

SUPREME COURT STATE OF LOUISIANA

DOCKET NO. 06 CC 2378

WALTER BORG, M.D.

Plaintiff-Appellee

Versus

**DOUGLAS W. COOK, M.D., PALMETTO ADDICTION
RECOVERY CENTER, INC, DENEAN JAMES, BCSAC, JOHN
COLALUCA, D.O., JAY WEISS, M.D. AND TONY YOUNG, Ph.D.**

Defendants-Appellant

**SECOND CIRCUIT COURT OF
APPEAL FOR THE STATE OF LOUISIANA
Docket No. CW 06-41739**

**4TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF OUACHITA
STATE OF LOUISIANA
CASE NO. M108-2005 CIVIL SECTION "C"
THE HONORABLE BENJAMIN JONES**

***AMICUS CURIAE* BRIEF BY THE ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS**

**FILED IN SUPPORT OF THE APPLICATION FOR A SUPERVISORY
WRIT TO REVIEW DENIAL OF WALTER BORG, M.D.'S MOTION TO
COMPEL THE DEPOSITION OF CECELIA MOUTON, M.D.**

**FILED IN SUPPORT OF PLAINTIFF-APPLICANT,
WALTER BORG, M.D.**

CIVIL PROCEEDING

J. Clayton Culotta (Bar # 22318)
CULOTTA & CULOTTA LLP
1615 L Street NW, Suite 1350
Washington, D.C. 20036
Telephone No. (202) 457-8888
Facsimile No. (202) 457-8832

Attorney for Association of American
Physicians and Surgeons, Inc.

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WALTER BORG, M.D.**

MAY IT PLEASE THE COURT:

The Association of American Physicians and Surgeons, Inc. (“AAPS”) respectfully submits this *amicus curiae* brief in support of Petitioner Walter Borg, M.D. For the following reasons, the ruling below should be overturned and Plaintiff Walter Borg, M.D. (“Borg”) should be allowed to depose Dr. Cecilia Mouton, the Director of Investigations for the Louisiana State Board of Medical Examiners (“LSBME”) who was personally involved in Dr. Borg’s case, in order to discover information relevant to this litigation.

I. Statement of Identity, Interest and Source of Authority to File.

AAPS is a non-profit national organization consisting of thousands of physicians in all major specialties. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service to patients who entrust their care to the medical profession. AAPS files *amicus* briefs in cases of high importance to the medical profession, like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court Justice Kennedy frequently citing AAPS submission); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

AAPS has a strong interest in promoting the integrity and accountability of medical board disciplinary proceedings. The membership of AAPS has a substantial and legitimate interest in the outcome of this case. All practicing physicians, including thousands of members of AAPS and many in Louisiana, are subject to such disciplinary proceedings. The ruling below, which appears to flatly prohibit the deposition of investigators, makes it impossible to uncover wrongdoing and even discrimination. Nothing supports such a sweeping ruling, least of all confidentiality statutes designed to protect the physician rather than wrongdoing.

II. Rules Protecting Confidentiality of a Proceeding Should Not be Applied Against the Physician Whom the Confidentiality is Deemed to Protect.

In denying Petitioner Borg's right to depose a state official, the trial court below mistakenly relied on confidentiality provisions designed to protect physicians like Dr. Borg, not hinder them.

The first provision cited by the trial court below was the law of confidentiality concerning public records. But that has no application to discovery in litigation, and is particularly inapplicable to a claim by the beneficiary of the confidentiality.

The Louisiana Supreme Court has already implicitly rejected the view below that the Louisiana Public Records Act can shield information from discovery, *Larriviere v. Howard*, 771 So. 2d 747 (La. App. 3 Cir. 2000), *writ granted in part by, and remanded by*, 781 So. 2d 567 (La. Jan. 26, 2001). There the Louisiana Supreme Court affirmed a denial of a motion to quash a discovery request of investigative material and merely required that the trial court conduct an "in camera inspection of the information obtained" and "grant protective order if necessary."

In a ruling that the Louisiana Supreme Court implicitly affirmed, the Court of Appeals of Louisiana, Third Circuit, held that "[e]ven if we assume that the act applies, La.R.S. 44:4(3) clearly precludes applicability of the privilege to this case. La.R.S. 44:4(3) (emphasis added) states: 'This Chapter shall not apply: To any records, writing, accounts, letter, letter books, photographs or copies thereof, in the custody or control of any officer, employee, agent or agency of the state whose duties and functions *are to investigate . . . the business of any private person . . .* when the records, writings, accounts, letter books, photographs or copies thereof, *pertain to the business of the private person, firm or corporation, and are in their nature confidential.*'" 771 So. 2d at 750 (emphasis in decision). This Court should apply the *Larriviere* holding to this case and overturn the decision below, thereby allowing discovery to proceed.

The second provision invoked by the trial court below was La. R.S. 37:1285(E), but that provision simply protects physicians against public disclosure of their disciplinary records. Dr. Borg, the intended beneficiary of that provision, is the one seeking this information, and has agreed to enter into a protective order to address any concerns the Board may have. Nothing in this provision justifies concealing the information at issue in this case, and the decision below cites no cases for such a proposition.

The Board argued that there would be a chilling effect if its investigator submitted to a deposition. That is baseless. The only chilling effect would be to deter wrongdoing by the Board in the future. That is a very worthy effect indeed.

III. CONCLUSION

Petitioner Borg has a right to depose anyone, not protected by privilege, who has information that is “reasonably calculated to lead to the discovery of admissible evidence.” *Clark v. Matthews*, 2005-0465 (La. App. 5 Cir. 1/11/05) 891 So.2d 799. Dr. Mouton is not protected by any privilege and her deposition is reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

This Court should order the lower court to allow Plaintiff Dr. Borg to depose Dr. Mouton in this case.

Date: October 5, 2006

Respectfully submitted,

J. Clayton Culotta (Bar # 22318)
CULOTTA & CULOTTA LLP
1615 L Street NW, Suite 1350
Washington, D.C. 20036
Telephone No. (202) 457-8888
Facsimile No. (202) 457-8832

Attorney for Association of American
Physicians and Surgeons, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2006, a copy of the foregoing *Amicus Curiae Brief by the Association of American Physicians and Surgeons Filed in Support of the Application for a Supervisory Writ to Review Denial of Walter Borg, M.D.’s Motion to Compel the Deposition of Cecelia Mouton, M.D.*, was mailed via Federal Express overnight shipping, postage prepaid to:

The Honorable Benjamin C. Jones
Judge, 4th Judicial District, Parish of Ouachita
300 St. John Street, 4th Floor
Monroe, LA 71201

Diana Pratt-Wyatt
Clerk of Court
Court of Appeal, Second Circuit
430 Fannin Street
Shreveport, LA 71101

Matthew Brown, Esq.
SULLIVAN, STOLIER & RESOR
909 Poydras Street, Suite 2600
New Orleans, Louisiana 70112

David H. Nelson, Esq.
Nelson, Zentner, Sartor & Snellings, LLC
1507 Royal Avenue
Monroe, LA 71201

W. Glenn Burns, Esq.
Hailey, McNamara, Hall, Larmann & Papale, LLP
One Galleria Blvd., Suite 1400
Metairie, LA 70001

Elmer G. Noah, II, Esq.
Noah, Smith & Johnson, LLP
1900 North 18th Street, Suite 302
Monroe, LA 71201

Don McKinney, Esq.
Adams and Reese
701 Poydras Street, Suite 4500
New Orleans, LA 70139

J. CLAYTON CULOTTA