No. 86325-8

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

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,

v.

MEGHAN A. McSORLEY,

Plaintiff-Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners-Defendants The Everett Clinic ("TEC"); Optum Care Services Company; Optum Care, Inc.; Nariman Heshmati; and Albert Fisk (collectively, "Defendants") respectfully request that the Court review the unprecedented, published decision entered by the Court of Appeals, Division I ("Division I").

II. COURT OF APPEALS DECISION

Under Washington law, records relating to a health care facility's quality improvement and/or peer review processes are protected from disclosure in civil actions (the "Statutory Peer Review Privileges"). *See* RCW 4.24.250; RCW 43.70.510; RCW 70.41.200. Division I held that by waiving the Statutory Peer Review Privileges as to the peer review files of Plaintiff-Respondent Dr. Meghan McSorley ("Plaintiff"), as Plaintiff demanded, TEC waived any Statutory Peer Review Privileges that applied to ***other physicians***. In so doing, Division I did not follow the statutory language or any governing case law.

Defendants will suffer irreparable harm because if TEC is forced to produce privileged documents; "'no bell can be unrung.'" *Magney v. Truc Pham*, 195 Wn.2d 795, 815 (2020) (quoting *Dana v. Piper*, 173 Wn. App. 761, 769 (2013)).

In addition to the harm to Defendants, Division I's holding has statewide implications. It is not hyperbole to say that Division I's new rule would have drastic consequences for all patients, medical providers, and physicians in Washington. If this decision stands, physicians will avoid participating in peer reviews, either as a reviewer or reviewee, and the quality of medical care will decline.

Physicians in Washington would know that, based on Division I's ruling, if a reviewee is unhappy with a peer review process, he or she could sue, claim discrimination, demand his or her peer review files and then, if the medical facility agrees to his or her demand, potentially obtain the files of every single physician working for the same defendant. Knowing that their peer review files might be exposed to review in a later

proceeding, physicians would likely stop participating in peer reviews, leading to bad patient outcomes and an overall decrease in the quality of care.

This is not a hypothetical. Decades ago, another state supreme court explained why privileges like the Statutory Peer Review Privileges are necessary, and why the new rule announced by Division I would be so destructive:

> Review by one's peers within a hospital is not only time-consuming, unpaid work, it is also likely to generate bad feelings and result in unpopularity. If lawsuits by unhappy reviewees can easily follow any decision, even a temporary one followed by a due process hearing such as here, then the peer review…will become an empty formality, if undertaken at all.

Scappatura v. Baptist Hospital of Phoenix, 120 Ariz. 204, 210 (1978).

Defendants urge this Court to review Division I's decision and reverse the harmful impact its holding would have on Washington patients, physicians, and medical providers.

III. ISSUE PRESENTED FOR REVIEW

Prior to this proceeding, no court, in Washington or elsewhere, had ever held that a waiver of the Statutory Peer Review Privileges or similar privileges as to one physician's peer review files resulted in a waiver of the separate privileges over ***other*** physicians' files. Was Division I's unprecedented holding erroneous?

IV. STATEMENT OF THE CASE

On June 10, 2021, Plaintiff commenced this action. (CP 1-13).[1] Plaintiff alleged gender discrimination and retaliation in violation of the Washington Law Against Discrimination ("WLAD") and wrongful termination. (*Id.*) Plaintiff alleged that Defendants, and particularly Dr. Heshmati, treated her differently and took adverse employment actions against her based upon her gender. (CP 4-12).

[1] References to "CP" are to the Clerk's Papers transmitted by the Superior Court Clerk to Division I.

Plaintiff further alleged that when she raised concerns, Defendants retaliated by filing complaints against her, placing her on involuntary leave pending a peer review process, and subjecting her to quality improvement and peer review processes based upon Plaintiff's treatment of patients at TEC. (*Id.*)

In discovery, Plaintiff requested from TEC peer review files pertaining to her own peer review and the peer reviews of other physicians, including Defendant Dr. Heshmati. (*See* CP 39-40). TEC withheld certain documents in accordance with the Statutory Peer Review Privileges. (*Id.*) However, on May 2, 2022, the Superior Court issued an order directing TEC to produce "information and documents not created specifically for and collected and maintained by the quality improvement committee." (CP 460-62). The Superior Court ruled that TEC was not required to produce "information and documents that were generated, created, collected and maintained exclusively by the TEC peer review committee." (*Id.*) Although TEC asserted several documents were privileged, the Superior Court

undertook an *in camera* review of documents on TEC's privilege log and on July 14, 2022 directed TEC to produce documents associated with 48 entries on its privilege log. (CP 499-500).

TEC determined that, based upon the documents the Superior Court required TEC to produce, it was necessary to produce remaining documents related to Plaintiff's at-issue peer review to provide critical context. (CP 534-35, 546-47). Accordingly, TEC waived its Statutory Peer Review Privileges ***in full*** as to Plaintiff's own peer review file. (*Id.*)

TEC made very clear that it did not make a general waiver of its Statutory Peer Review Privileges, and did not waive the Privileges as to any other physician. (*See id.*) TEC communicated the limited extent of its waiver to Plaintiff. (*See id.*) Regardless, Plaintiff moved to compel production of Dr. Heshmati's peer review file, arguing that TEC waived its privileges broadly for both Plaintiff and Dr. Heshmati's peer review files. (CP 505-16). Plaintiff argued that she was entitled to Dr. Heshmati's files because he is purportedly a "comparator"

for purposes of her WLAD claim. (*Id.*) Plaintiff admitted that she would potentially seek the peer review files of at least one other purported "comparator" physician who is ***not*** a defendant. (*See* CP 514).

Plaintiff has never cited any authority holding that waiver of the Statutory Peer Review Privileges as to the peer review files of the plaintiff results in a waiver as to any alleged WLAD "comparator," but the Superior Court granted Plaintiff's motion. (*See* CP 580-91). The Superior Court first determined that, "at least for purposes of discovery," Dr. Heshmati was a "comparator." (CP 586).

Even though TEC produced ***all*** of Plaintiff's relevant peer review files rather than only those that help TEC, the Superior Court held that TEC produced Plaintiff's files "to gain a tactical advantage by allowing negative comments about [Plaintiff] to be discovered and discussed, without allowing analogous negative comments about Dr. Heshmati to be discovered and discussed."

(CP 587). The Superior Court held that this would "result[] in a fundamental unfairness." (CP 587-90).

The Superior Court also reasoned that by producing documents relating to Plaintiff's peer review, Defendants put the peer reviews of other physicians in issue. (*Id.*) The Superior Court held that Dr. Heshmati's peer review files, which the Superior Court previously held were privileged, were "essential to advancing [Plaintiff's] claims." (CP 589). The Superior Court stated that its holding was driven, in part, by its view of "the noble statutory purpose" of the WLAD. (CP 590). The Superior Court also asserted that "Dr. Heshmati, and potentially other male OBGYNs at TEC, is a proper comparator [sic]," implying that Plaintiff might be able to obtain peer review files of other, non-party physicians. (*Id.*)

On April 28, 2025, Division I affirmed the Superior Court. (*See* Opinion). On May 19, 2025, Defendants moved for

reconsideration, but on May 22, 2025, the Court of Appeals denied that motion. (*See* Reconsideration Order).[2]

V. ARGUMENT AS TO WHY REVIEW SHOULD BE GRANTED

The Superior Court and Division I are the only courts in the United States to hold that the waiver of a peer review privilege over one physician's peer review files results in waiver of the privilege over ***other*** physicians' peer review files. Division I's holding sets a dangerous precedent that will undermine not only the Statutory Peer Review Privileges, but the peer review and quality improvement processes in Washington. Division I's ruling also expands the definition of "same subject matter" for purposes of privilege waiver in a way that could undermine other privileges.

"RCW 4.24.250, and similar statutes prohibiting discovery of hospital quality review committees, represent a

[2] Pursuant to RAP 13.4(c)(9), copies of the Court of Appeals' Opinion and its Order denying Defendants' motion for reconsideration are included in the Appendix hereto.

legislative choice between competing public concerns. The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review." *Ragland v. Lawless*, 61 Wn. App. 830, 837-38 (1991). Division I substituted its judgment for that of the Legislature and decided that, as between the "competing public concerns" of the WLAD and the Statutory Peer Review Privileges, the WLAD trumps. There is no basis for that conclusion in the statutory text or case law regarding privilege waiver.

Division I's published decision is contrary to the Legislature's intent to encourage physicians to participate in the peer review process by protecting them, and to allow for the candid, conscientious, and objective discussions about patient care needed to protect patients and improve outcomes. Division I's decision also undermines patient care and safety. The public policy implications of this case – its conflict with existing

precedent and the novel issues of law it presents – all warrant this Court's review. *See* RAP 13.4(b)(1), (2), (4).

A. The Statutory Peer Review Privileges are critically important.

Quality improvement and peer review are processes "by which physicians analyze critically the medical services performed by their colleagues for the purpose of decreasing instances of medical malpractice," Kenneth R. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157, 157 (2002), and "determining compliance with appropriate standards of health care." George E. Newton II, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection*, 52 Ala. L. Rev. 723, 723 (2001). The processes have "become the principal method of evaluating the quality of patient care." Kohlberg, *The Medical Peer Review Privilege*, 86 Mass. L. Rev. at 157; *see also* Troyen A. Brennan, *Hospital Peer Review and*

Clinical Privileges Actions: To Report or Not Report, 281 JAMA 381, 381 (1999) (peer review is a "pillar[] of quality assurance").

1. Every state acknowledges the importance of the privileges.

Recognizing the importance of the peer review process and candor in that process, every state has passed legislation to provide broad evidentiary privileges to the documents, communications, and information involved in the quality improvement and peer review processes. *U.S. v. Aurora Health Care, Inc.*, 91 F. Supp. 3d 1066, 1067 (E.D. Wis. 2015) ("All fifty states and the District of Columbia have adopted some form of privilege or confidentiality for peer-review materials").

These laws recognize that, although the protections come at the expense of access to documents in discovery, "[c]andid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such

deliberations." *Bredice v. Doctor's Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); *see also Rechsteiner v. Hazelden*, 753 N.W.2d 496, 505, 516 (Wis. 2008) ("[p]rotecting candor is necessary to the full and open review envisioned by the statute"); *Matchett v. Superior Court*, 40 Cal.App.3d 623, 629 (Cal. Ct. App. 1974) (privilege "expresses a legislative judgment that the public interest in medical staff candor…requires a degree of confidentiality" because "external access to peer investigations…stifles candor and inhibits objectivity"; privilege "embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence"); *Yedidag v. Roswell Clinic Corp.*, 346 P.3d 1136, 1141 (N.M. 2015) (privilege needed because "the threat of lawsuits significantly dampens peer reviewer candor"); Newton, *Maintaining the Balance*, 52 Ala. L. Rev. at 728 ("despite the burden on discovery, this legal shield…is ultimately to the benefit of both the health care system and the civil litigation system").

In addition to protecting physicians and other individuals ***reviewing*** patient outcomes of a colleague, the privileges protect physicians who are the ***subject*** of a peer review process, because these privileges encourage them to participate. *See Joel v. Valley Surgical Ctr.*, 68 Cal.App.4th 360, 367-68 (Cal. Ct. App. 1998) (privilege "removes a disincentive to voluntary physician participation in peer review"); *Aurora*, 91 F. Supp. 3d at 1067 (peer review privileges "have been adopted to encourage physicians and other health-care staff to participate in the peer-review process"). Without the privileges, physicians would be loath to cooperate with peer review processes into their patient outcomes, join medical facilities that have a peer review process, or even work in states that do not afford sufficient protections for peer review materials. This would have a further detrimental impact on patient care and reduce access to medical services.

2. The Washington Legislature recognized the importance of the peer review privileges.

Like other states, the Washington Legislature recognized the importance of protecting the peer review process by enacting the Statutory Peer Review Privileges. RCW 4.24.250 provides, in relevant part:

> The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in ***any civil action***, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020 (1) and (2).

RCW 4.24.250(1) (emphasis added).

RCW 43.70.510 provides, in relevant part:

> Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or

> discovery or introduction into evidence ***in any civil action***, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee.

RCW 43.70.510(4) (emphasis added); *see also* RCW 70.41.200(3) (same).

As this Court explained, "[t]he immunity from discovery of committee review embraces this goal of medical staff candor in apprising their peer to improve the quality of in-hospital medical practice." *Anderson v. Breda*, 103 Wn.2d 901, 905 (1985); *see also Ragland*, 61 Wn. App. at 837-38. Emphasizing the importance of the privileges, this Supreme Court held "[t]he statute, on its face, prohibits discovery of certain records in '*any* civil action' with a single exception" not applicable here. *Coburn v. Seda*, 101 Wn.2d 270, 273 (1984) (italics in original).

"[A]ll civil actions not falling within the specific exception are subject to the statutory provision shielding certain information from discovery." *Id.*

The Statutory Peer Review Privileges serve several important purposes and help protect Washington patients. Division I's decision is contrary to those purposes and is not based upon the law.

B. Division I's expansion of the waiver doctrine would undermine the Statutory Peer Review Privileges and other privileges.

Division I's decision was unprecedented, finding that Plaintiff's peer review files were of the "same subject matter" as ***different physicians'*** peer review files, which mostly involve ***different patients***. (*See* Opinion 9-11).[3] That decision is contrary to the statutory language and waiver principles.

[3] Even where two physicians shared a single patient that was the subject of separate peer reviews, as is the case for one of the patients at issue here, the peer review files of two different physicians are not of the "same subject matter" because the physicians are exercising independent medical judgment and providing separate care to that patient.

Essentially, Division I held that there is only one peer review privilege for an entire medical facility, regardless of the fact that there are different patients, different physicians, and different circumstances. It held that by producing a plaintiff's peer review file in discovery (when requested by the plaintiff), the facility no longer has the right to assert a privilege over any other physician's peer review files.

1. Waiver is disfavored in the context of peer review.

The Statutory Peer Review Privileges do not contain any statutory language permitting implied waiver. *See* RCW 4.24.250; RCW 43.70.510; RCW 70.41.200. Courts in other jurisdictions have cautioned that "recognition of an implied waiver of the peer review privilege is disfavored because of the accompanying infringement upon the right to confidentiality which the privilege was designed to protect." *Earhart v. Elder*, 2019 U.S. Dist. LEXIS 19427, at *14-15 (S.D. W. Va. Feb. 5, 2019).

2. Privilege waivers are limited to the "same subject matter."

This Court and other Washington courts construe privilege waivers narrowly. "[A] party who seeks to apply [the] implied waiver test must bear a significant burden." *Steel v. Olympia Early Learning Ctr.*, 195 Wn. App. 811, 825 (2016). This Court, in decisions such as *Pappas v. Holloway*, 114 Wn.2d 198, 207-08 (1990), "applied" the waiver test "with words of caution…cognizant of limiting application of the test." *Steel*, 195 Wn. App. at 825.

In *Pappas*, defendant Holloway hired plaintiff Pappas, together with other attorneys, to represent him in various lawsuits. *Pappas*, 114 Wn.2d at 199-200. Pappas withdrew as counsel and Holloway went to trial with different attorneys, resulting in a verdict against him. *Id*. at 200.

Pappas sued to recover unpaid attorney's fees and Holloway counterclaimed, alleging malpractice. *Id*. at 200-01. Pappas brought third-party complaints against the other attorneys

who represented Holloway in the underlying litigation and filed a motion to compel them to produce documents relating to that litigation. *Id*. at 201. The other attorneys objected on the basis of attorney-client privilege and attorney work product doctrine. *Id*. at 202.

This Court affirmed the lower court's grant of Pappas' motion to compel. *Id*. at 207-08. The Court concluded that Holloway's affirmative act of filing a counterclaim caused malpractice to become an issue in the litigation, and thus Holloway waived the privilege as to the attorneys' work in the underlying lawsuit. *Id*. at 208. This Court ***did not find waiver*** of attorney-client privilege as to ***other clients*** of Pappas or ***other attorneys*** not involved in the underlying Holloway litigation. *See id.* at 202. The Court found a waiver only as to those documents relating to the underlying litigation relevant to the malpractice issue. *See id.*

In *Magney*, *supra*, this Court ***reversed*** the Superior Court's decision to compel production of documents protected

by the psychotherapist privilege. 195 Wn.2d at 815-16. The Court stated that "once privileged information is disclosed, it cannot be retracted: 'no bell can be unrung.'" *Id.* at 815 (quoting *Dana*, 173 Wn. App. at 769). Like the Statutory Peer Review Privileges, the Court held that the psychotherapist privilege is meant "to encourage full disclosure of information and proper treatment." *Id.* The Court warned of "negative ramifications" from production of privileged documents, directing the Superior Court to perform an *in camera* review. *Id.*

3. Division I's novel expansion of "same subject matter" had no legal support.

Plaintiff, the Superior Court, and Division I did not cite to authority holding that a waiver as to one physician's peer review file results in the waiver of peer review files relating to ***other physicians***. The cases they did rely upon supported ***Defendants'*** position. For example, Division I relied on *In re Actos Antitrust Litig.*, 628 F. Supp. 3d 524 (S.D.N.Y. 2022) (cited in Opinion 7-9), where a party waived privilege over documents relating to

two patents, referred to as the '584 Patent and the '404 Patent. *Id.* at 531.

The *Actos* court determined that the waiving party was required to produce additional documents "relating to Takeda's decision to list the '584 Patent and '404 Patent as claiming ACTOS and subsequent decisions to reaffirm the listings for such patents." *Id.* at 536. The waiver extended to ***the same patents, not to different patents***. *See id.*; *see also Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (cited in Opinion 9) ("waiver with respect to information disclosed to the auditor did not constitute waiver as to all communications concerning the hoped for tax deferral").

There was no support for Division I's expansion of the privilege waiver doctrine.

C. Division I's additional holdings exacerbated its errors.

Division I's expansion of "same subject matter" was driven by the court's other legal errors, which this Court should review and correct.

1. There is no basis for Division I's holding that WLAD trumps the Statutory Peer Review Privileges.

The Statutory Peer Review Privileges do not say anything about waiver, let alone authorize a waiver under the WLAD or for alleged WLAD "comparators." *See* RCW 4.24.250; RCW 43.70.510; RCW 70.41.200. Nor does WLAD override other laws when the discovery at issue relates to WLAD "comparators." *See* RCW 49.60.180.

Moreover, WLAD was enacted in 1949, and amended in 1957, 1961, 1971, 1973, 1985, 1993, 1997, 2006, 2007, and 2020. *See* (RCW 49.60.180). The Statutory Peer Review Privileges statutes, by contrast, were all enacted after 1971. *See* RCW 4.24.250 (enacted in 1971, amendments in 1975, 1977, 1977, 1979, 1981, 2004, and 2005); RCW 43.70.510 (enacted in 1993, amendments in 1995, 2004, 2005, 2006, and 2007); RCW 70.41.200 (enacted in 1986, amendments in 1987, 1991, 1993, 1994, 2000, 2004, 2005, 2007, 2013, and 2019).

The Legislature could have included a WLAD "comparator" exception in the Privileges if it had wanted to do so, but it did not. *See Money Mailer, LLC v. Brewer*, 194 Wn.2d 111, 124 (2019) ("Had the legislature meant for [that] interpretation…it would have said so"); *State v. Dennis*, 191 Wn.2d 169, 177 (2018) ("If the legislature intended" to include certain language, "it could have said so, but where the legislature omits language from a statute, we may not read language into the statute").

Division I effectively read a WLAD exception into the statutes, thereby substituting its judgment for that of the Legislature. Division I's holding was in error.

2. Dr. Heshmati is not a proper WLAD comparator.

Division I compounded its error by holding that Dr. Heshmati was a WLAD "comparator." (Opinion 11). "[C]omparators must be similarly situated 'in all material respects,'" meaning that they must "have similar jobs and display

similar conduct." *Hargrave v. Univ. of Wash.*, 113 F. Supp. 3d 1085, 1096 n.6 (W.D. Wash. 2015); *see also Litvack v. Univ. of Wash.*, 30 Wn. App. 2d 825, 847-48 (2024) (individuals are comparators if they are "'doing substantially the same work'").

Plaintiff's allegations confirm that Dr. Heshmati was not her peer or performing the same work. Plaintiff conceded that she was a relatively low-level physician at TEC, having joined in 2016, and was not a partner or head of any medical division at TEC. (*See* CP 2). Dr. Heshmati, by contrast, was a partner at TEC, and was "Medical Director of Obstetrics from 2016 to 2018 and then became Division Director for Women and Children's Services…from 2018 to 2019," as well as the "Surgery Section Chair for TEC," "Director of the Clinical Leadership Board," and a member of various committees and working groups. (CP 3; *see also* March 15, 2024 Response to Motion for Discretionary Review at 2-5 (Dr. McSorley admitting that Dr. Heshmati was "in a position of authority" at TEC)). Plaintiff's own allegations

make clear that she and Dr. Heshmati did not have "similar jobs" and were not similarly situated.

Moreover, Plaintiff alleges that Dr. Heshmati took the adverse employment actions against her. (CP 3-5). She alleges that "from the beginning of her employment, Dr. Heshmati began undermining [Plaintiff]" and he "did not mistreat male doctors the way he mistreated [Plaintiff]." (CP 4-5). She continues, "Dr. Heshmati did not challenge or undermine male doctors…whereas he attacked [Plaintiff] for being more knowledgeable, skilled, and credentialled because she was a woman." (CP 5). She essentially alleges that Dr. Heshmati was her employer, not her peer.

Division I's holding that Dr. Heshmati is a "comparator" would make the "waiver" of the Statutory Peer Review Privileges almost limitless because all male physicians who worked at TEC in the same field of medicine could be "comparators," regardless of whether they were similarly situated to Plaintiff. This holding was erroneous.

3. TEC did not engage in "strategic" waiver because Plaintiff put her peer review file in issue.

Division I accused TEC of engaging in "strategic" behavior that put the peer review files of Dr. Heshmati and other physicians "in issue." (*See* Opinion 9-12). Division I ignored that ***Plaintiff put her peer review in issue***. From the outset, she claimed that her peer review was baseless and retaliatory, and demanded that her peer review file be produced in discovery. *See* pgs. 5-7, *supra*. After the Superior Court directed production of certain peer review-related files regarding Plaintiff, TEC decided to produce the ***entirety*** of her peer review file, ***just as Plaintiff demanded***. *See* pgs. 7-8, *supra*.

Defendants ***never put Dr. Heshmati's peer review or other peer reviews in issue***, however. Defendants do not assert that Dr. Heshmati or other physicians were treated the same as Plaintiff. (*See* Reply Br. 21-25). Dr. Heshmati was not a proper comparator to a new physician in the department. Nor have

Defendants ever pointed to Dr. Heshmati's peer reviews or other peer reviews to support their defenses. (*Id.*)[4]

This case is different than *Chevron*, *supra*, relied upon by Division I, where "the party put at issue 'the tax advice it received'" by asserting an advice of counsel defense. (Opinion 9). Defendants have not raised a defense based on other peer reviews while refusing to produce files relating to those peer reviews. Division I erred.

D. Immediate review by this Court is appropriate to avoid irreparable harm to Defendants and protect the public.

This Court should review the issue presented by this petition now, rather than waiting for further proceedings.

[4] Plaintiff argued that Defendants put the peer review files of Dr. Heshmati "in issue" during Plaintiff's deposition. (*See* Opp. 13, 27-29). Dr. Heshmati's peer review only came up in the deposition, however, because Plaintiff made gratuitous assertions about Dr. Heshmati's peer review. (*See* Opening Br. 45 n.5). Defendants' counsel was forced to ask questions demonstrating her lack of knowledge about the matter. (*Id.*; *see also* Reply Br. 21). Plaintiff's unilateral attempts to inject Dr. Heshmati's peer review into the proceedings are not an instance of Defendants putting that review at issue.

Immediate review will avoid the development of discovery practices or doctrines undermining important statutory privileges. *Sims v. Blot*, 534 F.3d 117, 128-29 (2d Cir. 2008) (granting mandamus review based upon, *inter alia*, "the need to prevent the development of discovery practices that will undermine the privilege"). Once a peer review file is disclosed, "[t]he harm from disclosure of this confidential information cannot . . . be fully remedied by subsequent court sanctions." *Loudon v. Mhyre*, 110 Wn.2d 675, 678 (1988); *see also Magney*, 195 Wn.2d at 815 ("no bell can be unrung"). TEC's privileges will be lost if the issue is not resolved at this stage.

In addition, Division I's decision has broad implications. As set forth above, there is no alleged WLAD comparator exception in the statutes, nor is there any language in the statutes providing that a waiver of the privilege as to the plaintiff results in a waiver as to other physicians. By reading non-existent exception and waiver language into the statutes, Division I's ruling calls into question the viability of the Statutory Peer

Review Privileges and other privileges. Under Division I's reasoning, a limited waiver of the plaintiff's peer review files in non-WLAD cases could result in the discovery of peer review files of ***any*** physician who might in some way be relevant to the case.

This ruling would force a defendant to decide moving forward: (1) whether it can defend itself using the very documents a plaintiff seeks regarding her care and peer review; or (2) whether it cannot defend itself in order to protect the peer review process of other physicians who relied on those privileges when agreeing to participate in or undergo peer review in cases that may be wholly unrelated to the care at issue in plaintiff's peer review. Setting aside whether this is the proper outcome, this ruling, if not reviewed, will have a dramatic impact on whether physicians will agree to participate in peer review processes in Washington moving forward, as they risk their otherwise privileged care undergoing court scrutiny simply by being identified as a purported comparator. The Court should

weigh in on this balancing of interests and whether such a balance is supported by existing case law and statutes.

Because Division I's decision is a published opinion, it may be cited and relied upon to call the Statutory Peer Review Privileges—and even other privileges—into question. The issues in this case could have a statewide impact on the delivery of health care services and the application of privilege law in Washington.

The potential disruption to longstanding practices and expectations regarding the quality improvement and peer review privileges in Washington, and the potential burdens placed on health care providers and the courts relating to such privileges, are difficult to overstate. It is in the interest of all Washington health care providers for this Court to review these issues as soon as possible. *See Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (holding that when a ruling "involves a new legal question or is of special consequence," the trial court "should not

hesitate to certify an interlocutory appeal") (quoting *Mohawk Indus., Inc. v. Carpenter*, 588 US. 100, 111 (2009)).

Before the Legislature's intent is overridden and Washington patients are harmed as a result, this Court should review the important questions posed by Division I's decision.

VI. CONCLUSION

Defendants respectfully request that this Court grant the petition.

I certify that this document contains 4,965 words.

Respectfully submitted this 23rd day of June, 2025.

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CERTIFICATE OF SERVICE

I certify that on the date below, I caused the foregoing to be served via email pursuant to the parties' e-service agreement, and to be filed via the Washington State Appellate Courts' E-Filing Portal, which provides email notification with link(s) to:

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DATED this 23rd day of June, 2025, at Seattle, Washington.

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APPENDIX

EXHIBIT 1

FILED
4/28/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MEGHAN A. McSORLEY,

Respondent,

v.

THE EVERETT CLINIC, a Washington professional limited liability company; NARIMAN HESHMATI, an individual; and ALBERT FISK, an individual,

Petitioners,

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,

Defendants.

No. 86325-8-I

DIVISION ONE

PUBLISHED OPINION

BIRK, J. — The Everett Clinic (TEC) seeks discretionary review of a discovery order compelling it to disclose privileged material subject to the peer review and quality improvement privileges. Dr. Meghan McSorley brought a Washington Law Against Discrimination (WLAD), ch. 49.60 RCW, disparate treatment claim against TEC, her former employer. During discovery, TEC was granted a protective order as to its privileged peer review and quality improvement files, which it later partially waived, disclosing only Dr. McSorley's file. Dr. McSorley sought an order compelling disclosure of other privileged peer review

and quality improvement files, specifically for alleged WLAD comparator Dr. Nariman Heshmati. Because Dr. Heshmati's peer review and quality improvement file was part of the same subject matter as Dr. McSorley's, fairness required the disclosure of Dr. Heshmati's file. We affirm.

I

In June 2021, Dr. McSorley filed a complaint against, among others, TEC and its partner and obstetrics and gynecology (OB/GYN) specialist, Dr. Heshmati, alleging violations of WLAD and wrongful termination in violation of public policy. Dr. McSorley, an employee of TEC from 2016 to 2019, claimed Dr. Heshmati was regularly disrespectful to her, undermined her, and investigated and criticized her behind her back—behavior he did not direct towards male doctors. Dr. McSorley raised concerns about Dr. Heshmati's practice and "systemic quality control deficiencies that had led to bad patient outcomes." Dr. McSorley alleged these concerns were not properly investigated by TEC.

Dr. McSorley claimed Dr. Heshmati used the peer review and quality assurance systems at TEC to lodge meritless complaints against her. Dr. McSorley alleges she submitted a letter to the head of the Quality Review Committee for TEC, where she raised concerns over Dr. Heshmati's management of patient care. In response, Dr. McSorley claims she had an off the record meeting with Dr. Albert Fisk, the Chief Medical Officer at TEC, in which she was asked to voluntarily relinquish her hospital privileges by end of day. After protesting the request by e-mail, which she refers to as "a formal complaint of gender discrimination and retaliation, including whistleblower retaliation," Dr.

McSorley alleges that "[l]ess than one hour later, Dr. Fisk removed [her] ability to practice medicine at the Clinic entirely."

Dr. McSorley asserts that after she passed a "demeaning" and "remedial" assessment that TEC required, TEC delayed reinstating her, and when Dr. Fisk finally did begin the reinstatement process, he refused to apologize, compensate her for lost performance bonuses, or assist her in reestablishing her practice. Due to her continuing fear of gender-based discrimination, Dr. McSorley chose not to practice medicine at TEC again.

During discovery, Dr. McSorley sought documents related to TEC's response to complaints raised against her and other similarly situated male OB/GYN comparators. In February 2022, Dr. McSorley moved to compel TEC to produce all documents identified in its privilege logs, not generated, created, and maintained exclusively by the peer review committee. In July 2022, after conducting an in camera review, the superior court ordered the petitioners to produce numerous documents identified in the privilege log, while not ordering disclosure of others. The order conformed the privilege narrowly to those documents created exclusively for review committees.[1]

Then in 2023, TEC waived peer review and quality improvement privileges for "any and all files, facts, and testimony regarding" Dr. McSorley's peer review, and produced those documents. TEC provided little explanation for its reversal in strategy, stating, "In order to provide context to the documents that [the superior

[1] See Lowy v. Peacehealth, 174 Wn.2d 769, 778, 280 P.3d 1078 (2012) (strictly construing peer review and quality improvement privileges).

court] ordered to be produced, on June 16, 2023, TEC produced the rest of the documents related to [Dr. McSorley's] peer review file."[2] Dr. McSorley moved to compel production of Dr. Heshmati's peer review file, asserting that TEC had waived privilege by partially and selectively disclosing Dr. McSorley's peer review file and that in fairness, TEC should be ordered to produce at least Dr. Heshmati's peer review file as well, arguing he was a proper comparator for purposes of her discrimination claim. Dr. McSorley also suggested she would seek similar documents for other comparators.

The superior court granted Dr. McSorley's motion to compel. The superior court ruled that the test for implied waiver had been satisfied, that, for purposes of discovery, Dr. Heshmati was a proper comparator, and that in fairness his peer review file had to be produced. The superior court certified its order for discretionary review under RAP 2.3(b)(4). A commissioner of this court granted discretionary review under that rule. TEC maintains that its waiver of the peer review and quality improvement privileges is limited to Dr. McSorley's peer review file it disclosed, and that the superior court erred by compelling further disclosure.

II

The superior court ruled that TEC made an intentional[3] and selective disclosure of privileged information and it was appropriate to compel production of

[2] One document disclosed was a case review summary in which a reviewer assessing Dr. McSorley denoted a concern with the standard of care, issues with quality, and the opinion that Dr. McSorley's ministrations "[p]robably did contribute to harm" in the reviewed case. Other documents disclosed included e-mails in which Dr. McSorley's care for two patients was critiqued.

[3] We are concerned in this case with *intentional* disclosure of privileged information. We analyzed *inadvertent* disclosure in Sitterson v. Evergreen Sch.

other privileged documents necessary to fairly adjudicate Dr. McSorley's disparate treatment claims. We agree. The general rule, codified in ER 502(a) for the attorney-client privilege and the work product doctrine, is that when a party makes a partial disclosure of privileged documents, it waives privilege also for documents relating to the same subject matter and that ought in fairness to be considered together. Whether a waiver of privilege was made is reviewed de novo.[4] Magney v. Truc Pham, 195 Wn.2d 795, 801, 466 P.3d 1077 (2020).

A

The Washington Supreme Court considered the effect of a partial disclosure of privileged material in McUne v. Fuqua, where a litigant claiming personal injury from an automobile collision presented at trial his own testimony and that of three doctors about his physical ailments and disabilities. 42 Wn.2d 65, 68, 74-76, 253 P.2d 632 (1953). The opposing party sought to introduce the testimony of other doctors who would testify that the plaintiff had similar complaints predating the collision. Id. at 73. The court held the plaintiff's testimony at trial was a waiver, but limited to testimony regarding "the same ailments and disabilities." Id. at 76. McUne asks whether there is "*such relation* between the old and new medical

Dist. No. 114, 147 Wn. App. 576, 584-88, 196 P.3d 735 (2008), and adopted a five-part test to assess waiver on an inadvertent basis.

[4] Case law leaves open the possibility that a trial court's determination of the extent to which fairness requires further disclosure is a discretionary decision, reviewed for abuse of discretion. Magney, 195 Wn.2d at 799 ("[W]e conclude that the discretion of whether a privilege has been impliedly waived belongs to the trial court judge, who has access to the entirety of the record of the case and who can determine whether any disclosures thus far impliedly waived the privilege."). Because we affirm based on a de novo review, we do not consider whether the abuse of discretion standard governs review of the extent of a given waiver.

testimony that appellant's production of the former constituted a waiver of the privilege as to the latter."[5] Id. at 77 (emphasis added).

> McUne applied the rule of subject matter waiver. Under this rule,
>
> > When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter because "the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former."

In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982) (quoting 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2327, at 638 (J. McNaughton rev. 1961)). Selective disclosure of privileged material risks conveying an incomplete or even misleading picture to the trier of fact, because the privilege holder might unfairly disclose parts of privileged material that seem to support its position, while withholding context or other material undercutting its position. 2 EDWARD J. IMWINKELREID, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 6.12.7, at 1114-15 (2d ed. 2010).

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[5] Like McUne, our case involves waiver through partial disclosure. A different type of waiver occurs when a party asserts a contention in litigation that puts privileged information at issue. See Pappas v. Holloway, 114 Wn.2d 198, 203, 207, 787 P.2d 30 (1990) (counterclaiming for legal malpractice); Steel v. Phila. Indem. Ins. Co., 195 Wn. App. 811, 816, 832, 381 P.3d 111 (2016) (seeking a reasonableness determination of a covenant judgment settlement); cf. Chevron Corp v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992) (raising an affirmative defense) ("Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived."). In those situations, Washington applies its version of "the Hearn test," Steel, 195 Wn. App. at 832, a framework derived from Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975). At the parties' urging, the superior court used the Hearn framework to analyze and determine the extent to which fairness required further disclosure by TEC. Although the two kinds of waiver are analytically distinct, the superior court's thorough order covered the points relevant to the analysis of TEC's waiver through partial disclosure.

The modern trend has been to limit subject matter waiver to additional material on the same subject that fairness requires to be disclosed "to avoid prejudice to the adversary party and 'distortion of the judicial process' that may result from selective disclosure." In re Actos Antitrust Litig., 628 F. Supp. 3d 524, 533 (S.D.N.Y. 2022) (quoting In re von Bulow, 828 F.2d 94, 101 (2d Cir. 1987)). A version of subject matter waiver has been adopted by rule for the attorney-client privilege and the work product doctrine in Washington proceedings under ER 502, patterned after Federal Rules of Evidence 502. Under this rule, subject matter waiver going beyond the information actually disclosed is "reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." FED. R. EVID. 502 advisory committee note.

Finally, in determining whether a party has waived privilege, courts may consider the purpose the privilege is meant to serve. Carson v. Fine, 123 Wn.2d 206, 214, 867 P.2d 610 (1994) (analyzing the scope of waiver: "Waiver occurs because the purpose of the privilege no longer exists."); Pappas v. Holloway, 114 Wn.2d 198, 208, 787 P.2d 30 (1990) (characterizing waiver analysis in part as limiting the attorney-client privilege to "the purpose for which it exists."); cf. Steel v. Phila. Indem. Ins. Co., 195 Wn. App. 811, 825, 381 P.3d 111 (2016) (requiring case-by-case justification for application of implied waiver test). When a party's use of a privilege fits with the intended purpose of a privilege, a finding of waiver is less likely. In contrast, when a party's use of a privilege is not consistent with

the purpose the privilege serves, then both a finding of waiver and a finding of a greater extent of waiver are more likely. In such a case, the party's actions indicate that it is not concerned with protecting the interests that were meant to be protected by the privilege. Cf. Sealed Case, 676 F.2d at 818 (courts need not allow a claim of privilege "when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege.").

B

TEC acknowledges that subject matter waiver is the appropriate analysis, but argues that the "subject matter" of its disclosure is limited to Dr. McSorley's peer review file, which it has already disclosed. It argues that the peer review files of any other physician would be a different subject matter. We disagree.

The superior court appropriately defined the subject matter of TEC's disclosure not in an arbitrary, abstract sense, but in the context of the issues being litigated. Decisions analyzing subject matter waiver are illustrative. In Actos, where the privilege holder had described two patents as ones that " 'claim' " a brand name drug for purpose of competition from generic drugs, it asserted a defense requiring it to show that it, in good faith, relied on advice that the descriptions were required by regulation. 628 F. Supp. 3d at 531, 534. The privilege holder waived privilege as to documents relating to the *applicability of* and its *compliance with* certain regulations. Id. at 536. The court found the proposed scope of the waiver might result in the privilege holder selectively withholding documents rebutting its good faith conclusion that its descriptions were *required* by the regulations. Id. Thus a subject matter broader than the disclosure itself

was implicated. Id. And where a party maintained its tax position was reasonable "because it was based on advice of counsel," the party put at issue "the tax advice it received." Chevron Corp v. Pennzoil Co., 974 F.2d 1156, 1162-63 (9th Cir. 1992). Withholding material informing "the extent" of the party's knowledge would "deny [the plaintiff] access to the very information that [it] must refute in order to demonstrate" the defendant's misconduct. Id. In contrast, in Weil v. Investment/Indicators, Research & Management, Inc., a privilege waiver made early in litigation, that was limited in scope and not prejudicial to the opposing party, did not compel further disclosure. 647 F.2d 18, 25 (9th Cir. 1981).

TEC's position is that it can use Dr. McSorley's peer review file to support its "good faith, reasonable basis" for conducting a peer review of Dr. McSorley. If a plaintiff makes a prima facie showing of discrimination, then the burden shifts to the defendant to " 'articulate a legitimate, nondiscriminatory reason for the adverse employment action,' " and if the defendant meets that burden the plaintiff must produce evidence showing the plaintiff's reasons were pretextual. Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County, 189 Wn.2d 516, 527, 404 P.3d 464 (2017) (quoting Scrivener v. Clark Coll., 181 Wn.2d 439, 446, 334 P.3d 541 (2014)). TEC's interest in using Dr. McSorley's peer review file is in articulating a "legitimate, nondiscriminatory reason" for its actions towards her. Id. 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. Scrivener, 181 Wn.2d at 446-47 ("An employee may satisfy the pretext prong by offering sufficient evidence . . . (1) that the defendant's

reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer."). The superior court appropriately found that the relevance of the material to the action defined the subject matter for purposes of waiver: the disclosed documents allowed petitioners to "attack the quality" of Dr. McSorley's medical care "and *proffer an alternative explanation for the adverse actions against her* as a defense." (Emphasis added.) In the context of the litigation, the subject matter of TEC's disclosure of privileged material is appropriately defined as the justification for the actions taken against Dr. McSorley.

The superior court also appropriately determined that compelling a similar disclosure for male comparators was the fair requirement—and the fair limit—for additional disclosure. In some instances, the fairness standard might mean little or nothing additional needs to be disclosed after a waiver. See e.g., Weil, 647 F.2d at 25. Here, 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. Mikkelsen, 189 Wn.2d at 526 (direct evidence of discrimination is rare, which is why "plaintiffs may rely on circumstantial, indirect, and inferential evidence to establish discriminatory action."). As the superior court explained, TEC's disclosure gave it an 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." 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.

Thus far, the superior court has ruled only that Dr. Heshmati is a proper comparator for whom documents equivalent to those disclosed about Dr. McSorley must be produced. Contrary to TEC's fear, this does not give Dr. McSorley the unilateral ability to define the scope of discovery. The superior court's ruling logically limits further disclosure to equivalent peer review documents as to other doctors whom the court views as proper comparators. TEC does not precisely challenge the superior court's view that Dr. Heshmati is a proper comparator *for purposes of discovery*. And the record provides ample justification for the superior court's well-reasoned ruling in light of its broad discretion to determine the scope of discovery. 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."). With Dr. McSorley having so far identified one, or perhaps two, comparators after years of discovery, we see little risk that the superior court's ruling threatens an unfairly expansive definition of comparators for purposes of waiver. The superior court imposed a fair, reasonable, and clear limit on the extent of the privilege waiver.

Finally, both the conclusion of waiver here and its extent are appropriate in light of the purposes of the peer review and quality improvement privileges. See Carson, 123 Wn.2d at 214. "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." Lowy v. Peacehealth, 174 Wn.2d 769, 774,

280 P.3d 1078 (2012). TEC's disclosure to serve its strategic interests in an employment discrimination lawsuit with a former employee only undermines these purposes. For the purpose of a privilege to be served, "the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.' " Jaffee v. Redmond, 518 U.S 1, 18, 116 S. Ct. 1923, 135 L. Ed .2d 337 (1996) (quoting Upjohn Co. v. United States, 449 U.S. 383, 393, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). 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.

Affirmed.

Birk, J.

WE CONCUR:

Feldman, J.

EXHIBIT 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MEGHAN A. McSORLEY,

Respondent,

v.

THE EVERETT CLINIC, a Washington professional limited liability company; NARIMAN HESHMATI, an individual; and ALBERT FISK, an individual,

Petitioners,

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,

Defendants.

No. 86325-8-I

ORDER DENYING MOTION FOR RECONSIDERATION

The petitioners, The Everett Clinic, Nariman Heshmati, and Albert Fisk, and defendants, Optum Care Services Company and Optum Care Inc, have filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Bird, J.

Judge

EXHIBIT 3

Rev. Code Wash. (ARCW) § 4.24.250

*** Statutes current through Chapter 227 of the 2025 Regular Session***

Annotated Revised Code of Washington > Title 4 Civil Procedure (Chs. 4.04 — 4.105) > Chapter 4.24 Special Rights of Action and Special Immunities (§§ 4.24.005 — 4.24.900)

4.24.250. Health care provider filing charges or presenting evidence — Immunity — Information sharing.

(1) Any health care provider as defined in *RCW 7.70.020 (1)* and (2) who, in good faith, files charges or presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care and any person or entity who, in good faith, shares any information or documents with one or more other committees, boards, or programs under subsection (2) of this section, shall be immune from civil action for damages arising out of such activities. For the purposes of this section, sharing information is presumed to be in good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading. The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in *RCW 7.70.020 (1)* and (2).

(2) A coordinated quality improvement program maintained in accordance with *RCW 43.70.510* or *70.41.200*, a quality assurance committee maintained in accordance with *RCW 18.20.390* or *74.42.640*, or any committee or board under subsection (1) of this section may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a coordinated quality improvement committee or committees or boards under subsection (1) of this section, with one or more other coordinated quality improvement programs or committees or boards under subsection (1) of this section for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program or committee or board under subsection (1) of this section to another coordinated quality improvement program or committee or board under subsection (1) of this section and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (1) of this section and by *RCW 43.70.510(4)*, *70.41.200(3)*, *18.20.390 (6)* and (8), and 74.42.640 (7) and (9).

History

2005 c 291 § 1; 2005 c 33 § 5; 2004 c 145 § 1; 1981 c 181 § 1; 1979 c 17 § 1; 1977 c 68 § 1; 1975 1st ex.s. c 114 § 2; 1971 ex.s. c 144 § 1.

End of Document

EXHIBIT 4

43.70.510. Health care services coordinated quality improvement program — Rules.

(1)

(a) Health care institutions and medical facilities, other than hospitals, that are licensed by the department, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers approved pursuant to chapter 48.43 RCW, and any other person or entity providing health care coverage under chapter 48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof may maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice as set forth in RCW 70.41.200.

(b) All such programs shall comply with the requirements of RCW 70.41.200(1) (a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the institution, facility, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers, or any other person or entity providing health care coverage under chapter 48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof, unless an alternative quality improvement program substantially equivalent to RCW 70.41.200(1)(a) is developed. All such programs, whether complying with the requirement set forth in RCW 70.41.200(1)(a) or in the form of an alternative program, must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under *RCW 42.56.360(1)(c)* and subsection (5) of this section shall apply. In reviewing plans submitted by licensed entities that are associated with physicians' offices, the department shall ensure that the exemption under *RCW 42.56.360(1)(c)* and the discovery limitations of this section are applied only to information and documents related specifically to quality improvement activities undertaken by the licensed entity.

(2) Health care provider groups of five or more providers may maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice as set forth in RCW 70.41.200. For purposes of this section, a health care provider group may be a consortium of providers consisting of five or more providers in total. All such programs shall comply with the requirements of RCW 70.41.200(1) (a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the health care provider group. All such programs must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under *RCW 42.56.360(1)(c)* and subsection (5) of this section shall apply.

(3) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. Any person or entity participating in a coordinated quality improvement program that, in substantial good faith, shares information or documents with one or more other programs, committees, or boards under subsection (6) of this section is not subject to an action for civil damages or other relief as a result of the activity or its consequences. For the purposes of this section, sharing information is presumed

to be in substantial good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading.

(4) Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts that form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action challenging the termination of a contract by a state agency with any entity maintaining a coordinated quality improvement program under this section if the termination was on the basis of quality of care concerns, introduction into evidence of information created, collected, or maintained by the quality improvement committees of the subject entity, which may be under terms of a protective order as specified by the court; (e) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (f) in any civil action, discovery and introduction into evidence of the patient's medical records required by rule of the department of health to be made regarding the care and treatment received.

(5) Information and documents created specifically for, and collected and maintained by, a quality improvement committee are exempt from disclosure under chapter 42.56 RCW.

(6) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee or a peer review committee under *RCW 4.24.250* with one or more other coordinated quality improvement programs maintained in accordance with this section or with *RCW 70.41.200*, a coordinated quality improvement committee maintained by an ambulatory surgical facility under *RCW 70.230.070*, a quality assurance committee maintained in accordance with *RCW 18.20.390* or *74.42.640*, or a peer review committee under *RCW 4.24.250*, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under *RCW 4.24.250* and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (4) of this section and *RCW 4.24.250*.

(7) The department of health shall adopt rules as are necessary to implement this section.

History

2007 c 273 § 21. Prior: *2006 c 8 § 113*; *2005 c 291 § 2*; *2005 c 274 § 302*; *2005 c 33 § 6*; *2004 c 145 § 2*; *1995 c 267 § 7*; *1993 c 492 § 417.*

End of Document

EXHIBIT 5

Rev. Code Wash. (ARCW) § 70.41.200

*** Statutes current through Chapter 227 of the 2025 Regular Session***

Annotated Revised Code of Washington > Title 70 Public Health and Safety (Chs. 70.01 — Chapter 70.410) > Chapter 70.41 Hospital Licensing and Regulation (§§ 70.41.005 — 70.41.900)

70.41.200. Quality improvement and medical malpractice prevention program — Quality improvement committee — Sanction and grievance procedures — Information collection, reporting, and sharing.

(1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:

(a) The establishment of one or more quality improvement committees with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. Different quality improvement committees may be established as a part of a quality improvement program to review different health care services. Such committees shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures;

(b) A process, including a medical staff privileges sanction procedure which must be conducted substantially in accordance with medical staff bylaws and applicable rules, regulations, or policies of the medical staff through which credentials, physical and mental capacity, professional conduct, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;

(c) A process for the periodic review of the credentials, physical and mental capacity, professional conduct, and competence in delivering health care services of all other health care providers who are employed or associated with the hospital;

(d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice;

(e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients including health care-associated infections as defined in *RCW 43.70.056*, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;

(f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital;

(g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention, infection control, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of malpractice claims for staff personnel engaged in patient care activities; and

(h) Policies to ensure compliance with the reporting requirements of this section.

(2) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. Any person or entity participating in a coordinated quality improvement program that, in substantial good faith, shares information or documents with one or more other programs, committees, or boards under subsection (8) of this section is not subject to an action for civil damages or other relief as a result of the activity. For the purposes of this section, sharing information is presumed to be in substantial good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading.

(3) Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

(4) Each quality improvement committee shall, on at least a semiannual basis, report to the governing board of the hospital in which the committee is located. The report shall review the quality improvement activities conducted by the committee, and any actions taken as a result of those activities.

(5) The department of health shall adopt such rules as are deemed appropriate to effectuate the purposes of this section.

(6) The Washington medical commission or the board of osteopathic medicine and surgery, as appropriate, may review and audit the records of committee decisions in which a physician's privileges are terminated or restricted. Each hospital shall produce and make accessible to the commission or board the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section. Failure of a hospital to comply with this subsection is punishable by a civil penalty not to exceed two hundred fifty dollars.

(7) The department, the joint commission on accreditation of health care organizations, and any other accrediting organization may review and audit the records of a quality improvement committee or peer review committee in connection with their inspection and review of hospitals. Information so obtained shall not be subject to the discovery process, and confidentiality shall be respected as required by subsection (3) of this section. Each hospital shall produce and make accessible to the department the appropriate records and otherwise facilitate the review and audit.

(8) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee or a peer review committee under *RCW 4.24.250* with one or more other coordinated quality improvement programs maintained in accordance with this section or *RCW 43.70.510*,

a coordinated quality improvement committee maintained by an ambulatory surgical facility under RCW 70.230.070, a quality assurance committee maintained in accordance with RCW 18.20.390 or 74.42.640, or a peer review committee under RCW 4.24.250, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The privacy protections of chapter 70.02 RCW and the federal health insurance portability and accountability act of 1996 and its implementing regulations apply to the sharing of individually identifiable patient information held by a coordinated quality improvement program. Any rules necessary to implement this section shall meet the requirements of applicable federal and state privacy laws. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section, RCW 18.20.390 (6) and (8), 74.42.640 (7) and (9), and 4.24.250.

(9) A hospital that operates a nursing home as defined in RCW 18.51.010 may conduct quality improvement activities for both the hospital and the nursing home through a quality improvement committee under this section, and such activities shall be subject to the provisions of subsections (2) through (8) of this section.

(10) Violation of this section shall not be considered negligence per se.

History

2019 c 55, § 14, effective July 28, 2019; 2013 c 301 § 2. Prior: 2007 c 273 § 22; 2007 c 261 § 3; prior: 2005 c 291 § 3; 2005 c 33 § 7; 2004 c 145 § 3; *2000 c 6 § 3*; *1994 sp.s. c 9 § 742*; 1993 c 492 § 415; *1991 c 3 § 336*; 1987 c 269 § 5; 1986 c 300 § 4.

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SEYFARTH SHAW

June 23, 2025 - 9:54 AM

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