

No. 78247-4

SUPREME COURT OF THE STATE OF WASHINGTON

PARDNER WYNN,

Respondent,

v.

JOLENE EARIN AND JOHN DOE EARIN,
as Husband and Wife and Their Marital Community,

Petitioners.

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PETITIONERS' SUPPLEMENTAL BRIEF

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I. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding: (a) that the absolute witness immunity rule “does not apply to information acquired by a witness in a prelitigation confidential professional relationship that was formed for nonlitigation purposes;” and (b) that the Uniform Health Care Information Act (UHCIA), RCW Ch. 70.02, abrogated the absolute witness immunity rule for treating health care providers with respect to information acquired during treatment for nonlitigation purposes?

2. Is a treating health care provider who testifies as a witness in a court proceeding (especially without any objection from his or her patient based on confidentiality, privilege, or alleged noncompliance with the UHCIA) absolutely immune from liability based on that testimony?

3. Was Ms. Earin’s disclosure of confidential information acquired in counseling sessions with Mr. Wynn while testifying as a witness in the Wynns’ custody trial authorized, and did Mr. Wynn waive any objections to such disclosure that he might otherwise have had, where Mr. Wynn, even apart from his pre-trial conduct, failed to object to Ms. Earin’s being sworn as a witness at trial despite advance notice that Mrs. Wynn intended to call her, and failed to object on grounds of confidentiality, privilege, or the UHCIA to any question asked of Ms. Earin at the trial?

II. STATEMENT OF THE CASE

Jolene Earin, a licensed counselor, RP 589-93, 773, saw Pardner Wynn and his then wife, Cynthia Wynn, for joint and individual marital counseling sessions. RP 601-03; CP 297-99. The Wynns became embroiled in a bitter and contentious divorce and custody battle. See CP 387-88, 391. Ms. Earin also saw the Wynns' three children to help them deal with their parents' separation and divorce. CP 268-69; RP 379, 603.

A. Wynn v. Wynn.

In connection with the custody dispute, both Mr. and Mrs. Wynn signed "Consent and Waiver" forms authorizing a court-appointed guardian ad litem (GAL) to have access to "all information requested, whether written or oral, from . . . any . . . doctor, nurse, or other health care provider, psychologist, psychiatrist, . . . [or] mental health clinic . . . without further written release" The forms provided that: "This consent and waiver is intended to allow the [GAL] to disseminate any . . . mental health history" CP 458, 459. Mr. Wynn then wrote a letter to the GAL, suggesting that she contact several people, including Ms. Earin, about the children and him. RP 483-484.

Unhappy with observations attributed to Ms. Earin in the GAL report, CP 461-464, and hoping to find information to impeach Ms. Earin or the GAL report, CP 517, Mr. Wynn, in the summer of 2000 (with an

approaching September custody trial date), subpoenaed Ms. Earin to appear for deposition and to produce the records of the Wynns' joint and private counseling sessions. RP 628-30.

Mrs. Wynn, citing the UHCIA, RCW Ch. 70.02, moved for a protective order seeking to bar production to Mr. Wynn of Ms. Earin's records of her private counseling sessions. CP 540. Mr. Wynn opposed the motion, claiming initially that the UHCIA did not apply to Ms. Earin because she had not shown that she qualified as a "health care provider." CP 281-282. On August 14, 2002, an order was entered directing Ms. Earin to produce all records of counseling with either party "up until the time she began exclusively counseling Mrs. Wynn," and allowing Mr. Wynn to reapply to the court during the deposition for production of Mrs. Wynn's later individual counseling records to the extent they were shown to be the basis for Ms. Earin's statements to the GAL. CP 546.

At the deposition that followed on August 21, 2000, CP 480-529, Ms. Earin was unable to produce records of the Wynns' counseling sessions because they had been stolen from her car on August 11. CP 494. When Mr. Wynn's lawyer began to ask questions about Mr. Wynn's contact with Ms. Earin, Mr. Wynn's lawyer, in response to inquiry by Ms. Earin's lawyer, stated that Mr. Wynn was waiving any privilege with respect to his counseling sessions. CP 483. When a dispute arose as to

whether Mr. Wynn's counsel could ask Ms. Earin about "the content of any discussions . . . with Mrs. Wynn during the time that both parties were seeing [Ms. Earin]," CP 507, the parties contacted a commissioner to resolve the dispute, see CP 505-523.

Mr. Wynn's counsel asserted that Ms. Earin had to testify "concerning all of the sessions with respect to either party," at least until "the joint counseling turned into individual counseling." CP 505. She contended that the records theft "does not prevent [Ms Earin] from communicating about the course of conversation to the best of her recollection . . .," and that "[o]nce the records are found not to be protected by confidentiality the sessions are not protected by confidentiality" CP 512-513. She insisted that the law "does not protect individual sessions within a course of joint counseling." CP 517; see also CP 518.

The commissioner instructed the parties to take the matter up with Judge Donohue, CP 527-528, and the deposition was adjourned. On August 25, 2000, Judge Donohue, granting relief Mr. Wynn had requested, ordered Ms. Earin to "respond directly to all questions from Respondent or Petitioner's counsel related to either party's counseling, . . . including all statements to the GAL and the basis therefore, up until April 2000." CP 552. At the last deposition session on September 14, 2000, Ms. Earin responded to Mr. Wynn's counsel's numerous questions about

what each of the Wynns had said in counseling. CP 225-279.

The custody trial began on September 25, 2000. The Wynn children's residential placement was the only issue. CP 623. Ms. Earin, who had been listed as a trial witness in Mrs. Wynn's September 14 witness disclosure, CP 774, appeared and testified on September 27 without insisting on personal service of a subpoena, although Mrs. Wynn's counsel had evidently mailed her one on September 15. CP 292-385, 466. At trial, Ms. Earin was asked about her counseling sessions with both parents. Despite having known that Mrs. Wynn would be calling Ms. Earin as a witness, and knowing what Ms. Earin had said in her deposition about him and his counseling sessions, Mr. Wynn did not object to Ms. Earin's appearance as a witness, or to any question she was asked on grounds of privilege, confidentiality, or alleged violation of any provision of the UHCIA.¹ CP 304-305, 307-310, 312-322; see CP 290-386. Mr. Wynn's own counsel asked Ms. Earin about things Mr. Wynn had said (and not said) in counseling. CP 336, 339-344, 347-349, 351-361.

Judge Donohue issued his decision in the custody dispute on October 11, 2000, CP 623-633, and determined that it would not be in the children's best interest to change their residential placement from Mrs.

¹ Mr. Wynn's counsel's only objections during Ms. Earin's testimony were objections as to relevance, leading questions, non-responsiveness, and exceeding the scope of cross-examination. CP 313, 316, 365, 378-79, 381.

Wynn's home to the home that Mr. Wynn was arranging to make with his fiancé and her six children, CP 624-626.

B. Wynn v. Earin.

In November 2001, Mr. Wynn sued Ms. Earin. CP 3-11; 12-21, 27-39. Ms. Earin moved for partial summary judgment, seeking dismissal of claims (1) "arising from and relating to" her telephone conversation with the GAL for the Wynn children, and (2) "arising from and relating to the testimony given by [her] at her deposition and trial in the underlying custody dispute, including a claim that [she] violated the standard of care by testifying, or failing to testify, in a certain manner or fashion."² CP 118-28. She argued that she had immunity from liability under the witness immunity rule, CP 124-125, and that Mr. Wynn had waived any right to claim that she had made unauthorized disclosures. CP 125.

On July 31, 2003, Judge Kathleen O'Connor dismissed on grounds of witness immunity "any and all claims for damages for any conduct of the defendant as a witness in the underlying dissolution and custody matter" CP 906-907. Mr. Wynn's claim that Ms. Earin should not have spoken with the GAL without having his written authorization in

² Mr. Wynn alleged that, in her testimony, Ms. Earin "went beyond the scope of questioning to offer even more information than requested," and "made no effort to attempt to protect privileged information or to limit her answers to only what was being asked . . . ," CP 34 at ¶¶ 50, 51, and claimed that "[e]ven under compulsory process, you must limit your testimony ethically to precisely what is asked, to give as narrow and precise an answer as possible and to wait for the next question," RP 39.

hand was not dismissed. Nor was his claim that Ms. Earin had negligently allowed his counseling records to be stolen. The jury found that Ms. Earin had been negligent for speaking with the GAL, but that such negligence was not a proximate cause of harm to Mr. Wynn, and that Ms. Earin had been negligent in her handling of the records resulting in them being stolen, for which he sustained \$2,790 in damages. CP 937. The trial court awarded Mr. Wynn \$13,000 in attorney's fees and costs. CP 1077.

C. The Court of Appeals Decision.

On appeal by Mr. Wynn, the Court of Appeals reversed the trial court's witness immunity ruling, concluding: (1) that "witness immunity does not apply to information acquired by a witness in a prelitigation confidential professional relationship that was formed for nonlitigation purposes;" and (2) that the UHCIA trumps the witness immunity rule. Wynn v. Earin, 131 Wn. App. 28, 38-39, 125 P.3d 236 (2005).

III. SUMMARY OF ARGUMENT

The Court of Appeals decision undermines the absolute witness immunity rule – a cornerstone principle of Anglo-American jurisprudence that predates the King James Bible and Shakespeare's plays. Without basis in precedent, and despite repeated re-affirmations of the witness immunity rule, the Court of Appeals fashions a novel exception that allows a witness who discloses what she learned in a "prelitigation

confidential professional relationship” to be sued over her testimony. In so doing, the Court of Appeals misstates how courts construe statutes that “conflict” with common law rules and ignores Mr. Wynn’s multiple waivers not only of confidentiality, but also of any argument that the UHCIA applies. The Court of Appeals decision, if allowed to stand, will have exactly the kind of chilling effect on testimony that the witness immunity rule was designed to minimize.

IV. ARGUMENT

A. The Court of Appeals Erred in Creating an Exception to the Witness Immunity Rule for Treating Health Care Providers.

Witnesses in judicial proceedings are absolutely immune from civil liability based upon their testimony. Deatherage v. Examining Bd. of Psychology, 134 Wn.2d 131, 135, 948 P.2d 828 (1997); Bruce v. Byrne-Stevens & Assocs. Eng’rs, 113 Wn.2d 123, 125, 776 P.2d 666 (1989); Childs v. Allen, 125 Wn. App. 50, 54, 105 P.3d 411 (2004), rev. denied, 155 Wn.2d 1005 (2005); Gustafson v. Mazer, 113 Wn. App. 770, 775, 54 P.3d 743 (2002). The common law rule of witness immunity is simple, broad and absolute: “*All witnesses* are immune from *all claims* arising out of *all testimony*.” Dexter v. Spokane County Health Dist., 76 Wn. App. 372, 376, 884 P.2d 1353 (1994) (emphasis added). The rule is founded on sound public policy.

“[T]he claims of the individual must yield to the dictates of

public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.” . . . A witness’ apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. . . . And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. . . . A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.

Bruce, 113 Wn.2d at 126 (citations omitted) (quoting Briscoe v. LaHue, 460 U.S. 325, 332-33, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)).³ “The basic policy of ensuring frank and objective testimony obtains regardless of how the witness comes to court.” Bruce, 113 Wn.2d at 129.

Despite these well-established principles, the Court of Appeals held that witness immunity does not apply to testimony of treating health care providers about information they acquired in prelitigation treatment sessions. Wynn, 131 Wn. App. at 38. Contrary to the Court of Appeals’ conclusion, however, neither Gustafson, 113 Wn. App. at 776-77, nor Childs, 125 Wn. App. at 56, stands for the proposition that “witness immunity does not apply to information acquired by a witness in a prelitigation confidential professional relationship that was formed for non

³ “A witness’ reliability is ensured by his oath, the hazard of cross-examination and the threat of prosecution for perjury. . . . In light of these safeguards, the detriments of imposing civil liability on witnesses outweigh the benefits.” Bruce, 113 Wn.2d at 126 (citations omitted).

litigation purposes.” Nor does the fact that Bruce and Deatherage involved experts who prepared reports for purposes of litigation mean that witnesses whose testimony is based on treatment that predated the litigation and that was not undertaken for purposes of litigation can be sued based on their testimony. See Wynn, 131 Wn. App. at 38-39.

Nothing in Gustafson, Childs, Bruce, or Deatherage provides support for the proposition that treating health care providers who testify in litigation about treatment that predated the litigation must, unlike other fact or expert witnesses, do so under peril of being sued for what they say, or how they say it, while under oath. Each of those decisions instead reaffirms the general rule that all witnesses in judicial proceedings are absolutely immune from suit based on their testimony. See Bruce, 113 Wn.2d at 125 (“witnesses in judicial proceedings are absolutely immune from suit based on their testimony”); Childs, 125 Wn. App. at 54 (same); Gustafson, 113 Wn. App. at 775 (“[a]ll witnesses are immune from all claims arising out of all testimony”) (quoting Dexter, 76 Wn. App. at 376). Indeed, the court in Deatherage not only reaffirmed the *soundness* of the witness immunity rule, but also explained why courts have *expanded* it:

Witness immunity rests on the fact that an individual is a participant in a judicial proceeding. The rule is provided as an “encouragement to make a full disclosure of all pertinent information within their knowledge.” . . . Immunity was extended beyond eyewitnesses to include expert witnesses

because courts realized that forcing an expert witness to face retaliatory lawsuits by those who disagree with the expert's opinion may cause an expert to be reluctant to appear in litigation. . . . We extended this logic and decided because an expert assists the finder of fact in a matter that is often beyond its capabilities, an expert cannot be sued civilly when participating in a judicial proceeding. . . .

Deatherage, 134 Wn.2d at 136-37 (citations omitted).

To the extent that the Court of Appeals is correct that Gustafson and Childs drew "distinctions" between psychologists hired for litigation and psychologists who treat or advise patients before litigation is contemplated or commenced, Wynn, 131 Wn. App. at 38, its conclusion as to the *import* of such distinctions is incorrect. In both Gustafson and Childs, the plaintiffs tried to argue that their suits against psychologists hired as experts to conduct evaluations for purposes of custody or dependency proceedings were not suits arising out of the psychologists' testimony, but were suits based on the psychologists' allegedly negligent evaluations, conclusions, and reports. The Gustafson and Childs courts noted that the psychologists had no role as psychologists independent of their participation in the litigation and found that their conclusions and reports were part of the long evaluation process that culminated in their testimony at the hearings, such that they had absolute immunity from civil liability not only for their testimony, but also for the way they conducted their evaluations, reached their conclusions, and wrote their reports.

Had the psychologists had some professional relationship with plaintiffs independent of their participation in the litigation, such as having been the plaintiffs' treating psychologists, witness immunity would not have shielded them from liability for any malpractice or negligent misdiagnosis during their treatment simply because they were called upon to testify about that treatment or diagnoses in a judicial proceeding. The witness immunity rule does not immunize a treating health care provider from claims of malpractice in treatment provided for non-litigation purposes, any more than it immunizes persons who make defamatory statements outside the context of litigation from liability for defamation simply because the defamatory statements are later repeated in testimony at trial. See Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 564 P.2d 1131 (1977). But the fact that the witness immunity rule does not immunize a treating health care provider from liability for malpractice in treatment occurring outside the context of litigation does not mean that a treating health care provider is stripped of absolute witness immunity from liability arising out of testimony in a judicial proceeding about information acquired during that treatment.

Here, Mr. Wynn did not seek to impose liability on Ms. Earin because of any negligence in her counseling of him, but instead sought to impose liability because she appeared at the custody hearing at the request

of Mrs. Wynn's counsel without insisting on being personally served with a subpoena,⁴ and then testified in a manner that Mr. Wynn did not like or felt was not sufficiently precise.⁵ Mr. Wynn's claims of liability for how Ms. Earin testified are precisely the type of claims the witness immunity rule was designed to prevent. The Court of Appeals' conclusion that Ms. Earin is not entitled to witness immunity from such claims because she was testifying as a treating health care provider, rather than as an expert retained solely for purposes of litigation, flies in the face of the basic public policy underlying the absolute witness immunity rule – to obtain full and frank testimony regardless of how the witness comes to court. To force treating health providers to restrict, shade or nuance their testimony in a certain way, or to give opinions only if favorable to their patients, under peril of liability for their testimony if they do not do so, is contrary to sound public policy and the decisions the Court of Appeals cited.

⁴ In arguing below that Ms. Earin violated the UHCIA simply by showing up to testify at trial without having been served with compulsory process, see App. Br. at 14, Mr. Wynn overlooked the fact that Mrs. Wynn was entitled to call Ms. Earin as a witness to testify about information acquired in Mrs. Wynn's individual counseling sessions. Although Mr. Wynn knew from Mrs. Wynn's witness list that she intended to call Ms. Earin at trial, Mr. Wynn had no right under the UHCIA to receive notice of Mrs. Wynn's intention to call Ms. Earin to testify about Mrs. Wynn's individual counseling sessions. The fact that Ms. Earin had not been personally served with a subpoena is thus a red herring. Mr. Wynn's real grievance is that Ms. Earin did not pull her punches when asked questions about what *he* had said in counseling.

⁵ See footnote 3, supra.

B. The Court of Appeals Erred When It Concluded that the UHCIA Abrogated the Witness Immunity Rule for Health Care Providers.

The legislature is presumed to know the existing state of the case law in areas in which it legislates. Price v. Kitsap Transit, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). Therefore, when the legislature enacted the UHCIA in 1991, it is presumed to have known that “witnesses in judicial proceedings are absolutely immune from suit based on their testimony.” Bruce, 113 Wn.2d at 125.

The absolute witness immunity rule has been a bedrock principle of the Anglo-American justice system for more than 400 years:

The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. *Cutler v. Dixon*, 4 Co. Rep. 14b, 76 Eng. Rep. 886 (Q. B. 1585); *Anfield v. Feverhill*, 2 Bulst. 269, 80 Eng. Rep. 1113 (K. B. 1614); *Henderson v. Broomhead*, 4 H. & N. 569, 578, 157 Eng. Rep. 964, 968 (Ex. 1859); see *Dawkins v. Lord Rokeby*, 4 F. & F. 806, 833-834, 176 Eng. Rep. 800, 812 (C. P. 1866).

Briscoe v. LaHue, 460 U.S. at 330-332 (footnotes omitted).⁶ It is so universally followed as to render suspect any casual argument that the legislature intended to abrogate the rule when it did not state such an intention explicitly.⁷ As the U.S. Supreme Court noted in Briscoe, 460

⁶ The rule has long been followed in Washington as well. See Miller v. Gust, 71 Wash. 139, 140, 127 P. 845 (1912) (citing Abbott v. National Bank of Commerce, 20 Wash. 552, 56 P. 376 (1899)).

⁷ It also is by no means clear that the Legislature has the constitutional power to abrogate

U.S. at 334, “the common law’s protection for witnesses is “a tradition so well grounded in history and reason” that we cannot believe that Congress impinged on it “by covert inclusion in the general language [of the statute at issue].” And, Washington courts will not construe a statute in derogation of a common law rule unless the legislature has clearly expressed its intention to abrogate the rule. Price, 125 Wn.2d at 463; Baum v. Burrington, 119 Wn. App. 36, 41, 79 P.3d 456 (2003), rev. denied, 151 Wn.2d 1035 (2004).

Neither the Bill Reports,⁸ nor the legislative findings (RCW 70.02.005), nor any of the UHCIA’s provisions, evinces an intent to abrogate the witness immunity rule as applied to treating health care providers testifying in judicial proceedings about information acquired in the course of the patient’s treatment. None of them mentions the witness immunity rule, much less expressly authorizes lawsuits for damages against a treating health care provider for not unilaterally refusing to be sworn as a witness, or to answer questions under oath in a judicial proceeding concerning a patient who is there and raises no objection.

There is no indication that, in enacting the UHCIA, the legislature

a rule that courts for centuries have considered essential to the proper functioning of the justice system. See State v. Wadsworth, 139 Wn.2d 724, 740, 991 P.2d 80 (2000) (the judiciary has the “inherent power and obligation . . . to control all its necessary functions to promote the effective administration of justice”).

⁸ Copies of House Bill Report, HB 1828; House Bill Report SHB 1828; and Final Bill Report, SHB 1828, are attached as appendices hereto.

intended to require someone, like Ms. Earin, who has been sworn as a witness at a trial, to do anything except answer honestly, truthfully, and fully questions to which no objections have been made and sustained. The UHCIA was not designed to police health care providers' in-court testimony or to make them responsible for deciding whether to tell "the whole truth" or how much of the "whole truth" to tell. Those are matters that remain – and should remain – functions of the oath, the rules of evidence and procedure, and the authority of the judicial branch.

C. Ms. Earin's Testimony Was Not Unauthorized, and Mr. Wynn Waived any Objection He Might Have Had.

A trial court's ruling may be affirmed on any ground supported by the record, even if the trial court did not base its ruling on that ground. RAP 2.5(a); Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002); LaMon v. Butler, 110 Wn.2d 216, 223, 751 P.2d 842 (1988), adhered to on reconsideration, 112 Wn.2d 193, cert. denied, 493 U.S. 814 (1989). Here, the record demonstrates that Mr. Wynn waived any objection to Ms. Earin's testimony at the custody trial on grounds of confidentiality, privilege, or the UHCIA. The trial court's dismissal of Mr. Wynn's claims based on Ms. Earin's testimony can be affirmed on that basis as well.

Before Ms. Earin spoke with the GAL, was deposed, or testified at

trial, Mr. Wynn not only signed a consent form authorizing disclosure of mental health information about him, CP 459, but also took it upon himself to write to the GAL and tell her that Ms. Earin was someone the GAL should contact for information about the children and him, RP 483-484. A month before Ms. Earin testified at trial, Mr. Wynn obtained an order compelling her to testify in deposition about his, and Mrs. Wynn's, counseling sessions. CP 552. At the deposition, Mr. Wynn waived any privilege as to his sessions, and insisted that nothing he or Mrs. Wynn had said in counseling was confidential or privileged. CP 483, 505-507, 512-519, 546.

More importantly, however, despite knowing from Mrs. Wynn's witness list filed on September 13, 2000 that she planned to call Ms. Earin as a witness, and despite knowing from Ms. Earin's deposition testimony that her testimony would not be favorable to him, Mr. Wynn did not object to Ms. Earin appearing as a witness at trial, and did not object to any question she was asked on grounds of confidentiality, privilege, or alleged violation of any provision of the UHCIA. Mr. Wynn had more than adequate opportunity to seek a protective order prior to the custody trial,⁹

⁹ Ultimately, that is all that the compulsory process provision of the UHCIA, RCW 70.02.060, was designed to insure. It seeks to guarantee that a person's health care information will not be disclosed pursuant to a subpoena or compulsory process without the person receiving sufficient advance notice to enable them to seek a protective order.

and to object at the trial, if he thought he had a viable argument for excluding testimony by Ms. Earin on grounds of confidentiality, privilege, or some provision of the UHCIA. Having failed to do so, Mr. Wynn waived any objection he might otherwise have had to questions put to Ms. Earin and waived any right to later complain about what she said or how she said it. See McUne v. Fuqua, 42 Wn.2d 65, 74, 253 P.2d 632, 257 P.2d 636 (1953) (“[w]hen a patient permits his physician to testify without objection, he of course waives the privilege as to that physician”).¹⁰ Nothing in the UHCIA suggests that any rights it accords to patients cannot be waived in the same manner as other rights.

D. It Is Not for Professional Societies or Expert Witnesses to Say How Narrowly a Witness Should Have Answered Questions at Trial or Whether the Witness Answered Too Candidly.

The Court of Appeals suggests, Wynn, 131 Wn. App. at 40, that its reversal of the trial court’s witness immunity ruling was justified at least in part because “Ms. Earin’s own expert testified that standard professional practice placed limits on testimony.”¹¹ That suggestion is incorrect and disturbing. First, unless the UHCIA abrogates the witness immunity rule, the common law controls, Ms. Earin has immunity, no

¹⁰ See also Carson v. Fine, 123 Wn.2d 206, 212-16, 867 P.2d 610 (1994), and Christensen v. Munsen, 123 Wn.2d 234, 238-40, 867 P.2d 626 (1994) (once a patient waives an existing privilege, a treating health care provider is free not only to testify in the matter, but to give opinions adverse to the patient’s interest).

¹¹ That expert testified in deposition to the effect that the ethical code limits disclosure of information to that information which is relevant and essential. CP 617.

negligence claim could be asserted against her based on her testimony, and no expert or “standard of care” testimony would be relevant to prove such a claim. Second, even if the UHCIA abrogated witness immunity for health care providers, and one of its requirements had not been met, what would matter is whether Ms. Earin improperly disclosed health care information, not how candidly, or precisely tailored to a given question, she disclosed it. Third, a violation of ethical standards promulgated by a professional organization is not actionable. See Hizey v. Carpenter, 119 Wn.2d 251, 265-66, 830 P.2d 646 (1992).

Even more importantly, however, the Court of Appeals’ reference to expert testimony implies that health care providers, after being sworn as witnesses, may have some professional ethical obligation to not be wholly forthcoming in response to questions to which no objections have been made or sustained. It also implies that subsequent trials should be had at which experts will express their opinions as to whether testifying health care providers sufficiently limited their testimony to what was relevant, essential, and least harmful to their patients. But there is no such thing as a question-answering expert. Professional societies may or may not have the power to discipline members for their conduct as witnesses in judicial proceedings, but it is judges, not professional societies or “experts,” who run courtrooms. This Court should repudiate the Court of Appeals’

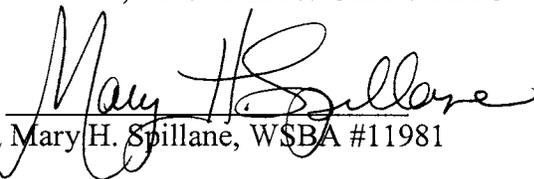
suggestion that a “standard [of] professional practice” can trump the oath, the rules of evidence, and the authority of a trial judge, and can require health care providers to hedge their testimony or do anything less than testify fully and truthfully.

V. CONCLUSION

If allowed to stand, the Court of Appeals’ decision would have a chilling effect on the willingness of treating health care providers in judicial proceedings to tell “the truth, the whole truth” and would encourage vindictive and vexatious litigation. The Court of Appeals’ decision with respect to the claims the trial court dismissed on grounds of witness immunity should be reversed and the trial court’s judgment should be reinstated. No remand for trial of those claims or for redetermination of attorneys’ fees in connection with those claims is needed.

RESPECTFULLY SUBMITTED this 9th day of November, 2006.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Mary H. Spillane, WSBA #11981

Attorneys for Petitioners

APPENDIX A

HOUSE BILL REPORT

HB 1828

As Reported By House Committee on:

Health Care

Title: An act relating to the uniform health care information act.

Brief Description: Providing regulations for the disclosure of health care records.

Sponsor(s): Representative Appelwick.

Brief History:

Reported by House Committee on:

Health Care, March 6, 1991, DPS.

HOUSE COMMITTEE ON

HEALTH CARE

Majority Report: That Substitute House Bill No. 1828 be substituted therefor, and the substitute bill do pass. Signed by 11 members: Representatives Braddock, Chair; Day, Vice Chair; Moyer, Ranking Minority Member; Casada, Assistant Ranking Minority Member; Cantwell; Edmondson; Franklin; Morris; Paris; Prentice; and Sprenkle.

Staff: John Welsh (786-7133).

Background: Patients sometimes encounter difficulty in obtaining access to their medical and health records. While it is generally established that the health provider is the owner and custodian of health records, courts have held that patients are entitled to reasonable access to their records.

There is no comprehensive statutory law governing the rights and responsibilities of patients and health providers with regard to the confidentiality of patients' health records, and the conditions or situations under which those records can be disclosed.

Generally, patients' health records are considered confidential but the law is unclear with regard to access by third parties for research and financial audit and other purposes, and by family members. Over the past several decades a number of fundamental changes have increased the threat to the confidentiality of health care information. They include: third party payment plans; the use of health care information for non-health care purposes; the growing involvement of government in all aspects of health care; and the advent of computers and automated information systems. Nationally, these developments have raised major concerns regarding the improper use of patients' health information.

The National Conference of Commissioners on Uniform State Laws developed the Uniform Health Care Information Act in 1984 for consideration by the states, specifying the rights and responsibilities of patients and the providers governing the confidentiality and disclosure of patient health information.

Summary of Substitute Bill: There is a legislative declaration that patients need access to their own health care information to help them make informed health care decisions, and that such information should not be improperly disclosed.

A patient's health care information must not be disclosed by the health care provider without the patient's consent. The patient's consent need not be expressly required where the information is being referred: to another health provider treating the patient; to another person for health education, planning, quality assurance, peer review, actuarial, legal, financial or administrative purposes where the confidentiality is maintained; to minimize an imminent danger to the patient; for bona fide research purposes where the patient is not identified; to auditors; or to penal authorities. However, disclosure to family members, to previous health providers, or for routine directory information purposes cannot be made where the patient objects.

The health provider must disclose patient health information to governmental public health authorities or law enforcement agencies where required by law, or by compulsory process to the courts.

Patients must authorize the disclosure of their health information by the health provider in writing. The authorization is valid for up to 90 days and is revocable. The provider must make the health information available within 15 working days or notify the patient of any delay, and may charge a fee not exceeding the administrative costs of producing it.

Providers may deny access to patients of their health information where it may be injurious to the patient; may violate other confidences; could endanger the life or safety of any individual; where it is compiled solely for administrative, litigation or quality assurance purposes; or where prohibited by law.

A patient's health care information must not be disclosed by a provider pursuant to compulsory legal process without the patient's consent, or where the patient has first had the opportunity to obtain a protective order from the court that prevents a health provider from complying with a discovery request or compulsory process to produce the health information.

A provider must correct the health information upon request of a patient within 10 days of the request, unless there are delays and the patient is notified of the delay within 21 days with the time when the record can be corrected. If the provider refuses to make the correction, the patient has the right to insert a statement of disagreement with the information.

Providers must post a notice on the premises specifying the rights of access by patients to their health records pursuant to this act.

For violations of this act, a court may award actual, though not incidental, damages, as well as reasonable attorney fees and other expenses, to the prevailing party. Actions for relief must be filed within two years of the discovery of the incident. Violations shall not be deemed violations of the Consumer Protection Act.

Exemptions from the provisions of this chapter are provided for juvenile justice, alcohol and drug abuse treatment, mental health, domestic relations, and sexually transmitted disease treatment records.

Substitute Bill Compared to Original Bill: A number of clarifying amendments are adopted. The exclusion for pharmacists is deleted. Directory information can be disclosed unless the patient objects. Health information can be used for the purposes of investigating unprofessional conduct of health providers. The act is exclusive, except where specific exclusions are provided.

Fiscal Note: Requested February 13, 1991.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: There is a great need for clarifying the rights and responsibilities of patients and health providers, as well as third parties, with regard to the confidentiality of patient records and the conditions under which they can be disclosed. Patients should be better informed of their rights with the passage of this bill, and health providers can enjoy the discretion allowed by law in dealing with the sensitivities of patient information. Third parties, such as researchers, auditors, and government agencies have access to health records, as well, for legitimate purposes.

Testimony Against: None.

Witnesses: Representative Appelwick, prime sponsor (pro); Andy Dolan, Washington State Medical Association (pro); Les James, Department of Social and Health Services (neutral); Sherman Cox, Department of Health; and Michele Radosevich, Washington State Trial Lawyers Association (pro).

APPENDIX B

HOUSE BILL REPORT

SHB 1828

As Passed Legislature

Title: An act relating to the uniform health care information act.

Brief Description: Providing regulations for the disclosure of health care records.

Sponsor(s): By House Committee on Health Care (originally sponsored by Representative Appelwick).

Brief History:

Reported by House Committee on:

Health Care, March 6, 1991, DPS;

Passed House, March 19, 1991, 98-0;

Amended by Senate;

House concurred;

Passed Legislature, 94-0.

HOUSE COMMITTEE ON

HEALTH CARE

Majority Report: That Substitute House Bill No. 1828 be substituted therefor, and the substitute bill do pass. Signed by 11 members: Representatives Braddock, Chair; Day, Vice Chair; Moyer, Ranking Minority Member; Casada, Assistant Ranking Minority Member; Cantwell; Edmondson; Franklin; Morris; Paris; Prentice; and Sprenkle.

Staff: John Welsh (786-7133).

Background: Patients sometimes encounter difficulty in obtaining access to their medical and health records. While it is generally established that the health provider is the owner and custodian of health records, courts have held that patients are entitled to reasonable access to their records.

There is no comprehensive statutory law governing the rights and responsibilities of patients and health providers with regard to the confidentiality of patients' health records, and the conditions or situations under which those records can be disclosed.

Generally, patients' health records are considered confidential but the law is unclear with regard to access by third parties for research and financial audit and other purposes, and by family members. Over the past several decades a number of fundamental changes have increased the threat to the confidentiality of health care information. They include the proliferation of third party payment plans; the use of health care information for non-health care purposes; the growing involvement of government in all aspects of health care; and the advent of computers and automated information systems. Nationally, these developments have raised major concerns regarding the improper use of patients' health information.

The National Conference of Commissioners on Uniform State Laws developed the Uniform Health Care Information Act in 1984 for consideration by the states, specifying the rights and responsibilities of patients and the providers governing the confidentiality and disclosure of patient health information.

Summary of Bill: There is a legislative declaration that patients need access to their own health care information to help them make informed health care decisions, and that such information should not be improperly disclosed.

A patient's health care information must not be disclosed by the health care provider without the patient's consent. The patient's consent need not be expressly required, however, where the information is being referred to another health provider treating the patient; to another person for health education, planning, quality assurance, peer review, actuarial, legal, financial or administrative purposes where the confidentiality is maintained; to minimize an imminent danger to the patient; for bona fide research purposes where the patient is not identified; to auditors; or to penal authorities. However, disclosure to family members, to previous health providers, or for routine directory information purposes cannot be made where the patient objects.

The health provider must disclose patient health information to public health authorities or law enforcement agencies where required by law, or in compliance with compulsory legal process to the courts.

Patients must authorize the disclosure of their health information by the health provider in writing. The authorization is valid for up to 90 days and is revocable. The provider must make the health information available within 15 working days or notify the patient of any delay, and may charge a fee not exceeding the administrative costs of producing it.

Providers may deny access to patients of their health information where it may be injurious to the patient; may violate other confidences; could endanger the life or safety of any individual; where it is compiled solely for administrative, litigation or quality assurance purposes; or where prohibited by law.

A patient's health care information must not be disclosed by a provider pursuant to compulsory legal process without the patient's consent, or where the patient has first had the opportunity to obtain a protective order from the court that prevents a health provider from complying with a discovery request or compulsory process to produce the health information.

A provider must correct the health information upon request of a patient within 10 days of the request, unless there are delays and the patient is notified of the delay within 21 days of the time when the record can be corrected. If the provider refuses to make the correction, the patient has the right to insert a statement of disagreement with the information.

Providers must post a notice on the premises specifying the rights of access by patients to their health records pursuant to this act.

For violations of this act, a court may award actual, though not incidental, damages, as well as reasonable attorney fees and other expenses, to the prevailing party. Actions for relief must be filed within two years of the discovery of the incident. Violations shall not be deemed violations of the Consumer Protection Act.

The Health Care Information Act does not modify the terms and conditions of disclosure under the state industrial insurance laws, along with the laws relating to juvenile justice, alcohol and drug abuse treatment, mental health, domestic relations, and sexually transmitted diseases.

Fiscal Note: Requested February 13, 1991.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: There is a great need for clarifying the rights and responsibilities of patients and health providers, as well as third parties, with regard to the confidentiality of patient records and the conditions under which they can be disclosed. Patients should be better informed of their rights with the passage of this bill, and health providers can enjoy the discretion allowed by law in dealing with the sensitivities of patient information. Third parties, such as researchers, auditors, and government agencies have access to health records, as well, for legitimate purposes.

Testimony Against: None.

Witnesses: Representative Appelwick, prime sponsor (pro); Andy Dolan, Washington State Medical Association (pro); Les James, Department of Social and Health Services (neutral); Sherman Cox, Department of Health; and Michele Radosevich, Washington State Trial Lawyers Association (pro).

APPENDIX C

FINAL BILL REPORT

SHB 1828

C 335 L 91

Synopsis As Enacted

Brief Description: Providing regulations for the disclosure of health care records.

By House Committee on Health Care (originally sponsored by Representative Appelwick).

House Committee on Health Care

Senate Committee on Health & Long-Term Care

Background: Patients sometimes encounter difficulty in obtaining access to their medical or health records. While the courts have held that the health provider is the owner and custodian of health records, patients are entitled to reasonable access to their records.

There is no comprehensive statutory law governing the rights and responsibilities of patients and health providers with regard to the confidentiality of patients' health records, and the conditions or situations under which those records can be disclosed.

Generally, patients' health records are considered confidential but the law is unclear with regard to access by third parties for research, financial audit, and other purposes, and by family members. Over the past several decades a number of fundamental changes have increased the threat to the confidentiality of health care information. These changes include the proliferation of third party payment plans; the use of health care information for non-health care purposes; the growing involvement of government in all aspects of health care; and the advent of computers and automated information systems. Nationally, these developments have raised major concerns regarding the improper use of patients' health information.

The National Conference of Commissioners on Uniform State Laws developed the Uniform Health Care Information Act in 1984 for consideration by the states, specifying the rights and responsibilities of patients and health providers governing the confidentiality and disclosure of patient health information.

Summary: The Legislature declares that patients need access to their own health care information to help patients make informed health care decisions, and declares that this information should not be improperly disclosed to others.

A patient's health care information must not be disclosed by the health care provider without the patient's consent. However, the patient's consent need not be expressly required where the information is being referred to another health provider treating the patient for health education, planning, quality assurance, peer review, actuarial, legal, financial or administrative purposes where the confidentiality is maintained; to minimize an imminent danger to the patient; for bona fide research purposes where the patient is not identified; for audit purposes; or for law enforcement purposes. However, disclosure to family members, to previous health providers, or for routine directory information purposes cannot be made where the patient objects.

The health provider must disclose patient health information to public health authorities or law enforcement agencies where required by law, or in compliance with compulsory legal process to the courts.

Patients must request the disclosure of their health information by the health provider in writing. The authorization is valid for up to 90 days and is revocable. The provider must make the health information available within 15 working days or notify the patient of any delay, and may charge the patient a fee not exceeding the administrative costs of producing it.

Providers may deny patients access to health information: when access may be injurious to the patient; when access may violate other confidences; when access could endanger the life or safety of any individual; when the information is compiled solely for administrative, litigation or quality assurance purposes; or when access is prohibited by law.

A patient's health care information must not be disclosed by a provider pursuant to compulsory legal process without the patient's consent, or where the patient has first had the opportunity to obtain a protective order from the court that prevents a health provider from complying with a discovery request or compulsory process to produce the health information.

A provider must correct the health information upon request of a patient within 10 days of the request, unless the patient is notified of a delay within 21 days and notified of the time when the record can be corrected. If the provider refuses to make the correction, the patient has the right to insert a statement of disagreement with the information.

Providers must post a notice on their premises specifying the rights of access by patients to their health records pursuant to this act.

For violations of this act, a court may award actual, though not incidental, damages, and reasonable attorney fees and other expenses to the prevailing party. Actions for relief must be filed within two years of the discovery of the incident. Violations shall not be deemed violations of the Consumer Protection Act.

The Health Care Information Act does not modify the terms and conditions of disclosure under the state industrial insurance laws, and laws relating to juvenile justice, alcohol and drug abuse treatment, mental health, domestic relations, and sexually transmitted diseases.

Notes on Final Passage:

House 98 0

Senate 43 2 (Senate amended)

House 94 0 (House concurred)

Effective: July 28, 1991

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 9th day of November, 2006, I caused a true and correct copy of the foregoing document, "PETITIONERS' SUPPLEMENTAL BRIEF," to be delivered by U.S. Mail, postage prepaid, to the following counsel of record:

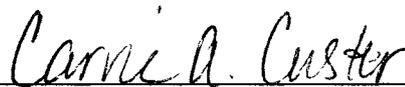
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Spokane, WA 99201

DATED this 9th day of November, 2006, at Seattle, Washington.



Carrie A. Custer