FILED

SEP 04 2012

No. 304051

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JAMES HENRY ESKRIDGE, II & AMY DAWN ESKRIDGE,
Respondents,

v.

DARLENE M. TOWNSEND, PH.D.,
Appellant.

BRIEF OF RESPONDENTS

John D. Allison, WSBA No. 26299
Benjamin P. Compton, WSBA No. 44567
EYMANN ALLISON HUNTER JONES P.S.
2208 West Second Avenue
Spokane, WA 99201
(509) 747-0101

Attorneys for Respondents

FILED

SEP 04 2012

No. 304051

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JAMES HENRY ESKRIDGE, II & AMY DAWN ESKRIDGE,
Respondents,

v.

DARLENE M. TOWNSEND, PH.D.,
Appellant.

BRIEF OF RESPONDENTS

John D. Allison, WSBA No. 26299
Benjamin P. Compton, WSBA No. 44567
EYMANN ALLISON HUNTER JONES P.S.
2208 West Second Avenue
Spokane, WA 99201
(509) 747-0101

Attorneys for Respondents

Table of Contents

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. Background Facts & Trial Testimony 1

1. Lack of Assessment and Misdiagnosis 2

2. Breach of Confidentiality 3

3. The End of Counseling with Dr. Townsend 4

4. Timing of CPS Report by Dr. Townsend 4

5. Testimony of CPS Investigator Denise Guffin 6

6. Dr. Townsend's later accusations to third parties re: Jim Eskridge 9

B. Procedural History 10

1. Original Complaint 10

2. Amended Complaint & Answer 11

3. Stipulation & Order 11

4. Discovery Responses 12

5. Dismissal Motion & Order 13

6. Notice of Intent to Admit Documents 13

7. The Parties' Trial Management Joint Report 13

8. Trial Briefs 15

9. Motions in Limine 15

10. CR 50 Motion & Jury Instruction Conference... 16

ARGUMENT 17

A. Dr. Townsend is Precluded from Raising the Immunity Provision of RCW 4.24.510 as an Affirmative Defense. 17

1. Standard of Review 17

2. Dr. Townsend Has Waived the Affirmative Defense of Immunity Under RCW 4.24.510 by Acting in an Inconsistent and Dilatory Manner 18

3. Absolute Immunity under RCW 4.24.510 is an Affirmative Defense, Not a Rule of Evidence 26

4. The Parties Entered Into a Binding Stipulation Allowing the Eskridges to Premise Liability on Dr. Townsend's Communications to CPS 27

B. RCW 4.24.510 Does Not Apply When One Party Seeks to Hold Another Liable for Making a Report of Abuse to CPS. 29

C. The Trial Court Correctly Overruled Defense Counsel's Hearsay Objections. If Not, the Error Was Harmless. 35

1. Standard of Review 35

2. Dr. Townsend Has Failed to Preserve the Issue Whether Ms. Guffin Improperly Commented on Other Witness' Credibility. 35

3. Dr. Townsend Has Inadequately Briefed the Hearsay Issue. 36

4. CPS Investigator Denise Guffin was an Expert Witness, Properly Allowed to Testify as to Statements Made to Her by the Eskridges and their Sons 38

5. The Statements at Issue Are Not Hearsay 42

a. The Statements Were Offered To Show their Effect on the Hearer, Ms. Guffin 42

b. The Statements Were Offered To Show Background and Context for Ms. Guffin's Investigation and the Conclusion She Reached. 43

6. Even if The Statements Are Hearsay, Admitting Them Was Harmless 44

D. Jury Instruction No. 11 is the Law of the Case Because Dr. Townsend Failed to Object to the Instruction Below. Moreover, Appellate Consideration is Unmerited Because Dr. Townsend Failed to Provide Argument and Citation to Authority in Support of Her Assignment of Error. 47

CONCLUSION 51

Table of Authorities

Cases

Amalgamated Transit v. State, 142 Wn.2d 183, 11 P.3d 762 (2000) 37

Bailey v. State, 174 Wn. App. 251, 191 P.3d 1285 (Div. 3 2008) 19

Beggs v. Dep't of Soc. & Health Servs., 171 Wn.2d 69, 247 P.3d 421 (2011) 34

Bour v. Johnson, 122 Wn.2d 829, 864 P.2d 380 (1993) 30

Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983) 44

Clark v. Baines, 150 Wn.2d 905, 84 P.3d 245 (2004) 32

Clark v. State Attorney General's Office, 133 Wn. App. 767, 138 P.3d 144 (2006) 43

Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 974 P.2d 847 (1999) 23

Dunning v. Pacerelli, 63 Wn. App 232, 818 P.2d 34 (1991) 32

Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 69 P.3d 895 (2003) 50

Estate of Ryder v. Kelly-Springfield Tire Co., 91 Wn.2d 111, 587 P.2d 160 (1978) 48

Flight Options, LLC v. Dep't of Revenue, 172 Wn.2d 487, 259 P.3d 234 (2011) 30

Floyd v. Meyers, 53 Wn.2d 351, 333 P.2d 654 (1959) 44

Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 722 P.2d 787 (1986) 41

Harris v. Robert C. Groth, M.D., P.S., 99 Wn.2d 438, 663 P.2d 113 (1983) 40

Holland v. City of Tacoma, 90 Wn. App. 533, 954 P.2d 290 (1998) 37

In re Det. of A.S., 138 Wn.2d 898, 982 P.2d 1156 (1999) 40

In re Det. of Marshall, 156 Wn.2d 150, 125 P.3d 111 (2005) 41

In re Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997) 17

In re Marriage of Suggs, 152 Wn.2d 74, 93 P.3d 161 (2004) 26

King v. Rice, 146 Wn. App. 662, 191 P.3d 946 (2008) 38

King v. Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (2000) 18, 19, 24

Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000) 18, 24

McDonald v. Murray, 83 Wn.2d 17, 515 P.2d 151 (1973) 19

Moneysource Mortg. Co. v. Shannon, 167 Wn. App. 242, 274 P.3d 375 (2012) 23

Moolick v. Lawson, 33 Wn. App. 665, 665 P.2d 1185 (1982) 43

Morgan v. Mass. General Hosp., 901 F.2d 186 (1st Cir. 1990) 44

Nelson v. Mueller, 85 Wn.2d 234, 533 P.2d 383 (1975) 48

Nguyen v. Sacred Heart Med. Ctr., 97 Wn. App. 728, 987 P.2d 634 (1999). 29

Oltman v. Holland America Line USA, Inc., 163 Wn.2d 236, 178 P.3d 981 (2008) 24, 25

Or. Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 36 P.3d 1065 (2001) 49

Patterson v. Kennewick Public Hosp. Dist. No. 1, 57 Wn. App. 739, 790 P.2d 195 (1990) 43

Peters v. Ballard, 58 Wn. App. 921, 795 P.2d 1158, rev. den., 115 Wn.2d 1032 (1990) 39

Roberts v. Atl. Richfield Co., 88 Wn.2d 887, 568 P.2d 764 (1977) 49

Roumel v. Fude, 62 Wn.2d 397, 383 P.2d 283 (1963) 48

Ryan v. Westgard, 12 Wn. App. 500, 530 P.2d 687 (1975) 48

Saldivar v. Momah, 145 Wn. App. 365, 186 P.3d 1117 (2008) 40

Schmidt v. Cornerstone Invest., 115 Wn.2d 148, 795 P.2d 1143 (1990) 37

Shinn Irr. Equipment, Inc. v. Marchand, 1 Wn. App. 428, 462 P.2d 571 (1969) 26

Smyth Worldwide Movers v. Whitney, 6 Wn. App. 176, 491 P.2d 1356 (1971) 28
State v. Bell, 10 Wn. App. 957, 521 P.2d 70 (1973) 38

State v. Bishop, 753 P.2d 439 (Utah 1988) 38

State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997) 35

State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995) 42

State v. Ferguson, 100 Wn.2d 131, 667 P.2d 68 (1993) 36

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) 17

State v. Fitzgerald, 39 Wn. App. 652, 694 P.2d 1117 (1985) 43, 44

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 50

State v. Johnson, 119 Wn.2d 167, 829 P.2d 1082 (1992) 30

State v. Koepke, 47 Wn. App. 897, 738 P.2d 295 (Div. 3 1987) 36

State v. Lee, 159 Wn. App 795, 247 P.3d 470 (2011) 38

State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004) 44

State v. McPherson, 111 Wn. App. 747, 46 P.3d 284 (Div. 3 2002) 40

State v. O'Connor, 155 Wn. App 282, 229 P.3d 880 (Div. 3 2010) 17

State v. Public Util. Dist. No. 1, 91 Wn.2d 378, 588 P.2d 1146 (1979) 34

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) 41

State v. Smith, 56 Wn. App. 909, 786 P.2d 320 (1990) 43

Stottlemyre v. Reed, 35 Wn. App. 169, 665 P.2d 1383 (1983) 28

Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983) 47

U.S. v. Bartley, 855 F.2d 547 (8th Cir. 1988) 41

Van Hout v. Celotex Corp., 121 Wn.2d 697, 853 P.2d 908 (1993) 48

Waste Management v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 869 P.2d 1054 (1994) 30

Wilson v. Key Tronic Corp., 40 Wn. App. 802, 701 P.2d 518 (1985) 43

Statutes

LAWS of 1965, ch. 13 § 6 31

LAWS of 1989, ch. 234 30

LAWS of 2002, ch. 232, § 1 30

LAWS of 2002, ch. 232, § 2 30

LAWS of 2004, ch. 37, § 1 ..... 31, 34

LAWS of 2007, ch. 118, §§ 1, 2 31

RCW 2.44.010 ..... 28, 29

RCW 4.24.510 ..... Passim

RCW 4.24.525 27

RCW 7.70 ..... 20, 27, 34

RCW 26.44 ..... Passim

RCW 26.44.010 33

RCW 26.44.015 33

RCW 26.44.030 ..... 21, 33, 34

RCW 26.44.032 33

RCW 26.44.060 ..... Passim

RCW 26.44.061 31

RCW 26.44.061(2) 31, 35

Other Authorities

14 Tegland, Wash. Prac., *Civil Procedure* § 12:17 at 488-89 (2nd ed. 2009) 26

5 K. Tegland, Wash. Prac., *Evidence* § 10, at 25 (2d ed. 1982) 36

5A K. Tegland, Wash. Prac., *Evidence* § 289 (1982) 40

5B K. Tegland, Wash. Prac., *Evidence* § 702.6 (2007) 41

5C K. Tegland, Wash. Prac., *Evidence* § 803.15 (5th ed. 2007) 42, 43

Black's Law Dictionary 264 (8th ed. 2009) 19, 22

Rules

CR 1 .... 18, 24

CR 2A 28, 29

CR 8 23

CR 8(c) 26

CR 10(b) 22

CR 12(b) 25

CR 12(h)(1) 25

CR 15(b) 21

CR 26(b)(4) 39

CR 51(f) 48

ER 702 .... 40, 41

ER 703 41

ER 801 .... 23, 37

ER 801(c) 42

ER 802 42

ER 904 23

RAP 2.5 36

RAP 2.5(a) 47

RAP 10.3 50

RAP 10.3(a)(6) 36, 48

RAP 10.3(b) 38

RAP 10.3(c) 38

RAP 10.4(c) 47

INTRODUCTION

Dr. Darlene Townsend appeals a jury's verdict finding her liable for negligence as a marriage and family therapist. The trial court properly ruled Dr. Townsend too late in raising general immunity under RCW 4.24.510 for accusations of sexual abuse against her client made in a report to Child Protective Services (CPS) and other governmental entities. The trial court also properly ruled that in any event, such general immunity does not trump or replace the specific immunity test of good faith under Washington's CPS reporting statutes, RCW 26.44.

The trial court properly labeled as "expert" the CPS investigator who, without objection, offered her opinion that Dr. Townsend's report was "unfounded." This fact expert was properly allowed to relay statements made by Dr. Townsend's clients and their sons. Finally, Dr. Townsend failed to preserve her claim of error regarding a jury instruction on good faith immunity under RCW 26.44.

STATEMENT OF THE CASE

A. Background Facts & Trial Testimony

On October 6, 2011, a jury found Spokane marriage and family therapist Darlene Townsend, Ph.D., negligent in her counseling of plaintiffs James (Jim) and Amy Eskridge. RP at 941-42. The Eskridges' liability expert testified Dr. Townsend violated standards of care by breaching confidentiality, failing to

make adequate assessments, and misdiagnosis – both in labeling Jim Eskridge a "sex addict," and in reporting him to CPS. RP at 410-61.

1. Lack of Assessment and Misdiagnosis

Jim Eskridge began therapy as Dr. Townsend's individual client in August of 2006, for follow-up care after inpatient treatment for alcohol dependency and depression. RP at 488, 497-99. After the third or fourth appointment, Dr. Townsend requested that Jim's wife, Amy, also begin separate, individual counseling with her. RP at 499-500, 96-97. Within a few weeks of this parallel individual therapy, Dr. Townsend concluded that Jim Eskridge was a sex addict. RP at 241. Dr. Townsend claimed Jim Eskridge's sexual issues were a predominant theme "in almost every [counseling] session." RP at 244. At trial, Dr. Townsend was shown her own notes for each of approximately 70 counseling sessions with Jim and Amy; she admitted that sex or intimacy issues were referenced in only about five of those 70 sessions. RP at 303-317. Dr. Townsend also admitted the need to use great care in diagnosing sex addiction, using standardized screening instruments and diagnostic criteria. RP at 223-24. She testified "every patient who comes in with a sexual addiction statement of need" is given 10 screening questions and a 30-page document to fill out. RP at 225. She admitted administering none of these tests to Jim Eskridge prior to her conclusion that he was a "sex addict." RP at 227.

2. Breach of Confidentiality

Dr. Townsend admitted the standard of care required her to not disclose client confidences without express written authorization or waiver. RP at 232. At trial, Dr. Townsend admitted she disclosed to Amy that Jim could not accept "his sexual addiction diagnosis." RP at 241. Dr. Townsend admitted she did not have Jim's permission to disclose those opinions. RP at 241.[1] In other private sessions with Amy, Dr. Townsend disclosed additional confidences learned from Jim in his therapy, including frustrations over Amy's work schedule. RP at 104. Dr. Townsend told Amy she had concluded Jim wasn't doing enough to recover from alcohol dependency, and that his current Alcoholics Anonymous sponsor was too much like Jim's father and needed to be replaced. RP at 104. Amy would return home from these sessions and confront Jim with Dr. Townsend's comments, causing conflict and protests from Jim. RP at 105.

Dr. Townsend presided over a couple of joint counseling sessions with Amy and Jim. RP at 106. Dr. Townsend admitted the standard of care required she maintain individual confidentiality during group and couple's counseling, absent expressed written permission for disclosure. RP at 233. Yet during one joint session, Dr. Townsend turned to Amy and disclosed her opinion that Jim had

[1] Jim Eskridge testified that Dr. Townsend never informed him of her sexual addiction diagnosis. RP at 539-40.

"Borderline Personality Disorder." RP at 240-41. Dr. Townsend admitted she had not received Jim's consent to disclose such an opinion. RP at 241.

Amy Eskridge testified that several months into their counseling, Dr. Townsend told her Jim needed intensive in-patient treatment for sex addicts in Mississippi. RP at 111-12. Amy testified Dr. Townsend instructed her to tell Jim only that the program was for "depression," and to hide the sexual addiction component because Jim likely would not go. RP at 828. Jim testified he agreed to go at Amy's and Dr. Townsend's urging, and later learned of the true nature of the program during a pre-admission phone interview with the facility. RP at 514-18. Jim testified he felt betrayed by Dr. Townsend. RP at 520-21.

3. The End of Counseling with Dr. Townsend

Jim Eskridge testified that on July 30, 2007, he confronted Dr. Townsend about repeated disclosures of confidentiality and co-opting of Amy. RP at 520-21. He testified when he told Dr. Townsend he wanted to terminate therapy, she threatened to cease counseling the Eskridge's two young sons. RP at 520-21.[2] Jim said he agreed to continue making appointments, but would no longer engage in substantive discussions with Dr. Townsend. RP at 520-21.

4. Timing of CPS Report by Dr. Townsend

One month later, on August 31, 2007, Dr. Townsend reported Jim and Amy Eskridge to CPS. RP at 630. At trial, Dr. Townsend testified her CPS report

[2] Dr. Townsend had also begun individual therapy of the Eskridge's sons that summer. RP at 283-84.

was based on statements Jim made in a counseling session on July 30, 2007, as reflected in Dr. Townsend's chart notes for that session:

> He says he just loves his boys so much and misses Amy so much that he is feeling lonely. Says the nights are difficult on missing Amy so he has begun crawling into bed w/ the boys and just "holding them close" says "they wake up and ask me what is wrong". (Townsend) expresses concern over this inappropriate substitution of the boys for Amy but he protests that it is OK because he loves them "so much."

RP at 243. Dr. Townsend testified this statement immediately convinced her that Jim was sexually molesting his children and that she was required to report to CPS. RP at 244-48, 289-90.[3] Dr. Townsend testified she waited a month to make a report to CPS because Amy would be out of town that entire month and the boys needed her when the report was made RP at 247-48. Dr. Townsend waited, even if that meant exposing the boys to more sexual abuse during that time. RP at 247-49.

It was plaintiffs' theory that Dr. Townsend's interpretation of Jim's comments, and how she reported them, changed dramatically when Jim confronted Dr. Townsend with the breaches of confidentiality and betrayal, and then tried to quit counseling with her. RP at 270, 883-84, 937. It was also plaintiffs' theory that Dr. Townsend's chart notes and actions during the intervening month between

---

[3] Dr. Townsend admitted this was the one and only statement by Jim Eskridge leading her to later tell the Washington State Bar Association that Mr. Eskridge had "described to her, in clear detail, the methods by which he was sexually molesting his sons." RP at 244-45.

the July 30th session and Dr. Townsend's report to CPS showed she did not believe that Jim Eskridge was abusing his sons. RP at 249, 271-77, 282-83.

On August 13, 2007, Jim Eskridge told Dr. Townsend, through voice mail, that he could not make his regular appointment set for August 13, 2007. RP at 524. It was his first "no-show" in more than a year of weekly visits. RP at 525. The next day, Jim arrived at Dr. Townsend's office with his two boys for their weekly appointment. RP at 525. Dr. Townsend admitted she did not question Jim or make any mention of his failure to appear the preceding day. RP at 279-80. Jim Eskridge testified that six days later, on August 20, he arrived for his next weekly appointment only to hear Dr. Townsend say he'd been replaced with another client and she was terminating his therapy. RP at 526-27.

Dr. Townsend agreed to see Amy on August 29, 2007, and told her that day she was reporting Jim to CPS. RP at 119-20. Dr. Townsend claimed confidentiality rules prevented her from disclosing reasons for the report, but she did offer this: "everyone had their clothes on." RP at 119-20.

5. Testimony of CPS Investigator Denise Guffin

Ms. Guffin took the stand and testified regarding her investigation of Dr. Townsend's complaint to CPS. Ms. Guffin further testified she had investigated more than 400 separate reports of child neglect or abuse and that she held a master's degree in social work. RP at 586-87. She then described for the jury the many steps of investigation that she followed according to CPS procedure,

including unannounced visits to the home, interviews of the children involved, interviews of "collateral" sources such as physicians, neighbors and teachers, and interviews of the accused parents. RP at 588-92. She testified that while interviewing children, she was trained to watch body language and other non-verbal signs as part of her interpretation. RP at 593-94.

Ms. Guffin testified, without objection, that Dr. Townsend reported to CPS "that the children are terrified of the father," and that Jim Eskridge had reported to her (Townsend) "spanking the children," "hit[ing] the kids and throw[ing] them in the room for the afternoon." RP at 597. Ms. Guffin testified that Dr. Townsend reported "that Jordan told her that dad spanked him so much he was bleeding," and that the boys had told her that one of the boys "was trying to get away from dad's spanking and dad hit him in the head and it required stitches." RP at 597. Ms. Guffin also testified that Dr. Townsend reported that Jim Eskridge was "a sex addict." RP at 597.

Ms. Guffin testified that Dr. Townsend's original allegations referenced only alleged physical abuse and neglect; there was no indication by the reporter (Dr. Townsend) that any sexual abuse had occurred. RP at 595. Dr. Townsend admitted that her original call to CPS referenced "physical and emotional abuse," and that she spoke about sexual abuse only after the CPS investigator later "asked for more details." RP at 277-78.

Dr. Townsend told the CPS intake person that Jim Eskridge "is a dry alcoholic and a sex addict." RP at 597. CPS Investigator Guffin contacted the Eskridge kids' elementary school and arranged with school officials to interview the children there. RP at 598-99. Both sons told Ms. Guffin they were not afraid of their father. RP at 601-604. Ms. Guffin then made an unannounced visit of the Eskridge home, bedrooms and other areas. RP at 604-05.

Ms. Guffin testified that during one of several lengthy conversations, Dr. Townsend acknowledged that Jim Eskridge "didn't tell me he was doing fondling, but I can't believe he isn't." RP at 627-28. Dr. Townsend also reported that Jim was holding his sons "with a full body hug" and "to me, this is getting close to molestation." RP at 617. Dr. Townsend told Ms. Guffin it "wasn't OK for a dad to get into bed with his kids." RP at 618.

Ms. Guffin testified that she interviewed the children's physician and family contacts provided to her by Amy Eskridge, before concluding the allegations against Jim and Amy Eskridge were "unfounded." RP at 627-29.

Ms. Guffin testified in response to questions from defense counsel and without objection, that "after a complete investigation, I found the allegations to be unfounded." RP at 648. Ms. Guffin further testified in response to questions from defense counsel and without objection, "I do not believe, based on my professional investigation and my professional opinion, that Dr. Townsend was concerned enough to report these allegations." RP at 649.

6. Dr. Townsend's later accusations to third parties re: Jim Eskridge

Months after CPS deemed Dr. Townsend's report unfounded, Dr. Townsend wrote a letter to the Eskridge's insurance company saying she was required to report Jim Eskridge to CPS "based on his description of the manner in which he was sexually molesting his children." RP at 294.

The Eskridges retained Jim's brother, a Western Washington attorney, for legal assistance; Dr. Townsend filed a grievance with the Washington State Bar Association (WSBA) alleging it was a conflict of interest for an attorney to represent his own brother. RP at 294. In correspondence to the WSBA in June of 2008, months after her report to CPS had been deemed unfounded, Dr. Townsend wrote the following about Jim Eskridge:

> I was required to report to DSHS Child Protective Services the fact that Mr. James Eskridge had described to me, <u>in clear detail</u>, the methods by which he was sexually molesting the two young sons of Amy and James.

RP at 294 (emphasis added).

Dr. Townsend also sent correspondence to the Spokane Police Department in which she described Mr. Eskridge as "an alcoholic sex addict with severe anger management problems, (who) had described to me his sexual abuse of his two sons." RP at 293.

The Eskridges filed a complaint with the Washington Department of Health (DOH). RP at 239. In correspondence to the DOH, Dr. Townsend wrote

that Jim Eskridge "has previously informed me that he has sexually molested his sons." RP at 293.[4]

Jim and Amy Eskridge separated in late 2010 and divorced in 2011. RP at 540-41. Plaintiffs' expert Dr. Conte testified that Dr. Townsend's "misdiagnosis and the application of wrong therapeutic errors . . . is the proximate cause of the destruction of their marriage." RP at 435. Dr. Conte further testified that both Jim and Amy suffered additional psychological harm such as distrust (including distrust of new counselors), anxiety, anger and frustration as a result of Dr. Townsend's standard of care violations. RP at 434-39.

B. Procedural History

1. Original Complaint

On June 5, 2009, Jim and Amy Eskridge filed suit against Dr. Townsend in Spokane County Superior Court. CP at 164-72. The complaint set forth seven "counts," each comprising an individual ground of liability. CP at 166-72. The first four counts are rooted in a cause of action for health care negligence and parse out Dr. Townsend's breaches of the applicable standard of care. CP at 167-70.

The Eskridges alleged Dr. Townsend breached the standard of care by sharing with Amy Eskridge confidential information about her husband, James Eskridge (Count I), expanding the assessment and treatment plan without consulting James Eskridge (Count II), unreasonably terminating the therapy (Count

[4] The DOH investigated the Eskridges' complaint, and took formal action against Dr. Townsend's license through a "Statement of Charges" which was still pending at the time of trial. RP at 239-40.

III), and reporting to CPS that James Eskridge had physically and sexually abused his children, "in retaliation for James Eskridge's termination of the counseling relationship." (Count IV). CP at 167-70. The Eskridges further alleged that Dr. Townsend wrongfully withheld medical records (Count V), breached the written, counseling contract in terms of confidentiality and billing practices (Count VI), and violated the Consumer Protection Act (CPA) (Count VII). CP at 170-72.

2. Amended Complaint & Answer

On November 16, 2009, the Eskridges filed an amended complaint, which mirrored the original complaint, but also included a count for defamation (Count VIII) predicated on Dr. Townsend's communications with CPS and the WSBA. CP at 1-9. Dr. Townsend answered on December 1, 2009, raising as an affirmative defense that "Townsend is entitled to statutory immunity for the acts and omissions alleged within the Complaint." CP at 160.

3. Stipulation & Order

Shortly before the answer was filed, a dispute arose regarding whether the trial court should order the Washington State Department of Social and Health Services (DSHS) to release records concerning its investigation of Dr. Townsend's complaint to CPS. CP at 173-87. After filing several motions on the issue, and after she answered plaintiffs' Amended Complaint (CP at 173-87), Dr. Townsend drafted a stipulation containing the parties' agreement that DSHS would release un-redacted records concerning the investigation. CP at 191. The stipulation

provided that "[t]here shall be no restrictions upon the use of the DSHS records, or the information contained therein, for purposes of litigating the above captioned matter[.]" CP at 191. The stipulated order was entered in the record by Judge Kathleen O'Connor on January 7, 2010. CP at 191-92.

*4. **Discovery Responses***

In February 2010, the Eskridges served Plaintiffs' Second Interrogatories and Requests for Production. CP at 48. Interrogatory No. 31 sought specificity and clarification of the immunity defense asserted in Dr. Townsend's answer:

> With regard to your claim that you have immunity for the acts complained of by Plaintiffs in their Amended Complaint, please identify any and all such acts for which you contend immunity applies, and please identify and describe each material fact which you contend supports your claim of immunity.

CP at 52. Dr. Townsend answered that:

> Pursuant to various state statutes, Dr. Townsend is immune from civil liability for making her good faith report to Child Protective Services which was required by law. See RCW 26.44.060.

CP at 52. Request for Production No. 38 immediately followed Interrogatory No. 31. CP at 53. It asked Dr. Townsend to "[p]lease provide copies of any and all documents pertaining to or referenced in your answer to the preceding interrogatory." Dr. Townsend responded only: "See RCW 26.44.060." CP at 53.

Thereafter, the parties engaged in many months of substantial discovery and litigation leading up to trial in September of 2011. Dr. Townsend was deposed on February 24, 2011 and responded to lengthy questioning over her statements

about Jim Eskridge in the CPS report and her letters to the DOH and the WSBA. RP at 222, 244, 289-91, 393-95.

5. Dismissal Motion & Order

On November 16, 2010, Dr. Townsend moved to dismiss plaintiffs' breach of contract, defamation and Consumer Protection Act counts as "automatically subsumed in RCW 7.70" as injuries arising from health care. Appendix A; CP at 201-04. The trial court granted the motion, stating "the breach of contract and defamation/slander causes of action are subsumed in RCW 7.70 and that the Consumer Protection Act is not available for plaintiffs alleging personal injuries due to medical negligence." CP at 11.

6. Notice of Intent to Admit Documents

On May 20, 2011, the Eskridges served their ER 904 notice, re-confirming their intent to offer into evidence at trial (1) Dr. Townsend's correspondence to the DOH, (2) Dr. Townsend's correspondence to the Spokane Police Department, (3) Dr. Townsend's correspondence to the WSBA, (4) Dr. Townsend's correspondence to Cigna Insurance, and (5) the CPS records. CP at 208.

Dr. Townsend objected to these documents on the sole basis of ER 904 (requirement of authentication) and ER 801 (hearsay) – there was no mention of an immunity defense under RCW 4.24.510. CP at 218-20.

7. The Parties' Trial Management Joint Report

One week later, on June 9, 2011, the parties filed their Trial Management Joint Report. CP at 223-29. Both parties agreed in Section D of that joint report that one of the undisputed issues was that "Dr. Townsend made a report to Child Protective Services regarding James Eskridge." CP at 224. Then, in Section E, the parties were required to list all disputed issues and were specifically instructed by the court that "[i]ssues not identified here may not be raised at trial without leave of court." CP at 224. Dr. Townsend did not identify any claimed immunity under RCW 4.24.510, with only two disputed issues listed: (1) whether Dr. Townsend violated the standard of care; and (2) whether any violation proximately caused damage. CP at 224.

The court's Trial Management Joint Report also required the parties to identify proposed pattern jury instructions and to provide copies of any special, non-pattern instructions they were requesting. Dr. Townsend did not request nor offer any jury instruction regarding RCW 4.24.510 immunity. CP at 227, 229. She only provided a special instruction regarding proximate cause. CP at 229.

Also as part of that Trial Management Joint Report, the Eskridges again listed the CPS records and Dr. Townsend's letters to governmental entities as proposed exhibits, and Dr. Townsend again objected only on the basis of ER 801 (hearsay). CP at 224-25.

Although the report cautioned that "[f]ailure to fully disclose all items required on this report may result in exclusion of restriction on use of evidence at

trial[,]" Dr. Townsend raised no evidentiary objections based on RCW 4.24.510. CP at 223.

8. Trial Briefs

Afterward, on September 14, 2011, the parties submitted their respective trial briefs. CP at 13, 231. As before, the Eskridges made clear they intended to present evidence concerning the CPS report, Dr. Townsend's report to the police, the WSBA bar complaint made by Dr. Townsend against Perry Eskridge, and Dr. Townsend's correspondence with the Department of Health and Cigna Insurance. CP at 236-37. Dr. Townsend's trial brief detailed only her defense that she had made a good faith report to CPS and was thus entitled to immunity under RCW 26.44.060. CP at 20-21. She did not identify any other statutory basis for immunity. CP at 20-21.

9. Motions in Limine

Dr. Townsend filed her motions in limine on September 14, 2011. CP at 24. Dr. Townsend again sought to exclude her communications to the governmental entities and Cigna insurance only on hearsay grounds, again with no reference to RCW 4.24.510 immunity. CP at 26.

Then on September 23, 2011, only three days before the scheduled trial, Dr. Townsend – in a reply to the Eskridges' response to her motions in limine – asserted for the first time that RCW 4.24.510 provided immunity for claims based

on her communications with the Department of Health, the State Bar Association, CPS and the local police. CP at 45-46.

On the morning of trial, the parties filed supplemental briefing as to (1) whether Dr. Townsend had waived this brand new immunity claim; and (2) whether RCW 4.24.510 immunity applied to this case. CP at 70, 56. Judge O'Connor ruled Dr. Townsend had waived the right to assert immunity under RCW 4.24.510. RP (Motion in Limine Hearing) at 971-72. She further ruled that RCW 4.24.510 does not apply to this case, saying the case is instead governed by RCW 26.44. RP (Motion in Limine Hearing) at 972-76.

10. CR 50 Motion & Jury Instruction Conference

Upon conclusion of Dr. Townsend's trial testimony, the Eskridges moved under CR 50 for an order precluding Dr. Townsend from asserting her good faith immunity defense. The Eskridges argued that Dr. Townsend could not claim immunity under RCW 26.44.060 because the evidence conclusively showed Dr. Townsend failed to make a CPS report within 48 hours after the time she claimed she reasonably suspected abuse, as required by RCW 26.44.030. The motion was denied and the parties thereafter conferred with the trial court about jury instructions. RP at 841, 853.

The Eskridges had proposed Jury Instruction No. 11, which instructed the jury that the good faith immunity provision of RCW 26.44.030 was available to Dr. Townsend only if she made the report to CPS within 48 hours after forming a

reasonable basis to believe the child has suffered abuse or neglect. Although Dr. Townsend lodged many objections to the contemplated instructions, she did not raise any objection to proposed Jury Instruction No. 11 and, as a result, the instruction went to the jury unchanged and unchallenged. RP at 855-58; CP at 111.

The jury returned a verdict in favor of Jim and Amy Eskridge. Dr. Townsend appealed. She claims the trial court erred by (1) denying her motion in limine concerning the immunity provision of RCW 4.24.510, (2) overruling her hearsay objections to portions of the testimony offered by Ms. Guffin, and (3) submitting Jury Instruction No. 11 to the jury. Appellant's Opening Br. at 2-3.

ARGUMENT

A. Dr. Townsend is Precluded from Raising the Immunity Provision of RCW 4.24.510 as an Affirmative Defense.

1. Standard of Review

This Court reviews the denial of a limine motion for abuse of discretion. *State v. O'Connor*, 155 Wn. App 282, 291, 229 P.3d 880 (Div. 3 2010). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). As set forth below, the Eskridges contend the trial court's decision to deny Dr. Townsend's limine motion was within the "range of acceptable choices, given

the facts and the applicable legal standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

2. Dr. Townsend Has Waived the Affirmative Defense of Immunity Under RCW 4.24.510 by Acting in an Inconsistent and Dilatory Manner.

Common law waiver of an affirmative defense can occur in one of two ways: (1) when "assertion of the defense is inconsistent with [the] defendant's prior behavior," or (2) when "the defendant has been dilatory in asserting the defense." *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2000). As explained in *Lybbert v. Grant County*,

> the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1. If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised.

141 Wn.2d 29, 39, 1 P.3d 1124 (2000). Thus, "[t]he doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." *King*, 146 Wn.2d at 424 (citing *Lybbert*, 141 Wn.2d at 40).

King illustrates these principles well. There, the court held that Snohomish County's assertion of a claim filing defense was inconsistent with its behavior for years prior to trial and that, as a result, the defense was waived. *King*, 146 Wn.2d at 424. The County failed to clarify the defense in its response to an

interrogatory seeking clarification. *Id.* at 424-25. It argued a summary judgment motion without mentioning the defense, and did not raise the defense again until three days before trial. *Id.* at 425. The court said the parties had "engaged in extensive, costly, and prolonged discovery and litigation preparation," and "the claim filing defense could have been disposed of early in the litigation before any significant expenditures of time and money had occurred." *Id.* at 426.

Like the defendant in *King*, Dr. Townsend's assertion of immunity under RCW 4.24.510 is inconsistent with her prior behavior. When asked to specify each "material fact" supporting her claim of immunity, Dr. Townsend responded that, "[p]ursuant to various state statutes, Dr. Townsend is immune from civil liability for making her good faith report to Child Protective Services which was required by law. See RCW 26.44.060." CP at 52. This answer is inconsistent with the assertion of a defense based on RCW 4.24.510. The Eskridges asked Dr. Townsend to "identify and describe each material fact" supporting her claim of immunity. CP at 52. "'[A] material fact is one that is essential to the claim or defense.'" *McDonald v. Murray*, 83 Wn.2d 17, 19, 515 P.2d 151 (1973) (quoting Black's Law Dictionary). As this Court has recognized, the essential elements of a defense under RCW 4.24.510 are established "when (1) a person 'communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization' and (2) the complaint is based on any matter 'reasonably of concern to that agency.'" *Bailey v. State*, 174 Wn.

App. 251, 261, 191 P.3d 1285 (Div. 3 2008) (quoting RCW 4.24.510). Dr. Townsend did not identify or describe facts material to the second prong of the defense, i.e., that Dr. Townsend's report to CPS is based on a matter "reasonably of concern to that agency."[5] Instead, the phrase "good faith" was articulated and Dr. Townsend directed the Eskridges to a specific immunity provision, RCW 26.44.060, without also naming RCW 4.24.510. If Dr. Townsend was relying on RCW 4.24.510 as well, she should have included it alongside her references to RCW 26.44.060. The response directed the Eskridges away from all immunity provisions other than RCW 26.44.060. This resulted in the same kind of prejudicial unfair surprise that the waiver doctrine is designed to curtail.

Further, Dr. Townsend failed to articulate any facts relating to her communications with the WSBA, set forth in Count VIII of the Amended Complaint. She argues her discovery response did not need to address such facts because the trial court had dismissed the count and, accordingly, such communications "were no longer in the case at the time the Eskridges issued their discovery." Appellant's Opening Br. at 14. Dr. Townsend's argument on this point should be rejected. Judge O'Connor made clear the count was "subsumed in RCW 7.70." CP at 11. Thus, the allegations in Count VIII became a part of Counts I-IV, which are based on a cause of action under RCW 7.70 for healthcare

[5] It is also debatable whether Dr. Townsend fully described facts material to the first prong. She did not say, for example, that "Dr. Townsend communicated a complaint to an agency of state government."

negligence.[6] Because the allegations were still in the case, failing to address them in discovery was inconsistent with the assertion of immunity under RCW 4.24.510.

Dr. Townsend calls attention to the fact she used the words "various state statutes" in answering the discovery request. But, Dr. Townsend's answer contained two propositions: (1) "Dr. Townsend is immune from civil liability for making her good faith report to Child Protective Services," and (2) "which was required by law." CP at 52. Dr. Townsend's first proposition is supported by RCW 26.44.060; her second by RCW 26.44.030, which requires a practitioner to report reasonably suspected child abuse. Thus, the Eskridges reasonably believed Dr. Townsend's reference to "various state statutes" was referring only to statutes within chapter 26.44 RCW. And, when asked to provide copies of all documents pertaining to the discovery request, Dr. Townsend said simply, "See RCW 26.44.060." CP at 53. This behavior is inconsistent with an assertion of immunity based on another statute.

The stipulation of the parties, entered on January 7, 2010, also shows behavior inconsistent with the assertion of a RCW 4.24.510 immunity defense. The stipulation states: "There shall be no restrictions upon the use of the DSHS records, or the information contained therein, for purposes of litigating the [case]."

---

[6] This view is consistent with Dr. Townsend's own moving papers. CP at 201-06. In any event, the claim was at least tried by the implied consent of the parties and Dr. Townsend never supplemented her discovery response to address the claim. *See* CR 15(b).

CP at 191. The information contained in the DSHS records details Dr. Townsend's communications to CPS. *See* CP at 173-90. By entering into an agreement plainly allowing unrestricted use of such information, Dr. Townsend acted inconsistently with an assertion of immunity based on such information.

Also, Dr. Townsend brought a motion seeking to dismiss several of the Eskridges' claims, without also seeking to dismiss Count IV, which premised liability on Dr. Townsend's communications to CPS. Dr. Townsend argues she could not have moved to dismiss Count IV because the count mentioned other breaches of the standard of care besides her report to CPS, and her immunity did not cover the other alleged acts. Appellant's Opening Br. at 18. The Eskridges submit this makes little sense. Although Count IV includes facts that arguably may also constitute breaches of the standard of care, it is obvious the count was designed to parse out a theory of breach based on Dr. Townsend's negligent reporting to CPS. *See* CP at 4-5. To the extent several "claims" are set forth in Count IV, negligently reporting to CPS that Jim Eskridge had abused his minor children was certainly one of them.[7] Dr. Townsend could have included this claim in her dismissal motion or moved for partial summary judgment on the issue.[8]

---

[7] A "claim" is "[t]he *aggregate of operative facts* giving rise to a right enforceable by a court." Black's Law Dictionary 264 (8th ed. 2009) (emphasis added).

[8] It is noteworthy that under Dr. Townsend's view, a plaintiff could insulate him or herself from a dismissal motion simply by alleging several breaches of the standard of care in one count. In practice, a dismissal motion cannot be overcome so easily. But even if it is true that Dr. Townsend could not seek dismissal of the Eskridges' allegation because the allegation was contained in a count that included other standard of care breaches, then Dr. Townsend should have pointed to CR 10(b) and required the Eskridges to place the claim in a separate count.

Dr. Townsend had ample notice the Eskridges intended to base liability on Dr. Townsend's communications to CPS, the WSBA, the Department of Health, and the Spokane Police Department. She was deposed extensively on those topics. RP at 244, 289-91, 393-95. When the Eskridges filed their notice of intent to admit documents detailing such communications, Dr. Townsend objected only on the grounds of ER 904 and ER 801. CP at 218-19. The same is true in respect to the parties' joint report. CP at 224-25. Further, Dr. Townsend's trial brief is silent as to immunity under RCW 4.24.510, although she discusses the good faith immunity of RCW 26.44.060 in some detail. CP at 13-22. Not only that, but Dr. Townsend moved in limine to exclude the documents at issue under ER 904 and ER 801. CP at 26. Dr. Townsend waited until three days before trial was slated to begin to assert immunity under RCW 4.24.510,[1] and in a reply brief. CP at 45. All this behavior is inconsistent with the assertion of the defense.

Under these facts, it is apparent Dr. Townsend was unaware of RCW 4.24.510 until the eve of trial. For this reason, it cannot rightfully be said that Dr. Townsend first raised a defense of immunity under RCW 4.24.510 in her answer. A party must give the opposing party fair notice of the affirmative defense in its pleadings. CR 8; *See Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 256, 274 P.3d 375 (2012); *see also Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). Here, Dr. Townsend raised in her answer

[1] Dr. Townsend filed her reply brief concerning her limine motion on Friday, September 23, 2011. CP at 45. Trial was set to commence on Monday, September 26, 2011. CP at 230.

an extremely general defense of "statutory immunity." This language was insufficient to provide fair notice of RCW 4.24.510, especially when Dr. Townsend later specified RCW 24.44.060 as her sole source of immunity.

Thus, Dr. Townsend was dilatory in asserting the defense. Every indicator points to Dr. Townsend not discovering the defense until the final hour. The doctrine of waiver is meant to prevent a defendant from "misdirecting the plaintiff away from a defense for tactical advantage." *King*, 146 Wn.2d at 424. Here, the Eskridges spent two and a quarter years engaged in extensive, costly and prolonged discovery and litigation that largely revolved around the documents at issue and the communications detailed therein. Asserting the defense at the eleventh hour, after behaving throughout the litigation in a manner inconsistent with the defense, thwarts the very policy the waiver doctrine promotes: "the just, speedy, and inexpensive determination of every action." CR 1.

Dr. Townsend argues that the Washington Supreme Court has explained in *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 178 P.3d 981 (2008) that "the essential point of *King* and its predecessor, *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000), was that the plaintiff would suffer prejudice from its adversary's conduct if waiver were not applied; absent such prejudice, there is no occasion to apply the waiver doctrine." Appellant's Opening Br. at 20. The assertion is a gross mischaracterization of *Oltman*.

In *Oltman*, the court addressed whether the defendant waived an affirmative defense by filing its answer 11 days beyond the 20 day period allowed under CR 12(a). *Oltman*, 163 Wn.2d at 243. The defendant had urged the court to rule that "affirmative defenses are waived if they are asserted in an untimely answer and the late assertion causes actual prejudice to the plaintiff." *Id.* The *Oltman* court declined to address the defendant's argument, concluding that no prejudice was established. *Id.* at 246. The court also refused to endorse an overly strict interpretation of CR 12(b) and held that the affirmative defense was not waived. *Id.* at 244-47. Nowhere did the court say that prejudice must be established under the waiver doctrine. The opinion is concerned with the application of CR 12(h)(1) to an affirmative defense raised in a slightly untimely answer. *Id.* at 242-47. It does not speak to the case sub judice.

The waiver doctrine is not limited to situations where a timely and consistently asserted affirmative defense would have allowed the plaintiff to cure a defect in his or her case before the statute of limitations expired. The doctrine is meant to promote the policies underlying our procedural rules and prevent the defendant from misdirecting the plaintiff away from a defense for tactical advantage. Thus, the doctrine applies when the defendant has been dilatory in asserting a defense or has proceeded to act inconsistently with the assertion of that defense over a considerable period of time. Here, the parties have spent years engaged in extensive and costly litigation. Dr. Townsend has allowed the

Eskridges to develop a theory of the case largely premised on Dr. Townsend's communications to government agencies. Then, on the eve of trial (and after the expiration of the statute of limitation), Dr. Townsend claimed she is immune from liability based on those communications. She has misdirected the Eskridges away from a defense for tactical advantage. She has undermined the policies our modern day procedural rules are designed to promote. Accordingly, the trial court's ruling that Dr. Townsend had waived RCW 4.24.510 immunity was reasonable and within the range of acceptable choices.

3. Absolute Immunity under RCW 4.24.510 is an Affirmative Defense, Not a Rule of Evidence.

Dr. Townsend also contends "her immunity presented an evidentiary question, not a question of ultimate liability, given the way the Eskridges pleaded their claim." Appellant's Opening Br. at 18. She goes so far as to claim "she could quite properly have raised the objection [for the first time] at trial." Appellant's Opening Br. at 19. The notion should be rejected. RCW 4.24.510 is an affirmative defense that must be affirmatively pleaded in the answer. *See In re Marriage of Suggs*, 152 Wn.2d 74, 85 n. 5, 93 P.3d 161 (2004) (and cases cited therein); *see also Shinn Irr. Equipment, Inc. v. Marchand*, 1 Wn. App. 428, 430-31, 462 P.2d 571 (1969); *see also* 14 Tegland, Wash. Prac., *Civil Procedure* § 12:17 at 488-89 (2nd ed. 2009); *see also* RCW 4.24.510 (referring to the immunity in the section as a "defense"); *see also* CR 8(c).

The statute protects persons from "civil *liability for claims* based upon" certain governmental communications. RCW 4.24.510 (emphasis added). When applicable, it is an absolute immunity, not a rule of evidence. Evidence of governmental communications is excluded *as a result of* a court's determination that the defendant is immune from civil liability based upon the communications. *See* RCW 4.24.510. The defense must be asserted prior to trial. Dr. Townsend has implicitly recognized these principles by asserting "immunity" in her answer as an affirmative defense. *See* CP at 160.

As discussed above, two claims in the Amended Complaint were "based upon" governmental communications. One claim was contained in Count IV and based liability upon Dr. Townsend's reporting to CPS that Jim Eskridge had physically and sexually abused his children. CP at 4-5. The other claim, found in Count VIII, was subsumed into the Eskridges' RCW 7.70 causes of action and based liability upon Dr. Townsend's communications to the WSBA. CP at 7-8. Dr. Townsend could have isolated these claims early on and moved for their dismissal, either through a motion to dismiss, a motion for partial summary judgment or, possibly, a motion brought under RCW 4.24.525. In any event, Dr. Townsend has acted *inconsistently* with the assertion of the defense and, by so doing, she has waived it.

4. The Parties Entered Into a Binding Stipulation Allowing the Eskridges to Premise Liability on Dr. Townsend's Communications to CPS.

Dr. Townsend argues the trial court erred by denying her limine motion which sought to exclude several documents at trial, including records from the DSHS. Appellant's Opening Br. at 12-33; CP at 26. The DSHS records contain CPS' report detailing Dr. Townsend's communications to CPS (i.e., her allegations of abuse) and CPS's investigation of Dr. Townsend's allegations of abuse. *See* CP at 173-90. Dr. Townsend asserts that under RCW 4.24.510, she is "immune from civil liability for claims based on those communications." CP at 46, 56; Appellant's Opening Br. at 12-33. The assertion must fail. The parties entered into a binding stipulation expressly allowing unrestricted use of the information contained in the DSHS records for the purpose of litigating the case.

RCW 2.44.010 authorizes an attorney to enter into a stipulation binding upon his or her client, provided the agreement is made part of the record or "signed by the party against whom the same is alleged, or his or her attorney." *See also* CR 2A. Stipulations are viewed with favor. *Smyth Worldwide Movers v. Whitney*, 6 Wn. App. 176, 178, 491 P.2d 1356 (1971); *Stottlemyre v. Reed*, 35 Wn. App. 169, 173, 665 P.2d 1383 (1983). Hence, "[a]n agreement arrived at on the record is binding on the parties and will not be reviewed on appeal unless the party contesting it can show that the concession was a product of fraud or that the attorney overreached his authority." *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 735, 987 P.2d 634 (1999).

Here, the parties have entered into an agreement expressly providing that "[t]here shall be no restrictions upon the use of the DSHS records, *or the information contained therein*, for purposes of litigating the above captioned matter[.]" CP at 191 (emphasis added). The agreement was memorialized in writing, signed by defense counsel and placed in the record by Judge O'Connor. CP at 192. Because it complies with RCW 2.44.010 and CR 2A, it binds the parties. Under the stipulation's plain language, the Eskridges could not be restricted from using the DSHS records or the information contained therein (i.e., Dr. Townsend's communications to CPS and the details of CPS's investigation) to establish Dr. Townsend's liability. For this reason too, the trial court did not err in denying Dr. Townsend's limine motion in respect to the DSHS records. By stipulation, the appellant has waived the right to assert any restriction upon the Eskridges' use of the CPS report and the information it holds.

B. RCW 4.24.510 Does Not Apply When One Party Seeks to Hold Another Liable for Making a Report of Abuse to CPS.

The trial court correctly ruled that RCW 4.24.510 does not apply to cases covered by RCW 26.44. When a plaintiff seeks to hold a defendant liable for making a bad faith report of abuse to CPS, the Legislature intended only the good faith immunity provision of RCW 26.44.060 to apply. That statute is specifically addressed to such reports and prevails over the more general immunity provision of RCW 4.24.510.

In construing legislation, the Court's paramount duty is to ascertain and give effect to the intent of the Legislature. *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). When two statutes appear to conflict, the Court should endeavor to harmonize their respective provisions. *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993). Yet, "[s]trained, unlikely or unrealistic interpretations are to be avoided" and the general rule is that "[a] specific statute will supersede a general one when both apply." *Id.*; *Waste Management v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1054 (1994); *Flight Options, LLC v. Dep't of Revenue*, 172 Wn.2d 487, 504, 259 P.3d 234 (2011).

Washington's Anti-SLAPP statute, RCW 4.24.510, provides immunity from civil liability to a person who communicates a complaint to a governmental agency, provided the complaint regards a matter reasonably of concern to that agency. When originally enacted in 1989, the statute contained a good faith requirement. LAWS of 1989, ch. 234. The requirement was eliminated by amendment in 2002. LAWS of 2002, ch. 232, § 2. The purpose of the 2002 amendment was to bring "Washington law . . . in line with these court decisions which recognize[ ] that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." LAWS of 2002, ch. 232, § 1.

RCW 26.44.060, on the other hand, extends immunity to "any person participating in good faith in the making of a report pursuant to this chapter." The

statute was enacted in 1965. LAWS of 1965, ch. 13 § 6. It was amended in 2004 to add subsection 5, which extends immunity to "[a] person who, *in good faith* and without gross negligence, cooperates in an investigation arising as a result of a report made pursuant to this chapter, shall not be subject to civil liability . . . ." LAWS of 2004, ch. 37, § 1 (emphasis added). The statute was also amended in 2007 to eliminate the word "maliciously" from subsection 4 and to add a new section. LAWS of 2007, ch. 118, §§ 1, 2. The new section was encoded in RCW 26.44.061 and, *inter alia*, requires CPS to send a letter "to any person determined by the section to have made a false report of child abuse or neglect informing the person that such a determination has been made and that a second or subsequent false report will be referred to the proper law enforcement agency for investigation." LAWS of 2007, ch. 118, §§ 1, 2; RCW 26.44.061(2).

Dr. Townsend asserts the two statutes are in conflict, as both apply to the communications at issue here and RCW 4.24.510, unlike RCW 26.44.060, provides immunity regardless of the person's motive or state of mind. *See* Appellant's Opening Br. at 22-28. To resolve the conflict, Dr. Townsend proposes RCW 4.24.510 and RCW 26.44.060 be "harmonized" by reading RCW 26.44.060(1)(a) to provide full immunity unless the defendant has been convicted of false reporting under RCW 26.44.060(4). Appellant's Opening Br. at 28-30. In urging this construction, Dr. Townsend latches upon the beginning of the provision, which states: "Except as provided in (b) of this subsection." She

interprets this language to mean that the "*only* exception to immunity is that which [the Legislature] prescribed in subparagraph (b)" and thus good faith cannot function as a prerequisite to the immunity. Appellant's Opening Br. at 29-30. Dr. Townsend's suggested interpretation is strained, at best.

The statute plainly conditions immunity upon a showing of good faith. RCW 26.44.060(1)(a) ("any person participating in good faith in the making of a report . . . shall in so doing be immune from any liability"); *Dunning v. Pacerelli*, 63 Wn. App 232, 240, 818 P.2d 34 (1991). The natural reading of the first part of subsection (1) ("Except as provided in (b) of this subsection,") is that it precludes persons convicted of a violation of subsection (4) from asserting the good faith immunity. As such, it simply recognizes familiar principles of collateral estoppel and relieves the civil plaintiff from having to relitigate an issue (i.e., whether the defendant made the report in good faith) that has already been fairly determined in a criminal proceeding. *See Clark v. Baines*, 150 Wn.2d 905, 912-14, 84 P.3d 245 (2004).

Dr. Townsend proposed "harmonization" reads the words "good faith" out of the statute and does not cure the noted conflict with RCW 4.24.510. Dr. Townsend argues RCW 26.44.060 immunity is lost only upon a criminal conviction that is based on the bad faith of the reporter. Under her view, therefore, the reporter's state of mind can dictate whether RCW 26.44.060 immunity is available. Such an interpretation is inconsistent with RCW 4.24.510, which

extends immunity regardless of the defendant's state of mind. In actuality, Dr. Townsend's argument can be reduced to the proposition that RCW 4.24.510 trumps RCW 26.44.060. Any attempt at harmonizing RCW 4.24.510 with RCW 26.44.060 results in a strained interpretation and does damage to legislative intent.[10] The more specific statute controls here.

The Legislature has made plain the provisions of chapter 26.44 are intended to strike a balance between two polices: (1) limiting interference with the bond between parents and their children, and (2) protecting children from instances of abuse. *See* RCW 26.44.010 (recognizing that "[t]he bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian" but also providing for the reporting of instances of abuse); *see also* RCW 26.44.030 (limiting duty to report instances of child abuse to situations where "reasonable cause" exists); *see also* RCW 26.44.015 (stating the "chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not injurious to the child's health, welfare, or safety."); *see also* RCW 26.44.032 (providing that public employer shall provide for legal defense of public employee acting "in good faith" when making a report under RCW 26.44.030).

---

[10] Unless, of course, the Court harmonizes the statutes by holding that a bad faith report to CPS is not a matter "reasonably of concern" to that agency under RCW 4.24.510.

Such intent is seen in RCW 26.44.060 itself. There, the Legislature expressly made the immunity contingent on the good faith of the reporter. The statute has been amended twice since RCW 4.24.510 was enacted in 2002. Appellate courts presume the Legislature has considered its previous enactments when it amends legislation. *State v. Public Util. Dist. No. 1*, 91 Wn.2d 378, 383, 588 P.2d 1146 (1979). It has been ten years since the enactment of RCW 4.24.510 without the Legislature removing the good faith requirement of RCW 26.44.060. Moreover, the 2004 amendment—extending immunity to persons who cooperate in an investigation arising as a result of a report made pursuant to chapter 26.44—expressly conditioned the immunity on the good faith of the cooperator. LAWS of 2004, ch. 37, § 1. Such action eliminates any doubt whether the Legislature meant to retain the good faith requirement stated in RCW 26.44.060.

RCW 26.44.030 implies a cause of action against a mandatory reporter who makes a report to CPS without "reasonable cause" and in bad faith. *See Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 75-78, 247 P.3d 421 (2011). If the mandatory reporter is a health care professional, an action may be brought under RCW 7.70 for breach of the applicable standard of care. The availability of these causes of action does not rest on whether the State investigates, charges, and ultimately convicts a person for bad faith reporting. Under legislative policy, a bad faith reporter will not even be referred to the State for prosecution unless the person has made a bad faith report once before. *See*

RCW 26.44.061(2). Dr. Townsend's interpretation gives a free pass to a first time bad faith reporter. It should be rejected. The Legislature intended RCW 26.44.060, not RCW 4.24.510, to apply to cases of the ilk presented here. The Eskridges encourage the Court to examine Judge O'Connor's oral ruling. RP (Motion in Limine Hearing) at 971-76. It is spot on.

C. The Trial Court Correctly Overruled Defense Counsel's Hearsay Objections. If Not, the Error Was Harmless.

1. Standard of Review

"Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. An abuse of discretion occurs only when *no reasonable person* would take the view adopted by the trial court." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (internal citation omitted; emphasis added).

2. Dr. Townsend Has Failed to Preserve the Issue Whether Ms. Guffin Improperly Commented on Other Witness' Credibility.

Dr. Townsend assigns error to the trial court's decision to allow Ms. Guffin to testify about statements relayed to her by the Eskridges and their sons. Appellant's Opening Br. at 3. At trial, defense counsel objected to this testimony on the sole ground of hearsay. RP at 600-01, 603, 606-07. Now, Dr. Townsend asserts two grounds of error. She maintains the statements attributed to the Eskridges and their two sons are hearsay. Appellant's Opening Br. at 3, 34.

She also assigns error on the ground that Ms. Guffin improperly commented on the credibility of witnesses. Appellant's Opening Br. at 3, 34.

Dr. Townsend is precluded from asserting this second ground, as it is well settled that "[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Koepke*, 47 Wn. App. 897, 911, 738 P.2d 295 (Div. 3 1987). As explained in *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1993),

> if a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.

(quoting 5 K. Tegland, Wash. Prac., *Evidence* § 10, at 25 (2d ed. 1982)). Here, the record indicates defense counsel did not object on the basis that Ms. Guffin's testimony improperly commented on the credibility of other witnesses. Without that objection at trial, the lower court was not afforded an opportunity to rule on the issue, and appellate consideration is waived. RAP 2.5.

3. Dr. Townsend Has Inadequately Briefed the Hearsay Issue.

Under RAP 10.3(a)(6), the Court should also decline to review Dr. Townsend's contention that the trial court erred when it overruled defense counsel's hearsay objections to portions of Ms. Guffin's testimony. Dr. Townsend has not provided meaningful legal analysis or authority to support her contention. Indeed, the whole of her "argument" is but a single, conclusory sentence, reading:

"These statements were hearsay, subject to no exception identified by the Eskridges or the trial court, and should not have been admitted. ER 801." Appellant's Opening Br. at 34.

Adequate briefing requires more than bald citation to authority; it calls for reasoned analysis based on that authority. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). Because Dr. Townsend offered only a vague, unhelpful reference to the definition of hearsay, and failed to set forth reasoned argument based on that, or any other authority, her brief is inadequate. *See Amalgamated Transit v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000) (declining to review an issue where argument consisted of nothing more than conclusory statements and a single case citation). And "[w]ithout adequate, cogent argument and briefing, this court should not consider an issue on appeal." *Schmidt v. Cornerstone Invest.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990).

Further, Dr. Townsend neither identifies nor discusses the specific statements she contends are prejudicial hearsay. She points only to her hearsay objections (two of the three are "continuing objections"), which purport to cover nearly 12 pages of testimony. Appellant's Opening Br. at 33; RP at 600-12. The Eskridges, like the Court, should not have to speculate as to which particular statements Dr. Townsend is referring. It is not their burden to search the record,

identify each statement that might possibly be hearsay and explain why it is not. Under RAP 10.3(b), the responding party is tasked with answering the appellant's opening brief. The responding party must be given a clear, substantive argument to answer, and neither the responding party nor the reviewing court is "a depository in which the appealing party may dump the burden of argument and research." *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988).

It is the appellant who bears the burden of showing the testimony is hearsay. *State v. Lee*, 159 Wn. App 795, 818, 247 P.3d 470 (2011). If the appellant does not make this showing by reasoned, cogent argument and useful citation, then the appellant forfeits judicial review. Dr. Townsend has not made the requisite showing, and her error may not be corrected in a reply brief. *See King v. Rice*, 146 Wn. App. 662, 673-74, 191 P.3d 946 (2008) (argument and authority raised for the first time in a reply brief comes too late); RAP 10.3(c). As set forth in *State v. Bell*, 10 Wn. App. 957, 963, 521 P.2d 70 (1973):

> There is good reason for requiring an appellant to place his argument and supporting authority in his opening brief. Unless he does so, his opponent is deprived of a fair opportunity to respond in the only brief the rules authorize, namely, the answering brief. The rules do not provide that the respondent should prepare a second brief to respond to the reply brief.

In deference to these principles, the Court should decline to review this issue.

4. *CPS Investigator Denise Guffin was an Expert Witness, Properly Allowed to Testify as to Statements Made to Her by the Eskridges and their Sons.*

The record shows the trial court determined that CPS Investigator Denise Guffin was qualified to testify as an expert witness. Judge O'Connor stated:

> Ms. Guffin basically is testifying about the record. She's also an expert, I think one can qualify her as an expert. She can rely upon hearsay information so I would not have sustained an objection to that, i.e. what the intake worker - - what the intake worker received and what was provided to her from the intake worker provided to Ms. Guffin.

RP at 848.[11] A close examination of this language reveals Judge O'Connor had decided—at the time of Ms. Guffin's testimony—that Ms. Guffin was qualified as an expert. This explains why she overruled defense counsel's hearsay objections. Judge O'Connor's does say, "I think one can qualify her as an expert." But by this language, Judge O'Connor simply recognized that Ms. Guffin was sufficiently qualified. It is notable that Dr. Townsend did not object to the trial court's characterization of Ms. Guffin as an expert.[12]

The decision to allow expert testimony is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *In re*

---

11 The trial court's declaration that Ms. Guffin is an expert was given in the context of a dispute between the parties regarding whether the CPS report, upon which Ms. Guffin based her testimony, could be admitted into evidence as a substantive exhibit. RP at 841-50.

12 CPS investigator Guffin can properly be labeled as a "fact expert." *See, i.e., Peters v. Ballard*, 58 Wn. App. 921, 795 P.2d 1158, review denied, 115 Wn.2d 1032 (1990) (discussing the distinction between an expert testifying as a fact witness and an expert witness testifying as a Rule 26(b)(4) expert and holding that a fact expert may be called as a witness by the opposing party and may be asked questions calling for professional expertise, even though the opposing party did not designate the expert as an expert witness).

Det. of A.S., 138 Wn.2d 898, 917, 982 P.2d 1156 (1999). Under ER 702, a witness may qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." Practical experience suffices, *State v. McPherson*, 111 Wn. App. 747, 46 P.3d 284 (Div. 3 2002), as does training and academic background in a relevant field, *Harris v. Robert C. Groth, M.D., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (quoting 5A K. Tegland, Wash. Prac., *Evidence* § 289 (1982)). Hence, Washington courts have recognized that a social worker may qualify as an expert based on personal experience and education. *Saldivar v. Momah*, 145 Wn. App. 365, 398-99, 186 P.3d 1117 (2008) (holding trial court abused its discretion by categorically ruling social worker was not qualified as an expert based on her experience and master's degree in social work).

The record reflects that Ms. Guffin had investigated over 400 cases for CPS and that she held a master's degree in social work. RP at 586-87. Under Washington precedent, such experience and education qualifies Ms. Guffin as an expert witness. *See Saldivar*, 145 Wn. App. at 398-99; *see also In re Det. of A.S.*, 138 Wn.2d at 917-18. Ms. Guffin was, therefore, properly allowed to testify as to statements made by the Eskridges and their sons. Such testimony showed the basis of her expert opinion. It was relevant and helpful to the trier of fact.

It is true the trial court's pronouncement came after Ms. Guffin testified. But, "Rule 702 does not require the trial judge to announce in open court that the witness qualifies as an expert. To the contrary, the court should normally avoid

such an announcement because it may unduly influence the jury." 5B K. Tegland, Wash. Prac. Evidence § 702.6 (2007) (citing *U.S. v. Bartley*, 855 F.2d 547 (8th Cir. 1988) (commenting that an express finding by the court that a chemist was qualified as an expert "might influence the jury in its evaluation of the expert, and the better procedure is to avoid an acknowledgement of the witness's expertise by the Court.")).

"ER 703 permits an expert to base his or her expert opinion on facts or data that are not otherwise admissible provided that they are of a type reasonably relied on by experts in the particular field." *In re Det. of Marshall*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005). Thus, the rule allows for "the admission of otherwise [inadmissible] hearsay and inadmissible facts for the purpose of showing the basis of the expert's opinion." *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 399, 722 P.2d 787 (1986); *State v. Russell*, 125 Wn.2d 24, 73-74, 882 P.2d 747 (1994); *In re Det. of Marshall*, 156 Wn.2d at 162. Ms. Guffin was not allowed to relay all manner of inadmissible evidence. *See, e.g.*, RP at 600 (sustaining defense counsel's hearsay objection to Ms. Guffin's conversation with the children's school counselor). Rather, she was properly allowed to testify as to what she was told by the Eskridges and their sons, for the purpose of showing the basis of her opinion that Dr. Townsend's report to CPS

was "unfounded."[13] The statements are of the ilk reasonably relied upon by CPS investigators. *See* RP at 588-94 (explaining that it is customary to interview alleged child victims of abuse and their parents). And, the testimony was helpful to the trier of fact in demonstrating how Ms. Guffin reached her conclusion.

5. The Statements at Issue Are Not Hearsay.

ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is generally inadmissible, unless there is an applicable exception. ER 802. However, statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay. *State v. Collins*, 76 Wn. App. 496, 499, 886 P.2d 243 (1995). The Eskridges aver that the statements Dr. Townsend says are hearsay were not offered to prove the truth of the statements and were thus properly admitted as nonhearsay under two distinct, but related theories.

a. The Statements Were Offered To Show their Effect on the Hearer, Ms. Guffin.

An out of court statement offered to show its effect upon the person who hears the statement is not objectionable as hearsay. 5C K. Tegland, Wash. Prac., *Evidence* § 803.15 (5th ed. 2007). Such statements may be admitted to show the

[13] Ms. Guffin also opined, without objection, that: "I do not believe, *based on my professional investigation and my professional opinion*, that Dr. Townsend was concerned enough to report these allegations." RP at 649 (emphasis added).

nature or quality of action taken by the hearer in response to the statements. *See, e.g., Patterson v. Kennewick Public Hosp. Dist. No. 1*, 57 Wn. App. 739, 744, 790 P.2d 195 (1990); *State v. Smith*, 56 Wn. App. 909, 911, 786 P.2d 320 (1990); *Clark v. State Attorney General's Office*, 133 Wn. App. 767, 787, 138 P.3d 144 (2006).

Here, the statements made by the Eskridges and their two sons were properly offered to show their effect upon Ms. Guffin in determining whether Dr. Townsend's complaint to CPS was founded. *See Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 701 P.2d 518 (1985); *Moolick v. Lawson*, 33 Wn. App. 665, 665 P.2d 1185 (1982). Regardless of their truth, the statements explain why Ms. Guffin reached the conclusion she did, they demonstrate the reasonableness or quality of her investigation and conclusion, and they serve as circumstantial evidence material to whether Dr. Townsend made her report to CPS in good faith. The trial court did not abuse its discretion.

b. The Statements Were Offered To Show Background and Context for Ms. Guffin's Investigation and the Conclusion She Reached.

The statements at issue were also offered as background or to supply a context for Ms. Guffin's admissible statement that CPS deemed Dr. Townsend's complaint of abuse unfounded. In other words, the statements were properly offered to show how Ms. Guffin conducted her investigation. *See State v. Fitzgerald*, 39 Wn. App. 652, 660, 694 P.2d 1117 (1985); *State v. Lillard*, 122 Wn.

App. 422, 437, 93 P.3d 969 (2004); *Morgan v. Mass. General Hosp.*, 901 F.2d 186 (1st Cir. 1990).

The investigation conducted by CPS, and the quality thereof, is relevant as circumstantial evidence tending to show Dr. Townsend lacked good faith when she made the report to CPS. It is also relevant to the nature and degree of the privacy invasion suffered by the Eskridge family as a result of Dr. Townsend's negligent reporting. Accordingly, the trial court did not abuse its discretion.

6. Even if The Statements Are Hearsay, Admitting Them Was Harmless.

Dr. Townsend asserts that Ms. Guffin's testimony was "deeply prejudicial" and merits reversal, "given the centrality of the CPS complaint to the case as it was presented by the Eskridges." Appellant's Opening Br. at 34. This is her entire argument. Quite plainly, Dr. Townsend has "not shown in what manner the questioned testimony prejudiced [her] cause. Error in the admission of testimony is not reversible, in the absence of a showing of prejudice." *Floyd v. Meyers*, 53 Wn.2d 351, 355, 333 P.2d 654 (1959).

To show prejudice sufficient for reversal, the appellant must demonstrate that the error affected the outcome of the trial. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Here, Dr. Townsend fails to make this showing. She neither specifies particular statements said to be "deeply prejudicial," nor does she even attempt to explain how they caused prejudice in light of other evidence. Because Dr. Townsend failed to specify

particular statements, it is difficult for the Court to judge the degree of prejudice, if any, those statements may have caused. The Court should decline to wander through the record, examining all the evidence in this case to determine whether the challenged testimony was so prejudicial as to warrant a new trial. The burden rests with the appellant to make her argument. The Court should not make it for her and, as shown above, she may not make it for the first time in a reply brief.

Even so, any error attending the trial court's decision to admit the challenged testimony was harmless. To understand why the statements at issue caused no prejudice, the Court need go no further than examining Ms. Guffin's *unchallenged* testimony. Ms. Guffin told the jury what Dr. Townsend originally reported to CPS. RP at 596-97. She told the jury that her investigation consisted largely of interviewing the Eskridges and their sons. RP at 588-90, 92-93, 60, 604. She told the jury that, based on her investigation, she determined that Dr. Townsend's allegations were "unfounded," i.e., "more than likely did not happen." RP at 629, 594, 648. And, she testified that Dr. Townsend did not have "any reasonable belief that these children were being abused or neglected." RP at 637. Based on this information alone (that is, without knowing precisely what was said to Ms. Guffin by the Eskridges or their sons), the clear (if not necessary) conclusion to be drawn by the jury is that information revealed through the interviews undermined Dr. Townsend's allegations of abuse. Thus, in essence, the jury was already aware of what was relayed to Ms. Guffin.

Moreover, Ms. Guffin, without objection from defense counsel, testified to what Dr. Townsend told her in two phone conversations. RP at 612-28. During these conversations, Dr. Townsend reiterated her original concerns of abuse and, as Ms. Guffin put it, "the longer the conversation went on, the more allegations there were, and the more elaborate they were and the more severe and concerning they were." RP at 621. During this portion of Ms. Guffin's testimony, she also explained how Dr. Townsend's allegations were inconsistent with what Ms. Guffin learned through her interviews and what she observed in the Eskridges' home. RP at 612-28. With all this evidence properly before the jury, it cannot be said that the outcome of the trial would have been different.

Much of Ms. Guffin's testimony is simply cumulative of other testimony. For example, Ms. Guffin testified that both Jim Eskridge and his sons related a history of Jim having spanked his sons on a couple of occasions with an open hand. RP at 602-03, 608. But the jury had already heard Jim testify to the same issue. RP at 465. The younger son told Ms. Guffin about breathing problems and sleeping with his dad when his mother was out of town. RP at 603-04. The jury had already heard about the son's breathing issues and sleeping with his father, through testimony of Jim Eskridge, RP at 511-12, Amy Eskridge, RP at 125-26, and even Dr. Townsend, RP at 274.

Again, it is difficult for the Eskridges to address Dr. Townsend's general hearsay objections, both at trial and in this appeal. A close reading of Ms. Guffin's

testimony reveals that most of her comments regarding these interviews were of observations made of the boys' and their parents' demeanor. These were observations of non-assertive conduct.[14]

D. Jury Instruction No. 11 is the Law of the Case Because Dr. Townsend Failed to Object to the Instruction Below. Moreover, Appellate Consideration is Unmerited Because Dr. Townsend Failed to Provide Argument and Citation to Authority in Support of Her Assignment of Error.

Dr. Townsend asks this Court to reverse the judgment below on the ground that the jury was given an erroneous instruction.[15] The instruction at issue, Jury Instruction No. 11, states that immunity under RCW 26.44.060 is available only if the report to CPS is made within 48 hours after there is reasonable cause to believe the child has suffered abuse. CP at 111. Whether the instruction provides a correct statement of the law is of no moment. By not objecting below, Dr. Townsend failed to preserve the issue for appeal. *See* RAP 2.5 (a). Similarly, she has removed the issue from appellate consideration by neglecting to provide argument and citation to authority in support of her assignment of error. *See* RAP 10.3(a)(6).

---

[14] For example, Ms. Guffin said Jim Eskridge "was very calm, readily willing to answer all questions." RP at 608. One of the boys "was easygoing, smiling, and openly communicative, meaning he did not appear fearful." RP at 602.

[15] Dr. Townsend makes this argument without setting forth the language of the proposed and final instructions and thus violates RAP 10.4(c), which provides that a party who presents an issue requiring the study of a jury instruction should include that instruction in his or her brief on appeal. In this context, the word "should" is a word of command, not merely suggestion. *Thomas v. French*, 99 Wn.2d 95, 99, 659 P.2d 1097 (1983).

"An appellate court may consider a claimed error in a jury instruction only if the appellant raised the specific issue by exception at trial." *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993). As explained in *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978):

> The cognizance we take on appeal of alleged erroneous instruction in the trial court depends upon the action appellant took in that court. The trial court must have been sufficiently apprised of any alleged error to have been afforded an opportunity to correct the matter if that was necessary. CR 51(f). In *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975), we quoted from *Roumel v. Fude*, 62 Wn.2d 397, 399-400, 383 P.2d 283 (1963), as follows:
>
>> Our rules require that exceptions to instructions shall specify the paragraphs or particular parts of the charge excepted to and shall be sufficiently specific to apprise the trial judge of the *points of law* or question of fact in dispute. The purpose is *to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.*

Thus, "[t]he trial court is entitled to be informed of the grounds for objection, enlightened on the theories of law which support the objector's position and given the opportunity to correct a mistake in time to avoid unnecessary retrials. Unless this has taken place pursuant to CR 51(f), [the appellate court] cannot review [the] assignment of error . . . ." *Ryan v. Westgard*, 12 Wn. App. 500, 510, 530 P.2d 687 (1975).

Dr. Townsend acknowledges she did not object to the jury instruction at issue. Appellant's Opening Br. at 36. Her contention is that the Court may nevertheless consider the correctness of the instruction because she had, on another

occasion, argued against the legal proposition stated in the instruction. Appellant's Opening Br. at 36. The argument is without merit. First, it is not supported by citation to legal authority. "If no authority is cited, [the Court] may presume that counsel, 'after diligent search, has found none.'" *Or. Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001) (quoting *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 895, 568 P.2d 764 (1977)). Second, Dr. Townsend fails to appreciate that her prior action in opposing the Eskridges' motion did not adequately apprise the trial court of any possible error *in the jury instruction*. It is the parties' duty to raise a claim of error, not the trial court's. If the claim of error is not directed to the instruction itself, but to the argument of opposing counsel concerning a prior polemic, then the trial court is denied a chance to correct a mistake, if necessary. In such a case, appellate review frustrates the policy of preventing the expense of unnecessary retrials and quashing gamesmanship.

Before instructing the jury, Judge O'Connor supplied counsel with written copies of the instructions the trial court intended to give the jury and gave counsel an opportunity to object to those instructions. RP at 853-54. Defense counsel did in fact voice objections to several instructions, but made no objection to Jury Instruction No. 11. RP at 855-58. As a result, the instruction is the law of the case.[16]

[16] "The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. Under the doctrine jury instructions not objected to become the law of the case." *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (citing numerous cases holding the same).

Besides failing to apprise the trial judge of any error in the jury instruction, Dr. Townsend failed to provide this Court with argument and citation in support of her contention that the jury instruction is erroneous. Apparently, she believes the instruction is automatically erroneous because the trial court had previously denied the Eskridges' motion for a directed verdict and, in so doing, ruled that the immunity provided by RCW 26.44.060 is not lost when the CPS report is made after 48 hours. But, it is unclear why Dr. Townsend believes the trial court's prior ruling is determinative of error in the instruction. Again, no authority is cited. What *is* clear is that whether Jury Instruction No. 11 misstates the law is not determined by the trial court, but by this Court. And, the appellant must show why the jury instruction is wrong. The law is well settled on this point; "[A] party's failure to . . . provide argument and citation to authority in support of an assignment of error, as required by RAP 10.3, precludes appellate consideration of an alleged error." *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, n.4, 69 P.3d 895 (2003).

Besides being the law of the case. the Eskridges maintain the instruction at issue contains a correct statement of the law.

CONCLUSION

For the reasons stated above, Respondents James and Amy Eskridge respectfully request the Court to affirm the judgment below.

Respectfully submitted this 4th day of September, 2012.

EYMANN ALLISON HUNTER JONES P.S.

John D. Allison, WSBA No. 26299
Benjamin P. Compton, WSBA No. 44567
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Benjamin P. Compton, hereby declare that on the 4th day of September, 2012, I caused to be served a true and correct copy of the foregoing Brief of Respondents, by First Class U.S. Mail delivery, to all parties named below:

Leslie R. Weatherhead
Geana M. Van Dessel
Samual C. Thilo
WITHERSPOON KELLEY
422 West Riverside, Suite 1100
Spokane, Washington 99201

Attorneys for Appellant

Benjamin P. Compton

FILED

SEP 05 2012

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
By

APPENDIX A

RECEIVED
NOV 16 2010
EYMANN, ALLISON, HUNTER JONES P.S

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

JAMES HENRY AND AMY DAWN ESKRIDGE, Plaintiffs, vs. DARLENE TOWNSEND, Ph.D. Defendant.	No. 09-2-02494-9 DEFENDANT'S MOTION TO DISMISS BREACH OF CONTRACT, DEFAMATION/SLANDER AND CPA CLAIMS

1. **Relief Sought.** Defendant moves the Court for an Order dismissing plaintiffs' claims for breach of contract, defamation/slander and violation of the Consumer Protection Act.

2. **Grounds**. The breach of contract and defamation/slander causes of action are subsumed in RCW 7.70. The CPA is not available for plaintiffs alleging personal injuries due to medical negligence.

3. **Basis**. Defendant's motion is based upon CR 12(b)(6) and her Brief in Support of the Motion.

WITHERSPOON·KELLEY
Attorneys & Counselors
422 W. Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: 509.624.5265
Fax: 509.458.2728

1 DATED this 16th day of November, 2010.

2 **WITHERSPOON · KELLEY**

3

4 By: ______________________________

5 Brian T. Rekofke, WSBA No. 13260
Samuel Thilo, WSBA No. ________

6 Attorneys for Darlene Townsend, Ph.D.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

WITHERSPOON·KELLEY
Attorneys & Counselors
422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

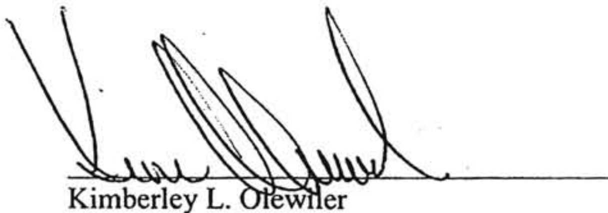
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 16 day of November, 2010, the foregoing was delivered to the following persons in manner indicated:

Counsel for Plaintiffs
John Allison
Eymann, Allison, Hunter & Jones
2208 W. Second Avenue
Spokane, WA 99201

[X] By Hand Delivery
[ ] By U.S. Mail
[ ] By Overnight Mail
[ ] By Facsimile Transmission



Kimberley L. Olewiler

WITHERSPOON·KELLEY
Attorneys & Counselors
422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

APPENDIX B

RCW 4.24.510

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

APPENDIX C

RCW 26.44.060

(1) (a) Except as provided in (b) of this subsection, any person participating in good faith in the making of a report pursuant to this chapter or testifying as to alleged child abuse or neglect in a judicial proceeding shall in so doing be immune from any liability arising out of such reporting or testifying under any law of this state or its political subdivisions.

(b) A person convicted of a violation of subsection (4) of this section shall not be immune from liability under (a) of this subsection.

(2) An administrator of a hospital or similar institution or any physician licensed pursuant to chapters 18.71 or 18.57 RCW taking a child into custody pursuant to RCW 26.44.056 shall not be subject to criminal or civil liability for such taking into custody.

(3) Conduct conforming with the reporting requirements of this chapter shall not be deemed a violation of the confidential communication privilege of RCW 5.60.060 (3) and (4), 18.53.200 and 18.83.110. Nothing in this chapter shall be construed as to supersede or abridge remedies provided in chapter 4.92 RCW.

(4) A person who, intentionally and in bad faith, knowingly makes a false report of alleged abuse or neglect shall be guilty of a misdemeanor punishable in accordance with RCW 9A.20.021.

(5) A person who, in good faith and without gross negligence, cooperates in an investigation arising as a result of a report made pursuant to this chapter, shall not be subject to civil liability arising out of his or her cooperation. This subsection does not apply to a person who caused or allowed the child abuse or neglect to occur.