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 DEFENDANTS-PETITIONERS' PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner The Everett Clinic (TEC) is a defendant in an employment discrimination case under the Washington Law Against Discrimination, Chapter 49.60 RCW, and for wrongful discharge in violation of public policy. TEC sought and obtained a ruling from the Superior Court that many relevant employment records about Plaintiff Dr. Megan McSorley and Defendant Dr. Nariman Heshmati, her main antagonist and a comparator, were protected by peer review privilege. But after retaining new counsel, TEC intentionally and selectively waived the peer review privilege, disclosing records about Plaintiff to justify its adverse actions against her, while maintaining its assertion of the same privilege over comparator records, including those for Defendant Heshmati.

On Dr. McSorley's motion to compel production of those records, the Superior Court applied this Court's precedent, holding that TEC could not withhold relevant records relating to Defendant Heshmati after having waived that same privilege over records relating to Plaintiff, so must in fairness produce them. Division I of the Court of Appeals accepted discretionary review, and affirmed unanimously. *McSorley v. Everett Clinic*, 34 Wn. App. 2d 323, 567 P.3d 1155 (2025).

The Petitioner's primary argument is that the natural consequence of its own litigation strategy of intentional waiver would undermine the purpose of the privilege. Petitioner identifies no error in the Court of Appeals' decision.

Because the Petitioner makes no showing that satisfies RAP 13.4(b), this Court should deny review.

II. IDENTITY OF RESPONDENT

Respondent Dr. Meghan McSorley is the Plaintiff in King County Superior Court (No. 21-2-07687-1 SEA), and the Respondent in the Court of Appeals (No. 86325-8).

III. ISSUES PRESENTED FOR REVIEW

1. Under RAP 13.4(b)(1) and (2), does the opinion below conflict with any decision of this Court or the Court of Appeals? Answer: No.
2. Under RAP 13.4(b)(4), does Petitioner's decision to intentionally waive the peer review privilege, resulting in the disclosure of documents on the same subject matter, constitute "an issue of substantial public interest that should be determined by the Supreme Court"? Answer: No.

IV. STATEMENT OF THE CASE

The Court of Appeals set forth the factual and procedural background at pages 2 to 4 of the Slip Opinion (Exhibit 1 to Petition), *McSorley*, 34 Wn. App. 2d at 325-328. The Superior Court also set forth the factual and procedural history, at CP 580-591. Petitioner does not assign error to either court's factual findings, so those findings are verities on this appeal. *State v. Sum*, 199 Wn.2d 627, 636, 511 P.3d 92 (2022).

i. Factual Background

Plaintiff Meghan McSorley, MD, PhD, MPH, is a doctor licensed to practice medicine in the State of Washington. Complaint. CP 2, ¶2.1. From early 2016 to early 2019, Dr. McSorley was an employee of Defendant The Everett Clinic (TEC), for which she practiced medicine in the specialty of

Obstetrics and Gynecology (OB/GYN). *Id*. Dr. McSorley is Board Certified by the American Board of Obstetrics and Gynecology and is a Fellow of the American Congress of Obstetricians and Gynecologists (FACOG). *Id.*

Dr. McSorley alleges that, from the beginning of her employment, fellow OB/GYN Defendant Dr. Heshmati, sought to undermine her practice, because Dr. McSorley was an accomplished and ambitious female OB/GYN whose thriving practice competed with Dr. Heshmati's for patients. CP 4—9, ¶¶4.3-4.6, 4.18. After seeing Dr. Heshmati engage in a troubling pattern of substandard medical practices, Dr. McSorley repeatedly raised safety concerns regarding his care, in writing to TEC. CP 6—10, ¶¶4.8, 4.12, 4.23. Dr. Heshmati repeatedly mismanaged a dangerous medical condition called preeclampsia which, in combination with Dr. Heshmati's and TEC's mismanagement of the facility generally, led to tragic and preventable incidents of fetal and maternal injury and death. CP 5, ¶4.6; CP 117-120.

Among other concerns, Dr. Heshmati prematurely discharged a patient with life-threatening preeclampsia, who Dr. McSorley had admitted. CP 5, ¶4.6. The patient had preeclampsia with severe features requiring immediate delivery per Maternal Fetal Medicine recommendations, but Dr. Heshmati attempted to transfer the patient to another provider's panel, citing as the reason that he did not want Dr. McSorley to have the "RVUs" (relative value units, a means of tracking physician productivity for compensation purposes). *Id.* The concerns that Dr. McSorley shared included those about Dr. Heshmati's care of her patients and patients they both treated. CP 4, ¶4.3; CP 586; ¶ 23.

In response to Dr. McSorley's complaints regarding these and other incidents, Dr. Heshmati used the peer review system at TEC to lodge false

and unfounded complaints against her, damaging her career and reputation. CP 6—12, ¶¶4.9-4.27. TEC knowingly allowed and facilitated this unlawful retaliation and discrimination. *Id*. Dr. McSorley alleges that Defendants subjected her to peer review for medical incidents in which Dr. Heshmati was not only intimately involved, but where Dr. Heshmati was the party at fault yet blamed Dr. McSorley to shield his own misconduct. See, e.g., CP 4-5, ¶¶4.3, 4.6.

Just one day after Dr. McSorley again reported her concerns regarding Dr. Heshmati to the TEC Quality Review Committee, CP 7, ¶¶4.12, leadership of TEC, including Dr. Albert Fisk, called Dr. McSorley into a meeting; they told her they were stripping her of her ability to perform surgery, yet conceded that TEC had not found any problems with her care and were unable to review her performance in an unbiased manner. CP 7, ¶4.13. TEC also subjected Dr. McSorley to other adverse employment actions by sending her to a humiliating third-party remedial evaluation (which she passed easily) CP 10, ¶4.22-4.23, and by causing a misleading and professionally damaging report to be sent to the National Practitioner's Data Bank, CP 480-481, which has made it nearly impossible for Dr. McSorley to obtain employment, even though TEC closed its own review of Dr. McSorley's care with a finding of "no action taken." CP 10.

Ultimately, TEC's adverse employment actions, including placing Dr. McSorley on involuntary leave, damaging her reputation, and allowing an environment of retaliation, caused the end of Dr. McSorley's employment and related financial and emotional harm. CP 1—13, ¶¶4.1-4.33.

In contrast, TEC promoted Dr. Heshmati. CP 12, ¶4.29. TEC's review, investigation, or response – if any – to the safety concerns that Dr.

McSorley raised about Dr. Heshmati remains unknown and a core subject of discovery. At all relevant times, Dr. McSorley and Dr. Heshmati were both employed as OB/GYNs at TEC. CP 622, ¶23. Both Dr. McSorley and Dr. Heshmati were subject to complaints of misconduct at TEC. *Id.* Both Dr. McSorley and Dr. Heshmati were OB/GYNs with active labor, delivery, and gynecological practices; at the same location for the same employer; and even serving the same patients. *See* CP 5, ¶4.6.

ii. TEC Obtains a Ruling on Peer Review Privilege, and then Intentionally Waives that Privilege.

Early in discovery, Plaintiff served discovery requests seeking records concerning the allegations against her and regarding her allegations against Dr. Heshmati, and TEC's response to both, to show TEC's disparate treatment of her, with him as her comparator. CP 203 *et seq.*; CP 582, Findings of Fact and Conclusions of Law, ¶4. In response, Defendants made sweeping assertions of peer review privilege over not only the peer review files of Plaintiff McSorley and Defendant Heshmati, but also over a large number of documents outside the scope of peer review files. Dr. McSorley moved to compel withheld materials, while Defendants moved for a protective order, urging the Court to find that nearly all documents responsive to Plaintiff's discovery requests were privileged. CP 499, 582, ¶6.

Following *in camera* review, the Superior Court ordered Defendants to produce some documents pertaining to both Dr. Heshmati and Dr. McSorley that were not protected by privilege[1] while finding, at Defendants' urging, that the core peer review files of Dr. McSorley and Dr. Heshmati

[1] TEC has never appealed or contested that determination.

were privileged. CP 460, 499, 582, ¶¶6-8. TEC had persuaded the Court that key documents relating to Dr. McSorley's and Dr. Heshmati's care, and TEC's review, were privileged, in line with TEC's representation to the Superior Court that the core peer review files "**Are Not Discoverable**" under the peer review privilege. (Emphasis in original). CP 45.

Defendants then retained new counsel.

Through their new lawyers, Defendants initiated a new strategy that contradicted the prior rulings it had obtained, and yet exploited them as both a sword and a shield. Defendants produced peer review documents (showing alleged misconduct by Dr. McSorley) that they had successfully argued were privileged, but did not produce the documents that pertained to Dr. Heshmati. CP 583, ¶¶10-12. Defendants conceded that in doing so, they "waived the peer review and QI privileges," as to Plaintiff's file. *See* CP 536, Def's Response to Mtn. to Compel; CP 583, Findings of Fact and Conclusions of Law, ¶12; *see also* CP 577 (Defense counsel writes that supplemental documents they continued to produce in discovery while the waiver issue was pending before the Superior Court, "are indeed subject to peer review and quality improvement privileges.").

Since Defendants refused to produce any analogous records pertaining to Dr. Heshmati or any other comparator, Plaintiff moved to compel those remaining peer review documents because Defendants had waived the privilege. The Superior Court heard argument on August 30, 2023. *See* Report of Proceedings, at 4, *et seq.*

In opposing the motion, TEC framed its disclosure as consistent with the Superior Court's prior rulings, contending that TEC and the Court had always contemplated TEC was entitled to disclose Dr. McSorley's records

but withhold those relating to Dr. Heshmati. TEC claimed that in its first grant of TEC's protective order, "The Court did not order any of the documents related to any other physician be produced." CP 534. This was false.[2] As Dr. McSorley pointed out, the Court's first order directed TEC to produce non-privileged documents related to Dr. Heshmati. *See* CP 582, ¶7.

At oral argument, Defense counsel said it had waived privilege only over Dr. McSorley's file "at this point," yet acknowledged the unfairness inherent in its position:

> You know, we at this point have waived the privilege for Dr. McSorley's file. So we're not asserting that there is privileged -- that those are privileged anymore. We have waived those for purposes of this case. It would be – and I -- and I give you this -- **it would be unfair if we were to say nobody in Dr. Heshmati's peer review did -- said the same or found the same unless we had produced those files as well**, so that the plaintiff could review those, potentially take discovery on those documents.

(Emphasis added). RP at 39.

But in fact, Defendants did exactly what they acknowledged would be unfair – placing the peer review files at issue, while preventing Plaintiff from reviewing them. TEC questioned Plaintiff at deposition at length regarding the peer review documents it had selectively disclosed, while continuing to withhold Dr. Heshmati's peer review file. CP 559—561,

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[2] TEC has continued to falsely assert that its waiver was in line with the Superior Court's Order. *See* Appellants' CoA Brief, p. 10 ("Based upon the Superior Court's order, TEC determines to waive the peer review privilege as to McSorley's at-issue peer review files only."); TEC's decision was not "based upon the Superior Court's Order" – it was contrary to the plain terms of that Order, which found Dr. McSorley's peer review privileged, at TEC's urging. CP 460—61, 499.

572—573, 579 (Supplemental Declarations of Joe Shaeffer, describing questioning at deposition and attaching transcript under seal pursuant to TEC's confidentiality designation).[3] Defendants even tried to force Dr. McSorley to admit that because TEC had disclosed her privileged peer review file while withholding Dr. Heshmati's documents that she could not show TEC had treated Dr. McSorley differently. *Id.* Defendants questioned Dr. McSorley about six separate exhibits consisting of privileged documents, *id*., taking hours of deposition time, CP 560—561.

At oral argument, Defendants openly explained that its intent is to preclude Dr. Heshmati from serving as a comparator to Plaintiff:

> …we have what happened in Dr. Heshmati's file, we're not going to use that. We're not going to use that as a comparator. We're not going to be able to say he was treated the same. We're not even going to -- you know, we're not going to make that argument.

RP at 41 (Defendants' argument).

Defendants then repeatedly discarded the Court's order that they had secured, selectively producing additional privileged peer review materials from Dr. McSorley's file, even while Plaintiff's motion to compel was pending. CP 557 (Exhibit to Third Supplemental Decl. of Joe Shaeffer). Defense counsel conceded to Plaintiff's counsel that the documents "were indeed subject to peer review and quality improvement privileges." *Id.* While doing so, Defendants continued to oppose Plaintiff's motion and maintain their assertion of privilege over the files they did not want to

[3] TEC designated this sealed declaration exhibit and several others for inclusion in the Clerk's Papers. The Superior Court granted a stipulated motion to transmit the unredacted documents to the Court of Appeals.

disclose, which the Superior Court properly concluded they did "to gain a tactical advantage by allowing negative comments about Dr. McSorley to be discovered and discussed, without allowing analogous negative comments about Dr. Heshmati to be discovered and discussed." CP 587, ¶26.

The privileged documents that Defendants disclosed from Dr. McSorley's file are of an outside reviewer named Dr. Frances Tang assessing Dr. McSorley's care in several cases, from which TEC claimed it developed concerns that justified its adverse employment actions against her. *See* CP 559-561 (Supp. Decl. of Joe Shaeffer); CP 583, ¶13; CP 587—589, ¶¶27-33 (Superior Court's Order). As the Superior Court found, this selective waiver "enabl[ed] Defendants to proffer alterative, nondiscriminatory, non-retaliatory justifications for its adverse employment actions against Plaintiff, without Plaintiff being able to discover at all whether Defendants ignored or relied on similar justifications when analogous concerns were raised about a physician who is a not member of her protected gender class," Dr. Heshmati. CP 587—588, ¶28. The Superior Court observed that TEC's "initial strategy in this case was not to put peer review at issue. That position has changed…," putting peer review at issue. CP 588, ¶30.

> For example, by disclosing and relying on the opinion of third-party reviewers contained in the peer review file ….Defendants intend to justify their adverse employment actions by showing that a third-party reviewer found issues with Dr. McSorley's care. At the same time, Defendants seek to hide (shield) any analogous documents regarding Dr. Heshmati.

CP 588, ¶31.

In its order granting Plaintiff's Motion to Compel, the Superior Court issued detailed findings of fact and conclusions of law. *See* CP 580—590. The Superior Court found that Defendants had partially or selectively waived the peer review privilege for tactical advantage in the case. *Id*., ¶16. Applying this Court's authority regarding privilege waiver, the Superior Court concluded that Defendants' waiver, in fairness, required Defendants to disclose the remaining privileged documents. CP 586, ¶24; CP 586—589, ¶¶24-35.

iii. The Court of Appeals Unanimously Affirms

TEC sought discretionary review in the Court of Appeals. The Court of Appeals unanimously affirmed in a twelve-page published opinion. The Court of Appeals applied this Court's longstanding precedent, *see* Slip Op., at pp. 5-12, and held that TEC's intentional waiver in "fairness required the disclosure of Dr. Heshmati's file." *Id*., at p. 2. The Court of Appeals emphasized the need to prevent selective waivers of privilege that have the effect of "conveying an incomplete or even misleading picture to the trier of fact." *Id*., at p. 6. The Court of Appeals rejected TEC's arguments that the Superior Court's Order would discourage candid peer review, observing that:

> TEC's disclosure has the same discouraging effect, as it signals to its provider employees the possibility that it may use their disclosures against their interests, should doing so be perceived to serve TEC's interests. 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.

Id., at p. 12. The Court of Appeals also carefully cabined its holding, noting the limited nature of the Superior Court's Order, which did not rule that TEC had waived privilege as to all records. *Id.*, at p. 10. The Court of Appeals further held that analysis of waiver requires case-by-case determination, sensitive to the circumstances of each litigation. *Id.*

V. ARGUMENT

A. The Petition is Facially Insufficient under RAP 13.4(b)(1) and (2), because Petitioner Fails to Identify Any Decision in Conflict with the Decision in this Case.

TEC asserts in passing that the Court of Appeal's decision is in "conflict with existing precedent," invoking this Court's authority to review under RAP 13.4(b)(1) and(2). Pet., at p. 11. But TEC does not identify or even purport to identify a single such decision of this Court or of the Court of Appeals. In fact, for the reasons the Court of Appeals held and explained in detail, TEC's position is what conflicts with long-settled authority of this Court and the Court of Appeals. TEC never directly addresses or distinguishes such authority.

The Court of Appeals affirmed under *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953). *See* Slip. Op. at pp. 5-6. Yet, TEC does not even cite *McUne* or discuss the opinion. TEC's failure to address this binding authority applied by the Court of Appeals warrants denial of the Petition.

TEC emphasizes that peer review privilege is "critically important." Pet., at pp. 11-17. Dr. McSorley, the Superior Court, and the Court of Appeals all accept that premise. Indeed, Plaintiff sought peer review of Dr. Heshmati's conduct because of her concerns for patient safety. But that's not

the issue here. TEC undisputedly waived that privilege for its own purposes, and has failed to show that the Court of Appeal's decision finding that waiver determinative conflicts with any precedent. None of the cases or articles TEC cites regarding the importance of peer review purport to authorize selective and strategic waiver, nor do any come close to suggesting that the Superior Court or Court of Appeals erred here.

Petitioner cites *Magney v. Truc Pham*, 195 Wn.2d 795, 799, 466 P.3d 1077 (2020), but does not explain the holding of the case, which in no way conflicts with the Court of Appeal's decision. Pet., at pp. 20-21. *Magney* held that there is no *automatic* waiver of the marital counseling privilege when parents pursue a medical malpractice claim for injuries to their child. 195 Wn.2d at 979. The Court specifically noted it was not ruling on whether the plaintiffs may have waived the privilege by their actions in litigation, an issue which the Court held explicitly was not before it. *Id. Magney* does not conflict with the Court of Appeal's decision here, because nowhere does *Magney* hold that courts should countenance a party's intentional and selective disclosure of documents that it previously obtained a ruling were privileged, while depriving the opposing party of documents on the same subject under the assertion of the same (now waived) privilege.

Petitioner cites *Pappas v. Holloway*, 114 Wn.2d 198, 207-08, 787 P.2d 30 (1990), but that opinion contradicts Petitioner's position. The Court in *Pappas* affirmed that a party had impliedly waived privilege, holding that a party may not "use as a sword the protection which the Legislature awarded them as a shield." *Id*. at 208. TEC's selective disclosure violated *Pappas*, by treating the privilege as both a sword (to use Dr. McSorley's privileged records against her) and a shield (to prevent discovery into

whether TEC's employment actions against Dr. McSorley were unlawful). The Court of Appeal's decision here follows rather than conflicts with *Pappas*, which says nothing to support a party unilaterally picking and choosing privileged documents that it wishes to disclose for its own benefit in litigation.

Petitioner argues that since the peer review statute does not contain statutory language regarding waiver, that silence is a license for TEC to assert privilege over unfavorable materials, while waiving it over records that it would like to use. Pet., at p. 18. For this proposition, TEC cites only an unpublished decision of a West Virginia district court. *Id.* Meanwhile, TEC does not address the binding authority of this Court holding that the privilege must be "strictly construed and limited to its purposes" to avoid "hide and seek gamesmanship." *Lowy v. PeaceHealth*, 174 Wn.2d 769, 280 P.3d 1078 (2012).

TEC suggests that two federal cases cited by the Court of Appeals support TEC's position, but they do not. *See* Pet., at 21-22. In *Chevron Corp. v. Pennzoil Co*., 974 F.2d 1156, 1162-63 (9th Cir. 1992), the Ninth Circuit reversed the partial denial of a motion to compel based on a privilege waiver. Contrary to TEC's citation, the court ordered *more* documents to be produced than the trial court had allowed. The court of appeals held that because the defendant had waived privilege and put its privileged tax communications at issue as a justification in the case, it could not simultaneously invoke the attorney-client privilege to deny the opposing party the ability to refute the justification. *Id.* The Court of Appeals here was correct to observe that this case was consistent with *Chevron*'s holding because, here, TEC waived privilege in order to assert that its peer review

process was a justification for its adverse action against Plaintiff, while invoking the same privilege to prevent Plaintiff from accessing information needed to refute that contention and show discriminatory treatment. TEC's discussion of *In re Actos Antitrust Litig.*, 628 F. Supp.3d 524 (S.D.N.Y. 2022), is similarly misleading, and ignores the Court of Appeal's discussion of the case and its holding. *See* Slip. Op., at p. 8.

While TEC disputes the scope of the "subject matter" over which it waived privilege, the plaintiff is entitled to prove illegal motive in a disparate treatment discrimination case by contrasting the employer's unfavorable treatment of her with its favorable treatment of comparators, through the employer's own records. *See Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 527, 404 P.3d 464 (2017), and *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446-447, 334 P.3d 541 (2014)). As the Court of Appeals explained, "In a disparate treatment claim, disclosure of the former without disclosure of the latter would amount to a selective and potentially misleading portrayal of the facts." Slip Op., at pp. 10-11. Petitioner does not cite or discuss *Mikkelsen* or *Scrivener*, both of which the Court of Appeals applied on this issue. Slip Op., at pp. 9-11. Petitioner also fails to identify any decision in conflict.

In sum, Petitioner does not identify any case of this Court or the Court of Appeals in conflict with the decision below, so its request for review on that basis should be denied.

B. Under RAP 13.4(b)(4), the Petition Should be Denied Because Adequate Alternative Means of Protecting Petitioner's Privacy Interest Exist, and there is No Public Interest in Petitioner's Claimed Right to Engage in Selective and Intentional

Disclosure of Privileged Materials for Strategic Advantage in Litigation.

Throughout its briefing, TEC points to the important purpose of the peer review statute as a basis for this Court's review. According to TEC, the Court of Appeal's decision will have a "detrimental impact on patient care and reduce access to medical services." Pet., at p. 14.

This argument lacks credibility because, in this very case, TEC voluntarily disclosed and put at issue core peer review documents when it was to their advantage, including the identity and conclusions of peer reviewers, in contravention of the need to keep them secret that TEC simultaneously contends is sacrosanct. Plaintiff agrees that patient safety is paramount in the hospital setting. Indeed, that is precisely why she made the whistleblower complaints at issue. While the confidentiality of peer review plays an important role in patient safety, it is TEC whose actions have removed the cloak of confidentiality from the peer review process, and in an unfair manner. It is Petitioner who has disclosed exactly the information that it claims must not be disclosed, and it did so at the expense of the confidential review process designed to protect patient safety because partial disclosure here is to its advantage. Petitioner cannot have it both ways – it cannot assert a privacy interest that it simultaneously disregards, nor can it waive protection that the legislature provided (and which it urged upon the Superior Court), and then claim that this same protection is inviolable.

As the Court of Appeals aptly held, "The court is not obligated to protect a privilege more assiduously than its holder does." Slip Op. at p. 12.

This Court has had occasion to note that the peer review privilege, while important, is not unlimited or absolute. *See Coburn v. Seda*, 101

Wn.2d 270, 277, 677 P.2d 173 (1984) (as a statute in derogation of the common law, peer review privilege must be "strictly construed and limited to its purposes"); *Lowy v. PeaceHealth*, 174 Wn.2d 769, 788, 280 P.3d 1078 (2012) (warning against abuse of the peer review privilege for "hide and seek gamesmanship" to thwart discovery). Petitioner does not address this authority.

TEC's claim to unqualified protection, on its preferred terms, and regardless of its own conduct in litigation, is simply not tenable. In Washington, the protection of peer review activities is subject to reasonable limitations. *See* RCW 4.24.250(1) (protects only "good faith" peer review); RCW 7.71.010 (recognizing the risk of "peer review decisions based on matters unrelated to quality and utilization review," and "based on matters other than competence or professional conduct."); *Branco v. Life Care Centers of America, Inc*., No. CO5-1139-JCC, 2006 WL 4484727, *1 -*2. (W.D. Wash. 2006) (applying Washington peer review law and explaining that only actions taken in "good faith" are protected, and that the privilege applies only "for the sole purpose of healthcare evaluation."). The decision below adheres to this principle.

TEC's attempt to avoid the consequences of its strategic waiver of privilege is illogical. In an argument that is difficult to parse, Petitioner appears to argue the Court of Appeal's decision somehow places TEC in a double bind. *See* Pet., p. 30. But there is no double bind: Petitioner, like every other party, can assert the privilege, or waive it. If it chooses to waive, as it did here, it may not waive as to favorable documents while withholding unfavorable ones on the same subject matter. *McUne*, 42 Wn.2d at 68.

In sum, there is no public interest in Petitioner's claimed right to manipulate the scope of the discovery to be produced through selectively disclosing privileged materials to its advantage. This Court should deny review under RAP 13.4(b)(4).

C. Petitioner's WLAD Arguments Are Meritless.

Petitioner also raises several arguments related to the WLAD that lack legitimacy.

Petitioner argues that, "[t]here is no basis for Division I's holding that WLAD trumps the Statutory Peer Review Privileges." Pet., p. 23. This is misleading. The Court of Appeals did not hold that the WLAD "trumps" peer review privilege. Tellingly, Petitioner does not support its mischaracterization of the Court of Appeal's holding with any citation to the court's decision. *See* Pet., at 23-24.

Petitioner also wrongly asserts that "Dr. Heshmati is not a proper WLAD comparator," and that the decision below found that he is. But as Petitioner acknowledges, employees are comparators if they are "doing substantially the same work." Pet., at p. 25 (citing *Litvack v. Univ. of Wash.*, 30 Wn. App. 2d 825, 847-48, 546 P.3d 1068 (2024)). The Court of Appeals found only that Dr. Heshmati was a comparator for *discovery purposes*, which Petitioner did not contest before the Court of Appeals. Slip Op., at p. 11; *Nakata v. Blue Bird, Inc*., 146 Wn. App. 267, 277, 191 P.3d 900 (2008) ("A trial court has broad discretion under CR 26 to manage the discovery process.").

Here, as the Superior Court and the Court of Appeals recognized, and is undisputed, Dr. Heshmati was a male OB/GYN, employed by the same

employer, working at the same location, performing the same procedures on the same patients, and accused of similar alleged misconduct. *See* Slip Op., at p. 11; CP 12, ¶4.29; CP 622, ¶23; CP 5, ¶4.6. Therefore, Heshmati was a comparator for discovery purposes. Slip. Op., at p. 10 ("under longstanding principles governing employment discrimination cases, courts assess an employer's justification not just from what the employer claims, but from circumstantial evidence of its treatment of comparators.") (citing *Mikkelsen*, 189 Wn.2d at 526-527; *see also Scrivener*, 181 Wn.2d at 446-447).

The comparator issue was relevant here because, following TEC's voluntary waiver of peer review privilege over Plaintiff's file, the Superior Court and Court of Appeals were required to assess what materials ought in fairness be disclosed on the same subject matter. Slip Op., at pp. 5-12. As the Court of Appeals explained,

> TEC's interest in using Dr. McSorley's peer review file is in articulating a "legitimate, nondiscriminatory reason" for its actions towards her. If TEC was given similar reasons to take action against male comparators but took none, it would support the inference that a substantial factor in its actions towards Dr. McSorley was her gender.

Slip Op., at p. 9 (citing *Scrivener*, 181 Wn.2d at 446-47). In other words, an employment discrimination plaintiff is entitled to prove illegal motive in a disparate treatment case by contrasting the employer's unfavorable treatment of her with its favorable treatment of comparators through the employer's own records. Therefore, the employer's waiver of privilege over a subset of records relating to Plaintiff waives privilege over analogous records relating to her comparators for discovery purposes, which are probative of whether the employer treated Plaintiff differently because of her sex. "In a disparate

treatment claim, disclosure of the former without disclosure of the latter would amount to a selective and potentially misleading portrayal of the facts." Slip Op., at pp. 10-11.

VI. CONCLUSION

Petitioner identifies no error or conflicting authority, so review should be denied.

DATED this 23rd Day of July, 2025.

The undersigned certifies that this document was produced by word processing software and consists of 4,996 words pursuant to RAP 18.17(c)(10).

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 23rd day of July, 2025, I electronically filed the foregoing document with the Clerk of Court using the Washington State Appellate Courts' Portal.

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/s/ Lucas Wildner
Legal Assistant

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