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NO. 40909-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
(Clark County Superior Court Cause No. 09-2-02453-1)

DOUGLAS FELLOWS as Personal Representative
of the Estate of JORDAN GALLINAT

Petitioner,

39116
11981

vs.

11835

DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHINSON, M.D.
AND SOUTHWEST WASHINGTON MEDICAL CENTER, 13779

Respondents.

PETITION FOR REVIEW BY THE SUPREME COURT

Lawrence Wobbrock, WSBA #31412
LAWRENCE WOBROCK TRIAL LAWYER, P.C.
806 SW Broadway Floor 10
Portland, Oregon 97205-3312
(503) 228-6600

John Budlong, WSBA #12594
LAW OFFICES OF JOHN BUDLONG
100 Second Avenue South, Suite 200
Edmonds, Washington
(425) 673-1944

Attorneys for Petitioner

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A. Identity of Petitioner

Petitioner, plaintiff in the action below, is Doug Fellows as litigation guardian for Jordan Gallinat, a minor child.

B. The Court of Appeals Decision.

On November 9, 2010, the Court of Appeals, Division Two, denied petitioner's motion to modify, App. 217, the Court Commissioner's August 30, 2010 Ruling Denying Discretionary Review, App. 120-128, of four discovery orders that were entered by Judge Robert A. Lewis of the Clark County Superior Court. App. 1-12. The effect of the Court of Appeals' decision is to deny discovery of defendant Southwest Washington Medical Center's ("the hospital's") (1) credentialing, privileging and personnel records for the physicians who were involved in Jordan Gallinat's delivery and neonatal resuscitation.

C. Issue Presented for Review

1. Did the Court of Appeals err in ruling that in a medical negligence and corporate negligence lawsuit, the quality improvement privilege in RCW 70.41.200(3) shields from discovery all of a hospital's credentialing, privileging and personnel records that relate to whether or not the plaintiff's treating physicians were professionally competent to perform the medical procedures that resulted in the plaintiff's injuries?

D. Statement of the Case

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. 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. Jane Ahearn, M.D., an obstetrician, was summoned to the hospital to deliver Jordan by emergency C-section. App. at 14. Defendant Susan Hutchinson, M.D., a pediatrician, participated in Jordan's resuscitation.

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. 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. App. 17-18.

The hospital granted Dr. Moynihan staff privileges as a family medicine practitioner in 1993. App. 24. 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.” App. 13-16. The hospital also filed an Adverse Action Report against Dr. Moynihan with the Washington State Dept. of Health. *Id.*

The Dept. 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.” App. 61. 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. App. 60-64.

In June 2009, petitioner filed a complaint alleging medical negligence and corporate negligence against Dr. Moynihan, Dr. Hutchinson and the hospital. App. 65-70. Between March and June 2010, petitioner filed motions in the trial court to compel discovery or in camera review of the hospital’s credentialing, privileging and personnel records for Drs. Moynihan,

Ahearn and Hutchinson. App. 71-96. The trial court denied petitioner's discovery motions "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 and denied in camera review. App.1-2, 5-7. The trial court accepted a "certification" by the hospital's lawyer that the hospital's credentialing, privileging and personnel records for Drs. Moynihan, Ahearn and Hutchinson were privileged and did not require them to be produced in discovery or for in camera review.

On June 25, 2010, petitioner sought discretionary review of the trial court's orders denying this discovery. App. 111-113. 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

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

whether SWMC had a quality improvement committee in 1996 or 1997.” App. 125-126. But the Commissioner denied discretionary review, ruling that the declaration of a hospital employee Cindy Eling, which says that the hospital had a quality improvement committee in 1996-97, App. 153, “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. App. 126. On November 9, 2010, the Court of Appeals denied petitioner’s motion to modify. App. 217.

E. Why Review Should Be Accepted

- 1. The Court of Appeals Decision that a Hospital’s Credentialing, Privileging and Personnel Records for a Plaintiff’s Treating Doctors Are Privileged from Discovery in a Corporate Negligence Case Conflicts with this Court’s Decisions in *Burnet v. Spokane Ambulance, Coburn v. Seda, Anderson v. Breda, and Putman v. Wenatchee Valley Med. Ctr.* (RAP 13.4(b)(1) and (3))**

RCW 70.43.010 requires hospitals to credential physicians before granting them professional privileges:

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.

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

Under the doctrine of corporate negligence, the hospital owed petitioner 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 furnishing Dr. Moynihan with its vacuum extractor and allowing him to use it to deliver Jordan when he lacked the professional competence to use it. Petitioner does not know if the hospital did or did not credential Dr. Moynihan or grant him privileges to

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

perform vacuum extraction deliveries because the trial court and the Court of Appeals denied discovery of this relevant evidence.

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). Petitioner'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 separate from records of a hospital quality review committee's retrospective review of a medical incident. App. 107-110. To meet the medical expert testimony requirement of *Ripley v. Lanzer*, petitioner needs to have Dr. Conner review the hospital's credentialing and privileging records so he will be able to testify on whether Dr. Moynihan negligently exceeded his professional competence 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.

In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), this Court ruled that the portions of a hospital's credentialing and privileging files that contain a physician's prospective qualifications and

medical staff privileges are non-privileged, and it is an abuse of discretion to deny discovery of those records:

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....

131 Wn.2d at 486.

More importantly though, we agree with the Burnets that its negligent credentialing claim against Sacred Heart, and discovery relating to it, should not have been excluded absent a trial court's finding that the Burnets willfully violated a discovery order.... [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 497.

In *Coburn v. Seda* and *Anderson v. Breda*, this Court has ruled that a quality review privilege statute 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. In *Coburn*, 101 Wn.2d at 277, this Court ruled that the peer review statute, RCW 4.24.250 does not shield information and documents generated outside quality review committee meetings:

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.³

In *Anderson*, 103 Wn.2d at 906-07, this Court further said that quality review privileges only apply to retrospective review of patient care, not to current care or to hospital administrative records:

Whether the [hospital's] activity is concerned with retrospective review or current care is an additional consideration in determining whether a quality improvement or peer review privilege applies. ...[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.

The Court of Appeals erred in denying discovery of the hospital's credentialing, privileging and personnel records concerning the treating doctors' prospective competence to perform vacuum extraction deliveries and neonatal resuscitation. These hospital administrative records are non-privileged because they do not contain the record of immune proceedings and do not interfere with the statute's purpose of keeping peer review studies, discussions, and deliberations confidential.

³The "quality review" privilege in RCW 70.41.200(3), rather than the "peer review" privilege in RCW 4.24.250, is at issue in this case because the "peer review" privilege does not apply to "actions [like this one] arising out of committee recommendations which involve restriction or revocation of staff privileges." *Coburn*, 101 Wn.2d at 273.

The Court of Appeals decision distinguished *Burnet*, saying it only “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.” App. 127. While it is true that the defendant hospital in *Burnet* did not assert a quality improvement privilege (presumably because there is no Washington legal authority which holds or suggests that this privilege applies to a hospital’s credentialing or privileging files), that distinction does not support a denial of discovery of the hospital’s credentialing, privileging and personnel records for Jordan’s treating doctors in this case. *Burnet* holds that a hospital’s credentialing and privileging records for a treating physician are relevant on a negligent credentialing claim, and it is an abuse of discretion to deny discovery of those records. *Coburn* and *Anderson* say the quality improvement privilege only applies to “retrospective review” of a medical incident, not to a physician’s prospective professional competence to perform “current care”, or hospital administrative records, or “information generated outside review committee meetings.” Since the hospital’s credentialing, privileging and personnel records at issue involve the physicians’ prospective professional competence to perform vacuum extraction deliveries and neonatal resuscitation, not

retrospective review of OB Cases 1 and 2 by a quality review committee, the quality improvement privilege does not apply.

The hospital's credentialing committee is not listed among the "committees of the medical staff [that] are engaged in peer review activities..." App. 197. The Court of Appeals nevertheless ruled that the hospital's credentialing and privileging files are categorically exempt from discovery because they "could contain exclusively 'information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality review committee' such that RCW 70.41.200(3) would privilege the entire file and *in camera* review would not be required." App. 127. This unsupported assertion is contrary to Dr. Conner's uncontradicted testimony that a hospital's credentialing records typically are separate from a quality review committee's retrospective review of a medical incident. App. 107-110. Moreover, if the hospital's credentialing files only contained retrospective quality review documents, it would mean that the defendant hospital has no records of "considering and acting upon applications for staff membership or professional privileges" as it was required to do under RCW 70.43.010. That statutory violation in itself would give rise to a corporate negligence claim.

The Court of Appeals decision that RCW 70.41.200(3) exempts from discovery a hospital's entire credentialing, privileging and personnel records for a plaintiff's treating doctors because the records *possibly* could all be privileged is in conflict with *Burnet*, which holds credentialing and privileging records are relevant and discoverable, and with *Coburn* and *Anderson*, which say that quality review statutes must be strictly construed and limited to their purpose and that hospital administrative records relating to prospective or current patient care are not privileged.

In *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 985, 216 P.3d 374 (2009), this Court recently held there is a constitutional right to discovery of relevant, non-privileged evidence that is necessary to prove a medical negligence claim, and that a law which "unduly burdens the right of medical malpractice plaintiffs to conduct discovery... violates their right to access courts" under Art. 1, Sec. 10 of the Washington State Constitution:⁴

⁴Art. 1, Sec. 10 of the Washington State Constitution provides: "Justice in all cases shall be administered openly, and without unnecessary delay."

The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rest all the people’s rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts “includes the right of discovery authorized by the civil rules.” *Id.* As we have said before, “[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense.”

RCW 7.70.150 [the certificate of merit statute] unduly burdens the right of medical malpractice plaintiffs to conduct discovery and, therefore, violates their right to access courts.

Under *Pedroza v. Bryant*, a hospital’s conduct in determining “the professional competence of all physicians and dentists who are members of the hospital’s medical staff” is central to proving a corporate negligence claim. The Court of Appeals decision is in conflict with *Putman* because it deprives petitioner of relevant, non-privileged discovery that is necessary to prove his corporate negligence claims. Petitioner respectfully requests this Court to accept review under RAP 13.4(b)(1) and (3) because the Court of Appeals decision conflicts with this Court’s decisions in *Burnet*, *Coburn*, *Anderson* and *Putman*.

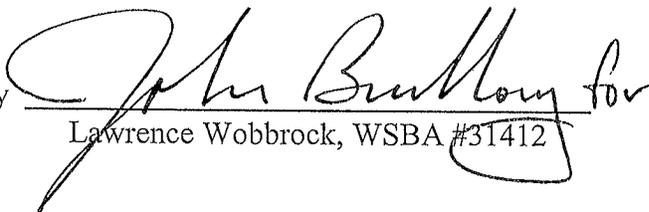
F. Conclusion

Petitioner respectfully asks the Court to accept his petition for review, reverse the Court of Appeals, and remand to the trial court with directions to order defendant Southwest Washington Medical Center to produce its

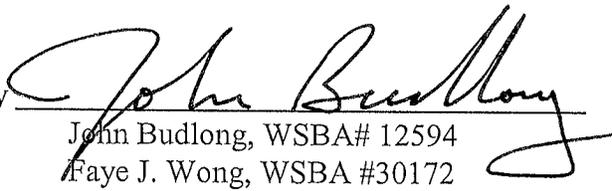
credentialing, privileging and personnel records for Jordan Gallinat's treating physicians.

RESPECTFULLY OFFERED this 7th day of December 2010.

LAWRENCE WOB Brock TRIAL LAWYER, P.C.

By  for
Lawrence Wobbrock, WSBA #31412

LAW OFFICES OF JOHN BUDLONG

By 
John Budlong, WSBA# 12594
Faye J. Wong, WSBA #30172

Attorneys for Petitioner Fellows/Gallinat

NO. 40909-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 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.

SECOND SUPPLEMENTAL APPENDIX

Lawrence Wobbrock, WSBA #31412
LAWRENCE WOB BROCK TRIAL LAWYER, P.C.
806 SW Broadway Floor 10
Portland, Oregon 97205-3312
(503) 228-6600

John Budlong, WSBA #12594
LAW OFFICES OF JOHN BUDLONG
100 Second Avenue South, Suite 200
Edmonds, Washington
(425) 673-1944

Attorneys for Petitioner

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APPENDIX

22. November 9, 2010 Order Denying Motion to Modify 217

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

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BY [Signature]

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:

[Signature]
ACTING CHIEF JUDGE

Mary H. Spillane
William Kastner & Gibbs
Two Union Square
601 Union St Ste 4100
Seattle, WA, 98101-2380

John Coleman Graffe, JR
Johnson Graffe Keay Moniz
925 4th Ave Ste 2300
Seattle, WA, 98104-1145

Amy Thompson Forbis
Bennett Bigelow & Leedom, P.S.
1700 7th Ave Ste 1900
Seattle, WA, 98101-1355

Dana Shenker Scheele
Hoffman Hart & Wagner LLP
1000 SW Broadway Ste 2000
Portland, OR, 97205-3072

Donald Lawrence Wobbrock
Lawrence Wobbrock Trial Lawyer PC
806 SW Broadway Fl 10
Portland, OR, 97205-3312

John Budlong
Law Offices of John Budlong
100 2nd Ave S Ste 200
Edmonds, WA, 98020-3551