No. 1030207

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 396151

BRENDA ADAMS, et al.,

Appellants,

v.

CONFLUENCE HEALTH,

Respondent.

RESPONDENT'S ANSWER TO APPELLANTS' PETITION FOR REVIEW

Jeffrey A. James, WSBA No. 18277
Amanda V. Masters, WSBA No. 46342
Sebris Busto James
15375 S.E. 30th Pl., Suite 310
Bellevue, WA 98007
(425) 454-4233
jjames@sbj.law
amasters@sbj.law

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

I. INTRODUCTION

Appellants are a group of Health Care Workers, formerly employed by Confluence Health,[1] Central Washington Health Services Association and Wenatchee Valley Hospital & Clinics (collectively, the "Hospitals"), who were outraged by the State's imposition of a mandatory vaccination requirement.[2] They refused to concede the legitimacy of the Governor's Proclamation, instead claiming they did not need the vaccine because they had "natural immunity." They asserted they had a constitutional right to reject the experimental "so-called vaccine." They argued that the public policy of the State of Washington allowed them to make their own medical decisions and the Hospitals violated this public policy when Appellants

[1] In their Petition for Review, Appellants' only identify Confluence Health as "Respondent." All three listed entities were named as defendants below.

[2] https://www.wenatcheeworld.com/news/local/protesters-gather-outside-confluence-health-in-wenatchee-after-vaccine-mandate-deadline/article_c3e946ca-3127-11ec-a5de-971a54138d9d.html

lost their employment with the Hospitals for failure to comply with the vaccine mandate.

As a second cause of action, they alleged that the Hospitals failed to accommodate their "perceived disabilities," which they explained as their unvaccinated status because of their "natural immunity" to COVID-19. In response to the Hospitals' Motion to Dismiss, they were granted leave to amend their Complaint a second time ("2nd Amended Complaint") to add a claim for failure to accommodate actual medical disabilities and sincerely held religious beliefs, which they conceded was not part of their original Complaint or first amended Complaint. Despite clear guidance from the trial court, and three opportunities to properly plead their claims, they stubbornly refused to make necessary changes. Eventually, the trial court properly dismissed their claims for wrongful discharge in violation of public policy and

failure to accommodate medical disabilities.[3] Division III of the Washington State Court of Appeals correctly affirmed the trial court's ruling in an unpublished decision.

Whether discretionary review should be granted now is controlled by RAP 13.4. Appellants fail to identify under what grounds they are seeking review as required by RAP 13.4. Instead, they raise the same meritless arguments they relied on previously, along with a new argument raised for the first time, in clear violation of RAP 2.5(a) and RAP 9.12. This Court should not spend additional time entertaining frivolous and ever-changing arguments. Review should be denied and sanctions under RAP 18.9(a) should be awarded.

II. ISSUES PRESENTED FOR REVIEW

1. RAP 13.4(c)(7) requires the petition for review to include a statement of the reason(s) why review should be

[3] The trial court dismissed Appellants' claim for failure to accommodate religious beliefs *without* prejudice. Appellants have since refiled that claim in Douglas County Superior Court.

accepted under one or more of the tests established by RAP 13.4(b).

Should review be denied because the Appellants did not present a statement of the reason why review should be accepted under one or more of the tests established by RAP 13.4(b)? **Yes.**

2. RAP 13.4(b)(3) allows review if the case involves a significant question of law under the Constitution of the State of Washington or the United States. Appellants have failed to raise any argument that could be interpreted in this manner.

Should review be denied because the Appellants have not articulated how any significant question under the Constitution of the State of Washington or the United States is involved under RAP 13.4(b)(3)? **Yes.**

3. RAP 13.4(b)(4) allows review if the case involves "an issue of substantial public interest." This case involves an issue in which the Hospitals followed Governor Inslee's 21-14 COVID Vaccination Proclamation, which required Health Care Providers to be fully vaccinated against COVID-19. Appellants

chose not to receive the COVID-19 vaccination due to their belief that they possessed "natural immunity." The Court of Appeals correctly determined that the Hospitals did not violate public policy by not taking Appellants' "natural immunity" into consideration. *Martin v. Gonzaga Univ*., 200 Wn. App. 332, 353 (2017) (citing *Gardner v. Loomis Armored, Inc*., 28 Wn.2d 931, 936 (1996)).

Should review be denied because the Appellants have not articulated any issue of substantial public interest that would allow this Court to grant review under RAP 13.4(b)(4) regarding their claims for wrongful termination in violation of public policy? **Yes.**

4. Appellants pled that the Hospitals perceived them to be disabled because they were unvaccinated and refused to accommodate them by allowing them to continue providing patient care while unvaccinated. They never pled, or even argued, that any individual Appellant suffered from an actual disability beyond the state of being unvaccinated. The trial court

ultimately ruled, "[a]s a matter of law, Plaintiffs have not established a disability under WLAD." The Court of Appeals determined that Appellants did not have a viable claim for failure to accommodate perceived disabilities, as this Court has held that employers are not required to accommodate perceived disabilities. *Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 619, 444 P.3d 606 (2019).

Should review be denied because the Appellants have not articulated any issue of substantial public interest that would allow this Court to grant review under RAP 13.4(b)(4) regarding their claims for failure to accommodate a disability? **Yes.**

5. Appellants argue in their petition for review, "resisting the vaccine mandate based on religious or disability grounds and exercising the Appellants [sic] personal choice was specifically exempted from the Proclamation. The Appellants were choosing a course not deemed illegal by the Proclamation and were wrongfully terminated as a result." This argument is raised for the first time in their petition, in violation of RAP

2.5(a). In addition, Appellants argue in their petition that they were somehow denied the right to submit declarations establishing actual medical disabilities suffered by some of them, despite submitting other extraneous materials and therefore turning the proceeding below into one under CR 56. CP 300. Sanctions may be awarded under RAP 18.9(a) when counsel files a frivolous appeal.

Should the Hospitals be awarded sanctions when Appellants' Petition for Review is meritless and frivolous? **Yes.**

III. RESTATEMENT OF THE CASE

As the COVID-19 pandemic quickly spread throughout the state and around the world, Governor Jay Inslee issued "Proclamation by the Governor 21-14 COVID VACCINATION REQUIREMENT" ("Proclamation 21-14") to help protect vulnerable individuals and to promote public health and safety. Proclamation 21-14 made it a crime for a Health Care Provider to work in a Health Care Setting unless fully vaccinated against COVID-19. Additionally, Proclamation 21-14 set forth limited

exemptions for medical reasons and did not recognize "natural immunity" as a valid exemption. No exemption allowed an unvaccinated person to continue providing patient care.[4]

The United States Supreme Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), settled the issue of whether a vaccine mandate unconstitutionally "invade[s]" an individual's liberty interests. *Id*. at 26. There, the individual argued that his constitutional liberty interests prevented the State from enforcing the legislative-issued smallpox mandate. In support, the individual submitted offers of proof from medical professionals concerning the "alleged injurious or dangerous effects of vaccination." *Id.* at 26. The Court properly rejected these arguments.

The Court refused to consider arguments concerning the efficacy of the vaccine because the legislature, not courts or

[4] Proclamation 21-14 was rescinded effective October 31, 2022, through Proclamation 21-14.6 signed by Governor Inslee on October 28, 2022.

juries, must determine the best mode for disease prevention. *Id*. at 30-38. To hold otherwise would effectively strip from the State the ability to protect public health and safety. *Id*. at 30, 35.

The Court then rejected arguments that an individual's liberty interest, without more, could prevent the State from engaging in its duty to protect public health and safety:

> We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.

Id. at 37-38.

To combat the spread of COVID-19, Governor Inslee, on August 9, 2021, acting through a legislative grant of power, proclaimed the need to "protect everyone, including persons who cannot be vaccinated for medical reasons, youth who are not eligible to receive a vaccine, immunocompromised individuals, and vulnerable persons including persons in health care facilities, long-term care facilities and other congregate care facilities from COVID-19." Proclamation 21-14 at 2; *see also* August 20, 2021, Amended Proclamation 21-14.1 ("Amended Proclamation 21-14.1") at 1.

Operators of "Health Care Settings" (including the Hospitals) had a duty to require all "Health Care Providers" (including Appellants) to comply with health and safety measures and abide by the standards of care "that are consistent with the recommendations of the state Department of Health." This specifically required Health Care Providers to be vaccinated unless otherwise exempt.

While employees could seek a medical or religious exemption, natural immunity was not considered a valid exemption.[5] Indeed, the Department of Health prohibited nonexempt employees from working in a Health Care Setting. Nothing in the Proclamation allowed a nonexempt, unvaccinated employee to have contact with patients in a Health Care Setting. *Id*. ("If you do not meet these deadlines, including by providing proof to the operator of health care setting where you work, **then you are not permitted to work there**, unless the operator has provided you a disability or religious accommodation.") (emphasis added). Employers who violated these mandates could be charged with, and convicted of, a gross misdemeanor. RCW 43.06.220(5); Proclamation 21-14 at 8.

Due to this mandate, along with public safety concerns and other business reasons, the Hospitals no longer allowed

[5] *See, e.g.*, Department of Health 505-160, updated September 2021 at 6, available online at https://doh.wa.gov/sites/default/files/legacy/Documents/1600/coronavirus//505-160-VaccinationRequirementFAQs.pdf.

unvaccinated employees (including Appellants) to have contact with patients or otherwise be in the Health Care Setting where they could potentially expose patients or coworkers to COVID-19. Also, in accordance with the mandate, natural immunity was not considered a valid exemption to the vaccination requirement. For those employees who qualified for an exemption, the Hospitals considered them for available remote roles when possible; otherwise, the Hospitals placed them on a leave of absence with continued healthcare benefits as an accommodation.

IV. PROCEDURAL POSTURE

On April 8, 2022, Appellants filed a Complaint commencing this legal action. CP 1-8. Appellants' allegations centered around their purported terminations between October 2021 to January 2022 based on their decisions not to receive a COVID-19 vaccination and/or expiration of their leaves of absence.

On May 3, 2022, Appellants filed an Amended Complaint. CP 26-33. On May 25, 2022, the Hospitals filed a CR 12(b)(6) Motion to Dismiss for Failure to State a Claim. CP 51-54.

Prior to the trial court ruling on the Hospitals' first CR 12(b)(6) Motion, on August 2, 2022, Appellants requested and were subsequently granted leave to amend their complaint a second time, purportedly to add claims for religious and medical disability discrimination. Specifically, the 2nd Amended Complaint added a partial sentence that read, "[t]he discharges of the dismissed employees were because of their perceived disability of the dismissed employees *and/or constituted a failure to accommodate their claims for accommodation based on medical or religious exemptions in violation of RCW 49.60.180.*" CP 250-257 (new language in italics).

On September 22, 2022, the Hospitals submitted a Second CR 12(b)(6) Motion detailing why Appellants still failed to state a claim. CP 233-249.

Ultimately, the trial court granted the Hospitals' motion to dismiss and dismissed Appellants' claims with prejudice. CP 295-313. With regard to the 2nd Amended Complaint, because of Appellants' addition of exhibits in their response to the Hospitals' motion, the trial court converted the request for dismissal into a summary judgment motion to be decided under CR 56(c). Using this standard, the trial court dismissed the initial claims of wrongful discharge in violation of public policy, disability discrimination (disparate treatment) under the WLAD and disability discrimination (failure to accommodate) under the WLAD with prejudice. The claim of failure to accommodate a medical exemption was reviewed under both CR 12 and CR 56.

Appellants appealed their claims for wrongful discharge in violation of public policy and failure to accommodate disabilities. The Court of Appeals, in an unpublished opinion (the "Opinion"), affirmed the trial court's dismissal of these claims. Appellants now petition this Court for review. Because both claims fail as a matter of law, the petition should be denied.

V. ARGUMENT

A. Appellants Have Failed to Cite Any Grounds for Discretionary Review under RAP 13.4(b), as required by RAP 13.4(c)(7).

Appellants do not cite *any* grounds for discretionary review and thus have failed to satisfy the requirements under RAP 13.4(b) and (c)(7). RAP 13.4(b) provides that the Supreme Court will accept a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Appellants were required to include "[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument." RAP 13.4(c)(7). They did not. Thus, the Hospitals are forced to submit this brief using guesswork as to under what subsection of RAP 13.4(b) Appellants intended to assign error. Based on this

failing alone, Appellants' petition for review should be denied. *Kagele v. Aetna Life & Casualty Co.*, 40 Wn. App. 194, 196, 698 P.2d 90 (1985), *citing Orwick v. Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984).

Appellants clearly had no grounds for seeking discretionary review pursuant to RAP 13(b)(1) or (2). As analyzed *arguendo* below, they have no grounds for seeking discretionary review under RAP 13(b)(3) or (4) either.

B. Appellants Have Failed to Establish that, Pursuant to 13.4(b)(3), this Matter Involves Any Significant Question Under the Constitutions of the State of Washington or the United States.

Appellants asserted below that they have a constitutional right to reject the "so-called vaccine," citing the Washington Constitution, art. I, § 7. They provide no legal support for this contention and ignore the United States Supreme Court's holding in *Jacobson*. *Jacobson* settled that it is within the police power of a State to provide for compulsory vaccination:

> It is within the police power of a State to enact a compulsory vaccination law, and it is for the

> legislature, and not for the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health.

Jacobson, 197 U.S. at 3. This matter simply does not involve a significant question under the Constitution of Washington or of the United States. The Hospitals acted within the mandate of the Governor.

C. Appellants Have Failed to Establish that their Wrongful Termination in Violation of Public Policy Claim Raises any Issue of Substantial Public Interest that Would Allow this Court to Grant Review under RAP 13.4(b)(4).

Appellants claim to have asserted "a clear public policy in favor of adult persons having the fundamental right to control their own decisions relating to bodily autonomy and rendering of their own health care," citing Washington Constitution, art. I, § 7, *McNabb v. Department of* Corrections, 163 Wn. 2d 393, 180 P.3d 1257 (2008) and RCW 70.122.060. Petition for Review, p. 5. This Court has interpreted a "substantial public interest" to mean when an issue "[i]mmediately affects significant segments

of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004) quoting *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 63 (1996). The refusal of a select group of Health Care Providers to receive a life-saving vaccine because of their alleged "natural immunity" and subsequent expectation that they should be allowed to risk their own safety, as well as that of their coworkers and patients, by working unvaccinated in a Health Care Setting is not a substantial public interest.

The Court of Appeals correctly noted that Appellants' grievance is not with the Hospitals, but with Governor Inslee: "[r]ather than argue that Proclamation 21-14.1 was invalid, the former employees focus on Confluence's decision to terminate them." Opinion, at 9. This position is highlighted by the declaration of Peter A. McCullough, MD, MPH, attached to Appellants' Complaint. CP 34-50. The declaration does not

state that all Appellants had a disability that prevented them from receiving the COVID-19 vaccination. Rather, Dr. McCullough opines that some individuals possess a natural immunity towards COVID-19 and, therefore, do not need the vaccine, which is in direct contradiction with the Governor's mandate. *Accord, Jacobson*, 197 U.S. at 30, 35. All of Appellants' arguments should be viewed through this lens.

1. There is no legal support for the argument that Health Care Workers could refuse the COVID-19 vaccination based on bodily autonomy.

In support of their argument that Health Care Workers could refuse the COVID-19 vaccination based on bodily autonomy, Appellants cite to the Natural Death Act (RCW 70.122.010), Washington Constitution, art. I, § 7, and *McNabb v. Dept. of Corrections*, 180 P.3d 1257, 1265 (2008). A patient's ability to decline medical treatment under the Natural Death Act and the constitutional privacy right that allows an individual, in certain circumstances, to refuse State-imposed, life-saving treatments (Washington Constitution, art. I, § 7; *McNabb v. Dept.*

of Corrections, supra) does not apply to employment situations. *See generally*, *Trumbauer v. Group Health Coop. of Puget Sound*, 635 F. Supp. 543, 549 (W.D. Wash. 1986) (dismissing the claim of wrongful termination in violation of public policy on summary judgment because constitutional provisions cited by plaintiff do not apply to a private hospital). As there is no overlap between the Natural Death Act and refusal of a vaccine mandated for health care workers by the government, Appellants' arguments fail.

Appellants misleadingly assert that "numerous Washington Courts have recognized that personal autonomy is a public policy." Petition, at 4. To support this argument, Appellants cite *Pacheco v. United States*, 200 Wn.2d 171, 515 P.3d 510 (2022) (holding that a patient who received negligent reproductive health when she received a flu shot instead of birth control and subsequently had a disabled child might recover all damages proximately caused by the provider's negligence (citing LAWS OF 2022, ch. 65, § 1(1), "[a]ll people deserve to make their

own decisions about their pregnancies, including deciding to end a pregnancy…")). *Pacheco* does not suggest that refusal to comply with a private employer's vaccine mandate in compliance with the law is analogous to a woman's reproductive rights. Appellants further cite *Am Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008), in support of this baseless assertion. In *Am Legion Post*, this Court discussed that the *federal* constitution protects the right to autonomous decision-making, including issues relating to marriage, procreation, family relationships, child-rearing, and education. Yet the United States Supreme Court has held that the U.S. Constitution embodies no fundamental right that would render vaccine requirements imposed in the public interest unconstitutional. *See Jacobson*, 197 U.S. at 11. Courts across the nation have consistently reviewed and upheld COVID-19 mandates in line with *Jacobson*. *See Bauer v. Summey*, 568 F. Supp. 3d 573 (D.S.C. 2021); *Evans v. N.Y.C. Health*, No. 21-CV-

10378 (PAE) (VF), 2023 U.S. Dist. LEXIS 139159 (S.D.N.Y. Aug. 7, 2023).

Finally, the Hospitals had a legal duty to follow the COVID-19 mandates—and in doing so, they avoided criminal penalties and maintained safe workplaces, which protected the health and safety of employees and patients. Appellants' right to make personal decisions concerning their medical treatments does not allow, much less require, an employer to violate the law or to refrain from making employment decisions for legitimate health, safety, and business reasons. Furthermore, the ability to decline a vaccination does not create any type of public policy requiring an employer to disregard a legally imposed vaccination requirement or create super employment rights. *E.g.*, *Hayes v. Univ. Health Shreveport, LLC*, 332 So. 3d 1163, 1166 (La. 2022) (Louisiana Medical Consent law is limited to relationship between patient and health care provider and does not support wrongful discharge claim based on hospital employee's refusal to be vaccinated against COVID-19). Rather, public policy, as

manifested in both legislative and court decisions, imposes on employers a duty to follow vaccination mandates and avoid legal consequences.

As Appellants' frustrations are directed towards the Governor and not the Hospitals and the Hospitals merely followed the letter of the law, Appellants' claim for wrongful discharge in violation of public policy is meritless and does not raise a substantial public interest.

2. The law does not support that Proclamation 21-14 protected the employment of Health Care Workers with "natural immunity" who refused to receive the COVID-19 vaccination.

In their Petition, Appellants introduce a new argument for the first time: that the Governor's mandate allowed individuals who sought religious or disability exemptions to remain employed and Appellants were terminated *because* they sought an exemption. Petition, at 5. Appellants seem to argue that if they applied for an exemption, this automatically made them immune from termination. In the three Complaints, multiple

briefs, and extensive arguments made to the trial court and Court of Appeals, Appellants never once claimed they were terminated because they sought an exemption from the vaccination requirement. Tellingly, Appellants' Amended Complaint reads, in pertinent part:

> **WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY**
>
> 5. It is the clear public policy of the State of Washington that adult persons have the fundamental right to control their own decisions relating to bodily autonomy and the rendering of their own health care. (RCW 70.122.010) (Article 1, section 7 of the Washington State constitution) (McNabb v. Department of Correction, 163 W2d 393, 2008).
>
> . . .
>
> 7. The terminations of the dismissed employees by the employer contravened the clear public policy set forth in paragraph 5 above.

When Appellants sought to amend their Complaint a second time it was not to change their public policy claim but rather to add a failure to accommodate claim. *See* CP 207-208 ("The original and previously amended complaint arguably

failed to state religious or medical disability discrimination, i.e., failure to accommodate as an additional basis for recovery. This motion for leave to amend is intended to clarify and/or correct that possible defect in the previous complaints."). This Court should refuse to consider Appellants' new argument that they were terminated in violation of public policy for seeking an exemption as permitted under Governor Inslee's proclamation. RAP 2.5(a) and RAP 9.12.

Moreover, as presented, Appellants' new argument is nonsensical. Governor Inslee's proclamation in no way creates a new public policy in favor of persons who seek exemptions. It merely encapsulates a state (and federal) prohibition on terminating an employee because of their sincerely held religious beliefs or medical disability. It does not affect an employer's right to make legitimate business decisions to remove unvaccinated persons from a Health Care Setting or terminate them after expiration of a leave of absence.

In sum, even if this Court were to consider Appellants' new argument, the claim does not present an issue of substantial public interest that merits discretionary review.

D. Appellants Have Failed to Establish that their Failure to Accommodate Claim Raises any Issue of Substantial Public Interest that Would Allow this Court to Grant Review under RAP 13.4(b)(4).

In their Amended Complaint and 2nd Amended Complaint, Appellants failed to identify any individual who suffered from an actual medical disability. Instead, they merely asserted that the Hospitals failed to accommodate their *perceived* disabilities. CP 254-255, ¶9 ("All the dismissed employees were disabled in the sense that the employer perceived each of them to have a status (lack of COVID-19 immunity produced by so called vaccination)...."). The Hospitals moved to dismiss this claim, arguing that it was well established that there was no obligation to accommodate a perceived disability. CP 229-232. Before the trial court ruled on the motion, Appellants sought permission to amend their complaint a second time. When given permission to

do so, they merely deleted the word "PERCEIVED" from the heading in their 2nd Amended Complaint. There are no allegations in Appellants' original, Amended, or 2nd Amended Complaints that *any* Appellant had an actual, known disability that required an accommodation.

Appellants malign the trial court for dismissing their failure to accommodate claim "without any analysis what-so-ever." Petition for Review, p. 11. They seem oblivious to history: despite creating three different versions of their complaint, responding to two motions to dismiss, submitting a motion to amend, participating in oral argument two times, and submitting a motion for reconsideration, they never represented to the trial court that any one of them suffered from a medical disability beyond the asserted disability of being "unvaccinated." Contrary to Appellants' assertion, the trial court analyzed Appellants' disability claim at length, finally concluding as follows:

> Moreover, even under the liberal notice pleading standard, Plaintiffs' claims cannot survive. While Plaintiffs may need to merely allege that they sought accommodations (as opposed to specifically alleging when and how they sought accommodations), they cannot allege they have an unspecified disability. Instead, Plaintiffs must allege the existence of particular "a sensory, mental, or physical abnormality." *Becker v. Cashman*, 128 Wn. App. 79, 84, 114 P.3d 1210 (2005). Since they have not done so, this Court need not reach Plaintiffs' other arguments.
>
> ... In this case, Plaintiffs have had three separate opportunities to plead their claims. Each version of the complaint suffers from the same defect: The lack of COVID-19 vaccination does not qualify as a disability under the WLAD as a matter of law. Plaintiffs have been unable to remedy this flaw so far and there is no reason to conclude they would be able to do so with further amendment.

CP 311-312.

Additionally, Appellants malign the Court of Appeals for relying on a summary judgment case in its decision (Petition for Review, p. 11), forgetting that it was their own conduct that originally converted the Hospitals' Motion to Dismiss from a 12(b)(6) motion to a motion for summary judgment under CR 56:

> The "submission . . . of extraneous materials" by either party converts a CR 12 (b)(6) motion into a CR 56(c) motion for summary judgment. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987), *as amended*, 109 Wn.2d 107, 750 P.2d 254 (1988). Courts may choose to exclude such materials when considering a CR 12(b)(6) motion. *Mason v. Mason*, 19 Wn. App. 2d 803, 820, 497 P.3d 431 (2021). If the materials are not excluded, then the motion "must" be treated as a summary judgment motion. *Id*. (citing *Worthington v. Westnet*, 182 Wn.2d 500, 505, 341 P.3d 995 (2015)).
>
> Exhibit B and Exhibit C to Plaintiffs' opposition to the dismissal motion are "extraneous materials." *Haberman*, 109 Wn.2d at 121. This Court will consider Exhibit B and Exhibit C in opposition to the Defendants' motion and therefore deems Defendants' motion to be converted into a summary judgment motion to be decided under CR 56(c).

CP 300.

Having submitted extraneous materials in opposition to the Hospitals' Motion to Dismiss, Appellants could just as easily have submitted declarations asserting that some of them suffered from actual medical disabilities that prevented them from getting vaccinated against COVID-19. They did not do so. But the fact

that they chose to submit *other* extraneous materials converted the motion into one for summary judgment.

Consequently, the Court of Appeals' citation to a case involving summary judgment was not error and does not change the result here. Appellants have not raised any substantial issue of public interest that must be addressed by this Court.

E. This Court Should Award Sanctions to the Hospitals for Having to Answer a Frivolous Petition for Review.

This Court may deny a petition for review and order the petitioner to pay fees for a frivolous petition pursuant to RAP 18.9. *E.g., Namiki v. ICT Law & Tech Grp, PLLC*, 190 Wn.2d 1032, 421 P.3d 460 (2018). In determining whether a petition is frivolous, five considerations guide the reviewing appellate court: (1) a civil appellant has the right to appeal; (2) any doubts about whether an appeal is frivolous are resolved in the appellant's favor; (3) the record is considered as a whole; (4) an unsuccessful appeal is not necessarily frivolous; and (5) an appeal is frivolous if it raises no debatable issues on which

reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exits. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914 (2013).

Applied here, attorney fees and costs should be awarded due to the frivolous nature of Appellants' appeal and discretionary review petition. Considering the record as a whole, Appellants' Petition is so devoid of merit that no reasonable possibility of reversal exists. Appellants further promulgate new arguments raised for the first time in violation of RAP 2.5(a) and RAP 9.12.

VI. CONCLUSION

Appellants have not and cannot prove that they have any legal or factual basis to prevail on their claims against the Hospitals and they never did. This Court should deny review and award the Hospitals sanctions.

I certify that this answer is in 14-point Times New Roman font and contains 4,933 words in compliance with Rule of Appellate Procedure 18.17.

RESPECTFULLY SUBMITTED this 10th day of June 2024.

By: s/ Jeffrey A. James
Jeffrey A. James, WSBA No. 18277
Amanda V. Masters, WSBA No. 46342
Sebris Busto James
15375 SE 30th Pl., Suite 310
Bellevue, WA 98007
(425) 454-4233
jjames@sbj.law
amasters@sbj.law

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Jeffrey A. James, certify under penalty of perjury under the laws of the United States and of the State of Washington that on June 10, 2024, I caused to be served the document to which this is attached to the party listed below in the manner shown:

Attorney for Appellant:
Paul S. Kube
Lacy Kane & Kube, P.S.
300 Eastmont Ave.
East Wenatchee WA 98802
paul@lacykane.com

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s/ Jeffrey A. James
Jeffrey A. James

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