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SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 63866-1-I]

LEASA LOWY,

Respondent,

v.

PEACEHEALTH, a Washington corporation; ST. JOSEPH HOSPITAL;
and UNKNOWN JOHN DOES,

Petitioners.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner PeaceHealth, a corporation that does business as St. Joseph Hospital, asks the Supreme Court to accept review of the published Court of Appeals decision designated in Part II.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its published decision on January 31, 2011. *Lowy v. PeaceHealth*, ___ Wn. App. ___, ___ P.3d ___, 2011 Wn. App. LEXIS 310 (2009). A copy of the Slip Opinion is attached as Appendix A.

The Court of Appeals decision requires the defendant hospital, at the behest of the plaintiff in this malpractice lawsuit, to review a database derived from incident reports and created solely for and maintained by the hospital's quality improvement committee and to identify from that database and disclose to plaintiff instances in which other patients have experienced treatment complications similar to plaintiff's. The decision requires such review despite the quality improvement privilege statute, RCW 70.41.200(3), under which "[i]nformation 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* [emphasis added]." The Court of Appeals reasoned that ordering

the hospital to conduct the review and to disclose to plaintiff information that its quality improvement program database contains does not invade the privilege created by RCW 70.41.200(3) because the patient records plaintiff seeks are not themselves hospital quality improvement committee records and because the privilege statute only prohibits persons outside the hospital from reviewing the hospital's quality improvement committee records.

III. ISSUE PRESENTED FOR REVIEW

Despite RCW 70.41.200(3), which provides that “[i]nformation 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* [emphasis added],” is a medical malpractice plaintiff entitled to demand that the defendant *hospital* review information contained in a database that was derived from incident reports and created solely for, and maintained by, its quality improvement committee, and disclose to the plaintiff, based on that review, medical records of other patients who have experienced treatment complications arguably similar to that which prompted the plaintiff's lawsuit?

In other words, is the Court of Appeals correct in holding that,

even though RCW 70.41.200(3) does not allow the plaintiff to review the hospital's quality improvement committee's records or database and extract information from them, the plaintiff can force the hospital to review such records or database and disclose to the plaintiff information contained therein?

IV. STATEMENT OF THE CASE

A. Nature of the Case.

Leasa Lowy, a physician with privileges at St. Joseph Hospital in Bellingham, CP 39 (p.10), and a member of PeaceHealth's Quality and Patient Safety Team, CP 51 (¶ 3), sued PeaceHealth, claiming that she suffered a neurologic injury to her arm as a result of an IV infusion she received while hospitalized at St. Joseph Hospital, CP 6 (¶ 4.1). St. Joseph Hospital is owned and operated by PeaceHealth. *See* CP 5 (¶ 1.2).

While wearing her Quality and Patient Safety Team member hat, Dr. Lowy saw a computer screen displaying data from a "Cubes" database that tracked IV infusion incidents. CP 29, 33-34, 51-52. Then, while wearing her plaintiff-suing-the-hospital hat, Dr. Lowy propounded discovery requesting PeaceHealth to produce "incident reports, adverse outcome reports, sentinel event reports, or other similar reports" regarding complications of IV treatment over a nine-year period. *See* CP 16-17. Defendants objected to that discovery on the grounds that such documents

or information were privileged and immune from discovery under the quality improvement and peer review statutory privileges set forth in RCW 70.41.200 *et. seq.*¹ and RCW 4.24.250.² *See* CP 17.

Dr. Lowy did not move to compel responses to her request for production, but instead served a notice for a CR 30(b)(6) deposition, demanding that PeaceHealth designate a representative to testify about, among other things, “any and all facts and information relating . . . to [i]ncidences of IV infusion complications and/or injuries at St. Joseph’s Hospital for the years 2000-2008.” CP 17, 21.

Defendants, explaining that “[t]here are no documents, other than quality assurance and peer review records, which may contain responsive information . . .,” and that “[a]ll such documents maintained by the quality assurance and peer review committees of St. Joseph Hospital were sent to and maintained confidentially by such committees in accordance with the quality assurance and peer review statutes, and are confidential from any dissemination, pursuant to those statutes,” CP 25, moved for a protective order, CP 16-25, on grounds that “[t]he discovery sought was overly broad, unduly burdensome, and subject to and protected by the quality assurance and peer review privileges,” under RCW 70.41.200 *et seq.* and

¹ The full text of RCW 70.41.200 is attached as Appendix B. In some of the trial court briefing, RCW 70.41.200 was mistakenly cited as RCW 70.40.200. *See, e.g.*, CP 17, 18.

² The full text of RCW 4.24.250 is attached as Appendix C.

RCW 4.24.250, *see* CP 16, 18. As defendants explained, CP 17:

[T]o provide a knowledgeable deponent to testify responsively to [the] request would require the deponent to either inspect confidential and privileged peer review and quality assurance documentation on any such injuries or complications or to review 9 years of medical records for all patients at St. Joseph's Hospital looking for reference to IV infusion injury or complication.

Dr. Lowy has conceded that a record-by-record search of patient medical records would be unduly burdensome for the hospital, *App. Br. at 6*, *see Slip Op. at 2-3*, and she has not claimed that patient medical records would reflect "incidences of IV infusion complications and/or injuries" in a form that would enable someone reviewing thousands of patient medical records to identify them as such. Rather, in response to PeaceHealth's motion for protective order, Dr. Lowy argued that the privilege statutes do not prohibit a court from ordering a hospital to review "its QA [quality assurance]³ files in order to determine whether the files contain documents which were not created specifically for the committee," CP 32, and that "[i]f there are medical records in the [quality assurance] file or information from original sources in the file, then those records and that information are not privileged and must be produced." CP 33.

Defendants explained that the Cubes database from which Dr.

³ The terms "quality assurance" or "QA" and "quality improvement" or "QI" have been used interchangeably in the parties' briefing.

Lowy was demanding the extraction of IV infusion complication information consists of materials “created, kept and maintained for the sole purposes of quality assurance and peer review,” and of materials “derived from incident reports, which are themselves quality assurance and peer review documents.” CP 46-47, CP 51-52. The Hospital’s Medical Director of Patient Safety explained, CP 51-52:

5. Dr. Lowy asked me whether PeaceHealth tracked IV infusion incidents. Since Dr. Lowy is also a member of the Quality and Safety Leadership Team at PeaceHealth and entitled to access Quality Assurance documents, I told her that such tracking does occur and showed her a screen on my computer from the Quality Assurance database with an example of the tracking format. I told Dr. Lowy that the screen I showed her was part of the PeaceHealth “Cubes” database and is material created, kept and maintained for the sole purposes of quality assurance and peer review.

6. The information in the Cubes database is derived from incident reports, which are themselves quality assurance and peer review documents.

7. Other than quality assurance and peer review documents, there is no source of information about IV infusion incidents at St. Joseph’s Hospital or PeaceHealth available, other than patient medical records.

The trial court initially denied PeaceHealth’s motion for protective order and ordered that someone from the hospital “review all relevant records of the quality assurance and peer review committee for the period January 1, 2003 through March 31, 2009,” and disclose to Lowy the “underlying facts and explanatory circumstances charted in hospital records relating to alleged injuries, complications, malfunctions or adverse

events associated with any IV infusions.” CP 54. Defendants moved for reconsideration, CP 55-82, *see also* CP 96-101, and submitted another declaration of the Hospital’s Medical Director of Patient Safety, who explained, CP 65-66:

4. The Cubes database is information and documents created specifically for, and collected and maintained solely by quality improvement committees. In the case of incidences of adverse drug reactions [such as possible IV infiltrations], those quality improvement committees are the Pharmacy and Therapeutic Committee and the Medication Safety Team. Both of these regularly constituted committees are established under RCW 70.41.200 and similar statutes, and the Cubes data, in spreadsheet format, are reports and written records of those two regularly constituted committees whose duty it is to review and evaluate the quality of patient care under RCW 4.24.250 and similar statutes.

* * *

6. Throughout the process of input and use of the information in the Cubes database by the QI committees are statements of its purpose and such statements include that the report is confidential and privileged under state law because it is a quality improvement report for quality improvement and peer review purposes. This confidentiality and privilege is maintained by passwords to preclude dissemination from the Cubes database to non-committee members.

7. I attach the Medical Staff Bylaws and Rules and Regulations of St. Joseph Hospital [Bylaws]. At page 4, section 3A of the Bylaws, the outline of the Medical Staff committees of the Hospital that carry our peer review and other performance improvement functions are delegated to the Medical Staff by the Board. At page 9, section 3.K. the Pharmacy and Therapeutics Committee is established to “conduct ongoing reviews of adverse drug events reported

through the Hospital Systems.” This review is the QI committee using the Cubes database.

8. The information about adverse drug events on the Cubes [database] is not patient medical records or excerpts of patient medical records; rather it is summary information reflecting the deliberative process and evaluation of the QI committee analyzing the occurrence in the performance of its QI mandate. Information such as severity, type of event, outcome and root cause is assessed. The committees evaluate improvement opportunities based on this information. However, the only information containing all the underlying facts and circumstances of any such events is the patient medical records.

Dr. Lowy never sought to controvert the Hospital’s showings, *see* CP 25 (¶ 4), 52 (¶¶ 6, 7), 65-66 (¶¶ 3, 4, 8), that there is no information in the Cubes database that was created for a purpose other than quality improvement, or that there are no original source documents, such as patient medical records or excerpts of records concerning other IV infusion incidents, in the Cubes database.

The trial court granted the motion for reconsideration. CP 103-04. The Court of Appeals granted Lowy’s motion to modify its Commissioner’s Ruling denying Lowy’s motion for discretionary review, and then issued its published decision reversing the trial court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

All hospitals in Washington are required to have quality improvement committees “with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to

improve the quality of medical care to patients and to prevent medical malpractice,” RCW 70.41.200(1)(a), as well as to carry out, among other things, “[t]he maintenance and continuous collection of information concerning the hospital’s experience with negative health care outcomes and incidents injurious to patients . . .,” RCW 70.41.200(1)(e). To foster true critical self-assessment, including the collection of information concerning the hospital’s experience with negative health care outcomes and incidents, the legislature provided as part of the same statute 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. . . .

RCW 70.41.200(3). It would be difficult to word a statute more clearly than RCW 70.41.200(3) is worded. Under RCW 70.41.200(3), if information or a document is created specifically for and is collected and maintained by a hospital’s quality improvement committee (which a hospital is statutorily mandated to have to engage in, among other things, “the maintenance and continuous collection of information concerning the

hospital's experience with negative health care outcomes and incidents", RCW 70.41.200(1)(e)), then the information or document is not only inadmissible in evidence, but also is not subject to review, or disclosure, or discovery, in any civil action.⁴

The Court of Appeals decision imputes to the Legislature an intent to distinguish between "review" that is "internal" and "review" that is "external." Thus, according to the Court of Appeals, while a malpractice plaintiff is prohibited from reviewing or mining a hospital's quality improvement committee database,⁵ that plaintiff may nevertheless require the hospital itself to review and mine it and tell her what it contains to aid her in her medical malpractice litigation. That reasoning, which could be applied to *any* type of privilege, vitiates the privilege conferred upon hospital quality improvement databases.

The Court of Appeals' imputation to the Legislature of an intent to

⁴ Dr. Lowy has repeatedly insisted, based on cases like *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984), interpreting the privilege conferred by RCW 4.24.250, that a privilege statute like RCW 70.41.200(3) must "be strictly construed and limited to its purposes," *see, e.g.*, CP 30-31, App. Br. at 12. But, she ignores the fact that, under RCW 70.41.200(3), the "strict construction" predicates that must be satisfied for the privilege from review, or disclosure, or discovery, or introduction into evidence in any civil action to apply are only that the "information and documents" be "created specifically for, and collected and maintained by a quality improvement committee." Dr. Lowy has never contended that the Cubes database, or the incident reports from which it was derived, or the information contained therein, do not meet those "strict construction" statutory predicates.

⁵ As the Court of Appeals acknowledged: "Plainly, the statute prevents the hospital from disclosing the quality assurance records themselves or allowing persons outside the hospital to review them." Slip Op. at 5.

distinguish between “external” and “internal” review of a quality improvement database for purposes of discovery in a civil action finds no support in the statute itself, which draws no distinction between “internal” and “external” review, but simply prohibits the review, or disclosure, or discovery of information and documents created specifically for, and collected and maintained by a hospital quality improvement committee in any civil action. That a statute is in derogation of either common law or a 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) (interpreting RCW 4.24.250), does not mean that courts are free to add words to the statute that are not there, or to fail to give effect to the words that are there. *Dot Foods, Inc. v. Dep’t of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185 (2009) (“To achieve such an interpretation, we would have to import additional language into the statute that the legislature did not use. We cannot add words or clauses to a statute when the legislature has chosen not to include such language”); *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (courts “must not add words where the legislature has chosen not to include them,” and we must “construe statutes such that all of the language is given effect”).

Indeed, the Court of Appeals’ attempt to draw a distinction

between “external” and “internal” review ignores the fact that the review and disclosure of information contained in the quality improvement committee’s database that its decision would require would have to be “external” and not “internal” to the quality improvement committee, as, under RCW 70.41.200(3), “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.”

If the Court of Appeals decision is allowed to stand, it will transform hospital quality improvement program databases into clearinghouses for records production in medical negligence lawsuits – precisely what the legislature meant to protect hospitals from. And, perversely, the more diligent and thorough an effort a hospital makes to engage effectively in critical self-assessment, the handier a tool plaintiffs’ lawyers will have at their disposal for discovery when they sue the hospital and/or health care providers who work there.

The Court of Appeals decision needs to be reviewed and reversed. Genuine critical self-assessment by hospitals of the care they provide to their communities and, in some instances, their regions, is of substantial

public importance. Any court decision that undermines that critical self-assessment, and converts the information and documents created specifically for and collected and maintained by a hospital quality improvement committee into a mother lode of data for plaintiffs' lawyers to mine raises an issue of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(4).

Almost every state has enacted a similar privilege statute to protect the records and work of hospital quality improvement committees.⁶ The privilege "imposes some hardship on litigants seeking to discover information from hospital records, but the Legislature has clearly chosen to impose that burden on individual litigants in order to improve the medical peer review process[.]" *Carr v. Howard*, 689 N.E.2d 1304, 1315 (Mass. 1998); *see also In re Investigation of Ruth Lieberman*, 646 N.W.2d 199, 201 (Mich. App. 2002) (quoting lower court's observance that "health care quality assurance is uniquely important and uniquely fragile. . . [M]eaningful quality assurance or peer review cannot exist . . . without a guarantee of confidentiality").

RCW 70.41.200(3), enacted in 1986, is even more broadly worded than RCW 4.24.250, which was originally enacted in 1971 to protect

⁶ *See Carr v. Howard*, 689 N.E.2d 1304 (Mass. 1998); *Sanderson v. Bryan*, 522 A.2d 1138, 1140 n.3 (Pa. 1987) (enumerating 46 states' medical quality assurance statutes).

“proceedings, reports, and written records of” quality assurance/peer review committees at a time when the law did not yet require hospitals to have such committees. RCW 4.24.250(1) provides in pertinent part that

The proceedings, reports, and written records of such [quality assurance] 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).

As the court explained in *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985), regarding RCW 4.24.250 (and before RCW 70.41.200 was enacted):

RCW 4.24.250, and similar statutes prohibiting discovery of hospital quality review committees, represent a legislative choice between competing public concerns. The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review.

RCW 70.41.200(3) does not apply just to quality review committee *proceedings, reports, and written records*; it applies to any “[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee” It applies with even greater specificity and clarity to information collected “concerning the hospital's experience with negative health care outcomes and incidents injurious to patients,” RCW

70.41.200(1)(e), and specifically prohibits such information from being subject to “review *or* disclosure, . . . *or* discovery *or* introduction into evidence in any civil action,” RCW 70.41.200(3) (emphasis added).

When it amended RCW 70.41.200(3) in 2005, the Legislature stated in the “Summary” in its Final Bill Report to EHB 2254 (July 24, 2005) that “[t]he review or disclosure of information and documents specifically created for, and collected and maintained by, quality improvement and peer review committees or boards is prohibited unless there is a specific exception.” The legislature did not invite the courts to infer exceptions; the legislature itself made the available exceptions express and specific. The second sentence of RCW 70.41.200(3) specifies five exceptions.⁷ Dr. Lowy has never argued, and the Court of Appeals did not hold, that she is entitled to discover the requested IV infusion complication records under any of those five statutory exceptions.

The Legislature’s decision to require hospitals to establish quality

⁷ “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.”

improvement committees, but to protect information and documents created specifically for, and collected and maintained by such committees from “review or disclosure . . . or discovery or introduction into evidence in any civil action,” must be respected even if it means that Dr. Lowy cannot access all the information she would like to access in discovery. Nothing in RCW 70.41.200(3) admits of any exception to its prohibition against review, disclosure, or discovery simply because there is no other, nonburdensome way to get the information or documents. Indeed, it goes without saying that a purpose of *any* privilege, whether it be the RCW 70.41.200(3) privilege, or the RCW 5.60.060(1) spousal privilege, or the RCW 5.60.060(2)(a) attorney-client privilege, is to make certain kinds of relevant information off limits to a litigant for public policy reasons. As the court explained in *McGee v. Bruce Hospital System*, 439 S.E.2d 257, 259-60 (S.C. 1993):

The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process.

* * *

We find that the public interest in candid professional peer review proceedings should prevail over the litigant’s need

for information from the most convenience source.
[Citations omitted.]⁸

Here, the hospital quality improvement committee's Cubes database was created under a legislative promise of privilege that it (as well as incident reports it was derived from and the information it contains) would not be subject to review, disclosure, discovery, or introduction into evidence. The courts should not interfere with that promise, any more than they should tamper with the statutory attorney-client or spousal privileges.

Dr. Lowy did not controvert the Hospital's showing that there is no information in the Cubes database that was created for a purpose other than quality improvement, and that there are no original source documents, such as patient medical records or excerpts of records concerning other IV infusion incidents, in the Cubes database. The distinction the Court of Appeals has tried to draw between "external" and "internal" review is unsupported by the statute and is wholly at odds with (a) the statute's purpose of fostering critical self-assessment by hospitals free of concern about plaintiffs' lawyers looking over their shoulders, and

⁸ Dr. Lowy is not precluded by RCW 70.41.200(3) from obtaining other patients' files from a source other than the hospital's quality improvement database. What precludes her from obtaining those is the fact that, *as she admits, App. Br. at 6, see Slip. Op. at 2-3*, it would be unduly burdensome to have someone retrieve and read thousands and thousands of patient records to search for and identify evidence of IV infusion incidents during the years 2000-2008 (not to mention having to redact the records to comply with privacy laws such as HIPAA).

(b) the legislature's undertaking to specify what exceptions to the privilege exist. No statutory exception applies to the information Dr. Lowy requested in discovery, so RCW 70.41.200(3) makes all information in or from the Cubes database statutorily protected from discovery, as the trial properly held.

At least one court has rejected the very reasoning adopted by the Court of Appeals and has held that a federal statute similar to RCW 70.41.200(3) does not allow the search of a quality improvement database in order to obtain non-privileged information. *Dayton Newspapers, Inc. v. Dept. of the Air Force*, 107 F. Supp. 2d 912 (S.D. Ohio 1999), arose from a FOIA request for Air Force and Army medical malpractice information in two databases. The government showed that the database had been created by and for a medical quality assurance program, and objected to the FOIA request based on 10 U.S.C. § 1102(a), which provides that "records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged [and] may not be disclosed to any person or entity, except in [narrowly defined circumstances not applicable to the case]." *Id.* at 914. The court held that "10 U.S.C. § 1102 protects the confidentiality of *all* 'medical quality assurance records,' regardless of whether the contents of such records originated within or outside of a medical quality assurance program."

Dayton Newspapers, 107 F. Supp. 2d at 917 (italics by the court). The reasoning of *Dayton Newspapers* is persuasive and the Court of Appeals erred by not applying it in this case.

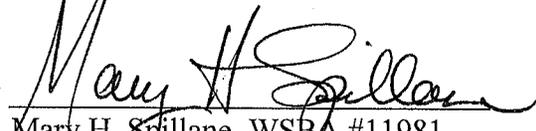
VI. CONCLUSION

For the foregoing reasons, this Court should grant review and reverse the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 2nd day of March, 2011.

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APPENDIX A

70.41.200(3), a statute designed to protect the confidentiality of information created for and maintained by a quality improvement committee. We disagree and hold the hospital may internally review the database for this purpose. The order denying discovery is reversed.

Appellant Leasa Lowy, formerly a staff physician at St. Joseph's Hospital in Bellingham, stayed at the hospital as a patient for six days in January 2007. Lowy alleges that during her stay, she sustained permanent neurological injury to her left arm as a result of negligence when she had an intravenous, or IV, infusion. According to her physician, Lowy will no longer be able to practice her specialties of obstetrics and gynecology due to the injury.

The hospital is owned and operated by PeaceHealth. Lowy commenced this action against PeaceHealth and certain hospital employees. One of her theories against PeaceHealth is that the hospital is liable for corporate negligence. The doctrine of corporate negligence applies to hospitals in Washington. Pedroza v. Bryant, 101 Wn.2d 226, 229-33, 677 P.2d 166 (1984).

In connection with her theory of corporate negligence, Lowy sought to obtain, through a deposition under CR 30(b)(6), information relating to instances of "IV infusion complications and/or injuries at St. Joseph's Hospital for the years 2000-2008." It is undisputed that the requested information is relevant.

One way for the hospital to gather the requested information would be to go through its entire database of patient records. But the hospital lacks the capability of conducting such a search electronically. The parties agree that

requiring the hospital to conduct the search manually, page-by-page, would be unduly burdensome.

Another way for the hospital to obtain the requested information would be to consult a computerized database maintained by the hospital quality assurance committee. As a member of a quality and safety leadership team at the hospital, Lowy knew the database was capable of producing a list of patient IV injuries indexed by date and identification number. It is undisputed that the hospital, through use of such a list, could readily identify the records of patients who experienced complications with IV infusions. After redactions to protect patient confidentiality, those records could then be produced to Lowy.

PeaceHealth believes the use of the quality assurance database to identify the records sought by Lowy is prohibited by RCW 70.41.200(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.

RCW 70.41.200(3). PeaceHealth moved for a protective order based on the statute, contending that the information in the database is protected because it is "derived from incident reports, which are themselves quality assurance and peer review documents."

The trial court at first denied the motion. On April 30, 2009, the court ordered the hospital to designate an agent to review the quality assurance records and then to disclose "underlying facts and explanatory circumstances

charted in hospital records relating to alleged injuries, complications, malfunctions or adverse events associated with any IV infusions." The only condition was that no records be disclosed that were "created specifically for, and collected and maintained by a quality improvement committee." After considering PeaceHealth's motion for reconsideration, however, the trial court reversed itself and concluded that the statute prohibits any disclosure arising from the use of the quality assurance database:

The court's order of April 30, 2009 authorized access to the relevant, factual complaints and related information in order to balance the competing interests at stake. However reasonable or practical such an accommodation may be, it appears to be contrary to the language of RCW 70.41.200(3).

It is unfortunate that a more practical solution allowing plaintiff relevant discovery is unavailable, but the plain language of RCW 70.41.200(3) compels the conclusion that any kind of disclosure, whether of committee opinion or underlying factual complaints, shall not be disclosed. Therefore, on further review and reconsideration, the court is persuaded that the Order of April 30, 2009 must be reversed.

Lowy asks this court to vacate the order granting reconsideration and to reinstate the order of April 30, 2009. Because a question of statutory interpretation is involved, our review is de novo. Cedell v. Farmers Ins. Co. of Wash., 157 Wn. App. 267, 272, 237 P.3d 309 (2010).

The court's purpose in interpreting a statute is to discern and implement the intent of the legislature. The first inquiry is whether, looking to the entire statute in which the provision is found and to related statutes, the meaning of the provision in question is plain. If so, the court's inquiry ends. But if the statute is susceptible to more than one reasonable interpretation, it is ambiguous. In that

case, the court may resort to statutory construction, legislative history, and relevant case law. Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., 168 Wn.2d 421, 432-33, 228 P.3d 1260 (2010).

Title 70 RCW concerns public health and safety. Chapter 70.41 RCW addresses hospital licensing and regulation. The primary purpose of the chapter 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. The quality improvement statute, RCW 70.41.200, requires every hospital to "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." RCW 70.41.200(1). The statute requires hospitals to create quality improvement committees to monitor and review the performance of their staff, including the "maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients." RCW 70.41.200(1)(e). According to the provision under review, such records "are not subject to review or disclosure." RCW 70.41.200(3).

Plainly, the statute prevents the hospital from disclosing the quality assurance records themselves or allowing persons outside the hospital to review them. The question, however, is whether the statute likewise prevents the hospital itself from conducting an internal review to facilitate the location of hospital records that were not created specifically for the quality improvement

committee and that are maintained elsewhere in the hospital. The statute does not expressly draw a distinction between internal and external review. But to interpret it as preventing all hospital personnel from reviewing the contents of the database would frustrate the very purpose for which the quality assurance committee gathered the records in the first place. Indeed, the hospital has already conducted an internal review of the database, as shown by a declaration stating that hospital personnel examined it and determined that it contained no responsive, nonprivileged documents.

Because it is not reasonable to interpret the statute as containing an outright prohibition on internal review, we conclude the statute is most reasonably interpreted simply as prohibiting review of committee records by persons outside the hospital. This interpretation is supported by the Supreme Court's opinion interpreting a similar statute in Coburn v. Seda, 101 Wn.2d 270, 276, 677 P.2d 173 (1984), and it is also supported by the legislative history of RCW 70.41.200.

The statute addressed in Coburn was RCW 4.24.250, which protects records created by regularly constituted committees that evaluate the quality of patient care in hospitals or similar institutions. Because it is a statute in derogation of both the common law and the general policy favoring discovery, RCW 4.24.250 "is to be strictly construed and limited to its purposes." Coburn, 101 Wn.2d at 276. The court explained that the purpose of the protection from discovery afforded by RCW 4.24.250 is to encourage the quality review process,

based on the theory that external access to the committee's work stifles the candor that is necessary to engage in constructive criticism:

Policies favoring both discovery immunities and evidentiary privileges underlie RCW 4.24.250. The discovery protection granted hospital quality review committee records, like work product immunity, prevents the opposing party from taking advantage of a hospital's careful self-assessment. The opposing party must utilize his or her own experts to evaluate the facts underlying the incident which is the subject of suit and also use them to determine whether the hospital's care comported with proper quality standards.

The discovery prohibition, like an evidentiary privilege, also seeks to protect certain communications and encourage the quality review process. Statutes bearing similarities to RCW 4.24.250 prohibit discovery of records on the theory that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review.

Coburn, 101 Wn.2d at 274-75; see also Anderson v. Breda, 103 Wn.2d 901, 905, 700 P.2d 737 (1985) ("The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review.").

At the same time, the statute "may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings."

Coburn, 101 Wn.2d at 277. To illustrate the point, the court commented that information from original sources "would not be shielded merely by its introduction at a review committee meeting." Coburn, 101 Wn.2d at 277. The statute was meant to protect "substantive information about specific cases and individuals generated in the course of committee meetings." Coburn, 101 Wn.2d at 278.

PeaceHealth has not demonstrated that the legislative purpose of encouraging internal candor, open discussion, and constructive criticism will be served by an interpretation of the statute as banning internal review of the database to identify the records Lowy requests. The medical charts Lowy seeks were not created specifically for the quality assurance committee, are maintained external to committee files, and are undisputedly relevant and discoverable. In disclosing them, 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. The response to the discovery request will reveal no more than if the hospital had produced the medical records through a burdensome page-by-page search.

Legislative history also weighs in favor of a narrow interpretation of what is meant by the prohibition on "review or disclosure." The version of RCW 4.24.250 addressed in Coburn provided that the records of quality assurance committees "shall not be subject to subpoena or discovery proceedings in any civil action," with certain exceptions not relevant here. Former RCW 4.24.250(1)(2) (2004). In 2005, the legislature enacted an amending statute adding the prohibition on "review or disclosure" to RCW 4.24.250 (health care providers) and RCW 43.70.510 (health care institutions and medical facilities other than hospitals), as well as to the statute at issue in the present case, RCW 70.41.200 (hospitals).

Laws of 2005, ch. 291, §§ 1-3. The vote was unanimous. SENATE JOURNAL, 59th Leg., Reg. Sess., at 1089 (Wash. 2005); HOUSE JOURNAL, 59th Leg., Reg. Sess., at 566 (Wash. 2005). According to a bill report, the 2005 amendment was supported by representatives of trial lawyers and hospitals. S.B. REP. on E.H.B. 2254, 59th Leg., Reg. Sess. (Wash. 2005). It is unlikely that the bill would have enjoyed such broad support if it had been intended to prohibit internal review as well as external review of quality assurance records. According to the summary of testimony in the bill report, the bill was designed to fill a gap in the earlier versions of these statutes. Before the 2005 amendment, the statute provided that quality assurance records were not subject to discovery or introduction into evidence "in any civil action." The purpose of the 2005 amendment was simply to ensure that the records could not be released to the public in some extrajudicial context, that is, outside of a civil action. S.B. REP. on E.H.B. 2254 (Wash. 2005).

In summary, the first order entered by the trial court satisfied Coburn's mandate that the statute be strictly construed and limited to its purposes, and it reflects an interpretation that is supported by legislative history. The hospital must deny review of its quality assurance records by outside persons, thereby preserving confidentiality of those records. But the statute may not serve as an artificial shield for information contained in ordinary medical records. We conclude that the hospital may review its quality assurance records for the limited purpose of identifying and producing these medical charts.

No. 63866-1-I/10

The order granting reconsideration is reversed. The original order is to be reinstated.

Becker, J.

WE CONCUR:

Spencer, J.

Appelwick, J.

APPENDIX B

RCW 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.

[2007 c 273 § 22; 2007 c 261 § 3. Prior: 2005 c 291 § 3; 2005 c 33 § 7; 2004 c 145 § 3; 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.]

Notes:

Reviser's note: This section was amended by 2007 c 261 § 3 and by 2007 c 273 § 22, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date -- Implementation -- 2007 c 273: See RCW 70.230.900 and 70.230.901.

Finding -- 2007 c 261: See note following RCW 43.70.056.

Findings -- 2005 c 33: See note following RCW 18.20.390.

Severability -- Headings and captions not law -- Effective date -- 1994 sp.s. c 9: See RCW 18.79.900 through 18.79.902.

Findings--Intent -- 1993 c 492: See notes following RCW 43.20.050.

Short title -- Severability -- Savings -- Captions not law -- Reservation of legislative power -- Effective dates -- 1993 c 492: See RCW 43.72.910 through 43.72.915.

Legislative findings -- Severability -- 1986 c 300: See notes following RCW 18.57.245.

Board of osteopathic medicine and surgery: Chapter 18.57 RCW.

Medical quality assurance commission: Chapter 18.71 RCW.

APPENDIX C

RCW 4.24.250

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

(1) Any health care provider as defined in RCW 7.70.020 (1) and (2) who, in good faith, files charges or presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care and any person or entity who, in good faith, shares any information or documents with one or more other committees, boards, or programs under subsection (2) of this section, shall be immune from civil action for damages arising out of such activities. For the purposes of this section, sharing information is presumed to be in good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading. The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020 (1) and (2).

(2) A coordinated quality improvement program maintained in accordance with RCW 43.70.510 or 70.41.200, a quality assurance committee maintained in accordance with RCW 18.20.390 or 74.42.640, or any committee or board under subsection (1) of this section may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a coordinated quality improvement committee or committees or boards under subsection (1) of this section, with one or more other coordinated quality improvement programs or committees or boards under subsection (1) of this section for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program or committee or board under subsection (1) of this section to another coordinated quality improvement program or committee or board under subsection (1) of this section and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (1) of this section and by RCW 43.70.510 (4), 70.41.200 (3), 18.20.390 (6) and (8), and 74.42.640 (7) and (9).

[2005 c 291 § 1; 2005 c 33 § 5; 2004 c 145 § 1; 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.]

Notes:

Reviser's note: This section was amended by 2005 c 33 § 5 and by 2005 c 291 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Findings -- 2005 c 33: See note following RCW 18.20.390.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 2nd day of March, 2011, I caused a true and correct copy of the foregoing document, "Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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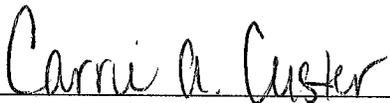
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