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SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 22811-8-III]

PARDNER WYNN,

Respondent,

v.

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

Petitioners.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioners Jolene and John Doe Earin ask this Court to accept review of the reversals by the Court of Appeals designated in Part II.

II. COURT OF APPEALS DECISION

In its published decision filed December 22, 2005 (a copy of which is attached), Division III reversed the trial court's ruling that witness immunity insulated Ms. Earin, a licensed counselor who had provided counseling to both Mr. and Mrs. Wynn and their children, from liability to Mr. Wynn for testimony she gave during the Wynns' custody proceeding. See Slip Op. at 7-12, 19. In remanding the case for resolution of those claims, Division III also remanded the question of attorney fees and costs for determination contingent on a jury's damage award on retrial. See Slip Op. at 16-20. Division III affirmed the trial court in all other respects. See Slip Op. at 12-16.

III. ISSUES PRESENTED FOR REVIEW

1. Is a treating health care provider who testifies as a witness in a court proceeding, without any objection from his or her patient based on confidentiality, privilege, or alleged noncompliance with the Uniform Health Care Information Act, absolutely immune from liability based on that testimony?
2. Did the trial court properly conclude that Ms. Earin was

absolutely immune from civil liability to Mr. Wynn based on her testimony as a witness in the Wynns' custody hearing?

3. Should the trial court's proper exercise of discretion in segregating and determining the amount of attorney fees and costs that Mr. Wynn was entitled to recover for the violations of the Uniform Health Care Information Act he proved at trial be affirmed.?

IV. STATEMENT OF THE CASE

A. Nature of the Case.

In this malpractice action Pardner Wynn alleged that Jolene Earin, a licensed counselor, RP 589-93, 773, violated the standard of care and provisions of the Uniform Health Care Information Act (UHCIA), RCW Ch. 70.02, by her conduct in a contentious custody dispute between Mr. Wynn and his ex-wife, Cynthia Wynn. CP 3-11, 12-21, 27-39, 1391-92.

B. Factual Background.

Ms. Earin saw Mr. and Mrs. Wynn for both individual and joint marital counseling. RP 601-03; CP 297-99. Eventually, she also saw the Wynns' children to help them deal with their parents' separation and divorce. CP 268-69, 297; RP 379, 603. The Wynns became embroiled in a bitter and contentious divorce and custody battle. See CP 387-88, 391.

As part of the custody proceedings, the court appointed a Guardian ad Litem, Kim Chupurdia, Ph.D, to make recommendations about custody

and visitation. RP 740. At Dr. Chupurdia's request, Mr. Wynn provided a list of people he thought Dr. Chupurdia should contact in her investigation concerning Mr. Wynn and the children. RP 483-84, 743-44. Mr. Wynn's list included Ms. Earin. RP 484, 746. Ultimately, Dr. Chupurdia called Ms. Earin, because Ms. Earin had seen both Mr. and Mrs. Wynn, and the children, and might have information about the Wynns' relationships with the children, and the Wynns' abilities with respect to parenting decisions, compromising, and the like. RP 612, 620, 746-47, 760-61; see CP 462-63.

When she spoke with Ms. Earin, Dr. Chupurdia had in her possession separate, identical written authorization forms signed by Mr. and Mrs. Wynn. CP 134; RP 133, 621, 748. Those authorizations, CP 458, 459, stated in pertinent part:

CONSENT AND WAIVER OF LIABILITIES FOR
DISSEMINATION OF MENTAL HEALTH INFORMA-
TION AND DRUG EVALUATION AND TREATMENT
INFORMATION & CONSENT FOR THE RELEASE OF
CONFIDENTIAL INFORMATION

* * *

I authorize Kim Chupurdia, Ph.D. to have access to all information requested, whether written or oral, from . . . any . . . doctor, nurse, or other health care provider, psychologist, psychiatrist, . . . mental health clinic . . . without further written release by [me] upon presentation of a copy of this Release of Confidential Information. . . .

* * *

I understand that the information being sought by Kim Chupurdia, Ph.D. may be utilized in a Guardian ad Litem report. In most cases, the reports of Guardians ad Litem

are available to the public. . . . This consent and waiver is intended to allow the Guardian ad Litem to disseminate any . . . mental health history. I hereby waive my rights under RCW 71.05.440 regarding the release of this information to the Court and the parties' attorneys.

I acknowledge that the information to be released was fully explained to me and this consent is given of my own free will.

At the beginning of the telephone conversation, Dr. Chupurdia identified herself, told Ms. Earin that she had been appointed Guardian ad Litem¹ and that she had releases of information from both Mr. and Mrs. Wynn, and read to Ms. Earin what the releases covered. RP 621, 820-21; see also RP 748. Ms. Earin understood that Dr. Chupurdia would send her copies of the releases.² RP 821-82. In the ensuing 20-minute conversation, RP 621, Dr. Chupurdia asked, and Ms. Earin answered, questions about how the children were doing, who should be the custodial parent, Mr. and Mrs. Wynn's respective abilities to withstand confrontation and to compromise, and their efforts to salvage their marriage. RP 621-28; see CP 264-74, 462-63. Ms. Earin responded to Dr. Chupurdia's questions from memory, as she did not have the Wynns' records in front of her at the time of the call. RP 621-22. According to Ms. Earin, the statements attributed to her in the Guardian ad Litem's report concerning

¹ Ms. Earin had already received a copy of the Order appointing Dr. Chupurdia as Guardian ad Litem. RP 815-16.

² Ms. Earin does not know whether she received copies of the releases from Dr. Chupurdia, as the releases would have been in records that she no longer had. RP 869.

Mr. Wynn were based on statements made in the Wynns' joint counseling sessions. RP 623, 624, 832; see RP 628. Ms. Wynn did not disclose to Dr. Chupurdia any secret, confidential, or private information obtained during Mr. Wynn's individual counseling sessions. RP 628.

After seeing the Guardian ad Litem's report which included a summary of her interview with Ms. Earin, Mr. Wynn, through his counsel Mary Schultz, served Ms. Earin with a notice of deposition and subpoena duces tecum for production of Mr. and Mrs. Wynn's individual and joint counseling records. RP 628-30. Mrs. Wynn, who was still counseling with Ms. Earin,³ told Ms. Earin that she did not want her records released. RP 631. Ms. Earin was notified that Mrs. Wynn's counsel had filed a motion to block production of the records. RP 631-32. Ultimately, Ms. Earin gathered together Mrs. Wynn's current records from her office, and Mr. Wynn's records and the joint counseling records from the dead files she kept at home, and placed them, as well as some other clients' records for which she needed to do reports, in a locked briefcase, RP 631-35, CP 180-81, which was stolen from her unlocked car parked in her driveway, RP 640-41, 769; see CP 178-80, 299-302. Because the records had been stolen, CP 178, Ms. Earin could not comply with a Commissioner's subsequent order, CP 546, that she produce them. See RP 903-04; CP 552.

³ Mr. Wynn stopped seeing Ms. Earin as of May 1998, but Mrs. Wynn was still seeing Ms. Earin at the time of the custody hearing in September 2000. CP 297.

Ms. Earin's deposition nonetheless took place. See CP 137-279. At the deposition, questions arose as to whether Mr. Wynn's visits with Ms. Earin were privileged, and Mr. Wynn's counsel, on the record, waived any privilege Mr. Wynn might have claimed. RP 770-71. The following colloquy took place, CP 157:

Mr. Crary: Can we clarify for the record that this is not privileged information?

Ms. Schultz: This is not privileged information.

Mr. Crary: If there is a privilege claimed by him you are waiving it, do I understand, for you as his counselor?

Ms. Schultz: That's correct.

Thereafter, a dispute arose regarding the extent to which Mr. Wynn's counsel could inquire about Mrs. Wynn's individual counseling sessions. CP 158-61. Counsel called a Commissioner to resolve the dispute. See CP 190. The Commissioner heard argument, recessed, and said she would get back to the parties, CP 210. In the interim, Mr. Wynn's and Ms. Earin's counsel engaged in further colloquy about the need for a release for Ms. Earin to testify concerning her communication with Dr. Chupurdia:

Mr. Crary: I still think it involves potentially involved confidential communications that we do not have a release to disclose.

Ms. Schultz: We have to get the Commissioner back on the phone and request that she be ordered to answer the question because there's no privilege.

CP 213. Ultimately, the Commissioner told the parties that they would have to take the issue up with the trial judge. CP 216.

The deposition adjourned, CP 221, and the parties sought further clarification from the court. See CP 287-89, 574-81. Mr. Wynn's counsel argued that the authorization Mrs. Wynn signed for Dr. Chupurdia waived Mrs. Wynn's confidentiality interests. CP 580. As Mr. Wynn's counsel stated in her declaration, CP 580 at ¶¶ 22 and 23:

22. On August 22, 2000, . . . I took the deposition of Dr. Kim Chupurdia. I had also subpoenaed Dr. Chupurdia's records. Within those records was a specific release signed by Cynthia Wynn, attached as Exhibit B, which authorizes Dr. Chupurdia as follows: to have access to "all information requested whether written or oral, from . . . any . . . healthcare provider, psychologist, psychiatrist, . . . mental health clinic . . . without further written release by me upon presentation of this release of confidential information. . . . *this consent and waiver is intended to allow the Guardian ad Litem to disseminate any . . . mental health history. I hereby waive my rights under RCW 71.05.440 regarding the release of this information to the court and the parties attorney (emphasis added [by Mr. Wynn's counsel]).*

23. This release is signed and dated February 9, 2000. In other words, we have all spent thousands of dollars at this point arguing about the confidentiality of records that are not confidential.

In that same declaration, CP 581 at ¶ 25, Mr. Wynn's counsel stated:

25. This matter involves the emotional and mental state of the parties as related to their propriety and comparative stability in terms of this court determining which parent can provide the best parental environment for the children. This information is relevant to the determination. In particular, the Guardian ad Litem report itself references

Ms. Wynn as having a history of depressive symptoms and her current status on prescription medication. In her deposition, Dr. Chupurdia indicated that she formed her opinions of Ms. Wynn's psychological stability from her discussions with Ms. Earin "who is the person in a position to know about Ms. Wynn's status given her counseling experience with her over the past two years." These records are, therefore, critical to this court[']s ability to properly deliberate this matter.

Ultimately, the court ordered Ms. Earin to appear for a continuation of her deposition, and to respond to all questions related to her counseling sessions with Mr. or Mrs. Wynn, including all statements to the Guardian and the basis therefor, up until April 2000. CP 287-89, 551-53. The court found that Ms. Earin's statements to the Guardian, and the underpinnings of those statements, were relevant to the determination of the custody dispute. CP 287-88. At the resumed deposition, Mr. Wynn's counsel questioned Ms. Earin about the Wynns' counseling sessions and her communications with the Guardian. CP 225-80.

Subsequently, at the custody hearing, Mrs. Wynn called Ms. Earin to testify as a witness. See CP 290-386, 1359. Although Ms. Earin was not "personally served" with a subpoena for her testimony,⁴ if she had refused to testify without a formal subpoena, Mrs. Wynn's counsel would have issued one. CP 466, 1359; RP 28. Mr. Wynn's counsel interposed

⁴ The record, however, contains a letter from Mrs. Wynn's counsel to Ms. Earin, which stated that a subpoena for her testimony at the custody hearing was enclosed. CP 466.

no objection to Ms. Earin's appearance as a witness, or to her testimony at the custody hearing, on grounds of privilege, confidentiality, or violation of any provision of the UHCIA.⁵ See CP 290-386.

At the conclusion of the custody hearing, the court issued its decision, CP 387-97, concluding that primary residential placement of the Wynns' children should be with Mrs. Wynn, CP 388.

C. Procedural Background.

Mr. Wynn, still represented by Mary Schultz, then brought this malpractice action against Ms. Earin, alleging that she had violated both the standard of care and provisions of the UHCIA, RCW Ch. 70.02, by: (1) disclosing counseling information to the Guardian without a release in hand, (2) offering to testify in the custody proceeding, (3) testifying in the manner she testified in the custody proceeding,⁶ (4) failing to proffer Mr. Wynn's counseling records within 15 days of receiving the deposition subpoena; and (5) failing to take reasonable safeguards to provide for the security of Mr. Wynn's records, resulting in their loss. See CP 27-39.

⁵ Mr. Wynn's counsel's only objections during Ms. Earin's testimony were objections as to relevance, leading questions, non-responsiveness, and exceeding the scope of cross-examination. See CP 313, 316, 365, 378-79, 381.

⁶ Mr. Wynn alleged that, in her testimony, Ms. Earin "went beyond the scope of questioning to offer even more information than requested," and "made no effort to attempt to protect privileged information or to limit her answers to only what was being asked" CP 34 at ¶¶ 50, 51, and claimed that "[e]ven under compulsory process, you must limit your testimony ethically to precisely what is asked, to give as narrow and precise an answer as possible and to wait for the next question," RP 39.

Before trial, Ms. Earin moved in limine to exclude all evidence relating to her participation as a witness in the custody case based on absolute witness immunity and on waiver. CP 809-22; RP 22-29, 45-47. The trial judge, Judge Kathleen O'Connor, granted the motion on the ground of absolute witness immunity. CP 906-07; RP 61-63.

At the close of the evidence, both sides moved for directed verdicts. See RP 1061-1102. Judge O'Connor dismissed Mr. Wynn's claim that Ms. Earin violated RCW 70.02.080 by failing to proffer Mr. Wynn's records within 15 days of receiving his subpoena duces tecum. See RP 1109-10, 1116-17. Judge O'Connor directed a verdict against Ms. Earin on Mr. Wynn's claim that Ms. Earin violated RCW 70.02.020 by talking to Dr. Chupurdia without a copy of the release in hand, RP 1102-07; CP 928, but submitted the questions of whether that conduct also constituted negligence and of proximate cause to the jury, RP 112-13; CP 933. Judge O'Connor also directed a verdict against Ms. Earin on Mr. Wynn's claim that Ms. Earin violated both the UHCIA and the standard of care when she left Mr. Wynn's records in a locked briefcase in an unlocked car, RP 1110-13; CP 928, but submitted the question of proximate cause to the jury, CP 933. Although Judge O'Connor submitted the issue of what, if any, damages were caused by negligence to the jury, she reserved for the court the determination of damages for any statutory

violations. RP 1151-54; RCW 70.02.170(2); see CP 934.

In answer to special interrogatories, the jury: (1) found that Ms. Earin was negligent in speaking with the Guardian ad Litem over the telephone, but that such negligence was not a proximate cause of damage to Mr. Wynn; (2) found that Ms. Earin's negligence in the loss of the medical records was a proximate cause of injury to Mr. Wynn; and (3) awarded Mr. Wynn \$2,790 in economic damages and \$0 in noneconomic damages for the negligent loss of records. CP 933-34; RP 1262-63.

In post-trial motions, Mr. Wynn asked the trial court to set aside the jury's verdict, arguing inconsistency as a matter of law in the jury's award of some economic damages, but no non-economic damages. CP 949-952. Judge O'Connor denied that motion. CP 1072-1074.

Mr. Wynn also asked the trial court to determine the amount of his actual damages under RCW 70.02.170 for Ms. Earin's violation of the UHCIA. CP 956-974. Judge O'Connor did not award any actual damages other than the damages awarded by the jury. See CP 1072-74, 1077-82.

Mr. Wynn also asked for an award of over \$130,000 in attorney fees and \$11,000 in costs for the statutory violations. CP 956-974, 975-977. Recognizing that fees "must bear a reasonable relationship to the work needed to be done to bring about the result," and that fees for work done on the statutory claims needed to be segregated from fees for work

done on the negligence claims, Judge O'Connor awarded \$11,900 in attorney fees and \$1,100 in costs, determining that 10% of Mr. Wynn's claimed fees were incurred in pursuit of the statutory claims.⁷ CP 1074.

Mr. Wynn appealed. CP 1085-1095. Division III reversed Judge O'Connor's ruling on absolute witness immunity and remanded the case for resolution of the surviving claims and a new determination of attorney fees and costs contingent on a jury's damage award on retrial.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Ms. Earin seeks review under RAP 13.4(b)(1), (2), and (4), because Division III's decision denying witness immunity to Ms. Earin for her testimony at the custody hearing is in conflict with decisions of this Court and of the Court of Appeals, and involves issues of substantial public interest that should be determined by this Court. This Court should reverse the Court of Appeals decision.

A. The Court of Appeals Decision Denying Witness Immunity to Ms. Earin Not Only Is in Conflict with Decisions of this Court and of the Court of Appeals, But Also Involves Issues of Substantial Public Interest that Should Be Determined by this Court.

Mr. Wynn, who did not at the time of the custody hearing seek to prevent Ms. Earin from testifying, or interpose any objection to her

⁷ Judge O'Connor noted that "[i]t is very difficult to segregate work on the statutory violation issue and plaintiff's counsel's time sheets are not very helpful in this exercise." CP 1074.

testimony, on grounds of confidentiality, privilege, or alleged violation of the UHCIA, sought to impose liability upon Ms. Earin because she offered to testify on behalf of Mrs. Wynn at the custody hearing, did so without formal personal service of a subpoena⁸ or notice to Mr. Wynn, and gave testimony that allegedly exceeded the scope of the questioning. The trial court dismissed those claims on grounds of absolute witness immunity.

In Washington, witnesses in judicial proceedings are absolutely immune from civil liability based upon their testimony. Deatherage v. Examining Bd. of Psychology, 134 Wn.2d 131, 135, 948 P.2d 828 (1997); Bruce v. Byrne-Stevens & Assocs. Eng'rs, 113 Wn.2d 123, 125, 776 P.2d 666 (1989); Childs v. Allen, 125 Wn. App. 50, 54, 105 P.3d 411 (2004); Gustafson v. Mazer, 113 Wn. App. 770, 775, 54 P.3d 743 (2002). As the court explained in Bruce, 113 Wn.2d at 125:

As a general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony.

The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. . . . [Citations omitted.]

. . . The rule is equally well established in American common law. . . . [Citations omitted.]

⁸ But see footnote 5, supra.

“All witnesses are immune from all claims arising out of all testimony.”
Dexter v. Spokane County Health Dist., 76 Wn. App. 372, 376, 884 P.2d
1353 (1994).

The Court in Bruce, 113 Wn.2d at 126 (quoting Briscoe v. LaHue,
460 U.S. 325, 332-33, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)), explained
the purpose of the absolute witness immunity rule as follows:

The purpose of the rule is to preserve the integrity of the
judicial process by encouraging full and frank testimony.

In the words of one 19th-century court, in
damages suits against witnesses, “the claims
of the individual must yield to the dictates of
public policy, which requires that the paths
which lead to the ascertainment of truth
should be left as free and unobstructed as
possible.” . . . A witness’ apprehension of
subsequent damages liability might induce
two forms of self-censorship. First, wit-
nesses might be reluctant to come forward to
testify. . . . And once a witness is on the
stand, his testimony might be distorted by
the fear of subsequent liability. . . . Even
within the constraints of the witness’ oath
there may be various ways to give an
account or to state an opinion. These altern-
atives may be more or less detailed and may
differ in emphasis and certainty. A witness
who knows that he might be forced to
defend a subsequent lawsuit, and perhaps to
pay damages, might be inclined to shade his
testimony in favor of the potential plaintiff,
to magnify uncertainties, and thus to deprive
the finder of fact of candid, objective, and
undistorted evidence. [Citations omitted.]

As the Bruce court further explained, 113 Wn.2d at 126:

In addition to the benefits obtained by extending immunity, the rule also rests on the safeguards against false or inaccurate testimony which inhere in the judicial process itself. A witness' reliability is ensured by his oath, the hazard of cross-examination and the threat of prosecution for perjury. . . . [Citations omitted.] In light of these safeguards, the detriments of imposing civil liability on witnesses outweigh the benefits.

“The scope of witness immunity is broad.” Bruce, 113 Wn.2d at 126. And, “[t]he basic policy of ensuring frank and objective testimony obtains regardless of how the witness comes to court.” Id. at 129.

Despite these well-established precedents, Division III holds that witness immunity does not apply to treating health care provider witnesses whose testimony is based on treatment that predated, and was not undertaken with any view toward, litigation. See Slip Op. at 9-10. Contrary to Division III's opinion, Slip Op. at 9, neither Gustafson, 113 Wn. App. at 776-77, nor Childs, 125 Wn. App. at 56, stands for the unbridled proposition that “witness immunity does not apply to information acquired by a witness in a prelitigation confidential professional relationship that was formed for nonlitigation purposes.” Nor, as Division III implies, Slip Op. at 10, does the fact that Bruce and Deatherage involved experts who prepared reports for purposes of litigation mean that witnesses whose testimony is based on treatment that predated the litigation and was not undertaken for purposes of litigation must testify

under peril of being sued for what they say, or how they say it, while testifying.

Mr. Wynn sought to impose liability on Ms. Earin not because she was negligent in her counseling of him, but because she appeared at the custody hearing at the request of Mrs. Wynn's counsel without insisting on formal personal service of a subpoena, and then allegedly testified in a manner that was not sufficiently precise so as to avoid exceeding the scope of some of the questions. Division III's decision that Ms. Earin is not entitled to witness immunity on such claims because she was testifying as a treating health care provider, rather than as an expert witness, conflicts with the decisions of this Court and the Court of Appeals cited above which recognize that all witnesses in judicial proceedings are absolutely immune from civil liability based on their testimony.

Division III's decision, if allowed to stand, would fly directly in the face of the basic public policy underlying the absolute witness immunity rule – ensuring that full and frank testimony obtains regardless of how the witness comes to court. It would hardly serve to encourage full and frank testimony or preserve the integrity of the judicial process, to adopt a rule that treating health care providers called as witnesses in litigation involving their patients, unlike any other witnesses, can be held liable if (even in the absence of objection or guidance from the

court as to what is responsive) they fail to limit their testimony to precisely what is asked, or if they fail to give as narrow and precise an answer as conceivably possible, or if they go beyond the scope of a given question, or if they offer more information than requested, see footnote 7, supra.

To suggest that treating health care providers must restrict, shade or nuance their testimony in a certain way, or to give opinions only if favorable to their patients, under peril of liability for their testimony unless they do, is not sound public policy and is contrary not only to the absolute witness immunity cases cited above, but also to this Court's decisions in Carson v. Fine, 123 Wn.2d 206, 212-16, 867 P.2d 610 (1994), and Christensen v. Munsen, 123 Wn.2d 234, 238-40, 867 P.2d 626 (1994). Under those cases, once a patient waives any existing privilege, which Mr. Wynn had done,⁹ a treating health care provider is free not only to testify in the matter, but to give opinions that may be adverse to the patient's interest. As the Court explained in Christensen, 123 Wn.2d at 239:

As we stated in Carson, the fiduciary nature of the physician-patient relationship is not an independent basis to preclude a treating physician's testimony once the patient-

⁹ Not only did Mr. Wynn unconditionally waive any privilege at the deposition his counsel took of Ms. Earin, see CP 770-71, but also he waived any privilege when he failed to object to Ms. Earin's testimony on grounds of privilege, confidentiality, or alleged violation of the UHCIA at the custody hearing. "When a patient permits his physician to testify without objection, he of course waives the privilege as to that physician." McUne v. Fuqua, 42 Wn.2d 65, 74, 253 P.2d 632 (1953).

physician privilege has been waived. While a physician assumes certain obligations in treating and advising a patient, these obligations do not include refraining from offering adverse testimony against a patient. The physician has an independent duty to testify honestly and truthfully in a court of law, be it in favor of the plaintiff or the defense. See Carson, at 218-19.

The Court of Appeals decision not only conflicts with decisions of this Court and the Court of Appeals, but also involves issues of substantial public interest that should be determined by this Court. Division III recognized that competing public policies and public interests were at play in this case, but unfortunately misbalanced them. The extent to which the public policy behind the compulsory process provisions of RCW 70.02.060, or the public interest in protecting confidential health care information, trumps the public policies behind the absolute witness immunity rule in cases involving testimony by treating health care providers is an issue of substantial public interest that should be determined by this Court. Similarly, the issue of whether a treating health care provider who testifies as a witness in a court proceeding, without any objection from his or her patient based on confidentiality, privilege, or alleged noncompliance with compulsory process provisions of the UHCIA, is entitled to absolute witness immunity from claims of liability for appearing without a formally served subpoena, or for testifying without sufficient precision, is also an issue of substantial public interest

that should be determined by this Court.

Thus, review is warranted under RAP 13.4(b)(1), (2) and (4).

B. Absent a Remand for Trial, and Proof Therein of Some Other Statutory Violation, Mr. Wynn Is Not Entitled to a New Determination of Attorney Fees and Costs.

Division III remanded the question of attorney fees and costs for determination contingent on a jury's damage award on retrial. In awarding attorney fees and costs for the statutory claim Mr. Wynn proved, the trial court was required to do its best, see Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 690, 82 P.3d 1199, rev. denied, 152 Wn.2d 1023 (2004), and properly did its best, to segregate fees for work done on the successful statutory claim from fees for work done on his unsuccessful statutory claims and his negligence claims. Division III found no abuse of discretion by the trial court in that regard.

If this Court accepts review, and concludes that the trial court properly dismissed the claims it dismissed on grounds of witness immunity, no remand for redetermination of attorney fees and costs is warranted. Even if there were a remand for trial of the claims dismissed on grounds of witness immunity, and Mr. Wynn were to prevail on those claims, Mr. Wynn will still have the burden of segregating fees, see Loeffelholz, 119 Wn. App. at 690, and the mere fact, if true, that "[t]he statutory and common law claims are inextricably intertwined . . . on the

issues of proximate cause and damages,” does not mean, as Division III suggests, Slip Op. at 19-20, that reasonable segregation will likely not be possible.

VI. CONCLUSION

For the foregoing reasons, this Court should grant review and reverse the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 23rd day of January, 2006.

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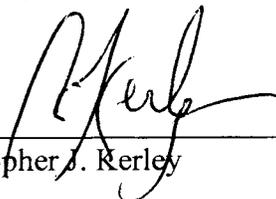
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 23rd day of January, 2006, I caused a true and correct copy of the foregoing document, "PETITION FOR REVIEW," to be delivered by U.S. Mail, postage prepaid, to the following counsel of record:

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DATED this 23rd day of January, 2006, at Spokane, Washington.



Christopher J. Kerley

FILED

DEC 22 2005

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PARDNER WYNN,)	No. 22811-8-III
)	
Appellant,)	
)	
v.)	Division Three
)	
JOLENE EARIN AND JOHN DOE)	
EARIN, as Husband and Wife and)	
Their Marital Community,)	
)	PUBLISHED OPINION
Respondents.)	

SWEENEY, A.C.J.—Washington’s Health Care Information Act prohibits disclosure of health care information without specific procedural safeguards, which include the consent of the patient. Chapter 70.02 RCW. But an expert witness has common law immunity for disclosing health care information during a trial, so long as the information was obtained in anticipation of the litigation. Here, a former patient sued his marriage guidance counselor for violating the Health Care Information Act by disclosing information in his child custody proceedings. The court concluded that the testimony was protected by witness immunity. We disagree and reverse in part.

FACTS

In September 1997, Pardner Wynn consulted certified mental health professional Jolene Earin for help with his marriage. She assured him of confidentiality. And Mr. Wynn divulged personal information. Ms. Earin took notes and kept records. Mr. Wynn's wife, Cynthia, also started counseling with Ms. Earin. But by May of 1998, Mr. Wynn viewed Ms. Earin as sympathetic to his wife and antagonistic to him. So he stopped seeing her. Ms. Earin continued to counsel Cynthia. The Wynns eventually became embroiled in a bitter dissolution and custody battle. The court appointed a guardian ad litem for the children.

Mr. Wynn suggested that the guardian ad litem talk to Ms. Earin and gave a signed, written release to the guardian to obtain his counseling records. The guardian ad litem telephoned Ms. Earin. And Ms. Earin, despite having no written release in hand, freely divulged Mr. Wynn's personal information. Ms. Earin discussed Mr. Wynn's therapy sessions without notes, based on her recollections from three years before. Mr. Wynn alleged that Ms. Earin violated multiple provisions of the Health Care Information Act as well as the prevailing standard of care for mental health counselors (malpractice).

The guardian ad litem included Ms. Earin's information in her report to the court. Mr. Wynn read the report. He thought Ms. Earin's information was inaccurate, incomplete, and biased. He served Ms. Earin with a subpoena duces tecum to appear for deposition in 24 days and to bring records of all counseling with him and his wife, both

joint and individual. Ms. Earin responded with a sworn declaration that the records were not accessible. At that time, the records were in Ms. Earin's basement. She transferred Mr. Wynn's records from her basement to her car, then left the unlocked car in her driveway. The records were then allegedly stolen and were never produced.

Ms. Earin testified on behalf of Cynthia Wynn at the custody hearing. She again disclosed information about Mr. Wynn. It is not clear from the record whether she was subpoenaed. But she did not notify Mr. Wynn or his counsel of the third party disclosure request. Mr. Wynn alleged that, as a witness, Ms. Earin's answers exceeded the scope of the questions.

Mr. Wynn sued for emotional distress caused both by Ms. Earin's alleged violations of the Health Care Information Act and by her alleged malpractice negligence. He alleged that Ms. Earin's acts constituted a "continuum" of misconduct that proximately caused his damages. He sued for actual damages and attorney fees under the Health Care Information Act, RCW 70.02.170, as well as traditional damages for professional negligence.

Dismissed Claims. The court granted Ms. Earin's pretrial motion for blanket immunity from any claims related to the custody proceedings. The court also dismissed Mr. Wynn's claims for Ms. Earin's filing a false declaration and failing to produce Mr. Wynn's records in response to his subpoena. The court ruled that a subpoena violation is

governed by the court rules,¹ and is not a written request for records under the Act.² The court allowed Mr. Wynn to amend his complaint to allege that the subpoena response violated a different provision of the Health Care Information Act. The Act precludes third parties from obtaining records without compulsory process to the provider and notice to the patient. RCW 70.02.060. Before the case went to the jury, however, the court changed its mind and dismissed these claims altogether.

Dismissed Juror. After the jury was sworn, a juror asked to be excused. She said her belief in the importance of professional confidentiality was so strong that it was unfair to Ms. Earin for her to remain on the jury. To satisfy the court, the juror listened to the testimony of the first witness, Mr. Wynn's expert on the professional confidentiality standard of care for mental health care providers. The juror then renewed her request. The court held a conference in chambers and then made a record of excusing the juror and seating an alternate. Mr. Wynn objects to the removal of this juror.

Jury Instructions. When the court drafted jury instructions, it recognized that the overlapping statutory and common law claims might confuse the jury.³ The judge was of

¹ CR 45(f): "Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him [or her] may be deemed a contempt of the court from which the subpoena issued."

² Upon receipt of a written request from a patient to examine or copy his or her recorded health care information, a health care provider must, within 15 working days, provide the information or inform the patient that the information does not exist or cannot be found. RCW 70.02.080(1)(a), (b).

³ See, e.g., Report of Proceedings at 1086.

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the opinion that Mr. Wynn's case against Ms. Earin boiled down to a negligence action in which the statutory violations were evidence of the breach of duty element: "Part of the standard of care is whether or not the Defendant complied with various statutes that govern her profession." Report of Proceedings (RP) at 1142. The court concluded that the statutory claim was, then, "subsumed into the negligence claim," RP at 1131, and that separating the two sources of duty unnecessarily complicated things. RP at 1142.

The judge also consolidated the statutory and negligence claims on the questions of proximate cause and damages. Mr. Wynn alleges a series of bad acts and claimed those acts caused his emotional distress damages. The jury would, accordingly, determine whether each act breached a duty and contributed to the harm, and then assess damages for the entire injury.

Key Instructions and Special Verdicts. The court directed a verdict that Ms. Earin violated the Health Care Information Act by talking to the guardian ad litem on the phone without having Mr. Wynn's written release in front of her. The jury was asked whether this was also negligence. The jury found it was also negligence but that it was not a proximate cause of harm to Mr. Wynn.

The court directed a second verdict that leaving health records in an unlocked car violated the Health Care Information Act and that this was also negligence as a matter of law. The jury was asked if this was a proximate cause of Mr. Wynn's damages and answered that it was.

Damages. The jury awarded \$2,790 for economic damages, the amount of Mr. Wynn's counseling expenses. The jury awarded zero noneconomic damages. Mr. Wynn moved for a judgment notwithstanding the verdict, asserting that these verdicts were inconsistent. The court denied the motion.

Fee Award. Mr. Wynn requested \$119,432 in attorney fees plus \$11,006 in costs, pursuant to the health care statute's remedies provision, RCW 70.02.170, based on the two directed verdicts that the statute was violated. The judge segregated the work she thought had been necessary to establish the statutory violations, estimated that this was 10 percent of the total effort, and awarded \$11,900 in fees and \$1,100 in costs.

DISCUSSION

Mr. Wynn challenges the court's grant of witness immunity and the court's interpretation of chapter 70.02 RCW. He contends the loss of these claims undermined his continuum theory of liability. He argues that Ms. Earin's acts should not be viewed singly as separate potential causes of his harm. Rather each incident was part of an ongoing and continuing course of conduct throughout his custody litigation.

Mr. Wynn assigns error to the dismissal of his claims based both on witness immunity and the court's statutory interpretation. He challenges the dismissal of the juror and the sufficiency of the jury instructions. He contends the court denied him statutory damages by not making its own damages determination in addition to the jury

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award. He also assigns error to the denial of judgment notwithstanding the verdict on noneconomic damages and the denial of full attorney fees and costs.

WITNESS IMMUNITY

A key component of Mr. Wynn's theory of the case (ongoing violations of the Health Care Information Act and malpractice) was the claim that Ms. Earin violated the statute and the standard of care by contacting the lawyers representing his wife and offering to testify against him in the custody proceedings. He claimed that Ms. Earin testified without a subpoena, contrary to the statute. The record includes a letter to Ms. Earin from the lawyers stating that a subpoena is enclosed. There is no suggestion, however, that Ms. Earin notified Mr. Wynn as the statute requires to enable him to seek a protection order. RCW 70.02.060(1). Mr. Wynn also claimed that Ms. Earin violated the statute by testifying beyond the scope of the questions. And Ms. Earin's own expert testified that this violated the professional confidentiality standard which requires a counselor, if subpoenaed, to respond strictly to the questions presented and to volunteer nothing.

The court dismissed these claims on Ms. Earin's motion based on blanket witness immunity. Mr. Wynn contends that the loss of these claims prejudiced him by gutting his "continuum theory" of the case—that is, that the conduct here was ongoing and involved multiple violations of the Health Care Information Act and ongoing negligence.

Mr. Wynn argues that witness immunity is broad but not absolute. It generally protects witnesses from civil liability for the substance of their testimony and trial preparation, even if erroneous or defamatory. He contends that this does not mean, however, that professionals with a duty of client confidentiality, such as lawyers and doctors, can divulge all they know about a client from the witness stand; the public interest in full disclosure by witnesses conflicts with and is outweighed by the public interest in encouraging full disclosure between clients and professionals.

He points out that a common law doctrine is trumped by a conflicting statute. He contends that witness immunity is a common law doctrine, and the Health Care Information Act is a conflicting statute that expressly provides for patients to sue for disclosures of health records except as provided by its terms.

Ms. Earin responds that witness immunity is absolute. Its purpose is to encourage full and frank disclosure in judicial proceedings. A professional should not, then, be subject to liability for violating professional standards in the course of litigation. Ms. Earin argues that the public interest in professional confidentiality is protected because witness immunity does not extend to professional disciplinary proceedings for violations of professional standards. *Deatherage v. Examining Bd. of Psychology*, 134 Wn.2d 131, 140, 948 P.2d 828 (1997). Ms. Earin also asserts that common law witness immunity exists independently of statute.

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The questions presented are questions of law. And review is therefore de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The general rule is that witnesses in judicial proceedings are “absolutely immune from suit based on their testimony.” *Bruce v. Byrne-Stevens & Assocs. Eng’rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). Witnesses are immune from any civil liability for statements made in the course of judicial proceedings. *Deatherage*, 134 Wn.2d at 135. The idea is to encourage full and frank disclosure to the court. *Bruce*, 113 Wn.2d at 126. The doctrine rests on the premise that frank and full disclosure is in the public interest. *Id.*

But witness immunity does not apply to information acquired by a witness in a prelitigation confidential professional relationship that was formed for nonlitigation purposes. *Gustafson v. Mazer*, 113 Wn. App. 770, 776-77, 54 P.3d 743 (2002). In *Gustafson*, for example, parents hired a psychologist during custody proceedings and instructed the psychologist to make a report to the guardian ad litem. *Id.* at 773. Division Two of this court distinguishes this situation from that of a psychologist who advises a patient before an action is commenced and *independently* of the litigation. *Id.* at 776-77. Division One of this court has also recognized the distinction between a psychologist hired for litigation purposes and one who treats the plaintiff before litigation is contemplated. *Childs v. Allen*, 125 Wn. App. 50, 56, 105 P.3d 411 (2004), *review denied*, 155 Wn.2d 1005 (2005).

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In the cases relied on by Ms. Earin, an expert was hired to prepare a report *for litigation*. For example, in *Bruce* an engineer consulted as an expert on damages underestimated the amount. The engineer was immune from the plaintiff's professional malpractice action. *Bruce*, 113 Wn.2d at 138. Likewise, the psychologist in *Deatherage* was negligent in preparing reports in his capacity as an expert in child custody proceedings. *Deatherage*, 134 Wn.2d at 134. Here, Ms. Earin acquired her information as she treated Mr. Wynn. That treatment predated the litigation and was not undertaken with any view toward litigation.

More importantly, statutes prevail over conflicting common law doctrines. *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 36-37, 323 P.2d 241 (1958). Witness immunity is a common law doctrine. *Bruce*, 113 Wn.2d at 125. And the courts cannot simply ignore statutes that conflict with case law. *State v. Varga*, 151 Wn.2d 179, 194, 86 P.3d 139 (2004) (quoting *Windust*, 52 Wn.2d at 37).

The statutory scheme here, chapter 70.02 RCW (the Health Care Information Act), is calculated to prevent disclosure of confidential health care information as against the public interest. It expressly provides a cause of action against a health care provider who releases treatment information to a third party without compulsory process and timely notice to the patient. RCW 70.02.060(1), (2); RCW 70.02.170.

Ms. Earin relies on *Briscoe v. LaHue*. *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). But *Briscoe* is distinguishable because there the policy of

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witness immunity did not contravene a statute. There, police witnesses were immune from an action under 42 U.S.C. § 1983 for giving allegedly perjured testimony that resulted in a criminal conviction. The holding rests in part on the fact that § 1983 contains no specific provision of a cause of action for perjured police testimony. The Court took this to mean that Congress intended that common law defenses, including witness immunity, applied. *Briscoe*, 460 U.S. at 330. Our state legislature, by contrast, has made “specific provisions to the contrary.” The Health Care Information Act expressly creates a cause of action for unauthorized disclosures of health care information, even in judicial proceedings. RCW 70.02.060.

Absolute immunity is a “blunt instrument” to be wielded solely in defense of a compelling public interest. *Deatherage*, 134 Wn.2d at 136; *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 478, 564 P.2d 1131 (1977). The public policy justification here is less than compelling compared to the competing interest of protecting confidential disclosures made during medical treatment. Consultations with confidential advisors should not require a warning that anything disclosed will be available to potential future litigation adversaries and may be used against the client in court. *See, e.g., Loudon v. Mhyre*, 110 Wn.2d 675, 677, 756 P.2d 138 (1988); *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 279, 996 P.2d 1103 (2000).

Mr. Wynn based several statutory and common law claims on Ms. Earin’s conduct in the custody proceedings, all of which were at least facially meritorious. The

provisions of RCW 70.02.060 must be followed before disclosing information to litigation adversaries; and Ms. Earin's own expert testified that standard professional practice placed limits on testimony.

The court erred in concluding that witness immunity applied.

SUBPOENA VIOLATION CLAIMS

Mr. Wynn served Ms. Earin with a subpoena duces tecum requiring her to bring his counseling records to a deposition 24 days later. Ms. Earin first filed a declaration that the records were unavailable, then said they had been stolen. She never did produce the records. Mr. Wynn claimed this violated RCW 70.02.080, which requires a health care provider to turn over records within 15 days of a patient's written request.

The court dismissed this claim. The court reasoned that RCW 70.02.080 was not violated because it was never invoked. The court then ruled that the third party provisions of RCW 70.02.060 did not apply to patient requests. Mr. Wynn appeals the latter ruling.

Whether RCW 70.02.060 applies to these facts is a conclusion of law that we review de novo. *Keyes v. Bollinger*, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982).

RCW 70.02.080 (Request from Patient). The court correctly denied Mr. Wynn relief under this section of the statute. He passed this over in favor of compulsory process. Mr. Wynn could simply have written to Ms. Earin requesting his records, then obtained a court order under RCW 70.02.080 and RCW 70.02.170 if she did not comply

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within 15 days. He did not do this. Instead, he served Ms. Earin with a subpoena under the superior court civil rules demanding production in 24 days. The civil rules, then, not RCW 70.02.080 provide his remedy.

RCW 70.02.060 (Request from Third Party). RCW 70.02.060 simply has no application to these facts. RCW 70.02.080 covers patients seeking their own records. RCW 70.02.060 does not. This section authorizes providers to deliver medical records to third parties who comply with its provisions. The primary requirement is that the third party must obtain compulsory process and give notice to the patient or counsel in time for them to seek a protective order from the court. RCW 70.02.060(1). Otherwise, the provider must not turn over the records. RCW 70.02.060(2). The court correctly dismissed these claims.

JUDGE VERSUS JURY DETERMINATION OF STATUTORY DAMAGES

Contrary to Mr. Wynn's contention, the court submitted the damages question to the jury. Contrary to Ms. Earin's contention, this was correct. The Health Care Information Act remedies section provides:

Civil Remedies. (1) A person who has complied with this chapter *may maintain an action for the relief provided in this section* against a health care provider or facility who has not complied with this chapter.

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

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RCW 70.02.170 (emphasis added).

The issue here is whether the “relief provided in this section” means in section .170 in its entirety or just in subsection (2). Ms. Earin maintains that “such relief” in subsection (2) means the court order that immediately precedes it. That is, an order of compliance issued by the court may include actual damages and attorney fees.

Mr. Wynn contends that “such relief” in subsection (2) refers to the “relief provided in this section” referred to in subsection (1). We agree. An aggrieved patient may or may not seek an order of compliance but may seek damages and fees.

The interpretation of a statute is a question of law, subject to de novo review. *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 681, 80 P.3d 598 (2003). Our review always begins with the plain language of the statute. *Id.* at 682. If the language lends itself to more than one interpretation, we apply accepted principles of statutory interpretation to try to determine the intended meaning. *Id.*

Here, RCW 70.02.170 is the remedies section of the Health Care Information Act. The remedies section has two subsections. Subsection (1) says a person who claims a violation “may maintain an action for the relief provided in this section.” Subsection (2) authorizes the court to order compliance. It then says that “[s]uch relief may include actual damages.” RCW 70.02.170(2).

We conclude that, if the legislature had intended to limit the availability of damages to plaintiffs who seek injunctive relief, it would have said so. The use of the

same word—relief—in both subsections suggests that the legislature intended the second—“such relief”—to refer back to the first—“the relief provided.” If the legislature had meant that only the injunctive relief obtainable in subsection (2) may include damages, subsection (1) would say an aggrieved patient may seek “the relief provided in subsection (2).” Instead, it says “the relief provided in this section.” The section can only be section RCW 70.02.170, including subsections (1) and (2).

We interpret RCW 70.02.170(2) as providing that the judge *may* provide equitable relief in the form of an injunctive order to comply. And the court *shall* award the prevailing party’s reasonable attorney fees and expenses. But the relief for which an aggrieved person may file an action includes actual damages.

This is consistent with the constitutional right to a jury on the issue of damages. CONST. art. I, § 21; CR 38.⁴ A plaintiff’s right to the relief warranted by the facts alleged and proved is not subject to legislation. If the claim requires determination of a purely legal right, “the court, as it always has done, may call a jury to try out that question.” *Durrah v. Wright*, 115 Wn. App. 634, 642, 63 P.3d 184 (quoting *Brown v. Baldwin*, 46 Wash. 106, 114, 89 P. 483 (1907)), *review denied*, 150 Wn.2d 1004 (2003).

We conclude, then, that Mr. Wynn had a right under this statute to submit the question of “actual damages” proximately resulting from violations of this Act to the

⁴ “The right of trial by jury as declared by article I, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate.” CR 38(a).

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jury. ““Actual damages” are synonymous with compensatory damages.” *Martini v. Boeing Co.*, 137 Wn.2d 357, 367, 971 P.2d 45 (1999) (quoting BLACK’S LAW DICTIONARY 35 (6th ed. 1990)); *Blaney v. Int’l Ass’n of Machinists & Aerospace Workers Dist. No. 160*, 114 Wn. App. 80, 95, 55 P.3d 1208 (2002). They are limited to “compensation for actual injuries or loss.” BLACK’S LAW DICTIONARY 35. But actual damages includes compensation for mental anguish from a tort involving an affront to personal dignity. *Anderson v. Pantages Theater Co.*, 114 Wash. 24, 31, 194 P. 813 (1921).

STATUTORILY RECOVERABLE ATTORNEY FEES

The jury found that a single statutory claim was a proximate cause of Mr. Wynn’s damages—Ms. Earin’s leaving his records in her unlocked car. The court decided this as a question of law and directed a verdict. The judge segregated this single statutory violation to award fees. The court estimated that Mr. Wynn could have conducted discovery of the facts and obtained a judicial determination of the law with 10 percent of the lawyering billed for. Of the over \$130,000 in attorney fees and litigation costs Mr. Wynn requested, the court awarded \$11,900 fees and \$1,100 costs.

Mr. Wynn contends his statutory claims and proof of negligence are inextricably intertwined. Therefore, he is entitled to all the fees requested. He argues that his claims are a sort of private attorney general action that furthers important public policy goals. Therefore, the statute should be liberally construed to make him whole. And, he

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continues, this requires fees and costs, not only for successful statutory claims, but also for related common law claims and other statutory claims, both successful and unsuccessful.

Ms. Earin responds that statutory fee shifting provisions should be narrowly construed to discourage frivolous claims. Withholding fees for pointless duplication and failed claims as the court did here, Ms. Earin contends, is consistent with this legislative intent. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). Moreover, Washington courts have rejected theories based on private attorney actions. So, Ms. Earin argues, Mr. Wynn was entitled only to fees for those statutory claims he prevailed on.

We review the legal basis for attorney fees de novo. *Schlener v. Allstate Ins. Co.*, 121 Wn. App. 384, 388, 88 P.3d 993 (2004). We review the amount of the award for abuse of discretion. *Ermine v. City of Spokane*, 143 Wn.2d 636, 641, 23 P.3d 492 (2001). The amount of damages involved is not a compelling factor in fixing the amount of fees. *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 409, 759 P.2d 418 (1988).

Statutory attorney fees are recoverable strictly for those services “related to the causes of action which allow for fees.” *Id.* at 410 (quoting *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987)). Fees should cover the legal effort necessary to recover for the actual violations. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987) (Consumer Protection Act, RCW 19.86.090); *Sierracin*

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Corp., 108 Wn.2d at 66 (unfair trade practices). An action in tort does not allow for recovery of attorney fees. *Norris v. Church & Co.*, 115 Wn. App. 511, 517, 63 P.3d 153 (2002). But the court may award fees to the prevailing party when authorized to do so by contract, statute, or a recognized ground in equity. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

Mr. Wynn is entitled to “attorneys’ fees and all other expenses reasonably incurred” in the prosecution of his statutory claims. RCW 70.02.170(2). But he is not entitled to attorney fees and costs incurred in the prosecution of his common law negligence claim. *See, e.g., State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Here, the court segregated Mr. Wynn’s negligence claims from his statutory claims. It then awarded fees solely for establishing the facts and the law for the single statutory violation the jury awarded damages for. We review, then, both the legal and factual bases for the court’s fee award.

The statutory and common law negligence claims can be segregated. Establishing a statutory violation did not require evidence of negligence. And proof of negligence may include proof that a statute was violated, but that certainly was superfluous here because duty and breach could have been established without reference to the statute. And breach of a statutory duty is not furthered by proving it was also negligent.

The statutory and common law claims are inextricably intertwined, however, on the issues of proximate cause and damages. Mr. Wynn alleged a course of conduct

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comprising a series of breaches—some statutory, some common law, some both—that caused a single injury. He was entitled to argue to the jury that the ultimate emotional distress was proximately caused by a series of acts and conditions. *See, e.g., Caughell v. Group Health Coop. of Puget Sound*, 124 Wn.2d 217, 233-34, 876 P.2d 898 (1994). Therefore, unless there is some principled way to sort out what caused what, the statute entitles Mr. Wynn to attorney fees for establishing the entire series of events that form the basis of his alleged damages.

ATTORNEY FEES ON APPEAL

Mr. Wynn is entitled to fees as the prevailing party under RAP 18.1 and RCW 70.02.170.

HOLDING

We reverse the superior court's ruling that common law witness immunity insulates Ms. Earin's testimony during the custody proceeding from liability either for violations of the Health Care Information Act or for breaches of professional standards of care.

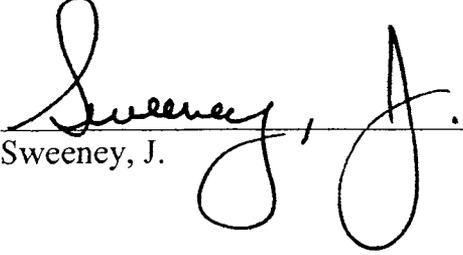
We conclude that the court correctly dismissed Mr. Wynn's claims that Ms. Earin's misrepresentations to the court in response to the subpoena violated either RCW 70.02.080 or RCW 70.02.060.

We hold that the question of "actual damages" and their proximate relationship to violations of the Health Care Information Act is one for the jury, not the court.

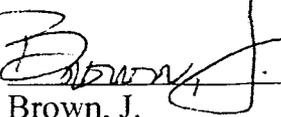
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We affirm the court's rulings that the disclosure to the guardian ad litem violated the statute and that the loss of records from the car violated both the statute and the standard of care.

Mr. Wynn is entitled to resolution of the surviving claims. *See, e.g., Korslund v. DynCorp Tri-Cities Servs., Inc.*, 121 Wn. App. 295, 335-36, 88 P.3d 966 (2004), *review granted*, 153 Wn.2d 1008 (2005). The question of attorney fees and costs is remanded consistent with this opinion, for determination contingent on a jury's damage award upon retrial.


Sweeney, J.

WE CONCUR:


Brown, J.


Baker, J. Pro Tem.