No. 104315-5

SUPREME COURT OF THE STATE OF WASHINGTON

MEGHAN A. McSORLEY,

Respondent,

v.

THE EVERETT CLINIC, a Washington Professional Liability Company, et al,

Petitioners.

MEMORANDUM OF *AMICI CURIAE* WASHINGTON STATE MEDICAL ASSOCIATION, WASHINGTON STATE HOSPITAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF REVIEW

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

A. Identity of Health Care *Amici.*

Amici Curiae are the Washington State Medical Association ("WSMA"), the Washington State Hospital Association ("WSHA"), and the American Medical Association (AMA") ("Health Care *Amici*"). They have a continuing interest in cases affecting their members, patients, and the safety of the health care system.

The WSMA is the statewide professional association of medical and osteopathic physicians, surgeons and physician assistants with over 13,500 physician and physician assistant members. The WSMA has actively worked with the Legislature on legislation affecting the practice of medicine and has participated in court cases as a party and *amicus curiae* on issues affecting the practice of medicine and the access to quality health care of its members' patients.

The WSHA is a nonprofit membership organization representing Washington's 107 member hospitals and several

health-related organizations. WSHA works to improve the health of the people of the state by becoming involved in all matters affecting the delivery, quality, accessibility, affordability, and continuity of health care. It has participated in this Court many times as *amicus curiae*, including in *Lowy v. PeaceHealth,* 174 Wn.2d 769, 280 P.3d 1078 (2012), and *Cornu-Labat v. Hosp. Dist. No. 2 Grant Cnty*., 177 Wn.2d 221, 298 P.3d 741 (2013), addressing application of the privilege in RCW 4.24.250.

The AMA is the largest professional association of physicians, residents and medical students in the United States. Substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy making process. AMA members practice in every medical specialty area and every state, including Washington.

The AMA and WSMA submit this memorandum on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the

medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

B. Interest of Health Care *Amici.*

At issue here is the applicability and scope of a purported waiver of the discovery immunity and evidentiary privileges afforded by RCW 4.24.250. This statute protects from discovery "the proceedings, reports, and written records of" 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."

These internal peer review systems are a critical aspect of providing quality care and improving patient outcomes. The Legislature enacted the statutory privilege to "[t]o ensure the proper delivery of services and the maintenance and improvement in quality of care through self-review." The privilege incentivizes both peer reviewers and subject physicians to participate fully and candidly in the process. *Coburn v. Seda*,

101 Wn.2d 270, 275, 677 P.2d 173 (1984); *Fellows v. Moynihan,* 175 Wn.2d 641, 649, 285 P.3d 864 (2012).

The scope and extent of any purported waiver of this privilege is of keen interest to the medical profession and to patients. It has potentially serious implications for the medical peer review and quality improvement processes in Washington and could thwart the important public policies underpinning RCW 4.24.250.

II. ISSUE ADDRESSED BY HEALTH CARE *AMICI*

Health Care *Amici's* concerns are reflected in the issue stated in the Petition for Review, particularly as rephrased from their perspectives as follows:

> Should any purported waiver of a statutory discovery privilege and immunity from suit be closely scrutinized and narrowly tailored to prevent weaponization and diminishment of the peer review process?

III. STATEMENT OF THE CASE

Health Care *Amici* accept the facts as stated by Petitioners and add the following facts relevant to this Court's evaluation.

Although the Superior Court determined that the peer review privilege would generally apply, it directed that many documents relating to peer review be produced including, *inter alia*, (a) emails between Dr. McSorley and the TEC peer review committee; (b) Dr. McSorley's patients lists and physician reviews relating to the peer review process; (c) documents relating to a physician evaluation program called PACE that the peer review committee recommended that Dr. McSorley undergo; (d) requests by the TEC peer review committee for information to assist their review of Dr. McSorley; and (e) documents relating to reviews of Dr. McSorley's patient outcomes in connection with the peer review process. *See, e.g.,* CP 79-85 at Privilege Log Entries 1, 2, 3, 6, 8, 18, 20, 23, 24, 25, 33, 34, 36.

But because Dr. McSorley's claim put the validity of the peer review process itself at issue, this picture of the process painted by the compelled partial disclosure was incomplete. Accordingly, TEC waived its Statutory Peer Review Privilege in full only as to Dr. McSorley's at-issue peer review files. CP 534-35, 546-47. TEC communicated the limited extent of its waiver to Dr. McSorley at the time of the waiver and reiterated the limited nature of the waiver in opposition to Dr. McSorley's subsequent motion to compel. *Id.,* CP 533-34, 542-43.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

Matters of broad public interest, especially when they are issues of first impression, are particularly apt subjects for this Court's review. RAP 13.4(b)(4). This Court has said such confidentiality is "essential" to the proper functioning of the peer review system. But here, the Court of Appeals' decision creates a dangerous loophole to confidentiality in medical peer review, making review especially appropriate.

A. The Integrity and Confidentiality of the Peer Review System Is a Matter of Broad Public Import.

Hospital internal review mechanisms are critical to maintaining quality health care. *Cornu-Labat v. Hosp. Dist. No. 2, supra,* 177 Wn.2d at 230. The scope and applicability of statutory peer review privilege and immunity is of broad public interest as stated by both the Legislative and Judicial branches of Washington State government. *See* RCW 4.24.250; *Coburn,* 101 Wn.2d at 274.

This Court in *Coburn* agreed with the federal courts that peer review cannot function properly without confidentiality:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care.... Constructive professional criticism cannot occur in an atmosphere of apprehension … .

Coburn, 101 Wn.2d at 275, quoting *Bredice v. Doctors Hosp., Inc.,* 50 F.R.D. 249, 250 (D.D.C.1970), *aff'd,* 479 F.2d 920 (D.C.Cir.1973). "E]xternal access to committee investigations

stifles candor and inhibits constructive criticism thought necessary to effective quality review." *Anderson v. Breda,* 103 Wn.2d 901, 905, 700 P.2d 737 (1985).

The issue of first impression raised and decided in the Court of Appeals is appropriate for this Court's consideration. It will have broad impacts that could potentially undermine the legitimacy and efficacy of peer review programs statewide. If not corrected, the Decision will harm the health care system, patients, and *Amici's* members, while increasing the cost of care and potentially wreaking havoc with the peer review system.

B. This Court Has Repeatedly Recognized Its Important Role in Examining Privileged Material Disclosure, Including from the Peer Review Process.

Leaving novel issues of privilege to lower courts can create the risk of eroding the privilege across the entire legal system. The problem with leaving these issues for later is simple: the harm from erroneous forced disclosure of confidential information is complete once the disclosure is made. For example, this Court cautioned lower courts that denying

admission at trial of confidential information disclosed in marriage counseling could not undo the harm of disclosure:

> [I]nadmissibility at trial does not rectify the potential harm to a family from the disclosure of privileged thoughts shared with a marriage counselor; once privileged information is disclosed, it cannot be retracted: "no bell can be unrung."

Magney v. Truc Pham, 195 Wn.2d 795, 815, 466 P.3d 1077 (2020), quoting *Dana v. Piper*, 173 Wn.App. 761, 769, 295 P.3d 305 (2013).

This Court exercises its role in shaping this area of the law frequently. Since 1984, nine appellate cases have been decided on the subject of piercing the RCW 4.24.250 privilege.[1] Of those

[1] A Westlaw search for "RCW 4.24.250" returns seventeen results. Of those seventeen, eight are either unrelated to the peer review privilege issue or are Court of Appeals decisions in cases where this Court issued the final decision. In three others, *Audit & Adjustment Co. v. Earl,* 165 Wn.App. 497, 267 P.3d 441 (2001); *Lafferty v. Stevens Mem'l Hosp.,* 136 Wn.App. 1027 (2006) (unpublished); and *Seattle Children's Hosp. v. King Cnty.,* 15 Wn.App. 2d 1060 (2020) (unpublished), the Court of Appeals held that the privilege was not implicated. The remaining six are decisions of this Court.

nine, six were decided by this Court: *Fellows v. Moynihan*, 175 Wn.2d 641 (2012); *Lowy v. PeaceHealth* (2012); *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 864 P.2d 921 (1993); *Anderson v. Breda*, 103 Wn.2d 901, 700 P.2d 737 (1985); *Cornu-Labat* (2013) , and *Coburn,* (1984)*, supra.*

This level of Supreme Court scrutiny of novel issues is entirely appropriate given the gravity of privilege concerns and the irremediable harm flowing from improper forced disclosure.

C. In This Unusual Factual and Legal Context, Applying Subject Matter Waiver to Other Physicians' Peer Review Poses a Threat to the Integrity of the Privilege

The central purpose of RCW 4.24.250's peer review privilege is to promote candor in medical quality improvement systems. *Anderson v. Breda*, 103 Wn.2d at 905. Without the privilege, hospitals and providers would worry about malpractice claimants using honest peer review against them. *Id.* This candor is so essential to improving the quality of care the Legislature enacted a discovery privilege contrary to this state's general favorability toward discovery. *Id.*

And the Legislature didn't just enact a discovery privilege. It also created immunity from civil liability for those who file charges or present evidence in connection with a competency review. *Id.* at 904; RCW 4.24.250. Medical professionals who participate in peer review may be candid without fear of being held liable by the subjects of their review.

The immunity from suit for statements made in peer review doesn't just apply to truthful statements made in good faith. For example, a surgeon could not bring a defamation claim or a claim for tortious interference with a business expectancy based on statements made in a competency review.

But this case is novel. Dr. McSorley is claiming the peer review process itself violated WLAD. She put her own peer review file at issue by claiming the peer review process was *not* candid. She contends that, with discriminatory intent, her peer lied in the peer review process. She wanted her file disclosed, but also the privileged files of other doctors. This put Petitioners

in a Catch-22: how do the parties try a claim attacking the peer review process without having the peer review materials?

There seemed to be no way to fairly try a claim attacking the validity of Dr. McSorley's peer review without disclosing her file. But because Petitioners produced her file, which she put at issue, the Court of Appeals ruled that they waived all privilege over Dr. Heshmati's and ***other doctors' files***. The rationale is that when a plaintiff puts the peer review process at issue, any other peer review constitutes the "same subject matter." This means that when a plaintiff directly attacks the peer review process, the trial court must either (1) try the claim without evidence, or (2) pierce privilege as to every peer review file. This is the only logical result when the plaintiff makes peer review the "subject matter" of a claim.

While the Court of Appeals' decision here may seem limited in scope to these unusual facts, it easily could be misused in other cases if this Court does not examine and rule on it. For now, under the appellate decision, attacking the peer review

process itself is an end-run around the privilege, effectively destroying the privilege contrary to legislative and this Court's directives. For example, a malpractice plaintiff could allege that a surgeon's peer review process of a physician was inadequate, leading to injury. The trial court could rule that not only the subject doctor's peer review file must be disclosed, but the files of all other medical providers so that the jury may evaluate the adequacy of peer review.

V. CONCLUSION

This Court should take review as it is has done historically in novel cases involving this privilege. The potential harm to an erroneous piercing of this privilege extends far beyond this case.

This document contains 2,080 words, excluding the parts exempted from the word count by RAP 18.17.

Respectfully submitted this 22nd day of August, 2025.

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CERTIFICATE OF SERVICE

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

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DATED this 22nd day of August, 2025.

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CARNEY BADLEY SPELLMAN

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