No. 1043155

SUPREME COURT OF THE STATE OF WASHINGTON

MEGHAN A. McSORLEY,

Plaintiff-Respondent,

v.

THE EVERETT CLINIC, a Washington Professional Liability Company; OPTUM CARE SERVICES COMPANY, a Minnesota Corporation f.d.b.a. DaVITA MEDICAL GROUP; OPTUM CARE, INC., a Minnesota Corporation f.d.b.a. DaVITA MEDICAL GROUP; NARIMAN HESHMATI, an individual; and ALBERT FISK, an individual,

Defendants-Petitioners.

PLAINTIFF-RESPONDENT'S ANSWER TO MEMORANDUM OF *AMICI CURIAE*

Joseph Shaeffer, WSBA #33273
Jesse Wing, WSBA # 27751
Nathaniel Flack, WSBA #58582
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEYS FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

Plaintiff-Respondent hereby responds to the Brief of Amici Curiae Washington State Medical Association, Washington State Hospital Association, and American Medical Association ("Amici").

Amici offer rhetoric that is not grounded in the circumstances of this case or the Court of Appeals' holding, which they fail to address. Amici stress the importance of the peer review privilege, but ignore that Petitioner alone waived the privilege in this case. As the Court of Appeals aptly put it, "The court is not obligated to protect a privilege more assiduously than its holder does." *McSorley v. Everett Clinic*, 34 Wn. App. 2d 323, 334 (Div. I 2025). While Amici express concern over the consequences of waiver, there is a very simple solution to that concern: health care institutions like those Amici represent can simply choose not to waive the privilege, in contrast to the strategic choice made by Petitioner in this case. Amici, like Petitioner, tout the need for confidentiality in peer review, while simultaneously condoning intentional waiver of that same confidentiality for litigation purposes. Under RAP 13.4(b)(4), there is no substantial public interest in this selective and self-serving position. The Court of Appeals simply applied

this Court's precedent, and neither the Petition nor Amici identify a novel issue to be decided by this Court.

This Court should deny the Petition.

II. ARGUMENT

A. Amici Mischaracterize the Issue Resolved by the Court of Appeals

Amici misstate that "at issue here is the applicability and scope of a *purported* waiver" of peer review privilege. Brief of Amici, at p. 3 (emphasis added); *see also* Brief of Amici at, p. 4 (referring to the "The scope and extent of any *purported* waiver") (emphasis added). But the fact of Petitioner's waiver is undisputed, not merely "purported." *Cf. McSorley*, 34 Wn. App. 2d at 331 ("TEC acknowledges that subject matter waiver is the appropriate analysis…."); Petitioner's Opening Brief, p. 6 ("Accordingly, TEC waived its Statutory Peer Review Privileges….").

Amici's "Statement of the Case" similarly suggests this Court review issues relating to "the scope and applicability of statutory peer review privilege…." Brief of Amici, p. 7. But the scope and applicability of the privilege were not before the Court of Appeals and are not at issue here. Indeed, Petitioner knowingly and intentionally waived privilege over documents that *were* privileged. *McSorley*, 34 Wn. App. 2d at 327-328.

Petitioner never sought discretionary review regarding the scope and applicability of the privilege, so the Court of Appeals never addressed those topics, nor are they at issue in the instant Petition. As this Court is aware from the Court of Appeals decision and the principal briefing, the Superior Court considered two motions to compel by Plaintiff. On the first motion, the Court determined the scope of the privilege, which was unrelated to waiver, granting Plaintiff's motion in part and denying it in part in 2022 (CP 460-461); Petition never appealed or contested this Order. *See McSorley*, 34 Wn. App. 2d at 327-328. Petitioner has never contended that the Superior Court erred in resolving the first motion to compel or in delineating the proper boundaries of the peer review privilege. *See* CP 612 (Notice of Discretionary review, seeking review of January 18, 2024 Order only); RAP 5.2 (party seeking review of an order must file notice of interlocutory review within 30 days of the order or denial of reconsideration); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993) (holding the Court does not consider issues raised only by amicus).

Ignoring the Petitioner's failure to challenge that ruling, in their statement of the case, Amici emphasize the Superior Court's ruling on the

first motion to compel.[1] Brief of Amici, p. 5. Amici appear to suggest that the Superior Court's first (unchallenged) ruling motivated TEC's later waiver. *Id.* This contention is meritless and irrelevant. Nothing about the ruling on the scope of a privilege required Petitioner to waive the privilege. And more fundamentally, the Superior Court's first, unappealed-from Order is not before the Court on the instant Petition.

Amici further assert that, "Dr. McSorley is claiming the peer review process itself violated WLAD." Brief of Amici, p. 11. Dr. McSorley has not made this claim, nor did the Superior Court or the Court of Appeals hold anything like it. Tellingly, Amici offer no citation to the record or to the Court of Appeals decision to support this characterization.

In sum, Amici's arguments and characterizations of the record are not only flawed but beyond the scope of the review Petitioner seeks.

B. Amici's Arguments Regarding the Importance of Confidentiality Are Immaterial Because Petitioner, Not Dr. McSorley, Undermined the Privilege to Benefit Itself.

[1] Amici's partial summary of the materials ordered produced in response to Plaintiff's first motion to compel, while not an issue before the Court, is also inaccurate. *Compare* Brief of Amici, p. 5, *with* Respondent's Answering Brief, pp. 5-9 and Respondent's Brief in the Court of Appeals, at p. 12.

Amici paint a dire picture in urging this court to accept review. Amici suggest Petitioner's voluntary waiver created a "dangerous loophole" in the privilege. Brief of Amici, p. 6. Amici accuse the Court of Appeals of "effectively destroying" the privilege. *Id.*, pp. 12-13. Amici warn of an "end run" around the privilege. *Id.* They claim there is "no way to fairly try a claim" without Petitioner's selective, intentional waiver, *id.*, p. 12, and that the decision below will "potentially wreak[]havoc," "harm the health care system," and "increase[] the cost of care…" *Id.*, p. 12.

But Amici's parade of horribles rings hollow because it is the Petitioner who decided to expose its own peer review files, and because in doing so it chose to place its own interests above that of the public. The Court of Appeals appropriately held that Petitioner's decision was fatal to preserving its privilege:

> The general purpose of the peer review statute is to encourage health care providers to candidly review the work and behavior of their colleagues to improve health care. TEC's disclosure to serve its strategic interests in an employment discrimination lawsuit with a former employee only undermines these purposes….When it disclosed Dr. McSorley's peer review file to aid its private interests in an employment discrimination lawsuit, TEC put aside the public's interest in encouraging providers—such as Dr. McSorley—to candidly report. The court is not obligated to protect a privilege more assiduously than its holder does.

McSorley, 34 Wn. App. 2d at 334 (internal citations and quotations omitted) (emphasis added). Amici never address the Court of Appeals' compelling reasoning. Nor do Amici address the foreseeable, natural consequence to Petitioner of its intentional, selective waiver to benefit itself at the expense of the public interest. Amici's rhetoric is simply inapposite to the facts.

C. This Court's Other Decisions Relating to Peer Review Do Not Suggest Review is Warranted Here.

Amici suggest this Court should accept review because it has issued six[2] decisions relating to the peer review statute over the past forty years. *See* Brief of Amici, pp. 9-10. They cite these cases for general propositions about the importance of the privilege, but neither Amici nor Petitioner contend that the Court of Appeals misapplied any of those decisions. Indeed, the scope of the privilege was not before the Court of Appeals, and it is not before this Court. Rather, the Court of Appeals did its job, correctly applying the well-settled law governing the intentional partial disclosure of privileged material. *McSorley*, 34 Wn. App. at 331-335. Amici do not offer any analysis regarding the Court of Appeals' application of subject matter

[2] Amici's tabulation of peer review cases, at p. 9 n.1 of their Brief is confusing. Amici claim there are eight other, unidentified cases involving the peer review statute, which "are either unrelated to the peer review privilege issue or are Court of Appeals decisions in cases where this Court issued the final decision." *Id.*

waiver doctrine, nor do they offer any analysis of this Court's holdings regarding peer review, so the Court should disregard Amici's arguments.

As a result, Amici have not shown any need for this Court to accept review to "shap[e] this area of the law." Brief of Amicus, p. 9. In failing to identify any error or special public interest in the Court of Appeals' application of this Court's law on the straightforward intentional waiver issue before it, Amici fail to offer any persuasive reason for this Cout to accept review.

Amici also argue the Court should grant the petition because this case is "unusual" or "novel." Brief of Amici, pp. 11-12. But if anything is unusual in this case, it is only "TEC's disclosure to serve its strategic interests," *McSorley*, 34 Wn. App. 2d at 334, which does not involve any public interest, but rather the private interest of a party using its own privileged records to its advantage in litigation, contrary to the purposes of peer review protection that Amici insist are at stake.

III. CONCLUSION

Amici's arguments are not grounded in the circumstances of this case or of the Court of Appeals' holding. This Court should disregard them accordingly.

DATED this 15th Day of September, 2025.

The undersigned certifies that this document was produced by word processing software and consists of 1,510 words pursuant to RAP 18.17(c)(10).

By: */s/Nathaniel Flack*
Joe Shaeffer, WSBA #33273
Jesse Wing, WSBA # 27751
Nathaniel Flack, WSBA #58582
705 Second Ave, Suite 1500
Seattle, WA 98102
Phone: (206) 622-1604
Email: Joe@mhb.com
JesseW@mhb.com
NathanielF@mhb.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 15th day of September, 2025, I electronically filed the foregoing document with the Clerk of Court using the Washington State Appellate Courts' Portal.

I certify that all participants in the case are registered Washington State Appellate Courts' Portal users, and that service will be accomplished by the Washington State Appellate Courts Portal system.

/s/Andrew Drake
Legal Assistant

MACDONALD HOAGUE & BAYLESS

September 15, 2025 - 3:48 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	104,315-5
Appellate Court Case Title:	Meghan McSorley v. The Everett Clinic, et al.

The following documents have been uploaded:

- 1043155_Briefs_20250915154343SC239734_4305.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was 2025-09-15 Answer to Brief of Amici.pdf

A copy of the uploaded files will be sent to:

- LucasW@mhb.com
- andrewd@mhb.com
- hmcfarland@seyfarth.com
- jessew@mhb.com
- jhenley@seyfarth.com
- jmcoleman@seyfarth.com
- miller@carneylaw.com
- oliviad@mhb.com
- tribe@carneylaw.com

Comments:

Sender Name: Joseph Shaeffer - Email: joe@mhb.com
Filing on Behalf of: Nathaniel Joseph Flack - Email: nathanielf@mhb.com (Alternate Email:)

Address:
705 2ND AVE STE 1500
SEATTLE, WA, 98104-1745
Phone: 206-622-1604

Note: The Filing Id is 20250915154343SC239734