RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 03, 2012, 4:33 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
MAY 03 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 86842-5

GASTON CORNU-LABAT,

Respondent/Plaintiff,

v.

HOSPITAL DISTRICT #2 GRANT COUNTY d/b/a QUINCY VALLEY HOSPITAL,

Appellant/Defendant

RESPONSE TO *AMICUS CURIAE* BRIEF OF WASHINGTON STATE HOSPITAL ASSOICATION AND ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS

David S. Mann, WSBA # 21068
Brendan W. Donckers, WSBA # 39406
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
(206) 621-8868
Attorneys for Respondent

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT IN RESPONSE 1

A. Trial Court's Order Granting Summary Judgment to Respondent Should be Affirmed.....1

1. Trial Court's Order Granting Summary Judgment to Respondent Should be Affirmed.....1

2. Documents Withheld by QVMC Subject to Disclosure.....2

a. Record Does Not Support Application of RCW 4.24.250.....3

b. Record Does Not Support Application of RCW 70.41.200.....8

c. Record Does Not Support Application of RCW 70.44.062.....10

B. Protections for Review of Quality Care Already Exist.....11

III. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Adcox v. Children's Orthopedic Hosp. and Medical Center, 123 Wn.2d 15, 864 P.2d 921 (1993).....2, 5

Amren v. City of Kalama, 131 Wn.2d 25, 929 P.2d 389 (1997).....2

Anderson v. Breda, 103 Wn.2d 901, 700 P.2d 737 (1985).....passim

Coburn v. Seda, 101 Wn.2d 270, 677 P.2d 173 (1984).....5

HomeStreet Inc. v. State, Dep't of Revenue, 166 Wn.2d 444, 210 P.3d 297 (2007).....7

Lowy v. Peacehealth, 159 Wn. App. 715, 247 P.3d 7 (2011).....3, 9

Otis Housing Ass'n, Inc. v. Ha, 165 Wn.2d 582, 201 P.3d 309 (2009)...1, 2

Statutes

RCW 4.24.250.....passim

RCW 42.56.030.....2

RCW 42.56.360(1)(c).....7

RCW70.41.200.....passim

RCW 70.44.062.....3, 10, 11

I. INTRODUCTION

This case concerns a request for records under the Public Records Act ("PRA"). While the exemptions at issue are to be narrowly construed, the WHA and WPHD ("amici") ask this court to expand the immunity afforded to hospital quality review committees and hospital boards of commissioners to now apply to any ad-hoc investigation by hospital administration. Amici's argument is contrary to the plain language of the statutes at issue, inconsistent with case law, and unsupported by the record. There is no basis to interpret the application of RCW 4.24.250, RCW 70.41.200, or RCW 70.44.062 any different under the PRA than in discovery. For the reasons argued below, and developed in greater detail in respondent's brief already on file with the Court, the trial court's decision should be affirmed.

II. ARGUMENT IN RESPONSE

A. Trial Court's Order Granting Summary Judgment to Respondent Should be Affirmed

1. Trial Court's Order May be Affirmed On Any Grounds in Record

This Court may "affirm the trial court on any grounds established by the pleadings and supported by the record." *Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009) (internal citation omitted).

Thus, even if the trial court erred interpreting how any of the statutes relied upon by amici apply here, this Court may nonetheless affirm the trial court's decision on alternative grounds, even if the trial court did not consider them. *Id.* at 587-88; *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 31-32, 864 P.2d 921 (1993) (Affirming trial court order requiring disclosure of internal investigation documents on alternative grounds).

2. Documents Withheld by QVMC Subject to Disclosure

From the outset, amici confuse the legal framework guiding this Court's review of the statutes at issue. For instance, while amici state that each issue is reviewed de novo,[1] amici fail to acknowledge that any exemption under the PRA is narrowly construed. The legislature has decreed that the PRA "shall be liberally construed and its exemptions narrowly construed" to promote public policy and protect the public interest. RCW 42.56.030; *see also*, *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). Strict construction of these statutes is also required when refusing disclosure in response to a discovery request.[2]

---

[1] Amicus Curiae Brief of Washington State Hospital Association and Association of Washington Public Hospital Districts ("Amicus Br.") at 7.

[2] Immunity from discovery is in derogation of the common law and contrary to the general policy favoring broad discovery. Thus, when reviewed in connection to a discovery request, RCW 4.25.250 and RCW 70.41.200(3) are to be strictly construed.

Amici ask this Court to afford the protections of RCW 4.24.250, RCW 70.41.200, and RCW 70.44.062 to a "non-physician hospital board" or any other person associated with the hospital, irrespective of *how* the information was generated or *who* gathered it. Amicus Br. at 7-9. None of the statutes relied upon by amici – strictly construed – grant the sweeping authority amici seek here.

a. Record Does Not Support Application of RCW 4.24.250

Amici's brief ignores the full scope of RCW 4.24.250 by selectively omitting the plain language of the statute in its analysis.[3] The statute applies where a health care provider:

> files charges or presents evidence against another member of their profession before a regularly constituted review committee or board...whose duty it is to evaluate competency and qualifications of members of the profession...or before a regularly constituted committee or board of a hospital whose duty it is to evaluate and review the quality of patient care...

RCW 4.24.250(1) (emphasis added). Amici are able to cite to no evidence establishing that anyone filed charges before a regularly constituted board or committee. Instead, the record establishes that the initial investigation

---

Anderson v. Breda, 103 Wn.2d 901, 905, 700 P.2d 737 (1985) (RCW 4.24.250 is "strictly construed and limited to its purposes"); *Lowy v. Peacehealth*, 159 Wn. App. 715, 720-21, 247 P.3d 7 (2011) (strictly construing RCW 70.41.200(3). Amici offer no authority supporting a liberal construction of RCW 70.44.062.

[3] The full scope of RCW 4.24.250 is included in Appendix C of Amicus Br.

responded to an incident that was reported, not to a "regularly constituted" board or committee, but to hospital administrator Mehdi Merred by Dr. Cornu-Labat. CP 31; 42. The second investigation responded to complaints received by Merred and Dr. Vance personally. CP 208. Only after receipt of these complaints – and *after* the initial investigation had been terminated[4] – Merred and Vance presented the charges relating to the second investigation to medical staff. CP 208-09. Amici's statement that the medical staff authorized both investigations is surprising since there is no evidence demonstrating that the medical staff was even apprised of the initial investigation before it concluded.

Amici are also unable to cite to evidence establishing that *either* of the committees formed by administrator Merred[5] were "regularly constituted." The initial committee was formed and disbanded on the same day.[6] The second committee included a member of the hospital board, Anthony Gonzalez, who makes no claim that he had ever

---

[4] According to evidence submitted by QVMC, the meeting with Medical Staff occurred on July 27, 2009. CP 593.

[5] While amici, for the first time, refer to the investigations as "Vance's proceedings", Amicus Br. at 8, the record provides little support for such an allegation: Dr. Cornu-Labat primarily corresponded with and received correspondence from Mehdi Merred. CP 127; *see also*, CP 31 (Mehdi Merred stating "I wrote you a formal letter stating the same...I placed in your office mail box...").

[6] Dr. Cornu-Labat was contacted by Merred and Vance on July 24, 2009. CP 31; 208. Other individuals targeted by the first investigation were contacted on July 24, 2009. *Id.*

previously – or since – been chosen to investigate or participate in an inquiry concerning physician competency on any other occasion. CP 202.

Courts have been unequivocal in construing RCW 4.24.250 to apply only where it has been demonstrated that the committee in question was "regularly constituted." *Adcox*, 123 Wn.2d at 31-32; *see also*, *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984) (remanding for evidentiary proceedings on whether committee was regularly constituted).

Amici do not attempt to argue that either of Merred's committees were regularly constituted, but claim that the activities of the "small medical staff" at QVMC constitute a "quality review committee" under RCW 4.24.250. Amicus Br. at 8. While medical staff did not conduct either investigation, QVMC's *own* bylaws belie amici's claim that the QVMC medical staff are charged with quality review: medical staff's professional activities are described in Article XI and the only provision contemplating physician performance and the quality of patient care applies to periodic review of patient records. CP 159-60.[7]

[7] Amici cite to conclusory statements in declarations executed by two doctors but these conflict with the pertinent provision in QVMC's bylaws discussing the revocation of clinical privileges for incompetency give decisionmaking authority not to the medical staff, but to the QVMC board. CP 148-56; 255-56. Although the bylaws provide for the *involvement* of medical staff in this process, QVMC failed to even follow these procedures when it neglected to interview Dr. Cornu-Labat prior to the completion of the second investigation <u>or</u> within 14 days of a request for corrective action. CP 594, 598.

QVMC's quality improvement committee is defined in QVMC's "Organizational Quality Plan." CP 253-56. While amici frequently invoke RCW 4.24.250's application to quality review or quality improvement activities[,]"[8] *see* Amicus Br. at 7-11, amici fail to offer a single fact showing that QVMC's quality improvement committee had any involvement in this matter. *See* Amicus Br. at 7-13. QVMC's quality improvement committee functions according to a defined purpose, with specific objectives, roles, responsibilities, and measures of accountability, all of which are discussed in QVMC's "Organizational Quality Plan." CP 253-56. The quality improvement committee consists of medical staff *and* hospital administration. *Id.* Incidents are referred to the quality improvement committee on a specific form. CP 31. Amici offers no evidence supporting the claim that either of Merred's committees assumed any of the roles outlined in the Organizational Quality Plan, met on any prior or subsequent occasion, or were otherwise acting in response to incidents reported on the required form. Amicus Br. at 7-13.

In a footnote, amici challenge the trial court's finding that RCW 4.24.250 applies only to "peer review" committees, Amicus Br. at 9 n.12,

[8] For instance, *Anderson* states that records are discoverable under RCW 4.24.250 only to the extent that "they do not contain the record of a quality review committee." 103 Wn.2d at 907. RCW 70.44.062(2), discussed below, references RCW 4.24.250 to apply to a "quality improvement committee established under RCW 4.24.250..."

and request this Court read "peer review" out of RCW 42.56.360(1)(c). While this Court should reject amici's invitation,[9] there is no reason to interpret RCW 42.56.360(1)(c) any different than the narrow construction of RCW 4.24.250 already mandated by the courts. While at least one decision, *Anderson*, has referenced both "quality review committees" and "peer review committees[,]"[10] there is no basis to conclude that QVMC's peer review process was followed. Amici make no effort to apply QVMC's peer review process based on any evidence in the record.[11] Amici's argument has no merit.

Evidence ignored by amici demonstrates that QVMC followed its own disruptive behavior policy.[12] CP 285-87. The disruptive behavior

---

[9] Where the plain language is subject to only one interpretation, there is no need for further inquiry. *HomeStreet Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2007) (internal citation omitted). Only one member of the medical staff participated in the investigation of Dr. Cornu-Labat. CP 31; 208.

[10] *Anderson* stated that "if the final decision to restrict, revoke, or suspend a physician's hospital privileges is made by an administrator or entity other than a peer review committee, the records of that entity or individual are discoverable to the extent they do not contain the record or a quality review committee." 103 Wn.2d at 907.

[11] Peer review at QVMC references a specific policy and series of procedures concerning individual medical cases, conducted by physicians using "Peer Review Screening Criteria Forms." CP 266. Under this policy, "the Hospital select[s] medical charts for Peer Review based on specific criteria." *Id.*; *see also*, CP 159 (Article XI(4) of QVMC's bylaws). Seven specific steps are outlined under the policy. *Id.* While respondent made this argument to the trial court, CP 243, amici can cite to no evidence in the record that any of these procedures were adhered to.

[12] Dr. Cornu-Labat was informed that the second investigation focused on allegations about his vacation schedule, personal hygiene, and time spent working on outside projects. CP 32. Vance stated that other issues involved tardiness, lengthy telephone calls, failing to take patients' vital signs, and intimidating hospital staff. CP 202; 209.

policy authorizes a hospital administrator and chief of the medical staff to investigate an allegation of misconduct. CP 286. While amici would prefer broad application of the statute to apply to QVMC's internal disciplinary procedures, the courts have already determined that it does not. Where actions are taken by an administrator or generated by an entity other than a quality review committee under RCW 4.24.250, the statute is inapplicable. *Anderson v. Breda*, 103 Wn.2d 901, 907, 700 P.2d 737 (1985). RCW 4.24.250 does not apply here.

b. Record Does Not Support Application of RCW 70.41.200

Amici seek refuge in RCW 70.41.200 to support the withholding of records, but RCW 70.41.200(3) exempts from disclosure only "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee[.]" This statute is plainly inapplicable: as argued above, amici cannot muster a citation to the record establishing any involvement of QVMC's quality improvement committee. *See* Amicus Br. at 11-13. This is not surprising, since the statute was argued below to have been "inappropriate." CP 272. Even more, QVMC admitted that it

would have made "little sense" for the quality improvement committee to have been involved in this matter whatsoever. CP 272.

Contrary to amici's insistence that RCW 70.41.200 applies, courts interpreting the statute do so strictly and refuse to allow a hospital to withhold internal records which were not "created specifically for the quality assurance committee" and were thus maintained "external to committee files..." *Lowy v. PeaceHealth*, 159 Wn. App. 715, 722, 247 P.3d 7 (2011). The statute may not be used "as a shield to obstruct proper discovery of information generated *outside* review committee meetings." *Id* at 722 (emphasis added). Amici's claim that RCW 70.41.200(3) protects information "without regard" to who created it is contrary to the plain language of the statute. *See* Amicus Br. at 13.[13]

QVMC's quality improvement committee comprises of "multidisciplinary medical staff and leadership personnel" and is responsible for a range of responsibilities according to QVMC's Organizational Quality Plan. *See* CP 255-56. These responsibilities are in addition to those described in RCW 70.41.200(1)(a)-(h). Neither of the ad-hoc committees investigating Dr. Cornu-Labat, *nor* the QVMC medical

[13] Nor is there merit to the claim that Merred, Vance, and Gonzalez were agents of QVMC's quality improvement committee, Amicus Br. at 12, because no agency relationship could have been created without *first* involving the quality improvement committee.

staff, were vested with authority to fulfill the quality improvement function at QVMC.

c. Record Does Not Support Application of RCW 70.44.062

Finally, amici argue that RCW 70.44.062 justifies withholding of records, but the statute, on its face, applies only to "meetings, proceedings, and deliberations of the board of commissioners, its staff or agents, concerning the granting, denial, revocation, restriction or other consideration of the status of the clinical or staff privileges..." RCW 70.44.062(1). Amici can cite to no evidence showing that the QVMC board of commissioners had any role whatsoever in either investigation, or further, demonstrate that the board was even apprised of either investigation before it was initiated. Amicus Br. at 14. Neither committee arose out of a "meeting, proceeding or deliberation of the board of commissioners" under RCW 70.44.062(1) and the agency relationship sought by amici was never established.[14]

[14] While a member of the QVMC board was involved in the second investigation only, he was asked to join, not at the request of the board of commissioners, but at the invitation of hospital administrator Mehdi Merred because he was a "State Patrol officer for eighteen years and [has] an investigatory background." CP 202. The statute, strictly construed, has no application to an ad hoc investigation organized by a hospital administrator.

Had QVMC intended the immunity in RCW 70.44.062 to apply, the board's involvement was critical. It is squarely the QVMC board – not hospital administrator Mehdi Merred – that is given authority to under QVMC's bylaws to grant, deny, revoke, or restrict clinical privileges. CP 151-53.

B. Protections for Review of Quality Care Already Exist

Amici argue that reversal is necessary to continue a "vigorous process of review of the quality of care in Washington hospitals[,]" Amicus Br. at 2, but offer no argument demonstrating that the statutory provisions *already* in place are inadequate. QVMC simply did not adhere to <u>any</u> of the statutory provisions which amici now claim apply. If QVMC had followed RCW 4.24.250, 70.41.200, or 70.44.062 – or at least had followed the provisions in its bylaws applying them – QVMC *might* have been able to raise a dispute of material fact. But it failed on all counts. This Court should affirm the trial court's decision.

III. CONCLUSION

Respondent respectfully requests that this Court affirm the trial court's order requiring QVMC to disclose all documents and records responsive to respondent's request.

Respectfully submitted,

GENDLER & MANN, LLP

By:

David S. Mann
WSBA No. 21068
Brendan W. Donckers
WSBA No. 39406
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, MARY BARBER, declare under penalty of perjury of the laws of the state of Washington, that on the 3rd day of May, 2012 I sent **via email** and also **deposited in the mails of the United States Postal Service** a properly stamped and addressed envelope containing Respondent / Plaintiff Gaston Cornu-Labat's Response to Amicus Curiae Brief of Washington State Hospital Association and Association of Washington Public Hospital Districts, to the following:

Counsel for Appellant/Defendant:
Jerome Aiken
Meyer, Fleugge & Tenney
230 South Second St.
P.O. Box 22680
Yakima, WA 98907
E-Mail: aiken@mftlaw.com

Amicus Curiae Counsel:
Mr. Michael J. Reitz
Freedom Foundation
2403 Pacific Ave., S.E.
P.O. Box 552
Olympia, WA 98507
E-Mail: mreitz@myfreedomfoundation.org

Amicus Curiae Counsel:
Mr. Greg Montgomery
Ms. Madeline Engel
Miller Nash, LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352
E-Mail: greg.montgomery@millernash.com
E-Mail: Madeline.engel@millernash.com

Mary Barber
MARY BARBER

OFFICE RECEPTIONIST, CLERK

To: Mary Barber
Cc: Mike Reitz; greg.montgomery@millernash.com; madeline.engel@millernash.com
Subject: RE: Cornu-Labat v. QVMC; No. 86842-5

Rec. 5-3-12

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

From: Mary Barber [mailto:Mary@gendlermann.com]
Sent: Thursday, May 03, 2012 4:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mike Reitz; greg.montgomery@millernash.com; madeline.engel@millernash.com
Subject: Cornu-Labat v. QVMC; No. 86842-5

Dear Clerk:

Attached please find Respondent/Plaintiff Gaston Cornu Labat's Response *to Amicus Curiae* Brief of Washington State Hospital Association and Association of Public Hospital Districts regarding the above matter. We ask your assistance in filing this response document with a due date of today.

Thank you for your time and attention. Please call me with any questions or concerns.

Mary Barber
Legal Assistant
Gendler & Mann
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
(206)-621-8868
Fax (206) 621-0512
mary@gendlermann.com