IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 89618-6

DARLENE TOWNSEND, Ph.D.,

Petitioner

JAMES HENRY AND AMY DAWN ESKRIDGE,

Respondents

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE

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I. REPLY TO RESPONDENTS' RESPONSE

A. INTRODUCTION

Pursuant to RAP 13.4 (d), Petitioner Dr. Townsend respectfully replies to Respondents James and Amy Eskridge's Response to her Petition for review. RAP 13.4 (d) allows a petitioner to file a reply to an answer if the answering party seeks review of issues not raised in the petition for review. The reply to an answer should be limited to addressing only the new issues raised in the answer. RAP 13.4 (d).

In their Response, Respondents contend "Dr. Townsend failed to preserve at trial the construction of RCW 26.44.060 that she urges here." Response, at p. 19. Respondents continue, "[D]r. Townsend's argument on this issue here is essentially one of having an objection to jury instructions." Response, at p. 20. Respondents conclude, "[b]ecause Dr. Townsend failed to raise the issue at trial, she is precluded from arguing it now in this Petition." *Id.*

Dr. Townsend files this reply to address this new issue raised by Respondents.

B. ARGUMENT

Respondents assert that since Dr. Townsend did not object to jury instructions on the basis that the Court of Appeals had misconstrued the statute under which she claimed immunity in its binding prior published

decisions, she is now precluded from raising that issue in her Petition. Respondents are mistaken: the trial court had no power to ignore clear precedent from the Court of Appeals, and Dr. Townsend was not required to engage in the futile act of asking that it do so. Furthermore, Dr. Townsend had no duty to make an objection to the jury instructions once the trial court had made its final ruling on her Motion in Limine. *Garcia v. Providence Medical Cntr.*, 60 Wn. App. 635, 806 P.2d 766 (Div. 2, 1993).

1. The Law Does Not Require Futile Acts, and Did Not Require Dr. Townsend to Make a Futile Request that the Trial Court Defy Binding Precedent.

It is a fundamental premise of *stare decisis* that lower courts are required to follow and apply binding precedents from higher courts. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wash.2d 566, 578, 146 P.3d 423, 430 (2006). Thus, the trial court was required to apply the clear rule of *Dunning v. Pacerelli*, 63 Wn. App. 232, 818 P.2d 34 (Div. 3, 1991) and its progeny, assigning to Dr. Townsend the burden of alleging and proving her own good faith as a condition to the immunity afforded her under RCW 26.44.060. Any proposal by Dr. Townsend that the trial court take a view of the statute contrary to that clearly expressed by the Court of Appeals would have been affirmatively improper. *See, e.g.*, RPC 3.3(a)(1).

It is also well established that "courts will not require vain and useless acts." *Orion Corp. v. State*, 103 Wash.2d 441, 458, 693 P.2d 1369, 1379 (1985) (holding that failure to exhaust administrative remedies, where to attempt exhaustion as normally required would have been futile, was no bar to appellate review). That rule applies especially where existing precedent bars the relief requested. *State v. Robinson*, 171 Wash.2d 292, 253 P.3d 84 (2011) (holding that defendant was not required to have brought a "meritless motion . . . that is clearly barred by existing precedent" before raising an issue on appeal).

Dr. Townsend was not required to engage in the theatrics of making a request of the trial court that would have been improper, and that the trial court would have been duty bound to reject.

2. Dr. Townsend Properly Presented Her Argument to the First Court Empowered to Honor it, the Court of Appeals.

This Court has never had occasion to review *Dunning*, *supra*, and its progeny, and has certainly never approved the rule of *Dunning*. That being so, the Court of Appeals was free to reexamine its own precedent, and to conclude that on a proper reading of RCW 26.44.060 Dr. Townsend was entitled to immunity *unless only* she had been convicted of the crime of false reporting (especially given that it does not appear that the *Dunning* Court, or any subsequent opinion of the Courts of Appeal following

Dunning examined or considered the language and structure of the statute as urged by Dr. Townsend). Dr. Townsend twice asked the Court of Appeals to review the matter, in her appeal and on request for rehearing, and the Court of Appeals twice refused to address or decide the issue as presented by Dr. Townsend. The matter is ripe for review by this Court, having been properly presented by Dr. Townsend to the first court with the power to hear and redress her claim.

3. In Any Event, the Trial Court's Ruling In Limine Foreclosed the Issue.

Finally, in fact, Dr. Townsend did make a request that the trial court exclude evidence that trenched upon her privilege. Dr. Townsend accepted that she was going to have to defend the allegations of malpractice to the extent that they were founded on matters of fact not related to the privilege (i.e., related to whether Dr. Townsend met the standard of care), however, she asked the trial court to exclude evidence of her report to Child Protective Services on the ground that this was privileged under two distinct statutes. CP 45-46. The trial court rejected the motion, which effectively disposed of Dr. Townsend's privilege claim. RP. 971-77.

Washington Courts have held that parties who lose motions *in* limine are not required to make further, futile objections. *See, e.g.*,

Garcia, 60 Wash. App. 635, 806 P.2d 766 (Div. 2, 1993), *State v. Ramirez*, 46 Wash. App. 223, 229, 730 P.2d 98, 102 (1986) ("The rule is that unless the trial court indicates further objections are required when making its ruling, its decision is final and the party losing the motion in limine has a standing objection.") (citing *State v. Kelly*, 102 Wash.2d 188, 685 P.2d 564 (1984)), *State v. Sullivan*, 69 Wash. App 167, 847 P.2d 953 (Div. 2, 1993) (a criminal case discussing exclusion of evidence and general rule allowing a standing objection to the introduction of evidence to the party losing the motion in limine to exclude the evidence).

4. The Court Has Broad Discretion in Determining its Scope of Review

Even had Dr. Townsend failed completely to preserve the issue, this Court has extremely broad discretion in deciding whether an issue was sufficiently preserved to permit appellate review. *See*, 4 Wash. Prac., Rules Practice CR 51 (6th ed.). RAP 2.5 states that "the appellate court *may* refuse to review any claim of error which was not raised in the trial court." Wash. R. App. P. 2.5 (a), (emphasis added). RAP 2.5 does not require the appellate court to review or to avoid reviewing any issue. *See e.g. Bennett v. Hardy*, 113 Wash.2d 912, 918, 784 P.2d 1258, 1260 (1990) (holding that "a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first

time on appeal"); *see also Falk v. Keene Corp.*, 113 Wash.2d 645, 659, 782 P.2d 974, 982 (1989) ("An appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision.") (citations omitted).

Given the serious issues of public policy presented in Dr. Townsend's petition, involving the mandate to report suspected abuse to protect children, and the associated immunity to encourage and shelter reporters, the Court should hear the matter even had Dr. Townsend failed completely to raise the issue in the lower courts. *See, e.g., City of Tacoma v. Luvene*, 118 Wash.2d 826, 827 P.2d 1374 (1992) and *State v. Card*, 48 Wash. App. 781, 741 P.2d 65 (Div. 3, 1987) (applying RAP 2.5(a) and entertaining argument that was raised for the first time on appeal).

C. CONCLUSION

Dr. Townsend properly preserved her claim of error in the Court of Appeals' interpretation of RCW 26.44.060 by presenting the issue to the first Court empowered to honor her arguments. The Court of Appeals having refused even to address the issue twice presented to it, this Court should grant Dr. Townsend's petition and correct the lower Court's error in the application of RCW 26.44.060 to Dr. Townsend.

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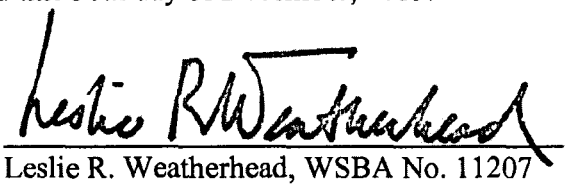
Respectfully submitted this 30th day of December, 2013.



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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 30th day of December, 2013, the foregoing PETITIONER'S REPLY TO RESPONDENTS' RESPONSE was caused to be served to the following:

John Allison Eymann, Allison, Hunter & Jones 2208 West Second Avenue Spokane, WA 99201 (509) 747-0101 ***Attorney for James Henry and Amy Dawn Eskridge***	☒ By Hand Delivery ☐ By U.S. Mail ☐ By Overnight Mail ☐ By Facsimile Transmission ☐ By Email to jdallison@eahjlaw.com

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Attachments: Petitioner's Reply to Respondents' Response 12-30-13.pdf

To the Supreme Court Clerk,

Pursuant to the Protocols for Electronic Filing, please find as an attachment to this email message the Petitioner's Reply to Respondents' Response in the following matter:

Case Name: Darlene Townsend, Ph.D., Petitioner – James Henry and Amy Dawn Eskridge, Respondents
Case Number: 89618-6
Name, phone number, bar number and email address of person filing this document: Leslie R. Weatherhead, (509) 944-4628; WSBA No. 11207, LeslieW@leehayes.com

Thank you.

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