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NO. 100390-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ASHA SINGH, personally and as Personal
Representative of the Estate of NARENDRA P.
SINGH,

Petitioner,

v.

STATE OF WASHINGTON, a governmental
entity; UNIVERSITY OF WASHINGTON, a
Washington State entity, and JOHN DOES 1-5,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

**PETITIONER'S ANSWER TO THE AMICUS CURIAE
MEMORANDUM OF DR. ROBERT H. HEFLICH, PH.D**

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I. INTRODUCTION

Like every public-research institution, the University of Washington touts that its “principal function” and “purpose” is “to preserve, to increase, and to transmit knowledge” and “to seek new knowledge for the general benefit.” CP 731 (UW Faculty Code); CP 850 (UW Patent, Invention, and Copyright Policy). Furthering this purpose is the UW’s promise to faculty “to preserve, protect, and share Research Data in accordance with academic, scientific, and legal norms.” CP 902 (UW Grants Information Memorandum 37).

Despite these lofty ideals and its specific promises to faculty, the UW interprets the policies that it drafted and imposed on its faculty to strip faculty of one of the few meaningful rights granted to them and integral to performing their job: preservation of their scientific research. The pursuit of scientific truth is the modern-day lingua franca—a universal language transcending borders, language barriers, and cultural norms. The

preservation of research performed in pursuit of that truth serves as a pillar of this universal language.

Dr. Robert Heflich's amicus memorandum addresses the universally recognized scientific norm that scientific research should be preserved. The reason, according to Dr. Heflich and even the UW Faculty Code, is both simple and salutary: preservation is fundamental to the scientific process and progress. *Heflich Amicus Memo* at 12; CP 731. This universal scientific norm was expressly incorporated into the UW's policies with its faculty. CP 731, 902. But the UW denied its faculty the right to carry on Dr. Singh's research during his extended medical leave and later destroyed Dr. Singh's research data including his cell lines, at least one of which showed promise to treat cancer. CP 784, 917.

Review is warranted to address this issue of substantial public interest about whether the UW has a contractual obligation to preserve a core faculty member's research data

consistent with academic, scientific, and legal norms.

RAP 13.4(b)(4).

II. ARGUMENT

Dr. Heflich's amicus memorandum supports Asha Singh's petition for review concerning the UW's destruction of her late husband's research data.

A. The Court of Appeals' decision, which sanctioned the UW's destruction of a core faculty member's cell lines, would apply to any faculty who generates, collects, manages, and retains research data at the UW.

If left to stand, the Court of Appeals' decision gives the UW carte blanche to destroy any faculty's research data without any consequences or accountability. That decision affects not only Dr. Singh and any other faculty conducting research at the UW but also the worldwide scientific community, who often rely on research generated by UW scientists. *See Heflich Amicus Memo* at 11–13. It provides a blueprint for the UW in the future to interfere with and destroy a faculty member's ongoing research whenever the UW deems it “necessary,” granting the

UW limitless discretion to destroy research data generated by all faculty employed by the UW.

The Court of Appeals' decision and the UW point to one clause in the operative policy, GIM 37, that supposedly allowed the UW to destroy Dr. Singh's research data. That clause states:

Access. The PI [principal investigator] generally shall determine who has access to Research Data generated within his or her project, provided that where necessary to assure needed and appropriate access, the University has the option to take custody of any or all Research Data.

CP 904; *see also Slip Op.* at 7–8; *Answer to Petition* at 19–20.

But it says nothing about authorizing the UW to destroy a faculty's research data; it concerns only access to such data. And the UW's interpretation of the clause would in any event contradict the express purpose of GIM 37—"to preserve, protect, and share Research Data in accordance with academic, scientific, and legal norms." CP 904.

Nor does that clause limit itself to situations where, according to the UW, the faculty member becomes incapacitated or gravely ill. GIM 37 authorizes only the scientist to destroy

any research data. CP 903, 905. If the UW could destroy faculty research data because of “needed and appropriate access,” then the policy the UW imposed on its faculty would be stripped of any meaningful life and thus be illusory. *See Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986) (holding that a “promise is illusory when its provisions make its performance optional or discretionary on the part of the claimed promisor”). That unreasonable interpretation cannot be the bargain that the UW forced its faculty to accept. *See Petersen-Gonzales v. Garcia*, 120 Wn. App. 624, 632, 86 P.3d 210 (2004) (explaining that ambiguities in take-it-or-leave-it type of contracts should be construed against the drafter).

B. The UW asks this Court to avert its eyes to what the record reflects about the UW’s destruction of Dr. Singh’s research data and its refusal to allow other faculty to carry on Dr. Singh’s research during his medical leave.

Dr. Heflich astutely points out that “all researchers at public institutions like [UW] rely on the institution’s promises to

respect and to preserve their work.” *Heflich Amicus Memo* at 2.

The UW apparently disagrees.

In her petition, Singh pointed to pages of documents produced and bates-stamped by the UW in discovery showing that Dr. Singh’s laboratory colleagues and fellow Bioengineering faculty agreed to maintain Dr. Singh’s cell lines to carry on his ongoing research projects. *See* CP 2315, 2322, 2326. Relying on a literal interpretation of RAP 9.12, the UW asks this Court to disregard those documents that Singh was unable to bring to the trial court’s attention at the summary-judgment hearing.

Because this Court should liberally interpret the Rules of Appellate Procedure to promote justice and to facilitate the decision of cases on the merits under RAP 1.2(a), this Court should consider these documents in deciding whether to grant review of the issues raised in Singh’s petition. These issues are important to the public and to the scientific community at large as shown by Dr. Heflich, and a draconian interpretation of court rules should not prevent their consideration here.

Dr. Heflich’s amicus memorandum shows that this Court should consider those documents for another reason. Preserving cell lines is vital because preservation ensures that research results can be replicated and peer-reviewed—a key part of the scientific method. Preserved research also facilitates future scientific breakthroughs. Given Dr. Singh’s lifetime of enormous contributions to the scientific community, the ARTN-103 cell line developed by Dr. Singh and destroyed by the UW could have had the same impact as Dr. Singh’s comet assay. At the very least, Dr. Singh’s research data, including his ARTN-103 cell line, should have been preserved—and not destroyed—by the UW so that future scientists and the public could continue to benefit from Dr. Singh’s scientific achievements after his death.

C. The UW policies governing Dr. Singh’s employment incorporated the universal scientific norm that all scientific research must be preserved.

Contrary to the UW’s assertions in its answer to Singh’s petition, Singh has consistently argued on appeal that the UW

destroyed her late husband's research data, which necessarily included the ARTN-103 cell line. *See Opening Br.* at 11–12; *Reply Br.* at 1–6; *Reconsideration Mot.* at 7–11. That issue is squarely before this Court. And Dr. Heflich's amicus memorandum confirms the public importance of this issue.

Dr. Heflich's scientific career has spanned over half a century. For four decades, he has worked at the Food and Drug Administration and National Center for Toxicological Research, where he currently serves as the Director of the Division of Genetic and Molecular Toxicology. In that role, he oversees the work within the FDA's Division of Genetic and Molecular Toxicology. Although Dr. Heflich provides a national perspective on the duty to preserve scientific research, the universal scientific norms discussed in his amicus memorandum concerning research preservation apply equally to the university setting. And that norm was expressly incorporated into GIM 37. CP 902.

UW claims to own and thus has the right to determine the disposition of research data in Dr. Singh's laboratory after he took medical leave, including the right to destroy that data and to deny others access to the laboratory. A reasonable construction of the policies UW drafted and forced its faculty to accept cannot support the UW's position. UW's "research data" policy under GIM 37, for instance, supports this conclusion.

GIM 37 is a self-entitled policy governing "rights in research data" between faculty and the UW. CP 902-08. That policy broadly defines "research data" as any "information, records, and tangible products arising from or associated with research conducted at, under the auspices of, or using the resources of the University," including "tangibles (e.g., cell lines, biological samples collected for research purposes, synthetic compounds, organisms, and originals or copies of laboratory notebooks)." CP 903. Dr. Singh was a UW faculty. The cell lines he developed were "research data." CP 903, 906. He was the "principal investigator" for the cell lines. CP 903. And the

principal investigator has “the ultimate responsibility for destruction of research data.” CP 905.

The UW thus has no right under GIM 37, or under any other policy identified by the UW, to destroy a core faculty member’s research data. It must instead preserve and protect the research data to benefit the scientific community and the principal investigator, who must in exchange collect, manage, and retain the data as Dr. Singh did here. CP 903–05.

GIM 37, when interpreted together with the UW’s other policies, establish the presumption that Dr. Singh owned a substantial share of his research data and lab work. The UW has the burden to establish, not merely assert, otherwise. UW faculty have a right to expect that the UW’s policies will be enforced according to their plain meaning and not be treated as illusory promises subject to the UW’s unfettered discretion and the

reinterpretation by the UW whenever the UW finds it convenient to do so.¹

Lastly, the UW has argued that it was “required and privileged” to dispose of all biological and hazardous waste remaining in the laboratory where Dr. Singh worked. But the documents it cites to support this supposed privilege do not trump the express promises in the UW policies giving faculty the right to control, to manage, and ultimately to destroy their own research data. *Compare* CP 788–826, *with* CP 902–08. And those documents contradict the scientific norm discussed in Dr. Heflich’s memorandum and incorporated in GIM 37 that the UW must “preserve, protect, and share Research Data.” CP 902.

¹ This Court should take judicial review of the peer-reviewed articles attached to Singh’s petition and Dr. Heflich’s amicus memorandum. *See Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980) (explaining that appellate courts can take notice of “legislative facts” social, economic, and scientific facts that “simply supply premises in the process of legal reasoning”). Those articles, whose factual and scientific principles are undisputed by the UW, provide important factual context bearing on the issues presented by Singh’s petition. *Id.*

D. During Dr. Singh’s medical leave, the UW refused to allow fellow faculty and personnel within the Bioengineering Department to carry on Dr. Singh’s ongoing research.

A fundamental scientific norm vital to scientific progress is that laboratory research and materials “must be preserved and archived.” *Heflich Amicus Memo* at 12. “[P]reservation ensures results can be repeated and peer reviewed, a key part of the scientific method.” *Id.* The UW expressly incorporated this universal scientific norm into their policies:

The principal functions of a university are to preserve, to increase, and to transmit knowledge.²

The purpose of university research is to seek new knowledge for the general benefit.³

It is the policy of the University of Washington to preserve, protect, and share Research Data in accordance with academic, scientific, and legal norms.⁴

Dr. Singh had ongoing research in the UW’s Bioengineering Department when he took an extended medical

² CP 731.

³ CP 850.

⁴ CP 902.

leave in 2016. CP 1303, 2322. This research included the ARTN-103 cell line that formed the basis for the UW's licensing agreement with Applied Biological Materials (ABM). CP 917, 1278, 1592. The reasonable inference from the record is that the ARTN-103 cell line existed in Dr. Singh's laboratory during his medical leave and that this cell line could have (and should have) been maintained by the UW. CP 846.

According to the Court of Appeals' decision and the UW, Dr. Singh's passing purportedly precluded the UW from supplying that cell line to ABM because "Dr. Singh was the only person with the unique knowledge and experience to ship the cell line with the necessary culturing instructions." *Slip Op.* at 8; CP 846. This is also around the same time when the UW destroyed all the biological materials in Dr. Singh's laboratory, including the ARTN-103 cell line. CP 784.

But Dr. Singh was not the only person with the unique knowledge and experience to ship the ARTN-103 cell line to ABM. Nor was the UW authorized to destroy Dr. Singh's cell

lines. Scientific research and progress do not happen in a vacuum. Research in the scientific community is published in peer-reviewed journals. The publication of scientific research specifically and purposely allows scientists to replicate others' research results. *Heflich Amicus Memo* at 12–14. Here, in the UW's own Record of Innovation form for Dr. Singh's cell line, the publicly available information informed other scientists, including Dr. Singh's colleagues, how to replicate and to culture the ARTN-103 cell line. CP 919.⁵

But the UW prevented Dr. Singh's fellow faculty and laboratory personnel from accessing his laboratory to maintain his cell lines and to carry on his ongoing research. CP 2315, 2326. The UW's actions thus prevented persons to whom

⁵ See also Narendra P. Singh et al., *Development of a Dihydroartemisinin-resistant Molt-4 Leukemia Cell Line*, 34 ANTICANCER RESEARCH 2807, 2807 (2014) (explaining how the cells were cultured and diluted so that the science could be repeated); Narendra P. Singh et al., *DNA Damage in Dihydroartemisinin-resistant Molt-4 Cells*, 25 ANTICANCER RESEARCH 1339, 1340 (2015) (same).

Dr. Singh delegated authority to manage his research data from accessing that data to further scientific progress.

III. CONCLUSION

Dr. Heflich's amicus memorandum brings to life the achievements of an exceptional scientist employed by the UW. Dr. Singh spent his entire life pursuing the scientific truth, and the techniques he pioneered and advanced in DNA analysis continue to have significant influence on current research and a substantial impact on public health. One of Dr. Singh's achievements—the development of a cell line that promised to treat cancer—never came to fruition because the UW destroyed that research.

This Court should grant review to address the issues of substantial public interest raised by Asha Singh's petition for review. RAP 13.4(b)(4).

This document contains 2,450 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted: February 11, 2022.

CARNEY BADLEY SPELLMAN, P.S.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the method noted:

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