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## I. INTRODUCTION

This case represents a disturbing departure from the statutory mandates of the Uniform Health Care Information Act (UHCIA), which expressly requires that any disclosure of medical information be preceded by the patient’s authorization. “Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient’s interests in privacy, health care, or other interests.” RCW 70.02.005 (emphasis added). Appellant Group Health contends that plaintiffs in putative class actions—*i.e.*, classes that have not been actually certified—are using UHCIA as a discovery toolbox to invade a patient’s privacy for the purpose of enticing and soliciting “potential” class action clients/members.

A trial court abuses its discretion when it allows a plaintiff’s aspiration of class certification to outstrip a patient’s state and federally protected right to keep his/her patient health care information confidential. No Washington law permits a trial court to indiscriminately apply a post-certification notice procedure (from *Wright v. Jeckle*) to this pre-certification case, wherein Group Health is forced to disclose a purported “class list” before the class is actually certified.

Group Health respectfully requests that this Court reverse the trial court's order denying Group Health's protective order protecting the names and contact information of its patients prior to class certification because: (1) the undisputed evidence shows that Group Health's patients' private health care information would be disclosed to third parties in violation of state and federal law; (2) it is unprecedented in Washington and an abuse of discretion for the trial court to compel a "class list" prior to the certification of a class under CR 23; and (3) respondents have ample opportunity to contact Dr. Chawla's former patients through other, lawful means.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in entering the order of December 5, 2008, denying Group Health's motion for a protective order, and ordering Group Health to disclose health care information of its female non-party patients to a third-party mailing agent before the putative class action was certified.
2. The trial court erred in entering the order of January 12, 2009, denying Group Health's motion for reconsideration and/or certification of its December 5, 2008 order.

**B. Issues Pertaining to Assignments of Error**

1. The trial court abused its discretion when it denied Group Health's motion for a protective order to prohibit answering Chavez's discovery request for the names, addresses, telephone numbers and health care information of every female patient who obtained health care from co-defendant Jitesh Chawla at Group Health from August 1, 2005, through March 31, 2006, because Washington's Uniform Health Care Act, and the federal Health Insurance Portability and Accountability Act specifically prohibit releasing such information without the patient's authorization.
2. The trial court abused its discretion when it denied Group Health's motion for a protective order to prohibit answering Chavez's discovery request for the names, addresses, telephone numbers and health care information of every female patient who obtained health care from co-defendant Jitesh Chawla at Group Health from August 1, 2005, through March 31, 2006. It abused its discretion because the putative class has not been certified, and Group Health's female patients have not waived their right to privacy because they are not members of the putative class.

3. The trial court erred by applying the wrong legal standard when it denied Group Health's motion for a protective order for a discovery request and prematurely ordered Group Health to produce a "class list" under the rubric of CR 23 and *Wright v. Jeckle*, 121 Wn. App. 624, 90 P.3d 65 (2004).

### **III. STATEMENT OF THE CASE**

On February 6, 2007, plaintiffs filed an amended complaint against Group Health and Jitesh Chawla, M.D., alleging that Group Health negligently hired, retained, and supervised Dr. Chawla, whom plaintiffs Kari Chavez, Patti Filand, and Alisa Jackson (collectively "Chavez") assert engaged in sexually inappropriate and unprofessional conduct with his patients. (CP 1-22) Chavez filed this case as a putative class action, however, the trial court has not certified a class.

The trial court stayed the civil case on March 30, 2007, while a criminal trial proceeded in Thurston County against Dr. Chawla—a family physician. (CP 33) On August 21, 2008, the Thurston County prosecutor dismissed all criminal charges against Dr. Chawla. (CP 49) After the court lifted the stay in the civil suit, Chavez propounded the following discovery to Group Health that is at issue in this appeal:

**Interrogatory No. 1: Please list the name, address and phone number of every female that saw Jitesh Chawla as a patient at Group Health from August 1, 2005 through March 31, 2006.**

Request for Production No. 1: With regard to the preceding interrogatory, please provide any and all documentation and/or written material containing any information referred to in Defendant's response to that interrogatory.

(CP 53)

The interrogatory answer would divulge the identity of each Group Health patient, her personal contact information, and the fact that she had received treatment at Group Health with Dr. Chawla. Notably, Chavez did not present any signed health care release from Group Health's patients. Moreover, the patients are not parties to this action and have not waived their rights to disclosure of health care information or medical privacy. (CP 34)

Group Health's Executive Director of Risk Management declared under oath that "patient privacy is a matter of enormous concern for Group Health and its patients. Patients stress their demand for privacy in many ways. My department receives frequent questions and grievances from patients about suspected breaches of their medical privacy. The number and frequency of these contacts demonstrate to me that our patients are extremely sensitive to any invasion into the privacy of their health care information." (CP 384-85)

Out of concern for their patients, Group Health moved the trial court for a protective order. (CP 32-45) The trial court denied Group Health's motion and ruled that within 10 days Group Health must provide to a third-party mailing agent a list of the names, addresses, and phone numbers of every female that saw Dr. Chawla as a patient at Group Health from August 1, 2005, to March 31, 2006. (CP 241-43) The order stated that the information "is necessary for purposes of establishing that typicality and commonality exist among the class representatives[.]" (CP 243)

The trial court expressly acknowledged that the information sought in plaintiffs' interrogatory "is health care information protected by federal Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320, 45 C.F.R. § 164 ("HIPAA"), and Washington's Uniform Health Care Information Act, RCW 70.02.005, et seq. ("UHCIA") where it is disclosed directly to Plaintiffs." (CP 242) The trial court also found that "this information [sought in the interrogatory and request for production] is not 'directory information' within the meaning of RCW 70.02.010(2)." (CP 242) However, the trial court found that "the information [sought in the interrogatory and request for production] is not health care information protected by HIPAA and UHCIA where it is disclosed to a third party who

does not know that anything about the persons on the list other than that they are receiving an envelope. (CP 242)

Group Health moved the trial court for reconsideration and/or certification to the Court of Appeals. (CP 321-36) In support of Group Health's motion for reconsideration, Group Health informed the trial court that Chavez had already extensively used other mechanisms to "discover" the identities of potential class members. Plaintiffs orchestrated intense media coverage, press releases, full-page paid legal advertisements, and web sites to publicize the lawsuit and solicit potential class members who were "victim of an inappropriate examination by Dr. Chawla at Group Health." (CP 251)

Specifically, both this lawsuit and the prior (dismissed) criminal prosecutions against Dr. Chawla received intense local media scrutiny. Between October 2006 and September 2008, at least forty-four (44) news stories appeared in newspapers and on television stations throughout Washington and neighboring States, and on internet news outlets. (CP 249-50)

All of these news stories discuss the allegations against Dr. Chawla in detail. (CP 250-307) Many discuss this pending putative class action lawsuit and identify plaintiff's attorney, Thaddeus Martin, by name. (CP 263, 266,



**ATTENTION:**

**FEMALE PATIENTS of GROUP HEALTH**

**Tacoma, did you or your children have an**

**Appointment with**

**Dr. JITESH CHAWLA?**

The department of Health has summarily Suspended Dr. Chawla's medical license for alleged sexual misconduct related to his medical appointments with female patients. A class action lawsuit has been filed against GROUP HEALTH and Dr. Chawla. Dr. CHAWLA has been criminally charged with: Indecent Liberties & 4<sup>th</sup> Degree Assault with Sexual Motivation involving Female Patients.

Contact Attorney **Thaddeus P. Martin** if you have information or believe that you or your children were the victim of an **Inappropriate Examination by Dr.**

**Chawla at Group Health.**

Call (253) 682-3420 or email today: [info@thadlaw.com](mailto:info@thadlaw.com)

This is a paid legal advertisement by Attorney Thaddeus Martin

4002 Tacoma Mall BLVD. Ste 102, Tacoma, WAJ 98409

(CP 316-17)

Moreover, on April 3, 2006, three days after terminating Dr. Chawla, Group Health mailed a letter to all of Dr. Chawla's former patients notifying them of Dr. Chawla's departure and inviting them to contact the clinic with any questions or concerns. (CP 251, 320)

On January 12, 2009, the trial court denied Group Health's motion for reconsideration and refused to certify the issues. (CP 388-90) However, the trial court stayed its original December 5, 2008, order to Group Health (to produce a list of the names, addresses and phone numbers of every female that Dr. Chawla saw as a patient at Group Health from August 1, 2005, to March 31, 2006) for 10 days, or until January 20, 2009, to permit Group Health to seek an emergency stay of enforcement from the Court of Appeals. (CP 389)

Group Health filed a Notice of Interlocutory Discretionary Review (CP 390-406) of two trial court rulings: the December 5, 2008, Order Denying Group Health's Motion for a Protective Order; and the January 12, 2009, Order Denying Group Health's Motion for Reconsideration of the Order Denying the Protective Order, and/or Certification to the Court of Appeals. Group Health also filed a Motion for Interlocutory Discretionary Review, and a Motion for an Emergency Stay.

The Court of Appeals granted Group Health's Motion for an Emergency Stay on January 16, 2009, and on March 2, 2009, Commissioner Schmidt granted Group Health's Motion for Interlocutory Discretionary Review. Commissioner Schmidt ruled that the trial court committed probable error that alters the status quo. See Commissioner Schmidt's Ruling Granting Discretionary Review at 1. Chavez moved to modify the Commissioner's Ruling, which the Court of Appeals denied on June 3, 2009.

#### **IV. SUMMARY OF THE ARGUMENT**

The crux of this appeal is whether the trial court abused its discretion when it denied Group Health's request for a protective order prohibiting disclosure of the name, addresses telephone number, and health care information of every female patient who obtained health care from co-defendant Jitesh Chawla at Group Health from August 1, 2005, through March 31, 2006. Group Health contends that Washington's Uniform Health Care Act, and the federal Health Insurance Portability and Accountability Act specifically prohibit releasing such information without the patient's authorization. The trial court also erred when it denied Group Health's request for a protective order because the putative class has not been certified, and Group Health's female patients have not waived their right to privacy because they are not members of the putative class. Additionally, the trial court erred when it denied Group Health's motion for reconsideration.

Finally, the trial court erred by applying the wrong legal standard when it denied Group Health's motion for a protective order for a discovery request and prematurely ordered Group Health to produce a "class list" under the rubric of CR 23 and *Wright v. Jeckle*, 121 Wn. App. 624, 90 P.3d 65 (2004).

## V. ARGUMENT

### A. The Standard of Review Is Abuse of Discretion and *De Novo*.

Generally, the appellate court reviews a trial court's discovery order for an abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006); *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004). The appellate court also employs the same standard when reviewing a trial court's denial of a motion for reconsideration. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). But if a trial court relied on an improper legal rule to arrive at its decision, an appellate court will remand to the trial court to apply the correct rule. *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 419-420, 204 P.3d 944 (2009), citing *Dreiling*, 151 Wn.2d at 907. The appellate court reviews questions of law *de novo*. *McCallum*, 149 Wn. App. at 419, citing *Dreiling*, 151 Wn.2d at 908.

Accordingly, Group Health contends that the trial court abused its discretion when it denied a protective order to Group Health's patients—who are not parties to this case, nor have authorized disclosure of their health care information. Group Health also contends that the trial court abused its discretion when it denied Group Health's motion for reconsideration.

Finally, the trial court relied on an improper and novel legal rule, which this Court reviews *de novo*. Specifically, the trial court employed post-class certification guidelines set forth in CR 23 and interpreted in *Wright v. Jeckle*, 121 Wn. App. 624, 90 P.3d 65 (2004) to this pre-class certification case involving a CR 26 discovery request for private health care information of non-parties. There is no clear authority permitting the trial court to order pre-certification mailings to potential class members when Group Health's patients' privacy rights are affected or violated.

**B. The Scope of Discovery and the Issuance of Protective Orders Is Governed by CR 26(c).**

CR 26(c) provides in pertinent part as follows:

(c) *Protective orders* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,

including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery[.]

CR 26(c) (emphasis added). This Court stated in *McCallum*, 149 Wn. App. at 422-24, that “a party seeking a protective order bears the burden of showing good cause for each particular document it seeks to protect. To establish good cause, the party must show that specific prejudice or harm will result if no protective order is granted. Unsubstantiated allegations of harm will not suffice” (citations omitted).

In deciphering the meaning of “good cause shown” within CR 26(c), this Court in *McCallum* relied on *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff’d*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984), wherein the Washington Supreme Court stated as follows:

In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. The judge’s major concern should be the facilitation of the discovery process and the protection of the integrity of that process, which necessarily involves consideration of the privacy interest of the parties and, in the ordinary case at least, does not require or condone publicity.

*McCallum*, 149 Wn. App. 423 (quoting *Rhinehart*, 98 Wn.2d at 256); *see also Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778- 79, 819 P.2d 370

(1991) (stating that in exercising its discretion to grant a discovery protective order, a trial court must identify and weigh the comparative and compelling public and private interests of the parties). This Court stated that the “United States Supreme Court affirmed, reiterating that ‘[a]lthough [CR 26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.’” *McCallum*, 149 Wn. App. at 423 (quoting *Rhinehart*, 467 U.S. at 35 n.21); *see also T.S.*, 157 Wn.2d at 430-31; *Doe*, 117 Wn.2d at 780-89.

This Court should reverse the trial court’s order denying Group Health’s motion for a protective order because the trial court abused its discretion by permitting Chavez access, even indirectly, to a list of Group Health’s patient’s names and addresses before any putative class has been certified. No case in Washington authorizes pre-certification disclosure.

As the Supreme Court stated in *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 428-29, 138 P.3d 1053 (2006), when a trial court considers a discovery request under CR 26(b)(1), the court considers the relevance of the requested discovery only after making the threshold determination of whether a privilege shields the matter from disclosure: “Parties may obtain discovery

regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action” (emphasis added). Washington commentators have explained that “[p]rivilege, within the meaning of the Rule, is privilege as it exists in the law of evidence.” *Id.* at 428. For example, among the privileges included in the nonexclusive list in ER 501 are the statutory attorney-client, doctor-patient, priest-penitent, and psychologist-client privileges, as well as the statutory spousal privilege and the common law news reporter’s privilege. As this court observed in *State v. Maxon*, 110 Wn.2d 564, 756 P.2d 1297 (1988), “[p]rivileges are recognized when *certain classes of relationships, or certain classes of communications within those relationships*, are deemed to be so important to society that they must be protected, even at the expense of the fact-finding process in criminal investigations and prosecutions.” *Id.* at 567 (emphasis added).

**C. The Superior Court Abused its Discretion by Failing to Protect Group Health’s Patient’s State and Federal Right to Privacy of Their Medical Information.**

The trial court abused its discretion by failing to enter a protective order preventing Group Health from being forced to violate the privacy rights of its female patients of Group Health by disclosing the name, address and telephone number of every female who was a patient of defendant Jitesh Chawla at Group Health from August 1, 2005, through March 31, 2006.

Upon a showing of good cause, the Court may issue an order protecting a party from annoyance, oppression, or undue burden or expense by limiting the scope of discovery that may be obtained. CR 26(c). A protective order may include, for example, one of the following limitations: (1) not allowing the discovery to be had; (2) that the discovery may be had only on specified terms and conditions; or (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery. CR 26(c).

The privacy of many female patients will be violated if Group Health is forced to divulge its patients' health care information without their written consent. The party moving for a protective order may demonstrate good cause by showing that this harm can be avoided without impeding the discovery process. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 256, 654 P.2d 673 (1982). Here, this harm could be avoided without impeding the discovery process because Chavez has already relied extensively on newspaper, radio, television, cable, radio, press releases, and/or internet websites to solicit the identify of Group Health patients who saw Dr. Chawla. (CP 254-314) Accordingly, potential class members have already been solicited.

As a preliminary matter, Chavez has never explained why she cannot obtain contact information (to presumably certify a class) through less intrusive, but legally appropriately methods of media, newspaper, radio,

television and the internet. Between October 2006 and September 2008, at least forty-four (44) news stories and three press releases appeared in local newspapers, on local television stations, and on internet news outlets about this lawsuit and the criminal charges against Dr. Chawla (which were subsequently dismissed). Many stories discussed this pending putative class action and mentioned Chavez's attorney by name. Group Health has also notified all of Dr. Chawla's former patients, by letter, of his departure from Group Health. The Court should confine Chavez to these lawful means, rather than requiring Group Health to unlawfully disclose its patients' private health care information.

Indeed, Chavez's attorney paid for full-page legal advertisements in Tacoma and Olympia newspapers stating in bold capital letters and underlines: "**ATTENTION: FEMALE PATIENTS OF GROUP HEALTH Tacoma, did you or your children have an Appointment with Dr. Jitesh Chawla?**" (CP 317) The full-page legal advertisement states "**A class action lawsuit** has been filed against GROUP HEALTH and Dr. Chawla." (CP 317) "Contact Attorney **Thaddeus P. Martin** if you have information or if [sic] believe that you or your children were the **victim** of an **Inappropriate Examination by Dr. Chawla at Group Health.**" (CP 317) This is a direct solicitation for potential class members to join Chavez's

putative class action, without violating the female patients' health care privacy.

Moreover, Group Health notified all of Dr. Chawla's former patients, by letter dated April 6, 2006, of his departure from Group Health. (CP 320) Group Health apologized for the inconvenience and provided contact information (names and telephone numbers) if the former patients had questions. (CP 320)

In *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9<sup>th</sup> Cir. 1985),<sup>1</sup> the Ninth Circuit affirmed the court's denial of plaintiff's motion to compel request for production of putative class members' names "to solicit support" for a plaintiff's efforts to certify a class. Here, the trial court abused its discretion by denying Group Health's motion for a protective order because Chavez has invoked, and may continue to invoke, alternative lawful methods for obtaining the discovery they seek. CR 26(c)(3).

Moreover, the trial court failed to properly balance the interests of the parties in determining whether a protective order was appropriate. CR 26(c) allows the trial court to exercise broad discretion in managing the discovery process so as to implement the goal of full disclosure of relevant information while affording the participants protection against harmful side effects. *Rhinehart*, 98 Wn.2d at 233. In this case, Group Health's female patients are

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<sup>1</sup> *Hatch v. Reliance Ins. Co.* is at CP 60-67.

not participants in this lawsuit—they are innocent bystanders who have not waived the physician-patient privilege set forth in RCW 5.60.060(4)(b). None of the patients have signed a consent form allowing Group Health to release to plaintiffs, third-parties, or any other entity their names, addresses, and telephone numbers, and by implication, the fact that they have been treated at Group Health by Dr. Chawla.

**D. The Superior Court Abused its Discretion by Denying Group Health’s Motion for Protective Order and Ordering Group Health to Disclose Patient Information in the Absence of the Patient’s Written Authorization and in Direct Violation of State and Federal Disclosure Laws that Guard Against Harmful Side Effects of Unauthorized Disclosure.**

The trial court abused its discretion by denying Group Health’s motion for a protective order, and by ordering Group Health to identify the name, address, and telephone number of all female patients who saw Dr. Chawla as a patient of Group Health from August 1, 2005 to March 31, 2006. The personal contact information indicates to the public that the patient sought and received medical treatment. Chavez’s discovery request is a perfect example of the type of information that the federal Health Insurance Portability and Accountability Act (“HIPAA”) and Washington’s Uniform Health Care Information Act (“UHCIA”) are designed to protect from disclosure.

Both HIPAA and UHCIA place heavy burdens on a health care provider to avoid the disclosure and unauthorized use of patients' private health care information. In many respects, these two statutory schemes are parallel with regard to protecting private patient information. The federal protection of HIPAA provides that if state law is more protective than a provision of HIPAA, then state law will apply. 42 U.S.C. § 1320d-2 note (§ 264(c)(2)). Here, Washington's UHCIA is more protective than the federally-enacted HIPAA in many areas, and therefore, provides even greater protection to patients against unauthorized disclosures.

The UHCIA, enacted in 1991, strictly governs the disclosure of health care information and medical records. The UHCIA is intended to protect highly personal information regarding medical care, to encourage free communication between patients and providers, and to afford "clear and certain rules" for the disclosure of patient information. The "findings" section of the UHCIA states:

Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests.

\* \* \*

In order to retain the full trust and confidence of patients, health care providers have an interest in assuring that health care information is not improperly disclosed and in having clear and certain rules for the disclosure of health care information.

RCW 70.02.005(1) and (3). These rules also extend to non-health care providers, which include the trial court, counsel, and third-parties (such as mailing agent Garden City Group), should Group Health's patients' records be disclosed: The "public policy of this state" is that "a patient's interest in the proper use and disclosure of the patient's health care information survives," even in the hands of a non-health care provider. RCW 70.02.005(4). "These findings show the importance of the substantive rights that patients and health care providers have under the Health Care Information Act." *Wynn v. Earin*, 163 Wn.2d 361, 372, 181 P.3d 806 (2008) (holding that the Health Care Information Act prevails over the common law witness immunity rule, and that the Health Care Information Act provides substantive rights to patients and health care professionals regarding disclosure of health care information, and enforcement of these rights is within the legislature's province).

In this case, the trial court mandated that there would be a large number of patients who would open a letter signed by Chavez's attorney, on the attorney's letterhead, which informs them that they have been identified as a former patient of a particular healthcare provider by name. The only conclusion that a patient receiving that letter could possibly draw is that

Group Health has provided her name and address to someone without her prior knowledge or consent. That is the only logical conclusion that a patient would be able to reach based on the “discovery” procedure ordered by the trial court.

The Legislature did not enact UHCIA as a litigation or discovery tool, but rather to underscore and enhance the privacy protections afforded to patients. There is no statutory authority under which a plaintiff in a civil action is entitled to obtain the health care information or medical records of non-party patients without those patients’ written authorizations.

Further, under both HIPAA and UHCIA, **absent an authorization from the patient**, a health care provider is prohibited from releasing a patient’s private health care information. *See* RCW 70.02.020; 45 C.F.R.

164. RCW 70.02.020(1) expressly states as follows:

(1) Except as authorized in RCW 70.02.050, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization.

RCW 70.02.020(1) (emphasis added). There are limited exceptions for patient safety, treatment by other health care providers, and research. *See*

RCW 70.02.050; 45 C.F.R. 164. Notably, **not one of these exceptions applies to litigation.** RCW 70.02.060 provides the only other statutory authority in UHCIA for obtaining patient healthcare information without the patient's authority. Under RCW 70.02.060, a patient's records can be obtained with the required notice to the patient and the healthcare provider (with the opportunity to seek a protective order to prevent disclosure). Chavez's discovery request disregards both the letter and the spirit of these privacy statutes.

Significantly, a plaintiff who files a personal injury lawsuit must provide signed authorizations for the disclosure of his/her own health care information and medical records. Thus, if Group Health were required to disclose other patients' health care information, individual patients who are not parties to this lawsuit would have *fewer* rights and protections attached to their health care information and medical records than the plaintiffs in this action who have voluntarily placed their own health at issue.

**E. No Health Care Information May Be Disclosed Absent the Patient's Written Authorization.**

The UHCIA's statutory requirements for disclosing a patient's health care information states:

Except as authorized in RCW 70.02.050, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization.

RCW 70.02.020 (emphasis added). The Act defines “health care” as “any care, service, or procedure provided by a health care provider: (a) To diagnose, treat, or maintain a patient’s physical or mental condition; or (b) That affects the structure of any function of the human body.” RCW 70.02.010(5)(a)-(b). Additionally, the Act defines “[h]ealth care information” as “any information, whether oral or recorded in any form or medium that identifies or can readily be associated with the identify of a patient and directly relates to the patient’s health care[.]” RCW 70.02.010(7). Accordingly, any patient “list” must be generated from the patient’s file, and by virtue of the disclosure indicate that there was “health care” provided. The statute is unequivocal that *absent patient authorization* any disclosure that “identifies” a patient, such as her name and that relates to any “care, service, or procedure,” such as any medical treatment, may not be revealed. *See also* Commissioner Schmidt’s Ruling Granting Discretionary Review at 5.

In *Doe v. Group Health Coop.*, 85 Wn. App. 213, 932 P.2d 178 (1997) (overruled on other grounds by *Reid v. Pierce Co.*, 136 Wn.2d 195, 961 P.2d 333 (1998)), the court held that disclosing the fact that a patient may

have received mental health services violated RCW 70.02.020. In *Doe*, Group Health revealed a plaintiff's name and consumer number in a training program for Group Health trainees learning how to operate the claim-processing system. *Id.* at 215. None of the trainees was able to access any of Doe's actual treatment history, however, the court held that reasonable jurors could infer from the context of the disclosure that Doe received mental health treatment. This inference, alone, violated the statute. *Id.* at 217-18. Here, as in *Doe*, the fact that female patients received medical treatment from Group Health is dispositive on the issue of improper disclosure.

**F. The Trial Court Abused Its Discretion Because the Exceptions to Prohibiting Disclosure of Confidential Patient Information Without Patient Authorization Do Not Apply.**

RCW 70.02.050(1)-(2) contains the sole exceptions to disclosing confidential patient information without patient authorization. None applies in the case at bar. RCW 70.02.050(1)-(2) states in relevant part:

(1) A health care provider or health care facility may disclose health care information . . . without the patient's authorization . . . if the disclosure is: (j) To provide directory information, unless the patient has instructed the health care provider or health care facility not to make the disclosure . . . (2) A health care provider shall disclose health care information about a patient without the patient's authorization if the disclosure is: (d) Pursuant to compulsory process in accordance with RCW 70.02.060.

RCW 70.02.050(1)-(2). Here, the information that Chavez requests is not “directory information.” In fact, the trial court specifically found that the information sought in Plaintiff Kari Chavez’s First Set of Interrogatories and Requests for Production “is not ‘directory information’” as it is defined in RCW 70.02.010(2). (CP 242) Further, Chavez has not complied with the notice provisions of RCW 70.02.060 for compulsory process. Significantly, RCW 70.02.060 compels disclosure only after “advance notice to the health care provider **and the patient** or the patient’s attorney involved through service of process[.]” RCW 70.020.060 (emphasis added). The purpose of the notice is to allow the patient time to obtain a protective order.

**G. The Trial Court Abused Its Discretion by Ordering a Pre-Class Certification Mailing to Potential Class Members Where Patient Privacy Interests Are Affected.**

As a preliminary matter, Chavez has never certified a “class” so any disclosure of Group Health’s patients’ health care information is premature, at best. Here, the trial court abused its discretion, “[g]iven that there is no clear authority allowing the trial court to order a pre-certification mailing to potential class members where patient privacy interests may be affected[.]” Commissioner Schmidt’s Ruling Granting Discretionary Review at 5.

A plaintiff may not obtain a “class list”—such as the one she essentially seeks here—before and until a class is certified because no class has been certified (and there is not likely to be one here, in any event). *Morlan v. Universal Guar. Life Ins. Co.*, 298 F.3d 609, 616 (7<sup>th</sup> Cir. 2002) (“Until certification there is no class action but merely the prospect of one; the only action is the suit by the named plaintiffs.”)<sup>2</sup>

Generally, the law does not require a defendant to provide the names of class members prior to certification of a class. Rather, class actions proceed on the premise that the representative plaintiffs can establish the claims of the class without resort to testimony from absent class members. For that reason, absent class members almost by definition do not have information that would be relevant to prosecution of class claims. In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, 2391, 57 L. Ed. 2d 253 (1978), the United States Supreme Court held that, outside the *post-certification* class notice context, the production of class members’ names normally was not “within the scope of legitimate discovery.”<sup>3</sup>

Throughout briefing in the trial court, Group Health and Chavez have relied on *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, 57 L.

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<sup>2</sup> *Morlan v. Universal Guaranty Life Ins. Co.* is at CP 69-78.

<sup>3</sup> *Oppenheimer Fund, Inc. v. Sanders* is at CP 81-98.

Ed. 2d 253 (1978) in support of their respective arguments. Notably, *Oppenheimer Fund* is a post-certification case involving a class of purchasers in an investment fund, a management corporation, and a brokerage firm. *Id.* at 2383. Accordingly, there are no privacy expectations or statutory protections involved, and the class was already certified. The facts involved whether names and addresses could be released to provide written notice to the certified class under Fed. Rule Civ. Proc. 23(d) (class actions).

Group Health relies on *Oppenheimer Fund* for the Supreme Court's holding that outside the *post-certification* class notice context, the production of class members' names normally is not within the scope of legitimate discovery. *Id.* at 2388-89. The Ninth Circuit relied upon *Oppenheimer Fund*, noting that the "Court examined the power of a district court to order class-action defendants to assist in compiling a list of members of the plaintiff class. Rejecting the Second Circuit's approach, the Court found power for such an order, not in the discovery rules, but in Fed. R. Civ. P. 23." *In re Victor Technologies Sec. Litigation*, 792 F.2d 862, 865 (9<sup>th</sup> Cir. 1986).

In fact, the Supreme Court in *Oppenheimer Fund* states that the "issues in this case arise because of the notice requirement of Fed. Rule Civ. Proc. 23(c)(2)." *Oppenheimer Fund*, 98 S. Ct. at 2383. The Court held that

class action Fed. Rule Civ. Proc. 23(d), *not the discovery rules*, was “the appropriate source of authority for the District Court’s order directing petitioners to help compile the list of class members.” *Id.* at 2384. This occurred after the class had been properly certified. *Id.* at 2387.

In contrast, Chavez has consistently relied on *dicta* in footnote 13 in *Oppenheimer Fund* for the notion that she is fully entitled to Group Health’s patients’ contact information because it is purportedly a source of discovery. *Id.* at 2389 n.13. First, footnote 13 is *dicta*—it is not the Court’s holding or analysis. Second, the *dicta* references an annotated article in 24 A.L.R. Fed. 872 (1975). In the article, the author summarizes that some courts allow discovery to help the plaintiff establish class certification *and some courts deny discovery to be utilized in this manner*. 24 A.L.R. Fed. at 877. Group Health respectfully submits that the key holding upon which Group Health relies in *Oppenheimer Fund* is more persuasive than *dicta* relied upon by Chavez in footnote 13.

The great weight of law stands for the proposition that until a class is certified, putative class members should not have their privacy interests violated, and a defendant should not be put in the untenable position of participating in essentially unilateral communications with prospective clients

by plaintiff's counsel. (This is especially true where, as here, class certification of emotional distress claims is not possible.)

Consistent with *Oppenheimer Fund*, courts ordinarily refuse to allow discovery of class members' identities at the precertification stage out of concern that plaintiffs' attorneys may be seeking such information to identify potential new clients, rather than to establish the appropriateness of certification. *See Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9<sup>th</sup> Cir. 1985) (affirming denial of a request for production of the names of putative class members "to solicit support" for a plaintiff's effort to certify a class). The proposition is well-settled and generally recognized. *See also 2 McLaughlin on Class Actions* § 11.1, at 11-4 (4<sup>th</sup> ed. 2007) ("In order to avoid converting the class action mechanism into a tool to identify potential new clients, courts ordinarily will not permit putative class counsel to obtain discovery of class members' identities at the precertification stage.") (citations omitted); *Federal Civil Procedure Before Trial*, § 10:742 (Rutter Group 2007) ("Courts generally refuse to allow discovery of class members' identities at the precertification stage out of concern that plaintiffs' attorneys

may be seeking such information to identify potential new clients, rather than to establish the appropriateness of certification.”)<sup>4</sup>

Here, the trial court simply allowed plaintiffs to “file a complaint, claiming to represent a class whose preliminary scope is defined by [them], and by that act alone obtain a court order which ... requires discovery concerning members of that class.” *Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 268 (D. Colo. 1990)<sup>5</sup> (holding that “I cannot accept the extraordinary assertion that an aggrieved party can file a complaint, claiming to represent a class whose preliminary scope is defined by him, and by that act alone obtain a court order which conditionally determines the parameters of the potential class and requires discovery concerning the members of that class.”) In *Shushan*, the court required that plaintiffs prove that they could satisfy the requirements of CR 23 before the court would

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<sup>4</sup>See also *In re Air Disaster Near Honolulu, Haw.*, 792 F. Supp. 1541, 1551 (N. D. Cal. 1990) (rejecting request by plaintiffs for production of the list of airline passengers; “short of plaintiffs satisfying the requirements for class certification ... it is not appropriate for this court to help plaintiffs’ counsel round up more clients); *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 342 (N.D. Ill. 1995) (plaintiffs not entitled to loan files without redacted addresses); *Flanigan v. Am. Fin. Sys. of Ga.*, 72 F.R.D. 563, 563 (M.D. Ga. 1976) (“Rule 23 should not be used as a device to enable client solicitation”); *Crabtree v. Hayden, Stone Inc.*, 43 F.R.D. 281, 283 (S.D.N.Y. 1967) (“the purpose of the pre-trial discovery rules ... is to enable the parties to prepare for trial with respect to their own bona fide existing claims, not to determine whether third parties may have similar claims”).

<sup>5</sup>*Sushan v. Univ. of Colorado at Boulder* is at CP 100-07.

“consider the question of notice under the guidelines set forth in rules 23(c) and 23(d)[.]” *Id.* at 268.

Here, the trial court effectively put Group Health in the impossible position of defending “[an] omnibus class action prior to any determination that the action [is] maintainable as such.” *Stewart v. Winter*, 669 F.2d 328, 332 (5<sup>th</sup> Cir. 1982).<sup>6</sup> Rather, plaintiffs must prove, as a condition-precedent, that they have certified the class. This is especially true where, as here, the pre-certification discovery invades the patient’s medical privacy.

As Washington Court of Appeals Commissioner Schmidt noted, the trial court erred by relying on *Wright v. Jeckle*, 121 Wn. App. 624, 90 P.3d 65 (2004). *Wright* involves *post*-certification class-notice procedures and had nothing to do with discovery or pre-certification contact with putative class members. *Id.* at 627-28. Chavez previously argued, without any basis, that the status of the class did not factor in the *Wright* court’s decision. This is incorrect. *Wright*—a case accepted on discretionary review—was governed solely by CR 23 (class actions) wherein the class had been certified already, and the only issue was how to correctly give notice to absent class members. In the case at bar, Chavez seeks to give notice under CR 26 (discovery rules) to a group of people who are not legally entitled to notification of a class

action—because there is no class. In sum, forcing Group Health to disclose its patients’ health care information to Chavez prior to her obtaining class certification is wholly premature.

**H. The Trial Court Erred by Ordering Group Health to Violate Its Patients’ Privacy, and Requiring that a Class List Be Produced Before Certifying a Class.**

Group Health’s patients’ health care information is protected by HIPAA and the UHCIA. While Washington has not decided the issue—many jurisdictions prohibit defendants from producing a list to solicit potential class members prior to class certification.

The proper mechanism for obtaining a “class list” of potential class members, and then sending notice to each member, is through the court’s notice powers arising under CR 23, after class certification, and not through CR 26 or CR 34. Otherwise defendants are forced to defend a class action suit before the court has properly certified one. *Stewart v. Winter*, 669 F.2d 328, 332 (5th Cir. 1982). There is not a single published Washington decision permitting production of a “class list” before a “class” exists.<sup>7</sup> *See Oppenheimer Fund*, 437 U.S. at 354, n.23 (“Our conclusion that Rule 23(d), not the discovery rules, is the appropriate source of authority is supported by

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<sup>6</sup> *Stewart v. Winter* is at CP 109-22.

<sup>7</sup> In this case, Chavez has repeatedly relied on trial court orders from Franklin County Superior Court, among a few others, ordering healthcare defendants to produce a class list before a class is actually certified. However, these trial orders are neither binding nor persuasive. They are not the law in Washington and it is erroneous for Chavez and other trial courts to rely upon them. Commissioner Schmidt noted that the trial court orders “are of limited precedential value because they are still proceeding in the trial court.” Commissioner’s Ruling Granting Discretionary Review at 4 n.1.

the fact that, although a number of courts have ordered defendants to help identify class members in the course of ordering notice, few have relied on the discovery rules”).

Group Health anticipates that Chavez will rely on a California case, *Pioneer Electronics, Inc. v. Superior Ct. of Los Angeles County*, 40 Cal. 4th 360, 150 P.3d 198 (2007). Such reliance is misplaced because it expressly excludes production of the type of information sought in this case prior to class certification.

In *Pioneer*, after buying a defective DVD player, Patrick Olmstead brought a putative class action against the manufacturer on behalf of other consumers. *Id.* at 364. In pre-certification discovery, it was revealed that the manufacturer had received approximately 700-800 consumer complaints about the defective DVD player. *Id.* at 364-66. Plaintiff requested those complaints, which the manufacturer produced only after redacting the complaining customers’ names and addresses. *Id.* at 364. Plaintiff moved to compel production of the unredacted complaints, arguing he “*needs* this information from the seller to facilitate communication with potential class members.” *Id.* at 363-64 (italics added). Over the manufacturer’s privacy concerns, the trial court directed the manufacturer to send “opt-out” letters to the *complaining* consumers describing the lawsuit and offering the opportunity to avoid having their identities disclosed to the plaintiff. *Id.* at 364-65. The California Supreme Court found that the trial court’s limited

pre-certification discovery plan was not an abuse of discretion, *id.* at 372, but with reasoning clearly distinguishable from the instant case in at least three important respects.

First, the *Pioneer* court found that a consumer's privacy interest in her electronics purchases is fundamentally less compelling than a patient's privacy interest in her personal medical information. Second, the scope of pre-certification discovery allowed by the *Pioneer* court was significantly narrower than the pre-certification discovery contemplated here. In *Pioneer*, the court directed that notice letters be sent -- not to *all* consumers of the defective DVD player -- but rather *only* to those approximately 700-800 consumers *who had previously identified themselves* in written complaints to the manufacturer. Third, pre-certification discovery allowed by the *Pioneer* court followed a significantly more cautious procedural course than the pre-certification discovery contemplated by the trial court's 12/05/08 Order in the case at bar. (CP 241-43) In *Pioneer*, even after the potential class members had identified themselves in written complaints to the manufacturer, the court nonetheless did not allow plaintiff to contact those self-identified consumers without their consent. Rather, the *Pioneer* court directed that the manufacturer first send those potential class members an opt-out letter.

In balancing consumers' privacy interests against Mr. Olmstead's "need" for pre-certification discovery, the only privacy "rights" considered by

the *Pioneer* court were those owed at large under that state's constitution. *Id.* at 370. Here, by stark contrast, the UHCIA expressly forbids Group Health from releasing patients' protected health care information without the patient's detailed<sup>8</sup> written consent.

**I. Even if Pre-Certification Letters to Potential Class Members Is Permitted Under *Wright v. Jeckle*, the Trial Court Erred by Approving of the Letter and Envelope Because They Violate the Standards Set Forth in *Wright*.**

Commissioner Schmidt's Ruling Granting Discretionary Review underscores the trial court's error of denying Group Health's motion for a protective order when there is no clear authority allowing a trial court to order pre-certification mailing to potential class members where patient privacy interests may be affected, even using the process approved in *Wright v. Jeckle*, 121 Wn. App. 624, 90 P.3d 65 (2004) (a post-certification case governed by CR 23). *See* Commissioner's Ruling Granting Discretionary Review at 5.

Additionally, Commissioner Schmidt correctly explains that even if pre-certification mailings to potential class members is permitted under

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<sup>8</sup>“To be valid, a disclosure authorization to a health care provider or health care facility shall: (a) Be in writing, dated, and signed by the patient; (b) Identify the nature of the information to be disclosed; (c) Identify the name and institutional affiliation of the person or class of persons to whom the information is to be disclosed; (d) Identify the provider or class of providers who are to make the disclosure; (e) Identify the patient; and (f) Contain an expiration date or an expiration event that relates to the patient or the purpose of the use or disclosure.” RCW 70.02.030(3).

*Wright* (which Group Health disputes), then the letter and envelope approved by the trial court in this case violate the standards set forth in *Wright* because: (a) the proposed letter gives the typical patient the impression that Group Health provided her name and address to plaintiffs' attorneys; (b) nothing informs her that the names and addresses were provided to mailing agent Garden City Group, to be placed in sealed envelopes prepared by Group Health, without Garden City Group knowing the content of the envelopes; (c) nothing informs her that her name and address has not been provided to plaintiffs' attorneys; and (d) the proposed envelope misleadingly states that the sender of the letter is the trial court, when in fact, the sender is mailing agent Garden City Group. *See* Commissioner Schmidt's Ruling Granting Discretionary Review at 5-6. "Thus, given that patients would receive the impression that Group Health had disclosed their health care information to Chavez's attorneys, the trial court committed probable error in approving the letter and envelope proposed by Chavez." Commissioner Schmidt's Ruling Granting Discretionary Review at 6.

Even the trial court in this case expressed doubt about the procedure it subsequently approved. Chavez's attorney explained how the pre-certification "class list" would be sent to an independent third party along with the mailing

envelopes, such that “you will effectively segregate the two parts of healthcare information, the parts that identify the patient and the fact that they actually had been in treatment.” RP at 16:6-12 (Oct. 24, 2008). The trial court stated as follows:

But isn't there another problem with this? Isn't there the problem of people getting letters from somebody saying, Gee, do you have any complaints or do you have any issue with the care that Dr. So and So gave you? Doesn't that appear a bit intrusive? I don't want to think that there are people out there looking into my healthcare issues, especially a bunch of lawyers. That's not the kind of letter you want to receive. Isn't it a legitimate concern that [Group Health's counsel] is raising about the intrusiveness and the whole idea behind HIPAA and that people need to feel protected as well as be protected.

RP at 16:14-25 (Oct. 24, 2008) (emphasis added). In this case, the trial court abused its discretion by denying Group Health's motion for a protective order, when Group Health urgently wanted its patients to feel protected as well as be protected.

## VI. CONCLUSION

For the reasons set forth above, Group Health respectfully requests that the Court reverse the trial court's order commanding Group Health to violate its patients' privacy, absent written authorization, and commanding Group Health to produce a list containing the identify and healthcare information of its female patients before the putative class has been properly

certified. The trial court abused its discretion, and also applied the wrong legal standard to the facts in this putative class action case.

Dated this 13 day of July, 2009.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.



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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on the 13<sup>th</sup> day of July, 2009, I caused to be served a true and correct copy of the foregoing via electronic mail and legal messengers addressed to the following:

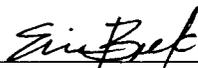
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