialing files *in camera*. He contends that because RCW 70.41.200(3) only privileges "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee," the only way a trial court can determine whether documents fall within that definition is to review them *in camera*. *Barry v. USAA*,

98 Wn. App. 199, 208, 989 P.2d 1172 (1999) (citing *Limstrom v. Ladenburg*, 136 Wn.2d 595, 615, 963 P.2d 869 (1998)).³

Neither *Barry* nor *Limstrom* creates the right to *in camera* review that Gallinat contends they do. Both involve claims that particular documents, within an otherwise discoverable file, should be privileged from discovery because they contain attorney work product. Because the files requested potentially contained both privileged and non-privileged documents, the appellate court remanded to the trial court for an *in camera* review to determine which documents were privileged and which were not. In this case, the SWMC credentialing files could contain exclusively "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee," such that RCW 70.41.200(3) would privilege the entire file and *in camera* review would not be required. Under Gallinat's theory, the trial court would be obliged to conduct an *in camera* review in every case where a facility or provider invoked a peer review or quality improvement privilege against disclosure. Washington case law does not support such a blanket obligation. Gallinat has not established that the trial court's denial of his motion for *in camera* review was either obvious error or a departure from the

³ Gallinat's reliance on *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497-98, 933 P.2d 1036 (1997), is misplaced because if addressed limitations on discovery of credentialing records imposed as a sanction for violation of a discovery order, not imposed by RCW 70.41.200(3) or other similar privileging statutes.

accepted and usual course of judicial proceedings and so does not show that discretionary review is appropriate under RAP 2.3(b)(1) or (3).

Gallinat has not shown that discretionary review is appropriate. Accordingly, it is hereby

ORDERED that Gallinat's motion for discretionary review is denied.

DATED this 30th day of August, 2010.

Eric B. Schmidt
Eric B. Schmidt
Court Commissioner

- cc: John Budlong
Donald L. Wobbrock
John C. Graffe, Jr.
Dana Shenker Scheele
Mary H. Spillane
Amy T. Forbis
Blair Russ
Hon. Robert Lewis

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DOUG FELLOWS,

Petitioner,

v.

DANIEL MOYNIHAN, MD, ET
AL,

Respondents,

No. 40909-7-II

ORDER DENYING MOTION TO MODIFY

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
COURT REPORT

Petitioner filed a motion to modify a Commissioner's ruling dated August 30, 2010, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 9th day of November, 2010.

PANEL: JJ. Bridgewater, Quinn-Brintnall, Worswick

FOR THE COURT:

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ACTING CHIEF JUDGE

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APPENDIX B

APPENDIX B

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).

CREDIT(S)

[2005 c 291 § 1, eff. July 24, 2005; 2005 c 33 § 5, eff. July 24, 2005; 2004 c 145 § 1, eff. June 10, 2004; 1981 c 181 § 1; 1979 c 17 § 1; 1977 c 68 § 1; 1975 1st ex.s. c 114 § 2; 1971 ex.s. c 144 § 1.]

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;

(c) 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.

CREDIT(S)

[2007 c 273 § 22, eff. July 1, 2009; 2007 c 261 § 3, eff. July 22, 2007. Prior: 2005 c 291 § 3, eff. July 24, 2005; 2005 c 33 § 7, eff. July 24, 2005; 2004 c 145 § 3, eff. June 10, 2004; 2000 c 6 § 3; 1994 sp.s. c 9 § 742; 1993 c 492 § 415; 1991 c 3 § 336; 1987 c 269 § 5; 1986 c 300 § 4.]

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; and

(f) A verification by the physician that the information provided by the physician is accurate and complete.

(2) Prior to granting privileges or association to any physician or hiring a physician, a hospital or facility approved pursuant to this chapter shall request from any hospital with or at which the physician had or has privileges, was associated, or was employed, the following information concerning the physician:

(a) Any pending professional medical misconduct proceedings or any pending medical malpractice actions, in this state or another state;

(b) Any judgment or settlement of a medical malpractice action and any finding of professional misconduct in this state or another state by a licensing or disciplinary board; and

(c) Any information required to be reported by hospitals pursuant to RCW 18.71.0195.

(3) The medical quality assurance commission shall be advised within thirty days of the name of any physician denied staff privileges, association, or employment on the basis of adverse findings under subsection (1) of this section.

(4) A hospital or facility that receives a request for information from another hospital or facility pursuant to subsections (1) and (2) of this section shall provide such information concerning the physician in question to the extent such information is known to the hospital or facility receiving such a request, including the reasons for suspension, termination, or curtailment of employment or privileges at the hospital or facility. A hospital, facility, or other person providing such information in good faith is not liable in any civil action for the release of such information.

(5) Information and documents, including complaints and incident reports, created specifically for, and collected, and maintained by a quality improvement committee are not subject to 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.

(6) Hospitals shall be granted access to information held by the medical quality assurance commission and the board of osteopathic medicine and surgery pertinent to decisions of the hospital regarding credentialing and recredentialing of practitioners.

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

CREDIT(S)

[1994 sp.s. c 9 § 744; 1993 c 492 § 416; 1991 c 3 § 337; 1987 c 269 § 6; 1986 c 300 § 11.]

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.

CREDIT(S)

[1986 c 205 § 1.]

NO. 85382-7

**SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 40909-7-11)
(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.

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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 the Supplemental Brief of Appellant Fellows and Appendices were 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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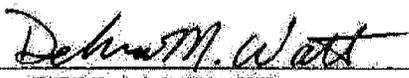
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DATED this 31st day of October, 2011.

By: 
DEBRA M. WATT