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COURT OF APPEALS NO. 22811-8-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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PARDNER WYNN, Appellant,

v.

JOLENE EARIN, Respondent.

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**BRIEF OF RESPONDENT**

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## I. COUNTER-STATEMENT OF CASE

This is in essence a malpractice case against Respondent Jolene Earin, a licensed counselor (hereinafter referred to as "Earin"). (CP 1-11, CP 12-21, RP 589-93). It arises from a contentious child custody dispute between Appellant Pardner Wynn (hereinafter referred to as "Wynn"), and his ex-wife, Cynthia Wynn (CP 1-11, 12-21).

Jolene Earin provided individual and joint marital counseling to both Mr. and Mrs. Wynn. (RP 601-03). A Guardian ad Litem, Kim Chupurdia, Ph.D., was appointed in the custody case. (RP 740). In the course of performing her investigation, Dr. Chupurdia spoke with Ms. Earin by telephone. (RP 746). When this telephone conversation took place, Dr. Chupurdia had in her possession separate written authorizations signed by Mr. and Mrs. Wynn. (RP 133, 621, 748). At the beginning of the conversation, Earin asked Dr. Chupurdia if she

had a release; Dr. Chupurdia replied in the affirmative. (RP 621)  
Ms. Earin also asked Dr. Chupurdia if she had orders allowing  
her to discuss the matter. Dr. Chupurdia replied in the  
affirmative and the orders were read to Ms. Earin over the  
phone. (RP 620-21-746).

Later in the custody proceeding, Ms. Earin was  
subpoenaed for a deposition by Mr. Wynn's counsel, Mary  
Schultz. (RP 629). At that deposition, questions arose regarding  
the extent to which communications between Ms. Earin and Mr.  
and Mrs. Wynn might be privileged, and Ms. Schultz, on the  
record, waived any privilege that might have run in favor of Mr.  
Wynn. (RP 770-71).

Before taking Ms. Earin's deposition, Mr. Wynn, through  
Ms. Schultz, subpoenaed Ms. Earin to appear and to bring Mr.  
Wynn's counseling records. (RP 628-630). This subpoena was  
issued on July 24, 2000 and ordered Ms. Earin to provide the

records on August 18, 2000 - 24 days later. (RP 628-30, 875). Ms. Earin was ultimately unable to respond to this subpoena because the counseling records for Mr. and Mrs. Wynn had been stolen from her car, along with the records for a number of other patients. (RP 641).

It is undisputed that Ms. Earin was called as a witness by Mrs. Wynn at the custody hearing. Although she did not have her records, she testified from memory and her appointment calendar regarding her sessions with Mr. and Mrs. Wynn. (RP 601-03). Ms. Earin was not subpoenaed for her testimony at the custody hearing, however, if she had refused to testify without a subpoena, one would have been served by Mrs. Wynn's counsel. (RP 28).

Mr. Wynn, through Ms. Shultz, subsequently brought this action, alleging that Ms. Earin's conduct in the prior custody proceeding violated both statutory and common law duties. (CP

1-11, 12-21). Mr. Wynn alleged Ms. Earin violated duties by: (1) disclosing counseling information to the Guardian Ad Litem, (2) offering to testify in the custody proceeding, (3) testifying in the custody proceeding, (4) being unable to proffer Mr. Wynn's records, due to the fact they were stolen from Ms. Earin's vehicle, and (5) failing to proffer Mr. Wynn's counseling records within 15 days of receiving the deposition subpoena. (CP 12-21, 27-39).

At trial on the issue of damages, the jury heard from various experts regarding the life issues facing Mr. Wynn when he started seeing Ms. Earin. (RP 118, 243, 325) Mr. Wynn's own expert testified at trial that Mr. Wynn was having sexual concerns in his marriage (RP 243), facing accusations that he was having an affair with his secretary (RP 243), and dealing with the death of his mother (RP 244). Dr. Klein further testified that nine "other factors" in his life such as the loss of a loved

one, a court case, a child custody case, long-term marriage loss and the loss of a job could play a role in the various symptoms Wynn was experiencing (RP 299, 370, 374).

After extensive motion practice, Judge O'Connor (the trial judge in this proceeding) directed a verdict against Ms. Earin for the statutory violation of discussing Mr. Wynn's counseling with the Guardian Ad Litem without physical possession of a release. However, Judge O'Connor submitted proximate cause on this issue to the jury. (CP 908-934, Ins. No. 17, Verdict Form). Judge O'Connor also directed a verdict against Ms. Earin on the issue of whether Ms. Earin's loss of Mr. Wynn's medical records was a statutory violation, as well as whether that statutory violation was negligent. (*Id.*). Proximate cause on this claim was also submitted to the jury. (*Id.* at Verdict Form). Adhering to the legislative mandate, Judge O'Connor reserved for the court determination of damages for the statutory

violations. (RP 1153-54); RCW 70.02.170(2)). Judge O'Connor also ruled that Ms. Earin was entitled to absolute witness immunity on the two claims related to testimony she gave at the custody proceeding. (RP 63-67).

The jury was asked to determine via special interrogatories: (1) whether Ms. Earin was negligent in speaking with the guardian ad litem over the telephone, (2) whether Ms. Earin's negligence in talking to the guardian ad litem over the telephone was a proximate cause of damage, and (3) whether Ms. Earin's negligence in the loss of the counseling records was a proximate cause of damage. (CP 908-934, Verdict Form). The jury answered "yes" to the first and third questions, and "no" on the second question. (RP 1262-1266). The jury then awarded \$2,790 in economic damages and found there to be no non-economic damages proven. (RP 1263).

By post trial motions, Wynn requested the trial court to set

aside the jury's verdict, arguing the jury's award of economic damages, but no non-economic damages, was inconsistent as a matter of law. (CP 949-952). Judge O'Connor denied this motion. (CP 1072-1074).

In a separate post trial motion, Wynn sought a determination from the trial court on damages flowing from the statutory violation, on which Judge O'Connor had previously directed verdicts. (CP 975-977, 956-974). Judge O'Connor, acting as the trier of fact, determined as a factual matter, that Mr. Wynn did not prove any damages resulting from the statutory claims. (CP 1072-1074).

Also by post trial motion, Wynn asked the trial court to award over \$130,000 in attorney fees and \$11,000 in costs. (CP 956-974, 975-977). Judge O'Connor noted that the Wynn was the prevailing party on the statutory violations, by virtue of the directed verdict entered against Earin. (CP 1072-1074). As

such, the court held the Wynn was entitled to reasonable fees in pursuing these statutory claims, pursuant to RCW 70.02.170(2). (CP 1072-1074) Recognizing that a fee “must bear a reasonable relationship to the work needed to be done to bring about the result,” Judge O’Connor determined 10% of the time Wynn submitted to the court was in pursuit of the statutory claims, and awarded \$11,900 in attorney fees and \$1,100 in costs. (CP 1072-1074).

Wynn filed a timely notice of appeal. (CP 1085-1095).

## II. ARGUMENT

A. **Claim Immunity: Judge O’Connor Did Not Abuse Her Discretion in Ruling That Ms. Earin Is Entitled to Absolute Witness Immunity from Wynn’s Claims Arising from or Related to Ms. Earin’s Testimony in a Prior Custody Proceeding.**

As a trial court’s application of Washington’s doctrine of absolute witness immunity is an issue of law, this court must review the matter de novo. *Deatherage v. State of Washington*,

Examining Board of Psychology, 134 Wn.2d 131, 135, 948 P.2d 828, 830 (1997), citing, Barr v. Day, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). A witness' absolute immunity stems from the witness' role in a judicial proceeding; it is afforded as "an encouragement to make a full disclosure of all pertinent information within [the witness'] knowledge." Deatherage, 134 Wn.2d at 136, 948 P.2d at 830. (citation omitted).

In Washington, witnesses in judicial proceedings are absolutely immune from civil liability based on their testimony. Deatherage, 134 Wn.2d at 136, 948 P.2d at 830; Bruce v. Byrne-Stevens & Associates, 113 Wn.2d 123, 128, 776 P.2d 666, 668-69 (1989); Gustafson v. Mazer, 113 Wn. App. 770, 775, 54 P.3d 745, 746 (Div. II 2002). The Washington State Supreme Court has left no doubt as to the vital role absolute witness immunity plays in exercising the judicial power: "[t]he purpose of granting immunity to participants in judicial

proceedings is to protect and enhance the judicial process.”  
*Bruce*, 113 Wn.2d at 128, 776 P.2d at 668. (Emphasis added).  
Moreover, “[t]he basic policy of ensuring frank and objective  
testimony obtains regardless of how the witness comes to court.”  
*Id.* at 129, 776 P.2d at 669. (Emphasis added):

“[t]he admissibility and scope of the expert’s  
testimony is a matter within the court’s discretion.  
. . . [t]he mere fact that the expert is retained and  
compensated by a party does not change the fact  
that, as a witness, he [or she] is a participant in a  
judicial proceeding. It is that status on which the  
immunity rests.”

*Id.* at 130, 776 P.2d 669.

*Bruce* stemmed from testimony proffered by an  
engineering expert as to the amount of money it would cost to  
repair Bruce’s property. *Id.* at 124, 776 P.2d at 666. At trial,  
Bruce retained Byrne-Stevens to calculate the cost, and Byrne-  
Stevens testified as to its findings. *Id.* Verdict and judgment  
were entered in Bruce’s favor. *Id.* The actual cost of repairing

Bruce's land proved to be greater than Byrnes-Stevens' calculations. *Id.* at 125, 776 P.2d at 666. Bruce brought suit against Byrnes-Stevens. *Id.* The Washington State Supreme Court held Byrnes-Stevens was immune from civil liability stemming from its testimony. *Id.* at 138, 776 P.2d at 673-74. Importantly, the Court granted immunity not only for Byrnes-Stevens' testimony, but also to the actions forming the basis of the opinions. The Court wrote:

“[a]n expert's courtroom testimony is the last act in a long, complex process of evaluating and consultation with the litigant. There is no way to distinguish the testimony from the acts and communications on which it is based. Unless the whole integral enterprise falls within the scope of immunity, the chilling effect of threatened litigation will result [in adverse effects], regardless of immunity shielding the courtroom testimony.”

*Id.* at 134, 776 P.2d at 672.

The Court in *Bruce* drew heavily from the United States Supreme Court's opinion in *Briscoe v. LaHue*, 460 U.S. 325,

103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). *See generally*, Bruce, 113 Wn.2d 123, 776 P.2d 666. In Briscoe the petitioner, Mr. Briscoe, claimed that LaHue, a police officer, violated his civil rights by proffering perjured testimony against him in a previous criminal proceeding. Briscoe, 60 U.S. at 326, 103 S.Ct at 1110-1111. The United States Supreme Court held that Officer LaHue was entitled to absolute witness immunity. *Id.* In addressing the policy behind witness immunity, the Court stated:

“controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, .... Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.”

*Id.* at 335, 103 S.Ct at 1115, *quoting*, Butz v. Economou, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978).

In a later case applying Bruce the Washington State Supreme Court wrote: “[In Bruce] [w]e concluded civil liability

for expert witnesses was too blunt an instrument to gain much reliability in testimony because liability would result in testimony motivated by litigants' interests and not professional standards." *Deatherage*, 134 Wn.2d at 138, 948 P.2d at 831. (Internal quotations and citation omitted). The *Deatherage* Court also noted that witness immunity is counterbalanced by the inherent safeguards of the judicial system, including the witness oath, cross examination and a threat of criminal perjury. *Id.* The *Deatherage* Court was asked to extend absolute witness immunity to professional disciplinary proceedings; the Court declined this invitation, **commenting that the threat of professional discipline is an appropriate check on witnesses who are otherwise immune from civil liability.** *Id.* at 140, 948 P.2d at 832.

Wynn argues that the witness immunity doctrine should be limited to situations where there was an error made by the

witness during his or her testimony. (*See* Wynn's Brief at 16). However, Washington law is not so limited. In fact, the *Bruce* court stressed that its holding was broad, and applied not only to the witnesses testimony itself, but all work the witness performed leading up to and in anticipation of the trial testimony. 113 Wn.2d at 134, 776 P.2d at 672. Furthermore, absolute witness immunity was afforded in *Briscoe v. LaHue*, which is highly analogous to this case. The petitioner in *Briscoe* claimed that his civil rights were violated by the Earin's wrongful testimony (in that case, perjury). Herein, Mr. Wynn alleges that he suffered psychological harm by Ms. Earin's allegedly wrongful testimony (in this case, violative of statutory and common law duties). In both cases the alleged injury was a result of the fact the defendant proffered testimony. In both cases absolute witness immunity was held to apply.

Wynn attempts to equate two distinct inquiries: first,

whether a violation of RCW 70.02.050 occurred and second, whether a witness is entitled to absolute immunity. (See Wynn's Brief at 13-14). Witness immunity's existence and applicability is not contingent upon the disclosure being in accord with the Health Care Information Access and Disclosure Act, RCW 70.02.005-904. Witness immunity shields a witness from civil liability for statements made in connection with a judicial process. This immunity would be worth little if it only immunized against testimony from which no civil liability could possibly flow.

Wynn alleges two distinct violations of the Health Care Information Access and Disclosure Act in connection with the Ms. Earin's testimony in the prior custody proceeding, the first consisting of Ms. Earin's offer to testify, and the second consisting of the testimony itself. (Wynn's Brief at 13). As to Ms. Earin's offer to testify, Wynn argues: ". . . there is no

immunity available which might encompass an offer to testify. Immunity is, at best, for the substance of the testimony.” (*Id.* at 14) (Emphasis omitted).

Wynn’s argument should be rejected. As noted above, the *Bruce* Court specifically stated that its holding was broad and covered the work the witness had done in preparing for and leading up to his or her testimony. 113 Wn.2d at 134, 776 P.2d at 672. However, even if we accept Mr. Wynn’s argument that no immunity can be afforded to an offer to testify, it is clear that no liability can possibly flow from such an offer. Distilled to its essence, Wynn’s claim is that he suffered psychic harm from Ms. Earin’s allegedly wrongful disclosure of information regarding his counseling sessions. His claim is based wholly upon common law duties and the Health Care Information Access and Disclosure Act’s mandate that health care information not be disclosed. The duty imposed is a duty not to

disclose information - an offer to breach a duty is not the same as a breach of that duty. Furthermore, Mr. Wynn's alleged emotional harm cannot be said to flow, neither factually nor proximately, from an offer to disclose information. Without a breach of duty and lacking causation Wynn's claim must fail.

Moreover, as a matter of public policy, a legal rule that held an otherwise immune witness liable for offering to testify, would strip Washington's doctrine of absolute witness immunity down to a meaningless shell. The holding in *Bruce* specifically extends absolute witness immunity to retained experts, who (by definition) offer to testify. *See*, 113 P.2d at 138, 776 P.2d at 673-74. Few witnesses would offer frank testimony under a rule that says: "you cannot be liable for testimony you give at trial, but you can be liable for offering to give such testimony."

Mr. Wynn argues that Judge O'Connor's "expansion in this case of *Bruce* witness immunity . . . is unwarranted and

contrary to law.” (Wynn’s Brief at 17). That is incorrect. Witness immunity extends to testimony offered in a judicial proceeding and “the whole integral enterprise” leading up to the testimony. *Bruce*, 113 Wn.2d at 134, 776 P.2d at 672. Judge O’Connor, recognizing the importance and breadth of Washington’s witness immunity doctrine noted:

’ “[W]itness immunity from civil action is absolute. To rule otherwise in my view would simply open the door to extensive litigation around people’s testifying at trials . . . The fact is there are times in this world where you just have a bright line . . . to do otherwise simply opens the door and invites endless litigation. Now, that is not to say that a witness who lies on the witness stand can’t be prosecuted . . . the State is not totally without some resources to go after a witness if it becomes appropriate . . . but in a civil case . . . to go after a witness civilly for their testimony . . . cannot be done . . .” (RP 62-63).

Judge O’Connor clarified that her ruling applied to Mr. Wynn’s claims regarding Ms. Earin’s testimony, as well as his claims related to Ms. Earin’s offer to testify. (RP 66). The trial court properly applied Washington law regarding witness

immunity, as such this court should affirm the trial court's rulings and order on this issue.

**B. Jury Instructions: Judge O'Connor Properly Instructed the Jury on Washington Law and Properly Reserved Determination of Damages for Statutory Violations.**

This Court reviews a trial court's determinations regarding jury instructions under an abuse of discretion standard; a trial court abuses its discretion if ". . . its decision was manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons." *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14, 16 (Div. I 1998). Reversal is only appropriate if this Court finds: (1) there was error in the lower court proceeding, (2) that the trial court abused its discretion in arriving at the erroneous determination and (3) the error was prejudicial. *See, Id.* Error can only be said to be prejudicial if it affected the outcome of the trial. *Washington State Dept. of Revenue v. Security Pacific Bank of Washington*

National Assn., 109 Wn. App. 795, 804 n. 7, 38 P.3d 354, 358 n.7  
(Div. II 2002).

This trial involved a morass of alleged violations of both statutory and tort duties. Wynn has attempted to make it about a series of alleged statutory violations which cumulatively and separately equaled negligence. (See Wynn's Brief at 19, 24-26).

However it is not. As Judge O'Connor noted:

"this is primarily a tort action . . . the allegation is a failure to comply with the standard of care. Part of the standard of care is whether or not the Defendant complied with various statutes that govern her profession. By separating those, in fact, the Plaintiff really contributed to the confusion in this case."

(RP 1142).

Yet, further confusing this matter, Mr. Wynn argues that "[p]rofessional negligence is often implicated by a continuing series of separate claims of malpractice." (Wynn's Brief at 19). He further argues that "[t]hese claims are considered 'course of professional treatment' claims", that "the negligence occurs over

an entire course of treatment, rather than through discreet acts”, and that “[t]he damage was caused from the entirety of negligence.” (*Id.* at 19-20).

The authority Mr. Wynn cites does not support these sweeping propositions. *Webb v. Neuroeducation Inc.*, 121 Wn. App. 336, 88 P.3d 419 (2004), simply stands for the proposition that in cases involving a course of professional treatment the statute of limitations begins to run at the end of the course of treatment. *American Home Assurance Co. v. Cohen*, 124 Wn.2d 865, 881 P.2d 1001 (1994), answers two certified questions regarding insurance coverage and public policy in Washington. Wynn cites **no authority** which alleviates him of the burden of proving that: (1) he was in fact harmed and (2) that harm proximately flowed from a negligent act or from negligent acts.

Regardless of the multiplicity of legal theories asserted by Wynn, this case was in essence about two alleged injuries, both

of which were submitted to the jury for its consideration. (CP 908-934). The first was the alleged psychic harm resulting from Ms. Earin's disclosure of counseling information to Dr. Chupardia, the Guardian Ad Litem, in the underlying custody proceeding. The second was the alleged psychic harm resulting from Ms. Earin's losing Mr. Wynn's counseling records. Mr. Wynn made this point well in his opening brief when he wrote:

“[p]er Plaintiff's complaint itself, the evidence obtained and used for the demonstrated statutory violates was the very same evidence used to demonstrate negligence.” (Wynn's brief at 45).

The jury determined that no injury was proximately caused by Ms. Earin's disclosures to Dr. Chupardia. (RP 1262-1266). The jury also determined that an injury was proximately caused by Ms. Earin's losing the counseling records and awarded damages accordingly. (*Id.*)

1. **Judge O'Connor properly dismissed Wynn's claim under RCW 70.02.080, and declined to submit Wynn's amended claim under RCW 70.02.060 to the jury.**

Mr. Wynn moved for a directed verdict based on RCW 70.02.080, which requires a health care provider to make recorded health care information available to a patient within 15 days of a written request for access to such records. (RP 1077). Mr. Wynn argued that when he subpoenaed Ms. Earin, to be deposed in the custody proceeding, it was actually a written request for his medical records pursuant to RCW 70.02.080. (*Id.*). Wynn further argued, that despite the fact that the subpoena ordered Ms. Earin to appear with the counseling records 24 days later, she was required to provide the records within 15 days. (RP 628-630, 875, 1077-79). Judge O'Connor denied Wynn's motion for a directed verdict and dismissed the claim under RCW 70.02.080 per Ms. Earin's motion. (RP 1113, 1115-16). Judge O'Connor's reasoning is clear and compelling:

"Mr. Wynn elected, through his Counsel, rather than to simply write a request, which he was free to do at any time for his records, and elected to use compulsory process . . . the fact that Ms. Earin did not comply with the 15-day disclosure requirement and/or letter to Mr. Wynn if disclosure doesn't occur is not applicable in this case. By electing to use a subpoena process that we fall under the compulsory process section, not under the 15-day disclosure section. To do otherwise, in fact, is to set up Ms. Earin. " (RP 1109)

Judge O'Connor allowed Mr. Wynn to amend his claims to include a claim based upon a violation of RCW 70.02.060. (RP 1115-16). Mr. Wynn's claim based upon RCW 70.02.060 did not appear in the Court's instructions to the jury. (CP 908-934).

RCW 70.02.060 dictates the steps a health care provider must take in complying with a subpoena. Mr. Wynn claims Ms. Earin's failure to comply with the statutory requirements (due to the records having been stolen from Ms. Earin's vehicle) caused him to suffer injury, and was therefore compensable. Not submitting this specific claim to the jury, however, was not error and did not result in any prejudice.

The jury was specifically told that Ms. Earin “violated the Health Care Information Act when she left confidential patient files of Pardner Wynn in a locked briefcase in an unlocked automobile, and such conduct is below the standard of care and constitutes negligence.” (CP 908-934, Ins. No. 17). The Jury was subsequently asked whether “the defendant’s negligence in the loss of medical records [was] a proximate cause of damage to the plaintiff.” (*Id.* at Verdict Form). The jury answered this question in the affirmative and determined that Mr. Wynn suffered damages in the amount of \$2,970. (RP 1262-1666).

“[A] party cannot recover damages twice for the same injury simply because he [or she] has two legal theories.” *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 527, 618 P.2d 1330, 1339 (1980). Mr. Wynn’s claim, under RCW 70.02.060, is simply a different legal theory seeking recompense for an alleged injury resulting from the loss of his counseling records. This injury was considered and compensated for by the

jury. As Division I of this Court has said: “[i]t is a basic principle of damages . . . that there shall be no double recovery for the same injury.” *Eagle Point Condominium Owners Assn. v. Coy*, 102 Wn. App. 697, 702, 8 P.3d 898, 902 (2000).

Mr. Wynn’s argument that he was prejudiced is without merit. The jury compensated Mr. Wynn for his injury. He cannot recover twice simply because he has another legal theory to support his claim.

**2. Judge O’Connor properly reserved determination of damages for statutory violations, in accord with a legislative mandate and the Washington State Constitution.**

Mr. Wynn essentially argues that Judge O’Connor misapplied RCW 70.02.170. (Wynn’s Brief at 22-26). The legislature passed the Health Care Information Access and Disclosure Act in 1991 and in so doing, decided that the court, rather than a jury, should determine the amount of damage attributable to a statutory violation. *See*, RCW 70.02.170.

Further, the legislature chose to limit a plaintiff's recovery to actual damages suffered rather than the full panoply of tort damages. *Id.*

Judge O'Connor respected this legislative determination and reserved determination of damages for Ms. Earin's alleged statutory violations for the court. (RP 1153-54). Doing so was not error. In fact, Judge O'Connor would have invited error by allowing the jury to consider damages for the same injury under two different legal theories. *See, Kammerer*, 27 Wn. App. at 527, 618 P.2d at 1339.

Judge O'Connor properly construed RCW 70.02.170 as requiring her to determine damages on Mr. Wynn's statutory claims. Mr. Wynn argues that the court may not "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." (Wynn's Brief at 24, *citing, Yousofian v. Office of Ron Simms*, 152 Wn.2d 421, 98 P.3d 463, 471 (2004)). While this is a correct statement of the law, the trial

court did not add words or clauses to RCW 70.02.170.

Subparagraph two is the portion of the statute at issue. It reads:

"(2) The court may order the health care provider or other person to comply with this chapter. Such relief may include actual damages, but shall not include consequential or incidental damages. The court shall award reasonable attorneys' fees and all other expenses reasonably incurred to the prevailing party."

Mr. Wynn argues that this provision required the issue of damages for his statutory claims to be submitted to the jury. (Wynn's Brief 23-24). Statutory provisions are construed in light of one another and are to be harmoniously construed with one another. *Timberline Air Service, Inc. v. Bell Helicopter-Textron Inc.*, 125 Wn.2d 305, 314-15, 884 P.2d 920, 925 (1994). The proper reading of the second sentence of the above provision is in accord with the first and third sentences - specifically that it is the province of the court to award actual damages for violations of the Act. Mr. Wynn's argument that the provision should be read as though the words "the jury" proceed the second sentence

is unsound statutory construction, which adds words or clauses the legislature chose not to.

Furthermore, Mr. Wynn was not prejudiced by Judge O'Connor's reservation of damages on these claims. Plaintiff's argument ultimately boils down to an assertion that the jury should have determined what damages were proximately caused by (1) Ms. Earin's disclosures to Dr. Chupardia and (2) what damages were proximately caused by Ms. Earin allowing Mr. Wynn's medical records to be stolen from her car. The jury, in fact considered and rendered a verdict on these claims. (RP 1262-1666). As noted above, Mr. Wynn is only entitled to recover once for his injury, regardless of his arguing multiple legal theories. *See, Eagle Point Condominium Owners Assn.*, 102 Wn. App. at 702, 8 P.3d 898 at 902; *Kammerer*, 27 Wn. App. at 527, 618 P.2d at 1339.

Ultimately, it is of no moment under which legal theory the jury evaluated Mr. Wynn's claims. The jury unambiguously

determined that Ms. Earin was negligent in disclosing information to Dr. Chupurdia, but that no injury was proximately caused thereby. (RP 1262-62 ) The jury also clearly determined that an injury was proximately caused by Ms. Earin's losing Mr. Wynn's records. (*Id.*) As the jury considered and rendered a verdict on Mr. Wynn's claims, no prejudice resulted from Judge O'Connor's reservation of damages on Mr. Wynn's statutory claims.

C. **Juror Dismissal: it Was Not Error for Judge O'Connor to Dismiss Juror Gisolo, as Judge O'Connor Was under a Continuing, Discretionary Duty to Excuse Any Juror Who Became Unable to Perform His or Her Duties.**

Wynn argues Judge O'Connor abused her discretion in dismissing Juror Gisolo; his argument focuses upon the fact neither party moved for the juror's dismissal. (*See* Wynn Brief at 26-37). However, RCW 2.36.110 imposes an unambiguous duty on a trial judge to "excuse from further jury service any juror, who **in the opinion of the judge** has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any

physical or mental defect or by reason of conduct or practices incompatible with proper jury service." (Emphasis added). The legislature has placed this duty squarely upon the trial judge's shoulders, being notably silent regarding a party's challenge.

Under RCW 2.36.110 and applicable court rules the trial judge is under a **continuous obligation** to excuse any juror who is unfit or unable to perform his or her duties. *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866, 869 (Div. II 2000). The Court of Appeals also adopted a test for determining whether a trial judge acted appropriately in removing a juror; that test is whether the record establishes that the juror engaged in misconduct. *Jorden*, 103 Wn. App. at 229, 11 P.3d at 870. However, the Court of Appeals declined to impose a mandatory format for trial courts to make the necessary record; the court noted: ". . . the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and thus avoids creating prejudice against either party." *Id.* In the present

case, Judge O'Connor created a substantial and compelling record, thereby satisfying the *Jorden* test. (RP 202-215). Prior to excusing the Juror Gisolo, Judge O'Connor gave both party's counsel an opportunity to question the juror. During questioning by Wynn's counsel, Ms. Gisolo candidly told the Court and counsel "I don't know what the law is . . . but going in right now the way I feel, I am very, unfortunately, I am biased in this. They said they need to have someone unbiased. I felt like if I went on with this, it would be immoral. It is not fair to Ms. Earin." (RP 209). It is understandable that the Wynn wished to have his case heard by a juror who admitted that her service would unfair to Ms. Earin. However, such is not our system. It was not judicial error for Judge O'Connor to dismiss a Juror Gisolo, in accord with RCW 2.36.110.

**D. Inconsistent Verdict: Judge O'Connor Did Not Err in Denying Wynn's Motion for Judgment as a Matter of Law, Which Argued the Special Verdict Was**

**Inconsistent.**

A motion for judgment as a matter of law should not be granted unless “viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Guijosa*, 144 Wn.d2 at 915, 32 P.2d at 254 (citing, *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

Wynn’s basic argument is that because the jury awarded special damages, it was required to award general damages, and that, consequently, the jury’s finding of \$2,790.00 of economic damages and no general damages was inconsistent. (Wynn’s Brief at 37-41). That is incorrect.

This very situation was addressed in *Gestson v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (Div. II 2003). There, Ms. Scott backed her vehicle into Ms. Gestson’s car. *Id.* at 618, 67 P.3d

at 497. In her action against Ms. Scott, Ms. Gestson claimed medical expenses of \$65,000, along with general damages. *Id.* The jury, however, awarded only \$458.34, the cost of Gestson's emergency room visit, and no general damages. *Id.*

Ms. Gestson moved for judgment notwithstanding the jury verdict, for a new trial, or for reconsideration. *Id.* at 619, 67 P.3d at 497. The trial court granted Gestson's motion for a new trial, ruling that a jury cannot award special damages without also awarding general damages, and that the fact the jury awarded special damages but no general damages showed the verdict was a result of passion or prejudice. *Id.* at 620, 67 P.3d at 498.

On appeal, the court reversed and reinstated the verdict. The court held in no uncertain terms: “[a] jury may award special damages and no general damages when ‘the record would support a verdict omitting general damages.’ ” *Id.* (*quoting*,

*Palmer v. Jensen*, 132 Wn.2d 193, 202, 937 P.2d 597 (1997)).

The Court of Appeals went on to say: “courts are reluctant to interfere with a jury's damage award that is fairly made; where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.” *Gestson*, 116 Wn. App. at 621, 67 P.d3 at 498. (Internal citation and quotation omitted). Using even stronger language the court wrote: “[i]f a jury award is within the range of evidence, it is error to rule that juror passion or prejudice motivated the award.” *Id.*

In the instant case, the nature, extent and cause of plaintiff's alleged emotional injuries was hotly contested. There was evidence that plaintiff, at the time of his visits with Dr. Ronald Klein and Dr. Paul Domitor, was experiencing stressful events and circumstances completely unrelated to the theft of Ms. Earin's records, including his ongoing custody dispute with Mrs. Wynn and a new family. (RP 299, 327, 370,

374) In addition, there was no evidence presented that the stolen counseling records had been found, or were even likely to be found, thus casting doubt on plaintiff's claims of anxiety and depression relating to the loss of records.

Moreover, Mr. Wynn's claims of mental and emotional distress were dependent entirely on his subjective description thereof to the jury and his psychologists. Consequently, Mr. Wynn's demeanor, credibility and candor were important jury issues at trial. Mr. Wynn told Dr. Domitor he had concerns that the records would be discovered, because of his political aspirations. (RP 326-327, 243). However, there was evidence that the jury was entitled to accept that would support the notion that there was not any highly secretive confidential information in the file, or, to the extent there was, it had already been made a matter of public record through plaintiff's very public divorce and child custody proceedings. (RP 601, 605-08, 610). In other

words, to award Mr. Wynn general damages for mental and emotional distress, a jury would have been required to believe and find credible what he had said both while on the witness stand and while speaking with his expert witnesses. The jury's verdict indicated it did not believe Mr. Wynn's testimony. That was well within their province and ability based on all of the evidence presented at trial.

In sum, viewing the evidence in the light most favorable to Ms. Earin, as the court must, the record supports the jury's award of only special damages for Wynn's visits with Dr. Domitor. Accordingly, this court should affirm the trial court's denial of Mr. Wynn's motion for judgment as a matter of law.

**E. Statutory Attorney Fees: Judge O'Connor Did Not Err in Awarding less than Wynn's Prayed for in Attorney Fees and Costs.**

This court reviews a trial court's determination of

reasonable attorney under an abuse of discretion standard.

Yousoufian, 152 Wn.2d 421, 98 P.3d at 467.

As originally filed, Apellant's claim related solely to the theft of plaintiff's counseling records from Ms. Earin's car, and the allegation that the theft was the result of Ms. Earin's failure to properly secure counseling records in violation of RCW 70.02, et seq. (CP 1-11, 12-21).

Over Ms. Earin's objection, Wynn was allowed to file an amended complaint that substantially expanded the scope of his case, to include the variety of statutory and common law claims discussed above. (*See* Defendant's Cross-Motion for Award of Costs and Reasonable Attorney's Fees). At trial, all of Wynn's claims for violation of RCW 70.02 were dismissed, except for those pertaining to Ms. Earin's telephone conversation with the GAL and the claim Ms. Earin failed to properly secure plaintiff's records. (CP 908-934, Ins. No. 4, 17).

The jury, by special verdict, found Ms. Earin was negligent

in speaking with the Guardian ad Litem over the phone. (RP 1262-63). However, the jury further concluded that Ms. Earin's negligence in this regard was not a proximate cause of damage to the plaintiff. (*Id.*)

In the wake of the court's directed verdict, the jury found that Ms. Earin's negligence in the loss of the medical records was a proximate cause of damage to the plaintiff. (*Id.*). Judge O'Connor then held that Wynn was the prevailing party under the statute based upon his having verdicts directed in his favor. (CP 1072-1074).

In general, a prevailing party is one who receives an affirmative judgment in his or her favor. *Rass v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997) (citing, *Schmidt v. Cornerstone Invs. Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990)); *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428, 434 (Div. I 2000). If neither party wholly prevails, as here, then the determination of who was the prevailing party depends

upon who is the substantially prevailing party. *Rass, supra*, citing *Marassi v. Lau*, 71 Wn. Ap. 912, 916, 859 P.2d 605 (1993).

Here, Judge O'Connor, in ruling on Wynn's request for attorney fees and costs, assumed Wynn to have been the prevailing party. However, the record supports the conclusion that Wynn was not the substantially prevailing party on many of the claims he asserted. That Wynn was the prevailing, or substantially prevailing party, on only some of his many claims is an alternate ground for upholding of Judge O'Connor's ruling on Wynn's request for attorney fees and costs. An appellate court may affirm a trial court ruling or order on any basis supported by the record. *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000). See also *Truck Ins. Exch. v. Vanport Homes*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

Even assuming, as Judge O'Connor did, that Wynn was the prevailing party here, her ruling on Plaintiff's request for costs and attorney's fees was nevertheless appropriate. Where a fee

shifting statute fails to indicate how an attorney-fee award should be calculated, the lodestar method is utilized. *Bowers v. Trans America Title Ins. Co.*, 100 Wn.2d 581, 594, 675 P.2d 193, 202 (1983). A court arrives at the lodestar award by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210, 1215-16 (1993). The lodestar amount may be adjusted to account for subjective factors such as the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case. *Bowers*, 100 Wn.2d at 597, 675 P.2d at 203-04. The **amount of recovery is a relevant consideration** in determining the reasonableness of a fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 953 P.2d 632, 650-51 (1998); *Travis v. Washington Horse Breeders Assn.*, 111 Wn.2d 396, 409-10, 759 P.2d 418, 425 (1988).

Under the lodestar methodology, a court must first

determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. In passing on the reasonableness of plaintiff's attorney fee request, in addition to the lodestar principles discussed *infra*, the court should consider that the amount of time "reasonably expended" should not include unproductive time, such as time spent on unsuccessful claims or duplicated efforts. *Scott Fetzer Co.*, 122 Wn.2d at 151, 859 P.2d at 1216.

In addition, a lodestar attorney fee award may be adjusted downward based on the lodestar figure greatly exceeding the amount involved in the controversy. *Id.* at 150, 859 P.2d at 1216. As the court recognized in *Scott Fetzer Co. v. Weeks*, the general purpose of most fee shifting statutes is to punish frivolous litigation and encourage meritorious litigation. 122 Wn.2d at 149, 859 P.2d at 1215. Necessarily, punishing frivolous litigation and encouraging meritorious claims requires the court to exclude from the requested fee any wasteful or duplicative hours, as well

as any hours pertaining to unsuccessful theories or claims. *Id.* at 151, 859 P.2d at 1216.

In order to justify an award of attorney fees, counsel must provide contemporaneous records documenting the hours worked. The Washington State Supreme Court in *Bowers v. Trans America Title Ins. Co.* stated that such documentation:

"Need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.)."

100 Wn.2d at 597, 675 P.2d at 203.

After several years of contentious litigation, at an expenditure of approximately \$130,000 in attorney fees and \$11,000 in costs, at the culmination of a two-week trial, Mr. Wynn managed to obtain a verdict in his favor in the amount of \$2,790. (*See* Wynn's Brief at 41, RP 1263).

Judge O'Connor determined that Mr. Wynn was entitled to reasonable attorney fees and costs for the two statutory claims, on

which she had directed verdicts in Mr. Wynn's. (CP 1072-1074). Judge O'Connor noted that it was "very difficult to segregate work on the statutory violation issue and plaintiff's counsel's time sheets are not very helpful in this exercise." (*Id.*) Due to Mr. Wynn not providing the documentation required by Bowers v. Trans America Title Ins. Co., Judge O'Connor had difficulty determining what fees and costs were reasonable. (*Id.*) The trial court wrote: "I have reviewed the time sheets and as best I can determine 10 percent of the time can be allocated to ascertaining the events that occurred . . . and analyzing them in the context of a statutory violation." (*Id.*).

Mr. Wynn argues that segregation of his claims was inappropriate, and that the current matter is akin to Brand v. Dept. of Labor & Indus. (See Wynn's brief at 43-44); 139 Wn.2d 659, 989 P.2d 1111 (1999). The Brand court concluded that a court should not segregate claims in awarding attorney fees and costs under the Industrial Insurance Act. 139 Wn.2d at 673, 989 P.2d

at 1118. The court wrote:

“claims brought under the industrial insurance act are different from the discrete, unrelated claims at issue in *Hensley*. [*Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (holding the extent of a litigant success is a crucial factor in determining an award of attorney fees and costs).] Worker’s compensation claims are statutorily based, and deal with one set of facts and legal issues. The sole issue on appeal before the superior court or appellate court in an Industrial Insurance Act case is whether or not the board adequately assessed the worker’s degree of injury.”

*Id.*

The only similarity between Mr. Wynn’s claim and a case brought under the Industrial Insurance Act is the fact that both cases involve portions of the Revised Code of Washington. While there might be a single legal issue in a case under the Industrial Insurance Act, Mr. Wynn’s claims involve multiple legal theories engendered multiple legal issues. As such, Judge O’Connor was correct in segregating successful claims in order to award reasonable fees and costs. (CP 1072-1074).

Taking account of all the above lodestar factors, it cannot be said that Judge O'Connor abused her discretion in awarding Mr. Wynn in excess of \$12,000 in fees and costs, incurred to recover a \$2790 judgment. This is especially true, in light of the fact that Mr. Wynn's fee and cost documentation were of little assistance to the trial court. (CP 1072-1074).

Despite the above, Mr. Wynn argues that "[t]he purpose of fee statutes is to enforce a legislative goal." (Wynn's brief at 42). Mr. Wynn notes this idea is "consistent with 'private attorney general' theories." (*Id.*). It warrants noting, that in May 2004, Division III of the Washington State Court of Appeals wrote: "[the private attorney general doctrine] is based on a belief that person who pursue legal remedies that benefit the public should be reimbursed their attorney fees. However, our court have refused to adopt the private attorney general doctrine." *Wright v. Jeckle*, 121 Wn. App. 624, 632-33, 90 P.3d 65, 69 (2004) (*citing*, *Blue Sky Advocates v. State*, 107 Wn.2d 112, 122, 727 P.2d 644

(1986); *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 401, 932 P.2d 139 (1997)). (Internal citation omitted).

Given Washington's use of the lodestar method and its rejection of the private attorney general doctrine, this court should hold that Judge O'Connor did not abuse her discretion in awarding Mr. Wynn reasonable attorney fees and costs on his statutory claims.

### **III. ATTORNEY FEES ON APPEAL**

Mr. Wynn is correct that RAP 18.1 allows for attorney fees on appeal if the applicable law, underlying the appeal provides for attorney fees; Mr. Wynn is also correct that RCW 70.02.170 allows for reasonable attorney fees. (*See* Wynn's brief at 46). However, Mr. Wynn's prayer for damages on appeal is predicated upon his assertion that he was not granted the proper remedy for allegedly proven violations of the Health Care Information Access and Disclosure Act. (*See* Wynn's Brief at 47). As the record below, and Washington law, clearly establish that Mr.

Wynn's claims were properly submitted to a jury and properly reviewed by a jury, his prayer for fees in this court rests on untenable grounds. As Mr. Wynn's claims were properly adjudicated below, his appeal presents no debatable issue; as such an award of fees on appeal is inappropriate and should be denied. See, *Harrington v. Pailthorp*, 67 Wn. App. 901, 913, 841 P.2d 1258, 1264 (Div. I 1992).

#### IV. CONCLUSION

Based on the foregoing arguments and authorities, Earin Jolene Earin respectfully requests that the Court affirm Judge O'Connor's juror dismissal, evidentiary rulings, and post-trial orders.

Respectfully submitted this 9th day of February, 2005.

KEEFE, KING & BOWMAN, P.S.

By

  
\_\_\_\_\_  
Christopher J. Kerley  
Attorneys for Earin

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 4<sup>th</sup> day of February, 2005, the foregoing was served via hand delivery on the following persons at the addresses stated below:

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