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NO. 63866-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

LEASA LOWY, Appellant

vs.

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

and

UNKNOWN JOHN DOES, Defendant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

APPELLANT'S REPLY BRIEF

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

2010 JUN -4 PM 2:28
FILED
COURT OF APPEALS
DIVISION I
SPokane, WA

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1. **The QA statutes, RCW 4.24.250 and 70.41.200(3), should be Strictly Construed in Favor of Discovery.**

“As a statute in derogation of common law and the general policy favoring discovery, RCW 4.24.250 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, 700 P.2d 737 (1985) and *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 31, 864 P.2d 921(1993) are in accord.¹ There is no more firm or fundamental tenet in the interpretation of QA statutes than this rule articulated in *Coburn* and the cases following it.

Missing from Respondents’ brief is any acknowledgment of the basic tenet that the QA statutes are to be strictly construed in favor of discovery. Respondents quote lengthy excerpts from *Coburn v. Seda* and *Anderson v. Breda*, but omit the language in both opinions mandating strict construction. See Respondents’ Brief at 22-24. Respondents’ brief does not explain why their interpretation of the QA statute is consistent with strict construction.

¹“Because this immunity from discovery is in derogation of both the common law and the general policy favoring discovery, it is to be strictly construed and limited to its intended purpose.” *Anderson*, 101 Wn.2d at 905. “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.” *Adcox*, 123 Wn.2d at 31.

Nor do they explain why the rule of strict construction should not apply in this case, if that in fact is their position.

Respondents' analysis of the statute is flawed from the outset because of this omission. Appellant addresses specific aspects of Respondents' brief below, but the failure of Respondents to address the question of strict construction infects their legal arguments throughout Respondents' brief.

2. **Dayton Newspapers, Inc. v. Dept. of the Air Force is Inapposite Legally and Factually.**

The primary case on which Respondents rely is *Dayton Newspapers, Inc. v. Dept. of the Air Force*, 107 F.Supp.2d 912 (S.D. Ohio 1990). According to Respondents, *Dayton Newspapers* "has specifically addressed the question and determined that requiring a search of a quality improvement database to obtain non-privileged information is prohibited." Response at 18.

In *Dayton Newspapers*, plaintiff newspapers made a Freedom of Information Act (FOIA) request for information in a medical quality assurance database operated by the Defense Department. The Defense Department successfully argued that the database was exempt from disclosure in its entirety under the federal statute authorizing the medical quality assurance program. This exemption extended to patient medical records created in the ordinary course of treatment, insofar as they were included

within the database. *Dayton Newspapers* is readily distinguishable, and these distinctions illuminate the specific character of Washington’s QA statutes.

First, the statutory scheme in *Dayton Newspapers* differs in critical respects from RCW 70.41.200(3). The federal statute protected quality assurance records from disclosure “regardless of whether the contents of such records originated within or outside of a medical quality assurance program.” 107 F.Supp.2d at 917. Only those records created *and* maintained *outside* the quality assurance program may be disclosed.² If a record is created as a QA record, *or* maintained as a QA record, it cannot be disclosed. Thus, under the federal statute, a patient record created in the ordinary course of treatment, but placed in a quality assurance file, is immune from disclosure. The patient record may be disclosed only to the extent that it is found in a source outside the QA file.

By contrast, RCW 70.41.200(3) only protects information and documents “*created specifically for and collected and maintained by, a*

² The statute, 10 U.S.C. §1102(h), states in pertinent part: “Nothing in this section shall be construed as limiting access to the information in a record created **and** maintained **outside** a medical quality assurance program, including a patient’s medical records . . .” (Emphasis added). 107 F.Supp.2d at 917. This provision does not authorize “disclosure of a patient’s medical files from a medical quality assurance record.” *Id.* Such disclosure can only be made from an outside source. *Id.*

quality improvement committee.” (Emphasis added). The record must have as its source of origin the QA process itself. If information and documents are not “created specifically for” the committee, they are not entitled to protection, even if they are “collected and maintained” by the QA committee. Thus, in Washington, an ordinary patient record created for treatment purposes is not protected by the statute even if it is maintained in the QA file.

Second, the Washington Supreme Court applies strict construction to the QA statute because it conflicts with a plaintiff’s right to discovery. *Coburn*, 101 Wn.2d at 276; *Anderson*, 103 Wn.2d at 905. *Dayton Newspapers* was an FOIA case. Disclosure of the database was the sole purpose of the lawsuit. It did not involve civil discovery. The District Court in Ohio therefore did not consider the implications of the decision on the right to obtain discovery in a civil case, since no such right was at issue. It did not have occasion to apply strict construction of the statute, and it did not do so.

Third, *Dayton Newspapers* does not address the relief sought by Appellant. Plaintiffs in *Dayton Newspapers* did not ask the Defense Department to review its database in order to identify materials outside the database. The newspapers sought the database itself.

Appellant in this case is not asking Respondents to disclose the database. Appellant is asking Respondents to review the database for the purpose of identifying and disclosing documents maintained outside the database, documents which are unquestionably discoverable.

The reasoning of *Dayton Newspapers* may well be a persuasive interpretation of federal law.³ *Dayton Newspapers*, however, has no relevance to the interpretation of the very different Washington statute.

3. **Respondents' Interpretation of the QA Statute neither Reflects the "Plain Meaning" of the Statute nor is a Reasonable Interpretation of the Statute.**

Appellant has not asserted a right to review the QA file. Rather, Appellant seeks an order requiring **Respondents** to review their own QA files, in order to identify non-privileged documents and information responsive to discovery requests.

Respondents contend, however, that according to its "plain meaning," the statute categorically prohibits any review by anyone of QA material in connection with litigation. They would have this prohibition apply to Respondents themselves insofar as the review is made for a discovery purpose.

³ No published case has cited *Dayton Newspapers*.

A “plain meaning” interpretation of a statute does not focus exclusively on the specific word or words whose interpretation is at issue. Rather, the Court must “consider the entire statute in which the provision is found as well as related statutes or other provisions in the same act that disclose legislative intent.” *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006).

As Appellant has shown above, the QA privilege only applies to documents and information “created specifically for” *and* “collected and maintained by” a QA committee. RCW 70.41.200(3). The fact that a document or information is present in a QA file does not mean that the document is protected from discovery. Accordingly, when confronted with a discovery request, a defendant’s duty to conduct a reasonable inquiry for responsive documents includes an internal *review* of its own QA files.

Under Respondent’s interpretation of “review,” a defendant is prohibited from reviewing a QA file to determine if it contains responsive and discoverable documents or information. This interpretation fundamentally changes the meaning and operation of the statutory language. Under this interpretation, a non-privileged document is insulated from review or discovery simply by its inclusion within a QA file, since the file itself

cannot be reviewed for discovery purposes. The broad interpretation of “review” undermines the statutory requirement that a protected document must be “created specifically for” the QA process. This interpretation in effect rewrites Washington’s QA statute along the lines of the federal statute at issue in *Dayton Newspapers*, notwithstanding the clear differences in statutory language on the very point.

Appellant made this argument regarding the effect of Respondents’ interpretation of “review” in her opening brief. *See* Appellant’s Brief at 14-15, 18-19. Respondents made no response. Respondents did not explain how, under their interpretation of “review,” the statute would allow a defendant to examine the QA file to determine if it contained discoverable information. Nor did Respondents argue that because of the “review” language, they were no longer required to examine the QA file to determine if it contained responsive information or documents not immune from discovery. As with the issue of strict construction, Respondents maintain silence.

This appeal concerns the interpretation of a statute. The Court’s decision regarding the interpretation will govern not just this case, but all other cases where the QA statute is at issue. Respondents’ interpretation of

“review” is inconsistent with other language in the statute, and indeed, fundamentally changes and undermines that other language. It is an unreasonable interpretation and should be rejected.

4. **The Court should Consider the Legislative History of the 2005 Amendment in Determining the Purpose of the Amendment.**

In support of her interpretation of the statute, Appellant set out the legislative history regarding the legislative purpose in adding the “review” language in 2005. Briefly, the amendment was intended to fill a gap in the QA process by prohibiting extrajudicial access by the public to QA materials. The amendment was not intended to address the subject of a defendant’s duties in response to discovery within the judicial process. The QA statutes already provide protection for a defendant’s legitimate concerns within the judicial process. *See* Appellant’s Brief at 20-22.

Respondents do not directly contest this account of the legislative history. Nevertheless, they suggest, at least by implication, that the Court should not consider this legislative history in determining the purpose of the amendment. Appellant disagrees.

First, as pointed out in the opening paragraph of this Reply, “[a]s a statute in derogation of common law and the general policy favoring discovery, RCW 4.24.250 is to be strictly construed *and limited to its*

purposes.” Coburn, 101 at 276. (Emphasis added). The Washington Supreme Court has already determined that the language of the QA statutes must be limited both by application of the canon of strict construction, and by an examination of the purposes of the legislation.

Respondents themselves in fact go beyond the “plain meaning” of the statute in explaining that purpose. Respondents cite language in Washington cases such as *Coburn*, *Anderson* and *Adcox*, regarding the purpose of the QA statutes. *See* Respondents’ Brief at 22-24. But Respondents also support their interpretation of the purposes of the statute by citation to and/or quotation of case law from South Carolina, Alabama, Florida, Michigan, Pennsylvania, Massachusetts, and Arizona. *See* Respondents’ Brief at 24-26. Appellant believes that in examining the purposes of the 2005 amendment, the legislative history and circumstances surrounding its passage in the Washington Legislature is more probative on the question of legislative intent than the decision, for instance, of the South Carolina Supreme Court in *McGee v. Bruce Hospital System*, 439 S.E.2d 257 (S.C. 1993) (quoted at length by Respondents at 26), or of any of the other out of state cases cited by Respondents.

Second, for reasons set out above, Appellant contends that

Respondents have not presented a reasonable alternative to the interpretation offered by Appellant. Nevertheless, assuming for the sake of argument that Respondents have offered a reasonable interpretation of the statute, and this Court determines that the statute is ambiguous, then the rules regarding the interpretation of ambiguous statutes come into play. If a statute “is susceptible to more than one reasonable interpretation, it is ambiguous,” and the court “may resort to statutory construction, legislative history, and case law.” *Columbia Physical Therapy Inc. v. Benton Franklin Orthopedic*, 168 Wn.2d 421 ¶13, 228 P.3d 1260 (2010).

The legislative history clearly indicates that the 2005 amendment was not intended to impact current law regarding the QA statutes and discovery proceedings, but that instead the amendment was intended to address concerns regarding extrajudicial access of the public to QA materials. This history, coupled with the categorical teaching of *Coburn*, *Anderson* and *Adcox* that the statute should be strictly construed in favor of the right to discovery, strongly supports Appellant’s interpretation of the statute.

5. Appellant’s Interpretation of the QA Statutes is Consistent with the Legislative Balance of Competing Interests.

Appellant in this appeal is not disputing the policy concerns undergirding the QA identified by Washington courts. Appellant does not

challenge the Court's conclusion in *Coburn* that the QA statutes involve a balance of competing interests between access to evidence and medical staff candor. 101 Wn.2d at 279.

But *Coburn* and *Anderson* have already explained how that balance is struck. The QA statutes stand and are enforceable. Candid criticisms made during the process, constructive and otherwise, cannot be disclosed in discovery or introduced at trial. But at the same time, the statutes are to be strictly construed and limited to their intended purposes.

The balance is operative in this case. Respondents conducted an investigation into the IV problem at St. Joseph Hospital. Appellant will not be receiving in discovery the documents and information generated by that investigation. The Cube database itself will not be disclosed in discovery, nor will not be introduced as evidence at trial. If a physician or staff member has offered candid criticisms of the hospital or other staff in the course of the investigation, Appellant will not learn of it.

But as part of the balance of interests, Appellant is entitled to discovery of any non-privileged documents and information. Where the only means of reasonably identifying discoverable information and documents outside the QA file is by Respondents' examination of its own QA file, then

Appellant is entitled to a court order requiring the Respondents to conduct just such an examination. This will not result in the disclosure of privileged information. The balance of interests contemplated by the statute will be preserved if the Court reinstates the original order entered by the trial court in this case.

One final point should be made regarding the original trial court order. As Respondents describe what Appellant seeks, the Hospital

may, and should be required to, review and mine the “Cubes” database, cull out information that would not be privileged if obtained from another source, *pretend* that the witness obtained the information from another source, and investigate and disclose that information to Dr. Lowy in discovery in this litigation.

Respondents’ Brief at 13 (emphasis added).

This description does not accurately characterize the process required by the original trial court order. CP 53-54 (Appendix 4-5). The description is caricature, not characterization, and it is unwarranted.

Appellant described the contemplated process in her initial brief. Appellant’s Brief at 16-17. The trial court below initially adopted an order along the lines proposed by Appellant.⁴ The trial court ultimately reversed itself, having reached the conclusion that the statute compelled this action.

⁴ The trial judge did not sign a proposed order, but drafted his own order.

The trial court did not reach this decision because of a concern that the proposed process would not work, or that it constituted a type of pretense, as described in Respondents' brief.

Appellant expects that whatever order is issued will be followed with the due respect to which any order of the court is entitled. Appellant does not expect anyone to "pretend" in response to the court order. The order is workable; the only issue is whether the QA statute prohibits it.

6. **RCW 70.41.200(3) as Applied in the Protective Order Violates the Right of Access to Courts, Wash. Const. Art. I, §10.**

In *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), the Court found that the statute in question was unconstitutional because it unduly burdened access to courts. That statute deprived a medical malpractice plaintiff of the opportunity to conduct discovery and obtain evidence to vindicate existing legal rights. The same issue is presented here.

Appellant has a right to pursue her claim for corporate negligence, and under *Putman*, she has a right to discovery on the claim. "It is a duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people." 166 Wn.2d at 979. A statute which unduly burdens Appellant's existing right to access to courts to pursue her claim is

unconstitutional.

Although *Coburn v. Seda* did not address the access question directly, it did discuss the evidence that would be available to a medical malpractice plaintiff in the face of the QA statute. *Coburn* contemplated that a plaintiff would be able to obtain evidence of all of the underlying facts in the case. Plaintiff would be able to retain her own experts to assess this evidence. Plaintiff, however, would not be able to access the hospital's own candid self-assessment or internal criticisms made within the QA process. *Coburn v. Seda*, 101 Wn.2d at 274.

In the present case, however, because of the broad interpretation of the QA prohibition urged by Respondents and adopted by the trial court, Appellant is unable to access these highly relevant underlying facts. As interpreted by the trial court, the statute in this case unduly burdens her right to pursue her recognized and legitimate claims through discovery.

Respondents hypothesize the existence of other ways of proving corporate negligence, and suggest that Appellant really does not need the requested discovery in order to make her corporate negligence claim. Respondents have fought so hard to keep from Appellant. Appellant respectfully disagrees.

The information sought is highly relevant, and until now, Respondents have never suggested otherwise. Respondents have not fought so hard to keep the evidence from Appellant – and Appellant has not fought so hard to obtain it – simply in order to engage in an academic exercise or moot court competition.

There may well be a number of hypothetical ways to prove corporate negligence. Appellant has a right to prove her case with all the available and relevant evidence. *Putman* did not hold that a plaintiff has a right to a little discovery, or to some discovery. Indeed, the logical conclusion from Respondents' argument is that since Appellant also has a medical malpractice claim, the denial of discovery all together on her corporate negligence would not unduly burden her access to courts. *Putman* does not make these distinctions, and neither should this Court.

7. **RCW 70.41.200(3) as Applied in the Protective Order is a Violation of Separation of Powers, Wash. Const. Art. IV, §1.**

Respondents argue that the legislature is at liberty to define any privilege it wishes, and that the courts will enforce that legislative action. If the Supreme Court in *Putman* had accepted this argument, it would have reached a different result on separation of powers.

In *Putman*, the Court declined the invitation to allow the legislature

to define what a “special proceeding” was for purposes of CR 81, or to alter the requirements of CR 8 and 11. It took this action using broad language that asserted the ultimate responsibility of the judicial branch to promulgate and determine the meaning of its procedural rules. It stated:

This argument is unsustainable because it places no limits on the ability of the legislature to determine procedural rules. Under this standard, the legislature could reclassify any common law action as a special proceeding by passing statutes regulating its procedures, thereby eroding this court's power to determine its own court rules.

Putman, 166 Wn.2d at 812.

Whether and to what extent other procedural statutes, including privileges statutes, may run afoul of *Putman* is an open question. What is clear is that the Court is not simply the ultimate arbiter in the *Marbury v. Madison* sense that it must “say what the law is.”⁵ *Putman* makes clear that over and above this power, the judiciary is the ultimate arbiter in the sense that it has final constitutional authority over the promulgation and meaning of its own rules. The legislature may not define what those rules mean.

Appellant is not contending in this case that the provisions in the QA statute prohibiting discovery or the introduction into evidence of QA information and documents are unconstitutional. But insofar as the Supreme

⁵ 5 U.S. (1 Cranch) 137, 177, 2 L.Ed.60 (1803).

Court has recognized the privilege, it has done so on the condition that the statute is strictly construed, and limited to its intended purposes. These limits are not found in the express language of the statute, but are judicially defined and imposed. They constitute minimum requirements for assertion of the privilege itself for purposes of CR 26(b)(1).⁶

Respondents in this case have not acknowledged that the QA statutes must be strictly construed. They have presented an interpretation of the statute which cannot be squared with strict construction. To the extent that Respondents are suggesting at least implicitly that strict construction may be dispensed with based upon the language of the statute, such an interpretation runs afoul of separation of powers. It constitutes an interpretation of QA privilege which exceeds the scope of the privilege allowed by the Court in *Coburn* and *Anderson*.

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⁶ Appellant recognizes that ER 501 is not intended as an exclusive list of privileges. Nevertheless, it is worth noting that the rule was adopted in 1988, after the enactment of RCW 4.24.250 and RCW 71.41.200; that it was amended in 1992 and 2005; and that it has never included the QA privilege among those listed.

Dated this 4th day of June, 2010.

LUVERA LAW FIRM

A handwritten signature in black ink, appearing to read "Joel D. Cunningham", is written over a horizontal line.

Joel D. Cunningham, WSBA #5586

Andrew Hoyal, WSBA #21349

701 Fifth Avenue, Suite 6700

Seattle, WA 98104

(206) 467-6090

Attorneys for Appellants

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of a copy of the foregoing Appellant's Brief in the manner set forth below:

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

Mr. Stephen C. Yost *VIA EMAIL*
Campbell, Yost, Clare & Norell, PC
101 N. First Ave, Suite 2500
Phoenix, AZ 85003

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

Dated this 4th day of June, 2010.


Dee Dee White

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