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OF THE STATE OF WASHINGTON

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LEASA LOWY, Appellant

vs.

PEACEHEALTH, a Washington corporation; ST. JOSEPH HOSPITAL;
Respondents

and

UNKNOWN JOHN DOES, Defendant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

RESPONDENT'S ANSWER TO AMICUS CURIAE MEMORANDUM
OF WASHINGTON STATE HOSPITAL ASSOCIATION, ET AL.

LUVERA, BARNETT, BRINDLEY,
BENINGER & CUNNINGHAM
Joel D. Cunningham, WSBA #5586
Andrew Hoyal, WSBA #21349
Attorneys for Appellant

701 Fifth Avenue
6700 Columbia Center
Seattle, WA 98104
206.467.6090

LAW OFFICES OF MICHAEL
J. MEYERS, PLLC
Michael J. Myers, WSBA 5291
Attorney for Appellant

1102 Washington Mutual Bldg
601 West Main Avenue
Spokane, WA 99201
509.624.8988

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I. INTRODUCTION

The Court of Appeals' opinion addresses a limited issue of statutory construction, the meaning of "review" in RCW 70.41.200(3). See *Lowy v. PeaceHealth*, 159 Wn. App. 715, 720, 247 P.3d 7 (2011). That provision was added to the statute in 2005. *Id.*, at 722-23.

Amici contend that the Court of Appeals has adopted a "strained interpretation" of the relevant language. Amici at 5. Yet Amici does not support this contention with arguments addressing the language, nor does it address any of the reasons laid out by the Court of Appeals in support of its interpretation of the statute. Instead it attacks the application of strict construction to the statute, though three opinions by this Court have applied strict construction to the QA statutes.

The baleful effects predicted by Amici if the Court of Appeals' opinion is allowed to stand presuppose that the opinion permits the disclosure to Plaintiff of information and materials protected by the QA privilege, either in document production or by testimony or both. Amici do not point out where the Court of Appeals authorizes such document production or testimony. Amici cannot direct this Court to the offending passage, because not such passage exists. The opinion does not authorize this discovery. The specter of the demise of the QA privilege raised by

Amici is a chimera, unconnected to the actual opinion and holding of the Court of Appeals.

The presence of Amicus Washington State Hospital Association on the brief is especially noteworthy, since WSHA, along with the Washington State Trial Lawyers Association, supported the 2005 amendment adding the “review” language for the limited purpose of filling a gap in the QA statute by prohibiting extrajudicial access to protected materials. *See Lowy v. PeaceHealth*, 159 Wn. App. at 722-23; Plaintiff’s Answer to Petition for Review at 12-14; Appendix A16-20. Amicus WSHA does not deny or dispute this account of the history of the legislation. It does not contest the statement of the Court of Appeals that this history weighs in favor of the Court’s interpretation of the statute. *Id.*, 159 Wn App. at 722-23. Rather, Amicus WSHA ignores this history, and ignores its own role in the passage of the bill.

The Court of Appeals’ has issued a well-reasoned opinion on an important, but limited question of statutory interpretation. Amici’s argument that review should be granted is based upon a distortion and/or misreading of the Court of Appeals’ opinion and the statute in question, with arguments that are irrelevant to the facts in this case. The claims of Amici should be rejected, and the parties allowed to proceed with the litigation in the trial court.

II. ARGUMENT

A. The Court of Appeals' Interpretation of the Statute Does not Threaten to Eviscerate the QA Privilege

Amici make a number of scattered and discrete arguments within the umbrella of its first sub-heading. Amici at 4-8. Plaintiff will address these arguments in order.

1. Amici first argue that the Court of Appeals adopted a “strained interpretation” of “review and disclosure.” Amici at 5. Amici, however, do not give any reason or argument to support the claim that the statutory interpretation was strained. The Court of Appeals carefully analyzed the statute in construing it. Plaintiff gave a reasoned argument in support of the Court of Appeals’ opinion. See Plaintiffs’ Answer for Petition for Review pp. 11-15. Amici completely fails to address or challenge these arguments. If Amici believed the interpretation was strained, it was incumbent on Amici to present supporting arguments.

Rather than presenting arguments on the meaning of “review” in the statute, Amici contend that the Court of Appeals ignored the “separate command that information ‘collected and maintained’ by a QI committee is not ‘subject to . . . discovery.’” Amici at 5 (ellipsis marks in Amici

brief). This argument itself ignores the relevant language in the Court of Appeals opinion, and omits critical language in the statute.

In order to obtain protection from discovery under the QA statute, material must meet three requirements. The material must be “[1] created specifically for, and [2] collected and [3] maintained by” by a QA committee. RCW 70.41.200(3). Amici’s argument criticizing the Court of Appeals’ opinion omits the “specially created for” requirement, thereby distorting the meaning of the statute.

The Court of Appeals was explicit in its holding that the only material to be produced in discovery is material which was **not** created specifically for the QA committee. As it noted with regard to the original trial court order, and order it is reinstating, “[t]he only condition was that no records be disclosed that were ‘created specifically for, and collected and maintained by a quality improvement committee.’” *Lowy v. PeaceHealth*, 159 Wn. App. at 718; see also *id.*, 159 Wn. App. at 722 (¶16) (quoted at p. 3 of Plaintiff’s Answer to Petition for Review). The Court of Appeals could not have been more clear that no protected material was to be disclosed. The Court of Appeals did not ignore the

separate command of the statute, but correctly held that three requirements must be met before materials are entitled to immunity from discovery.¹

2. Contrary to the insistence of Amici, the Court of Appeals' opinion did not fail to recognize that the database is a compilation of materials subject to the QA privilege. Amici at 6. The Court's order prohibits Plaintiff from examining the database because the database itself constitutes protected material. Nor will the reports which went into the database be used against the hospital or any of its reporting personnel. Plaintiff will not obtain those reports, the identity of the reporting agents, or any testimony regarding those reports. As the Court of Appeals' opinion makes clear, Plaintiff will only obtain non-QA documents.

In disclosing them [non-QA documents], the hospital will not be required to disclose who participated in the review process concerning IV injuries, which incidents the hospital found relevant or important, or how it sorted, grouped, or otherwise organized those incidents. The hospital will not disclose any analysis, discussions, or communications that occurred during the proceedings of the quality assurance committee.

Id., at 722.

¹ As Plaintiff understands it, the non-QA material Plaintiff is in fact neither collected nor maintained in the QA file. But whether or not it is collected or maintained there is irrelevant, since in order to be protected, the material must also be "created specifically for" the committee. The ordinary hospital records Plaintiff seeks were not created specifically for the committee. The hospital may not immunize non-protected documents simply by placing them in the QA file. *Coburn v. Seda*, 101 Wn.2d 270, 277, 677 P.2d 173 (1984).

3. Amici next question whether the evidence submitted to the QA committee is relevant to Plaintiff's claims. Amici at 7. First, the premise of the argument is erroneous; Plaintiff will not receive any evidence protected by the QA statute, relevant or otherwise. Second, the Court of Appeals had before it a pure discovery issue between the hospital and Plaintiff. The hospital has never contested the relevance in discovery under CR 26(b)(1) of the non-QA evidence sought by Plaintiff. The trial court specifically found that the information sought by Plaintiff was relevant. CP 109-110. Amici here is attempting to create a new issue for dispute, an issue which has never arisen between the parties themselves, and certainly was not an issue before the Court of Appeals or the trial court. Amici's argument is without merit, and is an improper attempt by a non-party to place a new issue before the Court. *See, e.g., State v. Gonzalez*, 110 W.2d 738, 752 n. 2, 757 P.2d 925 (1988) (arguments raised only by amici curiae need not be considered).

4. Amici claim that "the Court of Appeals' holding has no textual or logical boundaries," and that under the opinion as "[l]iterally read," hospital witnesses will be compelled to testify regarding the incident reports. Amici fail to direct this Court to any language in the Court of Appeals' opinion which would require hospital witnesses to so testify. RCW 70.41.200(3) is specific in its prohibitions on testimony. It

prohibits testimony “as to the **content** . . . of such [QA] proceedings or the documents and information prepared specifically for the committee ...” (Emphasis added). Nothing in the Court of Appeals’ opinion authorizes testimony in violation of this statutory language.

B. The Court of Appeals’ Opinion Does not Threaten the Integrity of the Quality Improvement Process

The claim of Amici that Plaintiff will be able to utilize information in the QA files to build her case ignores or misstates what the Court of Appeals’ opinion permits. Amici at 8-9. The order requires the hospital to produce only documents and information which were **not** prepared specifically for the QA committee. Plaintiff is not seeking “QI-derived” evidence. The evidence sought by Plaintiff was created independently of the QA process. Plaintiff is entitled to this discovery of non-privileged material so that her experts can make their own independent assessment of the relevant facts. *See Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984). The hospital’s own self-assessment in the QA process will not be disclosed to Plaintiff; Plaintiff will not be able to utilize the hospital’s self-assessment in making her case.

Most astonishingly, Amici fault the Court of Appeals for recognizing that the QA statutes should be strictly construed. Amici at 9. The Court of Appeals did no more than apply this Court’s well-settled

precedent that these statutes are to be strictly construed. As this Court stated in *Adcox v. COH*, 123 Wn.2d 15, 31, 864 P.2d 921 (1993):

We have already recognized that this statute, being contrary to the general policy favoring discovery, is to be strictly construed and limited to its purposes. *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984); *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985).

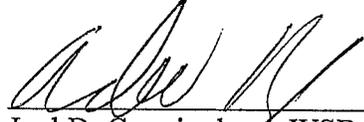
This Court applied the rule of strict construction in *Coburn*, *Anderson* and *Adcox*, without making any finding that the statute was ambiguous. The rule applies because of the policy considerations noted in the Court's opinions. The rule of strict construction applies in this case as well.

III. CONCLUSION

The Petition for Review should be denied.

DATED this 31st day of May, 2011.

LUVERA, BARNETT, BRINDLEY,
BENINGER & CUNNINGHAM



Joel D. Cunningham, WSBA #5586
Andrew Hoyal, WSBA #21349
701 Fifth Avenue, Suite 6700
Seattle, WA 98104
(206) 467-6090
Attorneys for Petitioner

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of a copy of the foregoing Respondent's Answer to Amicus Curiae Memorandum of Washington State Hospital Association, et al. in the manner set forth below:

Mr. John C. Graffe
Johnson, Graffe, Keay, Moniz & Wick
925 Fourth Avenue, Suite 2300
Seattle, WA 98104

VIA LEGAL MESSENGER

Ms. Mary H. Spillane
Williams, Kastner & Gibbs
2 Union Square - #4100
Seattle, WA 98111-3926

VIA LEGAL MESSENGER

Mr. Stephen C. Yost, Esq.
Campbell Yost Clare & Norell
101 N. First Avenue, Suite 2500
Phoenix, AZ 85003

VIA EMAIL

DATED this 31st of May, 2011.



Dee Dee White

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