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Court of Appeals, Division III No. 361039
Spokane Co. Superior Court Cause No. 17-2-00266-1

SUPREME COURT OF WASHINGTON

LOGAN MAGNEY, a minor; CALEB MAGNEY, a minor; BRIAN
MAGNEY and EMILY MAGNEY,

Plaintiffs-Petitioners,

vs.

TRUC PHAM, M.D.; AYUMI I. CORN, M.D.; LIQUN YIN, M.D.;
and INCYTE DIAGNOSTICS, a Washington corporation,

Defendants-Respondents.

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF MOVING PARTY

This motion is submitted on behalf of Plaintiffs-Petitioners Brian and Emily Magney.

II. DECISION SUBJECT TO REVIEW

The Magneys seek review of the superior court's Order Re: Plaintiffs' Motion for Protective Order, dated May 4, 2018, which directed them to produce privileged marital counseling records of Brian and Emily Magney. A-155 to A-156. A commissioner of the Court of Appeals, Division III, denied the Magneys' motion for discretionary review, and a panel of the appellate court denied their motion to modify the commissioner's ruling. A-150 to A-154.¹

III. ISSUES PRESENTED FOR REVIEW

1. Did the superior court err in holding that parents who make a claim for injury to their child under RCW 4.24.010 waive the marital counseling privilege under RCW 5.60.060(9), even though the parents are not making a claim for injury to their marital relationship?
2. Assuming for the sake of argument that the privilege has been waived, did the superior court err in declining to review marital counseling records *in camera* to determine whether they contained any relevant information and redact or withhold irrelevant information?

¹ Cited documents are reproduced in the separately bound Record Appendix Re: Motion for Discretionary Review, filed contemporaneously herewith.

The Court should grant discretionary review of these issues because the Magneys' marital counseling records are admittedly privileged under RCW 5.60.060(9); the statutory and common-law grounds for waiver have not been satisfied; the superior court did not conduct *in camera* review as required to prevent the disclosure of irrelevant information; and, most importantly, compelled disclosure will destroy the confidential nature of the records in a way that cannot be remedied on direct appeal.

IV. STATEMENT OF THE CASE

This is an action for medical negligence arising out of the misdiagnosis of 13-month-old Logan Magney with a form of cancer and the unnecessary and harmful treatment that occurred as a result of the misdiagnosis, including two rounds of chemotherapy. The action includes claims for injury to the parent-child relationship brought by Logan's parents, Brian and Emily Magney, pursuant to RCW 4.24.010. The complaint does not include claims for injury to the Magneys' marital relationship. *See* Complaint for Medical Negligence & Damages, filed Jan. 24, 2017; Verbatim Report of Proceedings, Apr. 30, 2018, at 3:8-13 (hereafter "VRP").

During the course of discovery, Defendants learned that the Magneys had undergone marital counseling prior to the

misdiagnosis of their son and requested copies of the marital counseling records. The Magneys have not had any marriage counseling after the misdiagnosis of their son. *See* VRP at 3:14-19.

The Magneys' marital counseling records are admittedly privileged under RCW 5.60.060(9), which provides:

A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

- (a) With the written authorization of that person or, in the case of death or disability, the person's personal representative;
- (b) If the person waives the privilege by bringing charges against the mental health counselor licensed under chapter 18.225 RCW;
- (c) In response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report under RCW 18.130.050;
- (d) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.360 (8) and (9); or
- (e) To any individual if the mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.

(Formatting in original.) It is further admitted that none of the express statutory exceptions to the privilege is applicable in this case, including the exception in subsection (b) based on waiver. However, the parties disagree whether the marital counseling privilege has been impliedly waived by bringing claims for injury to the parent-child relationship, and, if so, whether the Magneys' marital counseling records are relevant to their claims for injury to the parent-child relationship.

The Magneys filed a motion for a protective order preventing disclosure of the marital counseling records, and, in the alternative, asking the superior court to conduct *in camera* review of the records in order to determine relevance and to redact or withhold irrelevant information.² The superior court denied the motion for protective order and declined to conduct *in camera* review. *See* VRP at 27:22-24 & 28:9-11; A-155 to A-156. At the same time, the Court recognized and expressed concern about “the sensitive nature of the records.” *Id.* at 28:19-20; *accord id.* at 30:13 (again referring to “the sensitive nature of the records”).

² *See* Plaintiffs' Motion for a Protective Order, dated Apr. 12, 2018; Memorandum in Support of Motion for a Protective Order Re: Emily and Brian Magney's Marriage Counseling Records, dated Apr. 12, 2018; Defendants' Response to Plaintiffs' Motion for Protective Order, dated Apr. 20, 2018; Reply in Support of Motion for a Protective Order Re: Emily and Brian Magney's Marriage Counseling Records, dated Apr. 25, 2018; A-8 to A-109.

The Magneys timely sought discretionary review in the Court of Appeals under RAP 2.3(b)(2), which provides for review when “[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]” (Brackets added.) The Commissioner denied discretionary review on grounds that there is no “probable error” because there is “no direct authority” regarding implied waiver of the marital counseling privilege, and applied case law regarding implied waiver of the textually dissimilar psychologist-client privilege. Commissioner’s Ruling, at 3 (citing *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.3d 779 (2013)); A-150 to A-154. The Commissioner also determined that compelled disclosure of the otherwise privileged records does not substantially alter the status quo or limit the Magneys’ freedom to act because they “can move to seal the records and to limit their use in court.” *Id.* at 4.

A panel of the Court of Appeals denied a motion to modify the Commissioner’s Ruling and the Magneys now seek review in this Court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- A. Compelling disclosure of the Magneys' privileged marital counseling records simply because they brought a claim for injury to their child constitutes probable error that substantially alters the status quo and limits their freedom to act, warranting discretionary review under RAP 13.5(b)(2).**

Discretionary review is appropriate when “[t]he Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act[.]” RAP 13.5(b)(2) (brackets added). In this case, the Court of Appeals’ refusal to accept review constitutes probable error because the superior court order compelling disclosure of the Magneys’ marital counseling records is contrary to the text of the marital privilege statute, RCW 5.60.060(9), as well as this Court’s precedent addressing implied waiver of a statutory privilege based on the filing of a lawsuit. Even if the privilege is deemed to be impliedly waived, the superior court should have reviewed the Magneys’ marital counseling records *in camera* to determine whether they contained any relevant information and redact or withhold irrelevant information. The Court of Appeals’ refusal to accept review alters the status quo and limits the Magneys’ freedom to act because, once the privileged information has been disclosed, the Court cannot restore its confidential character or

protect the relationships that the privilege is intended to foster. Discretionary review should be granted on this basis.

1. Compelled disclosure of the Magneys' privileged marital counseling records constitutes "probable error" within the meaning of RAP 13.5(b)(2).

A "probable error" justifying discretionary review under RAP 13.5(b)(2) is contrasted with an "obvious error" under RAP 13.5(b)(1). Aside from the fact that it does not have to be obvious, a "probable error" is otherwise undefined. "[I]n the absence of a provided definition, [the Supreme Court] will give a term [in the *Rules of Appellate Procedure*] its plain and ordinary meaning ascertained from a standard dictionary." *State v. Taylor*, 150 Wn. 2d 599, 602, 80 P.3d 605, 607 (2003) (brackets added). The ordinary meaning of the word "probable" is "supported by evidence strong enough to establish presumption but not proof" and "likely to be or become true or real." *Merriam-Webster Online*, s.v. "probable" (viewed July 2, 2018; available at www.m-w.com); accord Black's Law Dictionary, s.v. "probable" (10th ed. 2014) (defining "probable" as [l]ikely to exist, be true, or happen"; brackets added).

"[T]here is an inverse relationship between the certainty of error and its impact on the trial" required to justify discretionary

review. *See Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462-63, 232 P.3d 591, 594, *rev. denied*, 169 Wn. 2d 1029 (2010) (involving criteria for discretionary review under RAP 2.3(b); brackets added); *see also* Task Force Comment to RAP 13.5 (1974), *reprinted in* 3 Wash. Prac., Rules Practice RAP 13.5 (8th ed.) (noting “Rule 13.5 corresponds to Rules 2.3 and 6.2 governing discretionary review of trial court decisions”). Washington St. Bar Ass’n, *Washington Appellate Practice* § 18.3 (4th ed.) (stating RAP 13.5(b) “parallels” RAP 2.3(b)). A strong showing of harm decreases the requisite showing of error, and vice-versa. *See id.*, 156 Wn. App. at 463. In this case, regardless of the extent of the showing required, the superior court committed probable error in multiple respects.

- a. **The Legislature’s express enumeration of statutory exceptions to the marital counseling privilege—including an exception that provides for waiver of the privilege in a different context—precludes judicial recognition of an automatic implied waiver of the privilege in this case.**

The law recognizes privileges for communications made in the course of certain types of relationships and protects them from disclosure in discovery and litigation, even though they might otherwise be admissible and helpful in resolving a dispute or arriving at the truth. *See generally* 5A Wash. Prac., *Evidence Law & Practice*

§ 501.2 (6th ed.). These privileges are based upon the policy choice that preserving and fostering the relationship in question is more important than the litigation process. *See Lowy v. PeaceHealth*, 174 Wn. 2d 769, 785, 280 P.3d 1078, 1086 (2012) (stating “[a]s a policy matter, because some relationships are deemed so important and cannot be effective without candid communication, courts and legislatures have granted them privilege communication in these relationships is so important that the law is willing to sacrifice its pursuit for the truth”; brackets & ellipses added).

The relationships between a marriage counselor and the spouses involved in counseling are among those relationships deemed to be of sufficient societal importance to be protected by a statutory privilege. *See RCW 5.60.060(9)* (quoted above). The Legislature’s express recognition of the five exceptions to the marital counselor privilege—in particular, the exception based on waiver arising from charges against the counselor—precludes judicial recognition of an additional, unstated exception based upon filing a claim for injury to a child under RCW 4.24.010. “Express exceptions in a statute suggest the Legislature’s intention to exclude other exceptions” under the rule of statutory interpretation known as *expressio unius est exclusio alterius*. *Nat’l Elec. Contractors Ass’n*,

Cascade Chapter v. Riveland, 138 Wn. 2d 9, 17-18, 978 P.2d 481, 485 (1999); accord *State v. Somerville*, 111 Wn. 2d 524, 535, 760 P.2d 932, 938 (1988) (stating “[u]nder the rule of *expressio unius est exclusio alterius*—specific inclusions exclude implication—these exceptions are exclusive, and the further exception carved out by the trial court here is barred”; brackets added); *Jepson v. Dep't of Labor & Indus.*, 89 Wn. 2d 394, 404, 573 P.2d 10, 16 (1977) (stating “[w]here a statute provides for a stated exception, no other exceptions will be assumed by implication”; brackets added).

The enumeration of a list of exceptions actually strengthens the statutory language protecting communications between a marriage counselor and the spouses involved in counseling because it demonstrates that the Legislature carefully considered the scope of the statute. Cf. *State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn. 2d 811, 830, 966 P.2d 1252, 1262 (1998) (stating the text of constitutional provision “demonstrates the ratifying public recognized and incorporated these specific exceptions to the otherwise absolute constitutional prohibition as if to say there are no others”). There is no basis in the text of the marital counseling privilege statute for concluding that the Magneys’ claim

for injury to their child automatically waives the marital counseling privilege.

b. The lack of an automatic implied waiver of the marital counseling privilege is supported by precedent interpreting the former physician-patient privilege statute.

In *Bond v. Independent Order of Foresters*, 69 Wn. 2d 879, 421 P.2d 351 (1966), the Court declined to find automatic implied waiver of the physician-patient privilege statute based on the filing of a personal injury lawsuit or testimony by the plaintiff regarding her injuries. At the time, the physician-patient privilege statute provided:

A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient.

Id., 69 Wn. 2d at 880-81 (quoting former RCW 5.60.060(4)). The defendants in *Bond* argued that the plaintiff waived the privilege by bringing suit and testifying about her injuries. *See id.* at 881 & 882 (describing defendants' arguments). The Court rejected this argument given the absence of an express waiver contained in the statutory text:

The bringing of an action for personal injuries does not constitute a waiver of the statute. The legislature expressly provided that a regular physician or surgeon shall not be

examined in a civil action as to any information acquired in attending a patient, without such patient's consent. This legislative enactment is a clear and positive mandate.

Id. at 881. The Court concluded as follows:

We are aware that in several jurisdictions the physician-patient privilege statutes specifically provide that the privilege is waived when a civil action for personal injuries is instituted. Whether RCW 5.60.060(4) [i.e., the physician-patient privilege statute] should be so amended is a legislative function which rests within the sole discretion of the legislature.

Id. at 882 (brackets added). *Bond* establishes that the courts are bound by the text of privilege statutes adopted by the Legislature.

In *Phipps v. Sasser*, 74 Wn. 2d 439, 443, 445 P.2d 624 (1968), the Court adhered to its ruling in *Bond* that “the bringing of a personal-injury action does not, by itself, constitute a waiver of the physician-patient privilege afforded by [former RCW 5.60.060(4)].” In so doing, the Court further explained its deference to the Legislature as follows:

The rule of privilege embodied in RCW 5.60.060(4) reflects the considered judgment of one branch of our tripartite-structured government, traditionally regarded as constitutionally separate, independent and equal. Such legislative judgments merit, even require, the exercise of judicial self-restraint of a very high order. It is our duty when confronted with a valid act such as this to give effect to the legislative intent embodied therein, refraining from substituting our judgment in the matter, whatever that may be, for that of the legislature.

Id., 74 Wn. 2d at 444 (footnote omitted). Deference to the Legislature is especially appropriate because the physician-patient privilege is a creature of statute, without any counterpart at common law:

It is to be noted that unlike the attorney-client and priest-penitent privilege, which have a common-law origin and are broad in their scope, the physician-patient privilege is of purely statutory origin; was not known at common law, and is limited in its scope by the statutes which create it

Since the legislature has created a physician-patient privilege, where none existed at common law, and has made its own limitations as to scope and as to where it shall not be applicable, any changes in it should be made by the legislature.

Id. at 444 & 445 (footnotes omitted; ellipses added).

The text of the physician-patient privilege statute has been amended since *Bond* and *Phipps* were decided, but the legislative deference required by these decisions remains unaffected by the amendments.³ Like the physician-patient privilege, the marital counseling privilege is a creature of statute, and courts should defer to the Legislature's limited exceptions. Because there is no exception

³ The physician-patient privilege statute was amended in 1986 to require the plaintiff to elect whether to waive the privilege within 90 days after filing an action for personal injuries or wrongful death. *See* Laws of 1986, ch. 305, § 101 (codified at RCW 5.60.060(4)(b)). The statute was amended in 1987 to provide for an automatic waiver 90 days after filing an action for personal injuries or wrongful death, and extending the waiver to all conditions, not just the conditions in controversy. *See* Laws of 1987, ch. 212, § 1501 (codified at RCW 5.60.060(4)(b)); *see also* *Youngs v. Peacehealth*, 179 Wn. 2d 645, 658 n.5, 316 P.3d 1035, 1041 n.5 (2014) (discussing amendments). There have been no similar amendments to the marital counseling privilege.

to the marital counseling privilege based upon filing a claim for injury to a child under RCW 4.24.010, this Court should decline to read one into the statute.

- c. **Implied waiver of the marital counseling privilege should be limited to circumstances where the plaintiff introduces testimony regarding a marital relationship or seeks damages for injury to the marital relationship, which is not the case here.**

Given the fact that there is no automatic implied waiver of the marital counseling privilege, at most a waiver could be implied if the Magneys offered testimony from themselves or their marriage counselor regarding their marital relationship, or sought damages for injury to the relationship. In the physician-patient context, the courts have recognized a limited waiver of the privilege under circumstances where the plaintiff offers testimony about a medical condition at issue in the case. *See Carson v. Fine*, 123 Wn. 2d 206, 213, 867 P.2d 610 (1994); *Phipps*, 74 Wn. 2d at 445; *McUne v. Fuqua*, 42 Wn. 2d 65, 74-76, 253 P.2d 632 (1953). However, the waiver is limited to the condition that is the subject matter of the testimony. *See Carson*, 123 Wn. 2d at 213-14 (referring to the “illness,” “condition,” and “disability or ailment at issue”); *McUne*, 42 Wn. 2d at 74-76 (referring to the “disability or ailment at issue”). Assuming

for the sake of argument that this type of waiver analysis applies to the marital counseling privilege, there can be no waiver in this case because the Magneys have not offered, and do not intend to offer, testimony regarding their marital relationship.⁴

The Magneys' claim is limited to injury to their relationship with their child pursuant to RCW 4.24.010. "In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just." RCW 4.24.010; *accord* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 32.06.01 (6th ed.) (pattern jury instruction regarding claim for injury to child). This contrasts with a spousal consortium claim, which permits recovery for "the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship," and "emotional support, love, affection, care, services, companionship, including sexual companionship, as

⁴The Legislature has expanded on the limited nature of the waiver by amendments to the physician-patient privilege. See Laws of 1986, ch. 305, § 101 (codified at RCW 5.60.060(4)(b)); Laws of 1987, ch. 212, § 1501 (same). There is no similar language in the marital counseling privilege that would expand the limited nature of the implied waiver analysis.

well as assistance from one spouse to the other.” 6 Wash. Prac., *supra* WPI 32.04 (brackets omitted).

Not only does the Magneys’ claim for injury to their child involve a subject matter that is separate and distinct from their marital relationship, it also involves a different time frame. The Magneys received and completed marital counseling before their son was injured, and they have not received any such counseling since he was injured. As a result, there is no basis for an implied waiver of the marital counseling privilege in this case.⁵

d. Division I’s decision in *Lodis v. Corbis*, on which the Court of Appeals relied, is both inapplicable and incorrectly decided.

The Court of Appeals Commissioner denied discretionary review based on the Division I decision in *Lodis*, which held that a plaintiff who makes a claim for emotional damages in an employment-related lawsuit waives the psychologist-client privilege

⁵ Respondents attempt to re-frame the Magneys’ injury at a higher level of generality, i.e., unspecified emotional distress rather than injury to their child. They assume that all forms of emotional distress are the same and that a jury cannot evaluate a claim for injury to a child without having complete information about all potential sources of emotional distress, including privileged marital counseling records. This is contrary to the implied waiver analysis in *Carson*, *Phipps*, and *McUne*, *supra*, which focuses on the precise condition at issue. In addition, there are no principled limits to this approach to implied waiver, under which any claim for general damages would justify finding an implied waiver of all privileges that protect potentially emotionally-laden communications and relationships, including marital communications, attorney-client communications, and even religious confession.

under RCW 18.83.110. The psychologist-client privilege statute provides in pertinent part:

Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client[.]

RCW 18.83.110 (brackets added). The express statutory linkage between the psychologist-client privilege and the attorney-client privilege obviously differs from the text of the marital counseling privilege. The attorney-client privilege is originally a common-law privilege that has merely been codified by the Legislature, giving the courts greater latitude in interpreting and applying it. *See Pappas v. Holloway*, 114 Wn. 2d 198, 787 P.2d 30 (1990); *Phipps, supra*.

To determine whether filing a lawsuit implicitly waives the attorney-client privilege, this Court has adopted the test from *Hearn v. Rhay*, 68 F.R.D. 574 (D.C.Wash.1975), at least in certain factual contexts. The *Hearn* test provides for waiver under the following circumstances:

(1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Pappas, 114 Wn. 2d at 207 (citing *Hearn*). The Court acknowledged that the *Hearn* test is subject to criticism, primarily because it allows a party's alleged need for evidence to overcome the privilege and thus "ignores the general interest of the system of justice in maintaining the privilege and leads to automatic waiver even when there has been no misuse by the privilege-holder or unfairness to his opponent." *Pappas*, 114 Wn. 2d at 207-08 (quotation omitted); accord *Dana v. Piper*, 173 Wn. App. 761, 773 & n.11, 295 P.3d 305, 312 & n.11, *rev. denied*, 178 Wn. 2d 1006 (2013) (noting "sharp criticism" of *Hearn*; finding no waiver). Accordingly, the *Hearn* test is applied with "caution" to avoid "swallow[ing] the attorney-client privilege" and making it "illusory." *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 825, 381 P.3d 111, 120 (2016) (discussing *Pappas* and *Dana*; brackets added; finding no waiver).

The *Hearn* test for waiver has never been extended by Washington courts beyond the attorney-client privilege context. Even if the *Hearn* test for waiver were applied to the marital counseling privilege, however, it would not establish a waiver under the circumstances present in this case because the Magneys have not put their marital counseling records at issue. They are making a claim for injury to their child, not to their marriage relationship, and

access to their marital counseling records is not vital to Defendants' defense of the claim.

In any event, *Lodis* is incorrectly decided because the court ignored the express statutory linkage between the psychologist-client privilege and the attorney-client privilege and wrongly equated the psychologist-client privilege with the physician-patient privilege. *Lodis* cited *Petersen v. State*, 100 Wn. 2d 421, 429, 671 P.2d 230 (1983), for the proposition that “[t]he Washington Supreme Court recognizes that the physician-patient and psychologist-client privilege provide essentially the same protection.” *Lodis*, 172 Wn. App. at 855 (brackets added). Whether or not this was true when *Petersen* was decided more than 35 years ago, it was unquestionably false when *Lodis* was decided because *Petersen* predated the Legislature’s amendments to the physician-patient privilege statute that provided for automatic waiver of the privilege as to all conditions upon filing a personal injury lawsuit. *See* Laws of 1986, ch. 305, § 101; Laws of 1987, ch. 212, § 1501. *Petersen* also predated adoption of the *Hearn* test for implied waiver of the attorney-client privilege, on which the psychologist-client privilege is based. *See Pappas, supra*. Following these developments in the law, the psychologist-

client privilege can no longer be equated with the physician-patient privilege, and *Lodis* is incorrect to that extent.⁶

Furthermore, *Lodis* did not follow the correct implied waiver analysis that prevailed under the physician-patient privilege before the statute was amended. As noted above, under that analysis, waiver only occurs when the plaintiff offers testimony about a medical condition at issue in the case, and the waiver is limited to the condition that is the subject matter of the testimony, *See Carson, supra; McUne, supra*. That waiver analysis is inapplicable in this case because the Magneys have not offered, and do not intend to offer, testimony regarding their marital relationship. Rather than applying the correct waiver analysis, in *Lodis* Division I chose from among three competing strands of federal authority regarding waiver of the psychologist-client privilege. *See Lodis*, 172 Wn. App. at 855. *Lodis* is also incorrect on this basis. *Lodis* is not binding on this Court and should not be followed, even if it could be applied to the marital counseling privilege.⁷

⁶ This error may be understandable because, as Division I noted, “*Lodis* points us to no Washington case law that requires us to treat these two privileges differently.” *Lodis*, 172 Wn. App. at 855.

⁷ *Lodis* was not binding on the Court of Appeals below, either. *See Matter of Arnold*, 190 Wn. 2d 136, 138, 410 P.3d 1133, 1134 (2018) (rejecting “horizontal stare decisis” among Divisions of the Court of Appeals).

- 2. The lower courts compounded their error by failing to require *in camera* review to determine whether the Magneys' marital counseling records contain relevant information and redact or withhold irrelevant information.**

Where a privilege has been waived, the waiver is not absolute but rather is limited to information relevant to the litigation. *See Youngs*, 179 Wn. 2d at 659 (quoting *Loudon v. Mhyre*, 110 Wn. 2d 675, 677-78, 756 P.2d 138, 140 (1988)). This limitation on the scope of the waiver is grounded in the discovery rules, which only permit discovery of information that is relevant. *See Youngs*, 179 Wn. 2d at 659; *see also* CR 26(b)(1). The party holding the privilege is entitled to *in camera* review to ensure that only relevant information is produced and to redact or withhold irrelevant information. *Cf. Cedell v. Farmers Ins. Co. of Washington*, 176 Wn. 2d 686, 702, 295 P.3d 239, 247 (2013) (requiring *in camera* review of insurance claims files to redact or withhold information for which the attorney-client privilege has not been waived); *Fellows v. Moynihan*, 175 Wn. 2d 641, 285 P.3d 864 (2012) (requiring *in camera* review of hospital peer review and quality improvement records to redact or withhold privileged and irrelevant information). Without such *in camera* review, there is no limit on an opposing party's ability to obtain irrelevant privileged information. Assuming for the sake of argument

that the Magneys' marital counseling privilege has been waived, the superior court nonetheless erred in failing to conduct *in camera* review of their marital counseling records to determine which, if any, records are relevant and to withhold or redact irrelevant records.

3. Compelled disclosure of privileged marital counseling records substantially alters the status quo and limits the Magneys' freedom to act within the meaning of RAP 13.5(b)(2) because once the records have been disclosed the loss of their confidential character cannot be restored or remedied by direct appeal.

Alteration of the status quo or limitation of a party's freedom to act justifying discretionary review under RAP 13.5(b)(2) refers to consequences outside of the litigation that cannot be fully remedied by subsequent court action. *See Washington Appellate Practice Deskbook* § 4.4(2)(b) (discussing RAP 2.3(b)(2) and citing *State v. Howland*, 180 Wn. App. 196, 321 P.3d 303 (2014)); *id.* § 18.3 (stating RAP 13.5(b) "parallels" RAP 23(b)). This includes orders requiring disclosure of privileged information. *See* Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, *The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*, 38 Seattle U.L. Rev. 91, 93 & 102 (2014).

Improper disclosure of privileged and confidential information causes irreparable harm that cannot be fully remedied

by subsequent court action. *See, e.g., Loudon*, 110 Wn. 2d at 678 (prohibiting ex parte contact with treating physician on discretionary review to avoid the mere potential for disclosure of irrelevant information protected by the physician-patient privilege). “If a trial court enforces an order requiring pretrial disclosure of information despite a claim that it is privileged ... any error cannot be remedied by an appeal from a final judgment.” Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1551 (1986) (ellipses added).

Once privileged information has been disclosed, it cannot be retrieved and returned to a protected or confidential status, and the damage to the privileged relationship has already occurred. *See, e.g., Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn. App. 98, 121, 168 P.3d 443, 455 (2007), *rev. denied*, 163 Wn. 2d 1049 (2008) (reversing denial of preliminary injunction to prevent state agency from disclosing confidential utility data). In other words, “no bell can be unrung.” *Dana v. Piper*, 173 Wn. App. 761, 769, 295 P.3d 305, 309, *rev. denied*, 178 Wn. 2d 1006 (2013) (reversing order compelling discovery of information protected by the attorney-client

privilege on discretionary review). For this reason, claims of privilege are properly subject to discretionary review.⁸

This case, which involves privileged marital counseling records, is no different. The superior court has already recognized the sensitive nature of the information contained in the records. Disclosure of this information threatens to jeopardize the relationship between married couples and their counselors, as well as between the married couples themselves.

As noted above, “there is an inverse relationship between the certainty of error and its impact on the trial” required to justify discretionary review. *Minehart*, 156 Wn. App. at 462-63. A strong showing of harm decreases the requisite showing of error. *See id.* at 463. In this case, the impact of destroying of the confidential nature

⁸ *See, e.g., Newman v. Highland Sch. Dist. No. 203*, 186 Wn. 2d 769, 776, 381 P.3d 1188, 1190 (2016) (reviewing claim of attorney-client privilege on discretionary review); *Estate of Dempsey v. Spokane Washington Hosp. Co. LLC*, 1 Wn. App. 2d 628, 406 P.3d 1162 (2017), *rev. denied*, 190 Wn. 2d 1012 (2018) (reviewing claim of work product protection on discretionary review); *Doehne v. EmpRes Healthcare Mgmt., LLC*, 190 Wn. App. 274, 360 P.3d 34 (2015) (reviewing claim of attorney-client privilege and work product protection on discretionary review); *Norton v. U.S. Bank Nat. Ass'n*, 179 Wn. App. 450, 324 P.3d 693, *rev. denied*, 180 Wn. 2d 1023 (2014) (reviewing claim of statutory privilege for Suspicious Activity Report by bank, 31 U.S.C. § 5318(g) on discretionary review); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 816, 21 P.3d 1157, 1159 (2001) (reviewing claim of First Amendment associational privilege on discretionary review); *see also Phipps v. Sasser*, 74 Wn. 2d 439, 445 P.2d 624 (1968) (reviewing claim of waiver of former physician-patient privilege on writ of certiorari); *Bond v. Indep. Order of Foresters*, 69 Wn. 2d 879, 880, 421 P.2d 351, 353 (1966) (same).

of the Magneys' marital counseling records cannot be remedied on direct appeal at the conclusion of the case.

VI. CONCLUSION

This Court should grant review and vacate the superior court's order compelling discovery of the Magneys' privileged marital counseling records. The Court should hold that the Magneys' did not impliedly waive their marital counseling privilege by filing a claim for injury to their child. Alternatively, the Court should require *in camera* review of privileged records to withhold and redact irrelevant information.

DATED this 19th day of December, 2018.

s/George M. Ahrend
George M. Ahrend, WSBA #25160
Co-Attorneys for Plaintiffs-Petitioners
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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email pursuant to electronic service agreement, as follows:

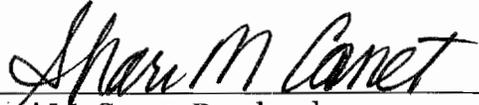
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Signed at Moses Lake Washington on December 19, 2018.



Shari M. Canet, Paralegal

AHREND LAW FIRM PLLC

December 19, 2018 - 1:26 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36103-9
Appellate Court Case Title: Brian Magney, et ux, et al v. Truc Pham, M.D., et al
Superior Court Case Number: 17-2-00266-1

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Court of Appeals, Division III No. 361039
Spokane Co. Superior Court Cause No. 17-2-00266-1

SUPREME COURT OF WASHINGTON

LOGAN MAGNEY, a minor; CALEB MAGNEY, a minor; BRIAN
MAGNEY and EMILY MAGNEY,

Plaintiffs-Petitioners,

vs.

TRUC PHAM, M.D.; AYUMI I. CORN, M.D.; LIQUN YIN, M.D.;
and INCYTE DIAGNOSTICS, a Washington corporation,

Defendants-Respondents.

RECORD APPENDIX RE:
MOTION FOR DISCRETIONARY REVIEW

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Co-Counsel for Plaintiffs-Petitioners

RECORD APPENDIX

Complaint for Medical Negligence and Damages, filed Jan. 24, 2017	A-1
Plaintiffs’ Motion for a Protective Order, dated Apr. 12, 2018	A-8
Memorandum in Support of Motion for a Protective Order Re: Emily and Brian Magney’s Marriage Counseling Records, dated Apr. 12, 2018	A-11
Defendants’ Response to Plaintiffs’ Motion for Protective Order, dated Apr. 20, 2018.....	A-85
Reply in Support of Motion for a Protective Order Re: Emily and Brian Magney’s Marriage Counseling Records, dated Apr. 25, 2018	A-94
Verbatim Report of Proceedings, Apr. 30, 2018	A-110
Notice of Discretionary Review, filed May 25, 2018	A-141
Order Re: Plaintiffs’ Motion for Limited Stay of Discovery of Marital Counseling Records, filed June 29, 2018	A-148
Commissioner’s Ruling, filed September 5, 2018	A-150
Order Denying Motion to Modify Commissioner’s Ruling, filed November 20, 2018.....	A-154
Order Re: Plaintiffs’ Motion for Protective Order, filed May 4, 2018.	A-155

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email pursuant to electronic service agreement, as follows:

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Alicia Asplint AliciaA@witherspoonkelley.com

and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

Mark D. Kamitomo at mark@markamgrp.com
Collin M. Harper at collin@markamgrp.com

Signed at Moses Lake Washington on December 19, 2018.



Shari M. Canet, Paralegal

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COPY
Original Filed

JAN 24 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AUMI I. CORN, M.D.,
LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No.

17200266 - 1

COMPLAINT FOR MEDICAL
NEGLIGENCE AND DAMAGES

I. IDENTIFICATION OF PLAINTIFFS

1.1 At all times material hereto, Plaintiff Logan Magney, a minor, was residing in
Spokane, Spokane County, Washington.

1.2. At all times material hereto, Plaintiff Caleb Magney, a minor, was residing in
Spokane, Spokane County, Washington.

1.3. At all times material hereto, Plaintiff Brian Magney was residing in Spokane,
Spokane County, Washington.

COMPLAINT FOR DAMAGES - 1

THE MARKAM GROUP, INC., P.S.
ATTORNEYS AT LAW
421 West Riverside, Suite 1060
Spokane, WA 99201
(509) 747-0902 FAX (509) 747-1993

1
2 1.4. At all times material hereto, Plaintiff Emily Magney was residing in Spokane,
3
4 Spokane County, Washington.

5
6 **II. IDENTIFICATION OF DEFENDANTS**

7 2.1 Defendant Truc T. Pham, M.D., is a physician licensed in the state of
8 Washington who was working in Spokane, Spokane County, Washington during the time
9 of the subject care.

10 2.2. Defendant Aumi I. Corn, M.D., is a physician licensed in the state of
11 Washington who was working in Spokane, Spokane County, Washington during the time
12 of the subject care.

13 2.3. Defendant Liqun Yin, M.D., is a physician licensed in the state of Washington
14 who was working in Spokane, Spokane County, Washington during the time of the subject
15 care.
16

17 2.4. Defendant Incyte Diagnostics, a Washington corporation, does business in
18 Spokane, Spokane County, Washington.
19

20
21
22 **III. VENUE AND JURISDICTION**

23 3.1 Subject matter and personal jurisdiction are proper in the Superior Court of
24 Washington for Spokane County.
25

26 3.2. Venue is proper in Spokane County Washington.
27

1 3.3. Plaintiffs bring their claims within the time limit allowed by the applicable
2 statute of limitations.
3

4 **IV. COMPLIANCE WITH LAWS**
5 **PECULIAR TO HEALTHCARE LAWSUITS**
6

7 4.1. Pursuant to the provisions of RCW 7.70A.020, an appropriate declaration of
8 counsel is appended hereto as Exhibit A declining the option to submit this dispute to
9 arbitration under the above entitled chapter.
10

11 **V. DATE AND NATURE OF OCCURRENCE**
12

13 5.1. In March 2015, Defendant Pham negligently interpreted a neck lymph node
14 tissue sample taken from Plaintiff Logan Magney as malignant. Again, in March 2015,
15 Defendants Pham and Corn negligently interpreted a left deep neck mass biopsy taken
16 from Plaintiff Logan Magney as acute myeloid leukemia. Again, in April 2015, Defendants
17 Pham and Yin negligently interpreted a needle core biopsy taken from Logan Magney as
18 residual acute myeloid leukemia.
19

20 5.2. Based upon the negligent interpretations, Plaintiff Logan Magney underwent
21 treatment including chemotherapy.
22

23 5.3. Subsequently, pathological interpretation from University of Washington
24 Children's Hospital and St. Jude's Children's Hospital interpreted Logan Magney's
25
26

1 pathology specimens as a reactive or inflammatory process and not acute myeloid
2 leukemia. As a result, the child's diagnosis was reversed and treatment for acute myeloid
3 leukemia discontinued.
4

5
6 **VI. MEDICAL NEGLIGENCE**

7 6.1. Defendant Pham failed to exercise that degree of care, skill and learning
8 expected of reasonably prudent healthcare providers in the same profession or class in the
9 state of Washington acting in the same or similar circumstances. Such conduct proximately
10 caused severe injuries and damages to Plaintiffs. Defendant Pham's conduct violated RCW
11 7.70 and other applicable laws.
12

13
14 6.2. Defendant Corn failed to exercise that degree of care, skill and learning
15 expected of reasonably prudent healthcare providers in the same profession or class in the
16 state of Washington acting in the same or similar circumstances. Such conduct proximately
17 caused severe injuries and damages to Plaintiffs. Defendant Corn's conduct violated RCW
18 7.70 and other applicable laws.
19

20
21 6.3. Defendant Yin failed to exercise that degree of care, skill and learning
22 expected of reasonably prudent healthcare providers in the same profession or class in the
23 state of Washington acting in the same or similar circumstances. Such conduct proximately
24 caused severe injuries and damages to Plaintiffs. Defendant Yin's conduct violated RCW
25 7.70 and other applicable laws.
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VII. MEDICAL NEGLIGENCE OF INCYTE DIAGNOSTICS

7.1. Defendant Incyte Diagnostics, through its employees, agents and members, including, but not limited to, Defendants Pham, Yin and Corn, failed to exercise the degree of care, skill and learning expected of reasonably prudent healthcare providers in the same profession or class in the state of Washington acting in the same or similar circumstances. Such conduct proximately caused severe and permanent injuries and damages to Plaintiffs. Defendant's conduct violated RCW 7.70 and other applicable laws.

7.2. **Vicarious Liability**. Defendant Incyte Diagnostics is vicariously liable for all acts and omissions of its employees, agents and members including, but not limited to, Defendants Pham, Yin and Corn under the doctrines of Respondeat Superior, Ostensible Agency or Apparent Agency.

VIII. INJURIES AND DAMAGES

8.1. The acts and omissions of Defendants directly and proximately caused Plaintiffs to suffer severe and permanent injuries, both mental and physical, pain and suffering and mental anguish as well as loss of consortium.

8.2. Plaintiffs have and will incur economic damages including, but not limited to, medical expenses and other expenses in an amount that will be proven at trial.

8.3. Plaintiffs are entitled to prejudgment interest on liquidated sums from the

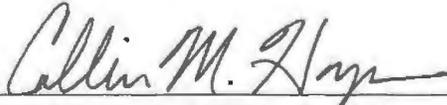
1 time the expenses were incurred to the time of trial at the appropriate and proper rate of
2 interest.

3
4 WHEREFORE, having set forth in their Complaint, Plaintiffs request this Court enter
5 judgment against Defendants for:
6

- 7 (1) All injuries and damages sustained by Plaintiffs in amounts to be proven at
8 trial;
9
10 (2) Reasonable costs and fees incurred herein; and,
11 (3) Such further relief as justice requires.
12

13
14 DATED this 23 day of January, 2017.
15

16 THE MARKAM GROUP, INC., P.S.
17

18
19 By: 
20 MARK D. KAMITOMO, WSBA No. 18803
21 COLLIN M. HARPER, WSBA No. 44251
22 Attorneys for Plaintiffs
23
24
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27

JAN 24 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AUMI I. CORN, M.D.,
LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. **17200266-1**

DECLARATION OF
COLLIN M. HARPER

Collin M. Harper, declares and states as follows:

I am one of the attorneys representing the Plaintiffs in this matter. I have discussed with my client the provisions of RCW 7.70A.020 regarding the election to arbitrate such dispute. Plaintiff has elected not to submit this dispute to arbitration under such chapter.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Spokane, Washington on January 24, 2017.


Collin M. Harper

EXHIBIT A

THE MARKAM GROUP, INC., P.S.
ATTORNEYS AT LAW
421 West Riverside, Suite 1060
Spokane, WA 99201
(509) 747-0902 FAX (509) 747-1993

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AYUMI I. CORN,
M.D., LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. 17-2-00266-1

PLAINTIFFS' MOTION FOR A
PROTECTIVE ORDER

Plaintiffs, through their attorneys, Mark D. Kamitomo and Collin M. Harper and
The Markam Group, Inc., P.S. move the Court for a Protective Order regarding the
marriage counseling records of Plaintiffs Emily and Brian Magney.

Plaintiffs' Motion for a Protective Order - 1

THE MARKAM GROUP, INC., P.S.
ATTORNEYS AT LAW
421 West Riverside, Suite 1060
Spokane, WA 99201
(509) 747-0902 FAX (509) 747-1993

1 This Motion is made pursuant to the Civil Rules, Local Rules, and the Memorandum
2 of Authorities filed herewith.

3
4 RESPECTFULLY SUBMITTED this 12 day of April, 2018.

5
6 THE MARKAM GROUP, INC., P.S.

7
8 By: 
9
10 MARK D. KAMITOMO, WSBA No. 18803
11 COLLIN M. HARPER, WSBA No. 44251
12 Attorneys for Plaintiffs
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DECLARATION OF SERVICE

I caused to be served the copy of the foregoing document by the method indicated below, and addressed to the following:

Stephen Lamberson [] U.S. Mail
Etter, McMahon, Lamberson, [] Fax/Email
Van Wert & Oreskovich, P.C. [x] Hand Delivery
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618 W. Riverside Avenue
Spokane, WA 99201

Steven J. Dixon [] U.S. Mail
Witherspoon · Kelley [] Fax/Email
422 W. Riverside Avenue, Suite 1100 [x] Hand Delivery
Spokane, WA 99201 [] Messenger Delivery

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 13th day of April, 2018, at Spokane, Washington.

Mary A. Kua
Mary A. Kua

Bench Copy: Honorable Julie M. McKay

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AYUMI I. CORN,
M.D., LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. 17-2-00266-1

MEMORANDUM IN SUPPORT
OF MOTION FOR A
PROTECTIVE ORDER RE: EMILY
AND BRIAN MAGNEY'S
MARRIAGE COUNSELING
RECORDS

Plaintiffs submit the following Memorandum of Authorities in support of their
Motion for a Protective Order Re: Emily and Brian Magney's Marriage Counseling Records.

INTRODUCTION

This is a claim for medical negligence arising out of the Defendants' misdiagnosis of
Logan Magney with Acute Myeloid Leukemia (AML) and his subsequent treatment for the

1 same. At the time of the misdiagnosis, Logan Magney was 13.5 months old. Plaintiffs have
2 filed suit alleging that the Defendants' negligence caused damages which include physical
3 injuries, pain, suffering and mental anguish, and loss of consortium through injury to the
4 parent-child relationship between Logan and each of his parents, Brian and Emily Magney.
5 Plaintiffs are not claiming any damages for injury to the marital relationship between Emily
6 and Brian Magney nor are they claiming damages for injury to their family relationship
7 generally.
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10 During the course of discovery, Defendants learned that Brian and Emily Magney
11 had undergone marital counseling prior to the Defendants' misdiagnosis of Logan Magney.
12 They now seek production of Brian and Emily Magney's marital counseling records, which
13 are privileged under RCW § 5.60.060(9). As is further discussed herein, Plaintiffs submit
14 they have not waived their privilege to their marital counseling records by bringing the
15 claims set forth above. Further, there is no information contained within their marital
16 counseling records which is relevant to any issue involved in this lawsuit.
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19 As a result, Plaintiffs respectfully request the Court grant Plaintiffs' Motion for a
20 Protective Order and enter an Order protecting Emily and Brian Magney's marriage
21 counseling records from discovery in this matter. In the alternative, Plaintiffs request the
22 Court conduct an in-camera review of the marriage counseling records, indicate to
23 Plaintiffs which, if any, information within the records is relevant and enter an Order
24 protecting all irrelevant information within the marriage counseling records from discovery
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1 in this matter. Plaintiffs would then be permitted to redact all non-relevant information
2 from the marriage counseling records prior to disclosing the records to the Defendants.
3
4

5 CASE BACKGROUND

6 This case involves Logan Magney who, at 13.5 months of age, was negligently
7 misdiagnosed with Acute Myeloid Leukemia (cancer) by Defendants. Specifically, the child
8 was seen initially by his pediatrician Dr. Rice on March 2, 2015, with bilateral enlarged
9 lymph nodes beneath his ears. He was diagnosed with a probable viral illness and sent
10 home on Ibuprofen and Tylenol for discomfort. He returned to Dr. Rice two days later on
11 March 4, 2015, with worsening lymphadenitis (inflammation of the lymph nodes) and was
12 subsequently referred to Sacred Heart Medical Center (SHMC) for further evaluation. The
13 emergency department physician diagnosed Logan with posterior cervical
14 lymphadenopathy (disease of the lymph nodes which, in Logan's case was thought to be
15 inflammation) and consulted with an ear, nose, and throat (ENT) specialist who agreed to
16 see the child the following morning. At that time, the ENT, Dr. Michael J. Olds, diagnosed
17 Logan with acute cervical adenitis (inflammation of a lymph node in the neck) and after
18 consultation with a hospitalist at SHMC, opted to admit Logan for IV antibiotics and
19 further medical management. The records indicate that by March 10, 2015, the child's
20 lymphadenopathy had improved and he was discharged home.
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1 Two days later, on March 12, 2015, the child returned to his pediatrician Dr. Rice
2 with a complaint of increased lymphadenopathy and was seen the following day by ENT
3 Dr. Karen Ahlstrom, who felt Logan likely had suppurative lymphadenitis (soft tissue
4 infection) and readmitted the child to SHMC for irrigation and drainage of the left and
5 right neck regions. Wound cultures returned positive for staph aureus (infection) and his
6 antibiotic regimen was changed. Because the child had not improved as readily as was
7 expected, Dr. Karen Ahlstrom performed a left deep lymph node biopsy which Defendant,
8 Dr. Truc Pham, a pathologist, interpreted as myeloid sarcoma (Acute Myeloid Leukemia
9 presenting as a soft tissue mass). A bone marrow aspiration was negative, thus pediatric
10 oncology was consulted and a request was made for ENT Dr. Karen Ahlstrom to re-biopsy
11 for additional tissue for cytogenics and molecular markers. Ultimately, the child's cytogenic
12 and molecular marker results were all normal. Importantly, Logan's oncologist, Dr. Angela
13 D. Trobaugh-Lotrario, documented many discussions with Defendant pathologist Dr.
14 Pham who was 99.9999% confident in her diagnosis of cancer and thus, chemotherapy was
15 initiated. **Exhibit 1.**

16 While undergoing chemotherapy, Logan was enrolled in an Acute Myeloid
17 Leukemia children's oncology group (AML COG) study. The COG study pathologist, after
18 reviewing the same pathology interpreted by Defendants, concluded that what was seen
19 was a reactive process (infection) rather than Acute Myeloid Leukemia (cancer). A second
20 overread/evaluation was obtained which concurred that the pathology specimens were not

1 a malignant process and most likely represented a reactive process instead. As a result,
2 Logan's diagnosis was reversed; however, unfortunately, the child had already completed
3 a second course of induction chemotherapy. Of particular note, Logan's pathology
4 specimens were also sent to the Seattle Children's Hospital pathology department who
5 reached the same conclusion that the diagnosis was a reactive process and not a
6 malignancy. Thus, three separate and independent pathologic/oncology reviews concluded
7 the child had no cancer contrary to the Defendants' (Drs. Pham, Corn, and Yin) diagnosis of
8 malignancy. **Exhibit 2.**
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11 PERTINENT FACTS

12 A. Plaintiffs' Claims

13
14 On January 24, 2017, Plaintiffs filed their Complaint in this matter. **Exhibit 3.** The
15 Complaint named Logan Magney, his brother Caleb Magney, and Logan's parents, Emily
16 and Brian Magney, as Plaintiffs. **Id.** Plaintiffs set forth the following as damages:
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19 The acts and omissions of Defendants directly and proximately caused
20 Plaintiffs to suffer severe and permanent injuries, both mental and physical,
21 pain and suffering and mental anguish as well as loss of consortium.

22 **Id.** The damages to each Plaintiff individually are:

- 23 • Logan Magney – physical and mental injuries and pain, suffering, and mental
24 anguish arising from being misdiagnosed with AML and subsequently
25 treated for the same, and loss of consortium arising from the injury to
26 Logan's individual parent-child relationships with his parents, Emily and
27 Brian Magney, caused by the misdiagnosis and subsequent treatment.

- 1 • Emily Magney – mental anguish, physical injuries, and pain and suffering
2 arising from having a child (Logan) misdiagnosed with AML and
3 subsequently treated for the same, and the loss of consortium arising from
4 the injury to Emily’s individual relationship with Logan caused by the
5 misdiagnosis and subsequent treatment.
- 6 • Brian Magney – mental anguish, physical injuries, and pain and suffering
7 arising from having a child (Logan) misdiagnosed with AML and
8 subsequently treated for the same, and the loss of consortium arising from
9 the injury to Brian’s individual relationship with Logan caused by the
10 misdiagnosis and subsequent treatment
- 11 • Caleb Magney - mental injuries and pain and suffering arising from having a
12 brother (Logan) misdiagnosed with AML and subsequently treated for the
13 same.

14 Importantly, Emily and Brian Magney are not claiming that Defendants’ negligence
15 caused a loss of consortium between themselves or any other damage to their marriage, nor
16 do they claim that Defendants’ negligence caused injury to their family generally. Nor are
17 Logan or Caleb claiming that Defendants’ negligence caused injury to their family
18 generally. Rather, Plaintiffs’ claims are specific to the mental and physical injuries and pain
19 and suffering arising from Logan being misdiagnosed with AML and subsequently treated
20 for the same and the impact the misdiagnosis and subsequent treatment had on Emily and
21 Brian Magney’s parent-child relationship with Logan.

22 B. Defendants’ Discovery Requests

23 After Emily and Brian Magney were deposed, Defendants Truc Pham, M.D. and
24 Incyte Diagnostics served their Second Interrogatories and Requests for Production to
25 Plaintiffs. **Exhibit 4.** These discovery requests included a request for the name of the
26

1 marriage counselor Emily Magney testified that she and Brian had seen prior to Logan
2 being diagnosed with AML, along with the marriage counseling records from the provider.
3 *Id.*, p. 5. That marriage counselor is Judy Markley (LH60203277). Although Defendants
4 have not requested other marital counseling records, Brian Magney saw a marital
5 counselor, Constance Moore (LH00004706) for individual counseling and the Magney's
6 counselor, Constance Moore (LH00004706) for individual counseling and the Magney's
7 have determined that they saw another counselor for an intake visit, Richard Silk
8 (LF00000928) but did not continue to see that counselor for treatment. All three counselors
9 are Licensed Mental Health Counselors, communications with whom are privileged under
10 RCW § 5.60.060(9). All of Brian and Emily Magney's marital counseling occurred before
11 Logan was negligently misdiagnosed with AML.
12

13
14 C. Emily and Brian Magney's Testimony Re: Pain and Suffering and
15 Marriage Counseling.

16 During their depositions, Brian and Emily Magney were questioned about the
17 damages they had experienced as a result of Logan being misdiagnosed with AML and
18 receiving treatment for the same. Brian testified that the decision of whether or not to put
19 Logan in the COG study was the most difficult decision of Brian's life. *Dep of Brian Magney*,
20 Nov. 14, 2017 (**Exhibit 5**), p. 48, lines 6-11. He discussed what it was like to be with Logan
21 while he received chemotherapy and what he witnessed his infant son go through. *Id.*,
22 p. 60-62, lines 2-25, 1-25, and 1. He described the effects of the blood transfusions on Logan.
23 *Id.*, p. 72, lines 9-15. He discussed the effects of being informed that Logan did not have
24 AML. *Id.*, p. 75-76, lines 7-25, 1-7. Finally Brian was asked how Logan's illness had impacted
25
26

27 *Memo in Support of Pltf.'s Mot. for a Protective Order - 7*
28

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1 him personally and described the devastating feeling of hopelessness when Logan was
2 diagnosed and the fear he now experiences regarding his children and injury and illness.
3 *Id.*, p. 104-05, lines 9-25, 1-17. Emily Magney also described in detail the effect of Logan's
4 diagnosis and treatment on her and her relationship with Logan. *Dep of Emily Magney*,
5 Nov. 14, 2017 (**Exhibit 6**), p. 99-104, lines 14-25, 1-25, 1-25, 1-25, 1-23.

7 Both Emily and Brian Magney testified that they had not received any marriage or
8 mental health counseling after Logan was diagnosed with AML. *Id.*, p. 105, lines 8-12;
9 **Exhibit 5**, p. 19, lines 20-23, p. 105, lines 18-21, p. 108, lines 12-19. As indicated above, the
10 Plaintiffs seek damages for physical and mental injuries, pain and suffering, and damage to
11 their personal relationships with Logan as a result of Defendants misdiagnosing Logan
12 with AML and the treatment he received as a result. Emily and Brian Magney are not
13 seeking damages for injury to their marital relationship and the Plaintiffs are not seeking
14 damages for injury to their family relationship generally. Because the only marriage
15 counseling Emily and Brian Magney have ever received occurred prior to Logan being
16 diagnosed with AML, the records of their marriage counseling are in no way relevant to
17 any of the matters at issue in this case.

22 ARGUMENT

23
24 Defendants have sought discovery of marital counseling records for marital
25 counseling Brian and Emily Magney underwent **prior** to Logan Magney's diagnosis of
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1 AML in March of 2015. **Exhibit 4.** Marital counseling records and communications with
2 marital counselors are privileged. RCW § 5.60.060(9)(a-e). The question then becomes
3 whether the Magney's have waived that privilege, either according to a waiver set forth in
4 RCW § 5.60.060(9)(a-e), or under some other theory of waiver. For the foregoing reasons,
5
6 Plaintiffs submit that the Magney's have not waived the marital counseling privilege and
7 therefore request that their motion for a protective order be granted.

8
9 A. There Is No Exception Set Forth In RCW § 5.60.060(9)(a-e), The Mental
10 Health Counselor, Independent Clinical Social Worker, And Marriage And
11 Family Therapist Privilege, Under Which The Magneys Have Waived Their
12 Privilege To Their Marital Counseling Records.

12 The purpose of statutory interpretation is to determine the intent of the legislature
13 and apply the same to the law at issue. Tesoro Ref. & Mktg. Co. v. State, Dep't of Revenue,
14 173 Wn.2d 551, 556, 269 P.3d 1013 (2012)(citing, HomeStreet, Inc. v. Dep't of Revenue, 166
15 Wn.2d 444, 451, 210 P.3d 297 (2009); in turn quoting Rozner v. City of Bellevue, 116 Wn.2d
16 342, 347, 804 P.2d 24 (1991)). The first place the court looks to determine the intent of the
17 legislature is the plain language of the statute. Tesoro, 173 Wn.2d at 556 (citing State v.
18 Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). If the plain language of a statute is
19 unambiguous, courts do not undertake to interpret the statute in order to determine the
20 intent of the Legislature. Tesoro, 173 Wn.2d at 556 (citing Agrilink Foods, Inc. v. Dep't of
21 Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)). The plain language of RCW §
22 5.60.060(9)(a-e) indicates the Legislature intentionally did not create an express exception to
23 RCW § 5.60.060(9)(a-e) in instances where a party brings a personal injury lawsuit.

1 In 2009, the Washington State Legislature enacted RCW § 5.60.060(9)(a-e), in which
2 the marital counseling privilege is codified along with five specific exceptions to the
3 privilege:

4 (9) A mental health counselor, independent clinical social worker, or
5 **marriage and family therapist licensed under chapter 18.225 RCW may not**
6 **disclose, or be compelled to testify about, any information acquired from**
7 **persons consulting the individual in a professional capacity when the**
8 **information was necessary to enable the individual to render professional**
9 **services to those persons except:**

10 (a) With the written authorization of that person or, in the case of
11 death or disability, the person's personal representative;

12 (b) If the person waives the privilege by bringing charges against the
13 mental health counselor licensed under chapter 18.225 RCW;

14 (c) In response to a subpoena from the secretary of health. The
15 secretary may subpoena only records related to a complaint or report
16 under RCW 18.130.050;

17 (d) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.360
18 (8) and (9); or

19 (e) To any individual if the mental health counselor, independent
20 clinical social worker, or marriage and family therapist licensed under
21 chapter 18.225 RCW reasonably believes that disclosure will avoid or
22 minimize an imminent danger to the health or safety of the individual
23 or any other individual; however, there is no obligation on the part of
24 the provider to so disclose.

25 RCW § 5.60.060(9)(a-e) [emphasis added]. On its face, the marital counseling privilege
26 prevents a licensed marriage counselor from disclosing or testifying about information they
27 obtain from patients who seek counseling, subject to five specific exceptions. Id.
28 Importantly, the Legislature did not set forth an exception to the marital counseling

1 privilege for claimants who file actions for personal injury. Id. Thus, the Magney's have not
2 waived their marital counseling privilege under any exception set forth in the statute itself.
3 This interpretation is consistent with The Washington State Dept. of Health's ("DOH")
4 interpretation of RCW § 5.60.060(9)(a-e) as addressed on the Frequently Asked Questions
5 page regarding RCW § 5.60.060(9)(a-e) wherein the DOH states a mental health counselor
6 may only disclose privileged information under the five specific exceptions set forth in (a-e)
7 of RCW § 5.60.060(9). **Exhibit 7.** The lack of an express exception to RCW § 5.60.060(9)
8 where a party brings a personal injury lawsuit also sets the privilege apart from the
9 physician-patient privilege and indicates the Legislature did not intend the same waivers to
10 apply to RCW § 5.60.060(9) as apply to the physician-patient privilege.
11
12

13
14 B. The Magneys Have Not Waived The Privilege Protecting Their Marital
15 Counseling Records By Bringing This Lawsuit.

16 It is anticipated that the Defendants will argue that Brian and Emily Magney have
17 waived the marital counseling privilege by bringing this lawsuit. Washington courts have
18 not addressed whether and under what circumstances, other than the exceptions set forth
19 in the statute itself, a party to litigation waives RCW § 5.60.060(9). As set forth above, the
20 plain language of RCW § 5.60.060(9) indicates the Magneys have not waived the privilege.
21 The legislative history of RCW § 5.60.060(9) also indicates the Legislature did not intend for
22 RCW § 5.60.060(9) to be waived in the same circumstances as the physician-patient
23 privilege, such as when a person brings a personal injury lawsuit. Further, the purpose of
24 the psycho-therapist privilege (codified in Washington as RCW § 5.60.060(9)), as explained
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1 by the United States Supreme Court, indicates that RCW § 5.60.060(9) should not be
2 automatically waived when a person brings a personal injury lawsuit. Finally, even if the
3 Court finds that RCW § 5.60.060(9) can be waived by something short of the party to
4 communications protected by RCW § 5.60.060(9) providing written authorization for such
5 records to be disclosed, there is no information in the Magney's counseling records that is
6 relevant to any of the matters addressed in the instant personal injury lawsuit.
7

- 8
9 1. The legislative history of RCW § 5.60.060(9)(a-e) indicates that RCW §
10 5.60.060(9) is not waived in the same circumstances as the physician-
11 patient privilege and further, that RCW § 5.60.060(9) can only be
12 waived under the circumstances set forth in RCW § 5.60.060(9).

13 The legislative history of RCW § 5.60.060(9)(a-e) indicates that the Washington State
14 Legislature intentionally did not include an exception to RCW § 5.60.060(9) where a
15 claimant files a personal injury action. First, RCW § 5.60.060(9) was codified in 2009, over
16 twenty years after the physician-patient privilege that contained an automatic waiver
17 where a claimant files a personal injury action was codified. Exhibit 8, p. 2; Youngs v.
18 PeaceHealth, 179 Wn.2d 645, 658, 316 P.3d 1035 (2014). The personal injury action waiver to
19 the physician-patient privilege states:
20

21 (b) Ninety days after filing an action for personal injuries or wrongful death,
22 the claimant shall be deemed to waive the physician-patient privilege.
23 Waiver of the physician-patient privilege for any one physician or condition
24 constitutes a waiver of the privilege as to all physicians or conditions, subject
25 to such limitations as a court may impose pursuant to court rules.

26 RCW § 5.60.060(4)(b). Thus, at the time RCW § 5.60.060(9) was created, the Legislature was
27 aware of the personal injury action waiver to the physician-patient privilege and would

1 have had to look no further than the very statute that was being altered, RCW § 5.60.060, to
2 include the same waiver under RCW § 5.60.060(9). The fact that the Legislature did not
3 include a personal injury action waiver under RCW § 5.60.060(9) indicates the Legislature
4 did not intend for such a waiver to apply to RCW § 5.60.060(9). Tesoro, 173 Wn.2d at 556,
5 *supra*. It also indicates that the Legislature viewed RCW § 5.60.060(9) as a different
6 privilege, waived under different circumstances, than the physician-patient privilege.
7 Tesoro, 173 Wn.2d at 556, *supra*.

8
9
10 The Bill Reports for RCW § 5.60.060(9)(a-e) further support the conclusion that the
11 Washington State Legislature purposefully excluded a personal injury action waiver from
12 RCW § 5.60.060(9). The February 20, 2009 Senate Bill Report notes that privileges are
13 created when, "certain classes of relationships or communications within those
14 relationships are deemed of such societal importance that they should be protected."
15 **Exhibit 9**, p. 1. The February 20, 2009 Senate Bill Report notes the existence of both the
16 physician-patient and psychologist-patient privileges, but, like RCW § 5.60.060(9), says
17 nothing about including a personal injury action waiver to the privileges created by RCW §
18 5.60.060(9). *Id.* The February 20, 2009 Senate Bill Report did make note of the five
19 exceptions to RCW § 5.60.060(9) that were codified, indicating the Legislature was
20 considering which exceptions to include under RCW § 5.60.060(9). *Id.* This Bill Report goes
21 on to note, "This is an important issue for mental health counselors, marriage and family
22 therapists, and independent clinical social workers to be able to really help their clients
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1 **without fear of any information they've disclosed being divulged in a court of law." Id,**
2 p. 2 [**emphasis added**]. Again, it is clear from this Bill Report that the Legislature was
3 aware of the physician-patient privilege, was considering what exceptions to include under
4 RCW § 5.60.060(9), and that the Legislature expressly stated that a purpose of RCW §
5 5.60.060(9) was to ensure that people could seek mental health counseling, "**without fear of**
6 **any information they've disclosed being divulged in a court of law."**

7
8 Another analysis of the bill, dated March 25, 2009, contains similar information to
9
10 the February 20, 2009 Senate Bill Report and further states that, at that time, there was not
11 an express privilege for marital counselors, and the other types of therapists covered by
12 RCW § 5.60.060(9)(a-e). Exhibit 10, p. 1. A House Bill Report, dated March 26, 2009, again
13 addressed the exceptions that would apply to RCW § 5.60.060(9), as well as acknowledged
14 the existence of physician-patient and psychologist-patient privileges. Exhibit 11, p. 1-2.
15 Once again, there is no mention, let alone discussion, of including a personal injury action
16 waiver in RCW § 5.60.060(9)(a-e) such as exists for the physician-patient privilege. Id. The
17 March 26, 2009 House Bill Report added the following information regarding the purpose
18 of creating a mental health counselor, independent clinical social worker, and marriage and
19 family therapist privilege:
20
21

- 22
- 23 • (In support) the privilege created in this bill brings the state law in line
24 with federal law and is an important protection for counselors and
25 therapists and their clients. **It is inappropriate to require these**
26 **professionals to testify about confidential communications.**

- Confidentiality and privilege are both mentioned in the current law and most people are surprised that counselors, therapists, and their clients are not protected by a privilege. **Therapy and counseling are supposed to provide a safe and confidential way to deal with sensitive issues.**

Id., p. 2 [emphasis added]. RCW § 5.60.060(9)(a-e), passed the House and Senate with 141 “yes” votes and 1 “no”, without any language regarding a personal injury action waiver to the privileges it established. Exhibit 8, p. 1.

The March 26, 2009 House Bill Report also contained the following statement:

The Judiciary has the inherent power to compel witnesses to appear and testify in judicial proceedings so that the court will receive all relevant evidence. However, the common law and statutory law recognize evidentiary or testimonial privileges as exceptions to compelled testimony. Privileges are generally disfavored in the common law because they impede the court’s truth-finding function. Privileges are recognized when certain classes of relationships or communications within those relationships are deemed of such importance that they should be protected.

Exhibit 11, p. 1-2. Each of the other legislative documents contains a similar statement.

Exhibits: 10, p. 1; 9, p. 1; 7, p. 1. This statement demonstrates that when it created RCW § 5.60.060(9), the Legislature fully understood that RCW § 5.60.060(9) would prevent discovery of information that could be relevant to litigation but that such protection was necessary because of the importance of the psychotherapist-patient relationship and the information passed back and forth in such a relationship. This legislative history indicates the Legislature intentionally did not include a waiver of RCW § 5.60.060(9) when a person brings a personal injury lawsuit, such as exists for the physician-patient privilege. It is further apparent that the Legislature intended RCW § 5.60.060(9) to be a different privilege

1 than the physician-patient privilege and did not intend RCW § 5.60.060(9) to be waived
2 under the same circumstances and/or facts as the physician-patient privilege. Plaintiffs
3 respectfully submit that both the plain language of RCW § 5.60.060(9) and its legislative
4 history indicate RCW § 5.60.060(9) is not waived when a person brings a personal injury
5 lawsuit unless the person bringing the lawsuit chooses to use such records in furtherance of
6 their own case. *See, RCW § 5.60.060(9)(a)*. As the Magneys have not sought to introduce
7 their marital counseling records in this case, they have not waived the privilege, and the
8 Court should issue the Protective Order requested.
9

- 11 2. The policy behind and purpose of the psychotherapist privilege, codified in Washington as RCW § 5.60.060(9), further demonstrates that the Magneys have not waived the privilege.

14 A finding that the Magneys have not waived their privilege to their counseling
15 records is supported by the United States Supreme Court's explanation of the policy and
16 purpose of the psychotherapist privilege. Again, the purpose and policy of RCW §
17 5.60.060(9) has not been evaluated by Washington appellate courts. When the United States
18 Supreme Court first established a federal psychotherapist privilege in the case, Jaffe v.
19 Redmond, in 1996, it explained the following as the basis for creating such a privilege:
20

22 **Like the spousal and attorney-client privileges, the psychotherapist-patient**
23 **privilege is "rooted in the imperative need for confidence and trust." Ibid.**
24 **Treatment by a physician for physical ailments can often proceed successfully**
25 **on the basis of a physical examination, objective information supplied by the**
26 **patient, and the results of diagnostic tests. Effective psychotherapy, by**
27 **contrast, depends upon an atmosphere of confidence and trust in which the**
28 **patient is willing to make a frank and complete disclosure of facts,**
emotions, memories, and fears. Because of the sensitive nature of the

1 problems for which individuals consult psychotherapists, disclosure of
2 confidential communications made during counseling sessions may cause
3 embarrassment or disgrace. For this reason, the mere possibility of
4 disclosure may impede development of the confidential relationship
5 necessary for successful treatment.⁹ As the Judicial Conference Advisory
6 Committee observed in 1972 when it recommended that Congress recognize
7 a psychotherapist privilege as part of the Proposed Federal Rules of
8 Evidence, a psychiatrist's ability to help her patients

9 "is completely dependent upon [the patients'] willingness
10 and ability to talk freely. This makes it difficult if not
11 impossible for [a psychiatrist] to function without being able
12 to assure ... patients of confidentiality and, indeed, privileged
13 communication. Where there may be exceptions to this
14 general rule ..., there is wide agreement that confidentiality is
15 a sine qua non for successful psychiatric treatment."
16 Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183,
17 242 (1972) (quoting Group for Advancement of Psychiatry,
18 Report No. 45, Confidentiality and Privileged Communication
19 in the Practice of Psychiatry 92 (June 1960)).

20 By protecting confidential communications between a psychotherapist and
21 her patient from involuntary disclosure, the proposed privilege thus serves
22 important private interests.

23 Jaffee v. Redmond, 518 U.S. 1, 10–11, 116 S. Ct. 1923, 1928–29, 135 L. Ed. 2d 337 (1996)

24 [emphasis added]. The Supreme Court in Jaffee stated that, "The mental health of our
25 citizenry, no less than its physical health, is a public good of transcendent importance," (Id.
26 at 11) and recognized that "marital harmony" is an important public interest (Id. at 11). In
27 holding that communications with a psychotherapist are privileged, the Supreme Court
28 explained that creating such a privilege would, "serve a 'public good transcending the
normally predominant principle of utilizing all rational means for ascertaining truth,'" Id.
at 15 (citing, Trammel v. United States, 445 U.S. 40, 50, 100 S. Ct. 906, 912, 63 L. Ed. 2d 186

1 (1980)). The Supreme Court noted that the psychotherapist privilege could be waived in
2 some instances, such as to prevent serious harm to the patient or others. Id., at 18, footnote
3 No. 19. However, the Supreme Court made no mention of waiver in instances where
4 individuals bring personal injury lawsuits and further rejected any notion that the needs of
5 the party seeking discovery has any bearing on the applicability of the psychotherapist
6 privilege. Id., at 17-18. The United States Supreme Court's explanation of the purpose and
7 policy of the psychotherapist privilege is consistent with the purpose and policy of RCW §
8 5.60.060(9), set forth in the legislative history documents addressed above. Plaintiffs
9 respectfully submit that the purpose and policy of the psychotherapist privilege further
10 demonstrates that the Court should not find that the Magneys have not waived the
11 privilege in this instance.¹

12
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16 1 Federal Courts are split as to under what circumstances a person who brings a personal injury lawsuit
17 waives the psychotherapist privilege set forth in the case Jaffee v. Redmand, Fitzgerald v. Cassil, 216 F.R.D.
18 632, 636 (N.D. Cal. 2003). The Federal Courts' approaches to waiver can be characterized as broad view of
19 waiver, middle ground view of waiver, and narrow view of waiver. Under the narrow view of waiver, a
20 person who brings a personal injury lawsuit does not waive the psychotherapist privilege unless the person
21 relies on the communications with the psychotherapist in furtherance of their case. *See*, Vanderbilt v. Town of
22 Chilmark, 174 F.R.D. 225 (D.Mass.1997). The policy behind the narrow waiver approach is prioritizing the
23 privacy interests of persons seeking psychotherapy counseling. Fitzgerald, 216 F.R.D. at 636. The middle
24 ground view of waiver is waiver of the privilege when a party asserts more than garden variety emotional
25 damages, such as emotional damages that have actually caused a specific psychiatric disorder. Id., at 637. The
26 broad approach to waiver finds waiver in any instance where a party claims emotional distress and the policy
27 behind broad waiver is fairness to a defendant seeking alternative explanations for emotional distress
28 suffered by the party making such a claim. Id., at 637. Plaintiffs respectfully submit that the Washington State
Legislature did not intend broad waiver to apply to RCW § 5.60.060(9) because, if the Legislature had
intended broad waiver to apply, it would have included a personal injury action exception to RCW §
5.60.060(9). While the Washington Courts have not reviewed whether RCW § 5.60.060(9) can be waived in any
circumstance other than the five codified exceptions, the plain language exception (a) which states a counselor
can only disclose information or testify with written permission from the patient, indicates the Washington
State Legislature intended for RCW § 5.60.060(9) to be waived only under the narrow view of waiver, where
the party to the privileged relationship themselves authorizes disclosure or testimony in furtherance of their
own case. RCW § 5.60.060(9)(a).

- 1
2
3 3. There is no information relevant to the Plaintiffs claims in this case in
4 the Magney's marriage counseling records because the counseling
5 was solely related to their marriage and occurred before Logan was
6 misdiagnosed with AML.

7 Brian and Emily Magney's claims in this case are for pain and suffering and mental
8 anguish arising from Logan being misdiagnosed with AML and subsequently treated for
9 the same and for the impact of the misdiagnosis and treatment on their individual
10 relationships with Logan. They are not bringing a claim for loss of consortium between
11 themselves. The marriage counseling occurred before Logan was misdiagnosed with AML
12 and received treatment for the same and they have not received any counseling for the pain
13 and suffering they experienced as a result of Logan's misdiagnosis and treatment.
14 **Exhibit 6**, p. 105, lines 8-12; **Exhibit 5**, p. 19, lines 20-23, p. 105, lines 18-21, p. 108, lines 12-
15 19.

16
17
18 Washington recognizes a distinct cause of action for injury to the parent-child
19 relationship. RCW § 4.24.010. Brian and Emily's marriage counseling records are not
20 relevant to their loss of consortium claims arising out of the injury to their parent-child
21 relationship with Logan. Nor are the records relevant to the pain and suffering they
22 experienced as a result of Logan's misdiagnosis and subsequent treatment because the
23 counseling was for their marriage and it occurred prior to Logan's misdiagnosis. As a
24 result, even if the Court were to hold that the privilege set forth in RCW § 5.60.060(9) has
25
26
27

1 been waived in this case, there is still no information contained within the marriage
2 counseling records relevant to the Magney's claims.

3 Plaintiffs respectfully submit that if the Court believes the marriage counseling
4 records may be discoverable, the Court should conduct an in-camera review of the records
5 to determine what information, if any, is relevant to the Magney's claims and permit
6 Plaintiffs to redact all non-relevant information from the records prior to disclosing the
7 records to the Defendants. The Court should conduct an in-camera review because of the
8 highly-sensitive, personal, and confidential (even from one's own spouse) nature of
9 marriage counseling records and the information contained therein, and the policy, set
10 forth above, forming the basis of the psychotherapist privilege.
11
12
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15

16 CONCLUSION

17
18 For the reasons set forth above, Plaintiffs respectfully request the Court grant
19 Plaintiffs Motion for a Protective Order and enter an Order protecting Emily and Brian
20 Magney's marriage counseling records from discovery in this matter. In the alternative,
21 Plaintiffs request the Court conduct an in-camera review of the marriage counseling
22 records, indicate to Plaintiffs which, if any, information within the records is relevant and
23 enter an Order protecting all information deemed not relevant within the marriage
24 counseling records from discovery in this matter. Plaintiffs would then be permitted to
25
26
27

1 redact all irrelevant information from the marriage counseling records prior to disclosing
2 the same to the Defendants.
3

4 RESPECTFULLY SUBMITTED this 12 day of April, 2018.
5

6 THE MARKAM GROUP, INC., P.S.
7

8
9 By: 

10 MARK D. KAMITOMO, WSBA No. 18803
11 COLLIN M. HARPER, WSBA No. 44251
12 Attorneys for Plaintiffs
13
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DECLARATION OF SERVICE

I caused to be served the copy of the foregoing document by the method indicated below, and addressed to the following:

Stephen Lamberson [] U.S. Mail
Etter, McMahon, Lamberson, [] Fax/Email
Van Wert & Oreskovich, P.C. [x] Hand Delivery
Bank of Whitman Building, 2nd Floor [] Messenger Delivery
618 W. Riverside Avenue
Spokane, WA 99201

Steven J. Dixson [] U.S. Mail
Witherspoon · Kelley [] Fax/Email
422 W. Riverside Avenue, Suite 1100 [x] Hand Delivery
Spokane, WA 99201 [] Messenger Delivery

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 13th day of April, 2018, at Spokane, Washington.

Mary A. Rua
Mary A. Rua

Bench Copy: Honorable Julie M. McKay

WSH SACRED HEART MEDICAL CENTER
 101 W 8th Ave
 SPOKANE WA 99204-2307
 Inpatient Record

MAGNEY, LOGAN PAUL
 MRN: 60004421645
 DOB: 1/31/2014, Sex: M
 Adm: 3/13/2015, D/C: 4/14/2015

Progress Notes (continued)

Progress Notes by Angela D Trobaugh Lotrario, MD at 3/22/2015 7:52 (continued)

Absolute Basophils	0.00	0.00 - 0.10 K/uL
CREATININE		
Result	Value	Range
Creatinine, Serum/Plasma	<0.20	0.19 - 0.41 mg/dL
Estimated GFR	Cannot calculate.	>60 ml/min/1.73m2
ELECTROLYTE PANEL		
Result	Value	Range
NA	138	135 - 145 mmol/L
K	3.2	3.2 - 5.7 mmol/L
CL	107	99 - 109 mmol/L
CO2	24	20 - 28 mmol/L
ANION GAP	7	5 - 16 mmol/L
CALCIUM		
Result	Value	Range
CALCIUM	9.2	8.5 - 10.2 mg/dL
URIC ACID		
Result	Value	Range
URIC ACID	4.6	2.0 - 5.5 mg/dL
PHOSPHORUS		
Result	Value	Range
PHOSPHORUS	5.4	4.2 - 7.2 mg/dL

13 m.o. male with myelosarcoma.

AML

- D/w/d pathologist prev, AML confirmed. BMA without clear evidence of leukemic involvement on prelim testing. CSF cytology negative.
- Re-biopsy of LN to obtain cytogenetics, molecular testing. Results pending. Flow cytometry on 2nd sample with 40% neutrophil at same stage of development. D/w/d Drs Dittman and Pham 3/21. Dr. Pham reviewed diagnostic criteria, review w/me to explain how diagnosis is made and confirmed. D/w/d Dr. Saleki today. No cytogenetic abn (which occurs in ~50% AML) detected on BMA and FISH from 1st LN biopsy. Given Dr. Ahlstrom's surgical exam (mass is infiltrative of muscle and very much a solid tumor) & Dr. Pham's histologic dx of myelosarcoma (99.9999% sure of diagnosis given the histopathologic appearance. Cells appear malignant, immature and not like reactive normal cells), will proceed with chemotherapy.
- Parents have reviewed the COG study AAML1031 in detail and have elected to go on study. Enrolled him on study. Randomized to arm A/standard arm. Will proceed with chemotherapy today on Induction 1 with cytarabine q 12 hrs x 12 doses, daunorubicin qod x 3 doses, and etoposide daily x 5 days.
- Discussed overview of treatment, risk of infections, side effects, including common side effects as well as rare but serious side effects death from infection/treatment, second malignancy, decreased fertility. Discussed possibility of need for SCT. Discussed low likelihood of need for RT.
- Discussed open COG tx study, gave consent to review. Have discussed again today as above. Answering questions. Discussed with our case manager as well as twice with GH case manager. Will not have answer regarding the study until Monday.
- Drew HLA typing on pt 3/21. Will need to organize HLA typing on sib.

EXHIBIT 1

Seattle Children's Hospital
206-987-2000

Letter

MAGNEY, LOGAN PAUL - 1426311

Result Type: Letter
Result Date: 20 July 2015 0:00
Result Status: Modified
Result Title: SCCA Consult SCCA-Letter
Performed By: Meshinchi, Soheil, MD, PhD on 22 August 2015 12:24
Verified By: Meshinchi, Soheil, MD, PhD on 22 August 2015 12:24
Encounter info: 96679504, SCH, Outpatient Recurring, 7/1/2015 - 9/30/2015
Contributor system: SOFTMED

SCCA Consult SCCA-Letter

**Document may Not be Signed/Finalized. See End of report
for Electronic Authentication of Signature.**

07/20/2015
SCCA Consult

Angela D Trobaugh-Lotrario MD
101 W 8th Ave - Pediatric Hem-Onc PO Box 2555
Spokane, WA 99220-2555

Date: July 20, 2015

Dear Dr. Trobaugh-Lotrario:

Thank you for your referral to see your patient, Logan Magney, for evaluation of AML. Logan was here to see me with his parents and his grandmother.

Although you are quite familiar with Logan's history, for the purpose of mutual documentation, I will

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Printed on 11/19/2015 8:52

Page 1 of 4
(Continued)

EXHIBIT 2

Letter

MAGNEY, LOGAN PAUL - 1426311

provide a brief summary of his medical care. I also appreciate your recent summary that was sent.

Logan is a 16-month-old male who had a history of mild hydrocephalus with a mild transient hydrocephalus and plagiocephaly and known minor rib abnormality who initially presented to medical care in early February with lymphadenitis and a fever and was referred to Otolaryngology. After initial CT showing lymphadenitis in the posterior neck, was admitted for further evaluation. At that time, he had a sedimentation rate of 76 and CRP of 1.1 with a normal CBC except for mild anemia. He was admitted for IV antibiotics with Unasyn and prednisone. After initial improvement of his lymphadenopathy, he was discharged home on oral antibiotics only to be readmitted a few days later because of an increase in the size of his lymphadenopathy.

At this time, he was admitted and underwent surgical drainage of the left neck, which showed a large purulent fluid collection and the right neck showed minimal purulence. Wound culture was positive for Staphylococcus aureus, and his antibiotics were changed. Because of the fact that he did not have immediate improvement, he went back to the OR at which time the Otolaryngology surgeon took muscle biopsies, which was read as myeloid sarcoma. As a result this finding, the patient was enrolled on AML COG study, AAML 1031, and started on induction chemotherapy. The COG study pathologist reviewed these findings and was concerned that this was not myeloid sarcoma. This was referred to a second evaluation by John Choi, MD, who agreed with the finding that this was not a malignant process and was most likely reactive. The patient was dis-enrolled from the study, and the clinician in charge of the patient was informed that the patient does not meet the study criteria, and the diagnosis was reversed. By this time, the patient had received a second course of induction chemotherapy.

After evaluation by Drs. Kahwash and Choi from COG, the biopsies were also sent to Raj Kapur, MD, in Pathology in Seattle, who after review of the slides as well as generating additional slides from the tissue block gave the same diagnosis of a reactive process.

In preparation for my meeting with the family, I called and discussed this case with Dr. Samir Kahwash, our central Pathologist for COG, as well as Dr. Raj Kapur, and they both independently confirmed that based on their expert opinion, the slides that they received as well the one that was generated at Children's Hospital of Seattle did not meet the criteria for a malignant process, and they felt this was a reactive process.

In my meeting with the family, I went over the process described above, about our central Pathology review with second opinion by Dr. John Choi and additional review by Dr. Raj Kapur, that overall all

Letter

MAGNEY, LOGAN PAUL - 1426311

studies point to the fact that this was not a malignant process. Parents had multiple questions, both about the pathology report as well as his exposures. The most important thing is that he has recovered completely from his chemotherapy. He has been happy and interactive, and there have been no infectious or other concerns. We discussed several issues the parents brought up including time for immunization, and I mentioned that given the fact that he has had full lymphocyte recovery, he should be able to start receiving his vaccines shortly and defer to Dr. Trobaugh-Lotrario for their clinic protocol for immunizations.

We also discussed concerns for cardiac toxicity and for infertility, and I pointed out that there is a maximum tolerated dose for cardiac toxicity that Logan would be well below that threshold given that he only received the first 2 cycles of chemotherapy, and he will not receive any further for cardiotoxic therapies. We also discussed infertility, and given the low-dose exposure, although he may have some issues, he is likely to be low risk of such complications and that during puberty this can be assessed more fully. We further discussed the fact that Dr. Raj Kapur of Pathology has offered to talk with the family but the family felt comfortable with the information provided. Both parents were concerned whether this could be a third possibility of usual reactive process, and although that is a possibility, it is more likely that the lymphadenopathy is secondary to an infectious process and the reactive process following that rather than an usual third process. Father commented about their concerns for their child being exposed to cytotoxic chemotherapy unnecessarily, and that they remain concerned about how the diagnostic process was handled.

I asked the parents if they had any additional questions, and they felt that all their questions were answered appropriately, and I told them that I would be available to answer any questions that they may have in the future.

Again, I appreciate the opportunity to meet with your patient and his family for this consultation and to be part of this process. Please keep me informed of his progress, and I am happy to provide any additional information that may come up.

For the purpose of documentation, I spent 60 minutes in direct face-to-face interaction with this family

Sincerely,

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Page 3 of 4
(Continued)

Seattle Children's Hospital
206-987-2000

Letter

MAGNEY, LOGAN PAUL - 1426311

Electronically Authenticated by
Soheil Meshinchi, MD, PhD 08/22/2015 12:24 P

Soheil Meshinchi, MD, PhD , Attending Physician, Hematology

SM/tmp Doc #4050554 d: 07/20/2015 03:06 P t: 07/22/2015 10:52 A (2288704-)

cc: Angela Trobaugh-Lotrario, MD

Completed Action List:

- * Perform by Meshinchi, Soheil , MD, PhD on 20 July 2015 0:00
- * Transcribe by on 20 July 2015 0:00
- * Perform by Meshinchi, Soheil , MD, PhD on 22 August 2015 12:24
- * VERIFY by Meshinchi, Soheil , MD, PhD on 22 August 2015 12:24

Printed by Carlson, Constance R
Printed on 11/19/2015 8:52

Page 4 of 4
(End of Report)



MRN	190747
Patient Name	MAGNEY, LOGAN PAUL
Sex	Male
Medical Service	
DOB	01/31/2014
FIN #	8010768
Race	
Primary Physician	REFERRING, PHYSICIAN

St. Jude Children's Research Hospital
262 Danny Thomas Place
Memphis, Tennessee 38105-2794

**P A T H O L O G Y - S U R G I C A L P A T H O L O G Y
C O N S U L T F I N A L R E P O R T**

Department of Pathology
(901) 595-3533
Fax: (901) 595-3100
Medical Director of Anatomic Pathology- Brent A. Orr, M.D., Ph.D.

Case No.: SC-15-01019
Collected Date/Time: 03/15/2015 11:51:00 AM
Received Date/Time: 05/12/2015 11:52:00 AM

CONSULT DISCLAIMER

This report is advisory and done at the request or knowledge of a pathologist outside of St. Jude Children's Research Hospital. It should be used to aid the final diagnosis by the referring pathologist and should not be the sole basis for definitive diagnosis or treatment.

DIAGNOSIS

- A. Mass, cervical, left, biopsy (obtained on 3/15/2015).
Mixed inflammatory infiltrate, favor infectious. No tumor seen. See Comments.
- B. Bone marrow, biopsy aspirate and clot (obtained on 3/18/2015):
Trilineage hematopoiesis, no tumor seen.
- C. Mass, cervical, left, biopsy (obtained on 3/20/2015):
Mixed inflammatory infiltrate with necrosis, favor infectious. No tumor seen. See Comments.

JOHN KIM CHOI, MD, PhD
Date Verified 05/13/2015
(Electronically Signed)
JC/JC

COMMENTS

H&E sections of the mass show skeletal muscle and fibrous tissue infiltrated by mixed inflammation consisting of neutrophils, histiocytes, lymphocytes (small and activated large), and eosinophils. The second biopsy shows fewer inflammation, but increased numbers of spindle cells that are likely fibroblasts. No definitive tumor cells are identified.

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Print Date 10/22/15
Print Time: 2:00 AM

MG SJCH-000099



MRN	190747
Patient Name	MAGNEY, LOGAN PAUL
Sex	Male
Medical Service	
DOB	01/31/2014
FIN #	8010768
Race	
Primary Physician	REFERRING, PHYSICIAN

St. Jude Children's Research Hospital
262 Danny Thomas Place
Memphis, Tennessee 38105-2794

P a t h o l o g y - S u r g i c a l P a t h o l o g y
C o n s u l t F i n a l R e p o r t

Department of Pathology
(901) 595-3533
Fax: (901) 595-3100
Medical Director of Anatomic Pathology- Brent A. Orr, M.D., Ph.D.

Case No.: SC-15-01019
Collected Date/Time: 03/15/2015 11:51:00 AM
Received Date/Time: 05/12/2015 11:52:00 AM

Submitted paraffin immunohistochemistry performed on specimen C demonstrate that the inflammation is composed of T cells (positive for CD3), scattered B cells (positive for CD20 and Pax-5), numerous histiocytes (positive for CD33, lysozyme, CD68), and neutrophils (positive for myeloperoxidase). Immature CD34 positive or CD117 positive blasts are not seen. The histiocytes do not aberrantly express CD56. The lymphocytes do not express TdT or CD99.

Additional immunohistochemistry done at St. Jude performed on specimen A demonstrate that the T cells, both small and large, are negative for ALK1 and positive for CD4 subset and CD8 subset. Hence, there is no evidence of a T cell clonal proliferation.

The above findings have some features of neoplasm and raise the possibility of myeloid sarcoma. However, the absence of immature markers (CD34 or CD117) and absence of CD56 expression on the myeloid cells argues against neoplastic myeloblast/monoblast proliferation. While the immature markers are not required for this diagnosis, more monotonous proliferation of a single cell type would be needed to support this diagnosis. T cell malignancies associated with background mixed inflammation was also considered, but the immunophenotype argues against this diagnosis. Based on the absence of clear malignancy, these findings are consistent with reactive inflammation, and sources of infections should be excluded.

JC/JC

CLINICAL HISTORY

1 year old boy with cervical neck mass.

JC/JC

SUBMITTED MATERIAL

REFERRING PATHOLOGIST AND INSTITUTION:
Pathologist

Printed by: BINION, INETA
Print Date 10/22/15
Print Time: 2:00 AM

Page 17 of 18

MG SJCH-000100



MRN 190747
 Patient Name MAGNEY, LOGAN PAUL
 Sex Male
 Medical Service
 DOB 01/31/2014
 FIN # 8010768
 Race
 Primary Physician REFERRING, PHYSICIAN

St. Jude Children's Research Hospital
 262 Danny Thomas Place
 Memphis, Tennessee 38105-2794

**Pathology - Surgical Pathology
 Consult Report Report**

Department of Pathology
 (901) 595-3533
 Fax: (901) 595-3100
 Medical Director of Anatomic Pathology- Brent A. Orr, M.D., Ph.D.

Case No.: SC-15-01019
 Collected Date/Time: 03/15/2015 11:51:00 AM
 Received Date/Time: 05/12/2015 11:52:00 AM

Truc T. Pham, MD
 Providence Sacred Heart Medical Center
 101 W. 8th Avenue
 Spokane, WA 99220
 509-474-3268
 509-474-2052

MATERIALS RECEIVED:

Accession #	Collected Date	Received at SJCRH	Stained		Unstained
			Slides	Blocks	Slides
S15-4747	3/15/15	5/12/15	16	0	4
M15-137	3/18/15	5/12/15	7	0	2
S15-5265	3/20/15	5/12/15	1	0	5

SUBMITTED UNSTAINED SLIDES (S15-4747):A1; (M15-137) & (S15-5265):A1

QUALITY CONTROL & ASR NOTIFICATION

If applicable, the histologic preparations for this case were reviewed by the responsible pathologist and found adequate for quality of fixation, processing, microtomy, and H&E staining. If applicable, appropriate positive and negative controls for special stains, immunohistochemistry, and/or *in situ* hybridization, show the expected reactivity.

The immunohistochemical testing and special stains, as applicable, were developed and the performance characteristics determined by the Anatomic Pathology Laboratory at SJCRH. It has not been cleared or approved by the U.S. Food and Drug Administration. Analyte Specific Reagent use does not require FDA approval. [21CFR809.30]

*** This print request includes documents that are images not included in this print out. ***

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 Print Date: 10/22/15
 Print Time: 2:00 AM

Page 18 of 18

MG SJCH-000101

COPY
Original Filed

JAN 24 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AUMI I. CORN, M.D.,
LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No.

17200266 - 1

COMPLAINT FOR MEDICAL
NEGLIGENCE AND DAMAGES

I. IDENTIFICATION OF PLAINTIFFS

1.1 At all times material hereto, Plaintiff Logan Magney, a minor, was residing in
Spokane, Spokane County, Washington.

1.2. At all times material hereto, Plaintiff Caleb Magney, a minor, was residing in
Spokane, Spokane County, Washington.

1.3. At all times material hereto, Plaintiff Brian Magney was residing in Spokane,
Spokane County, Washington.

COMPLAINT FOR DAMAGES - 1

THE MARKAM GROUP, INC., P.S.
ATTORNEYS AT LAW
421 West Riverside, Suite 1060
Spokane, WA 99201
(509) 747-0922 FAX (509) 447-1993

EXHIBIT 3

1
2 1.4. At all times material hereto, Plaintiff Emily Magney was residing in Spokane,
3
4 Spokane County, Washington.

5 **II. IDENTIFICATION OF DEFENDANTS**

6 2.1 Defendant Truc T. Pham, M.D., is a physician licensed in the state of
7 Washington who was working in Spokane, Spokane County, Washington during the time
8 of the subject care.

9
10 2.2. Defendant Aumi I. Corn, M.D., is a physician licensed in the state of
11 Washington who was working in Spokane, Spokane County, Washington during the time
12 of the subject care.

13
14 2.3. Defendant Liqun Yin, M.D., is a physician licensed in the state of Washington
15 who was working in Spokane, Spokane County, Washington during the time of the subject
16 care.

17
18 2.4. Defendant Incyte Diagnostics, a Washington corporation, does business in
19 Spokane, Spokane County, Washington.

20
21
22 **III. VENUE AND JURISDICTION**

23 3.1 Subject matter and personal jurisdiction are proper in the Superior Court of
24 Washington for Spokane County.

25
26 3.2. Venue is proper in Spokane County Washington.

1 3.3. Plaintiffs bring their claims within the time limit allowed by the applicable
2 statute of limitations.
3

4 **IV. COMPLIANCE WITH LAWS**
5 **PECULIAR TO HEALTHCARE LAWSUITS**
6

7 4.1. Pursuant to the provisions of RCW 7.70A.020, an appropriate declaration of
8 counsel is appended hereto as Exhibit A declining the option to submit this dispute to
9 arbitration under the above entitled chapter.
10

11 **V. DATE AND NATURE OF OCCURRENCE**
12

13 5.1. In March 2015, Defendant Pham negligently interpreted a neck lymph node
14 tissue sample taken from Plaintiff Logan Magney as malignant. Again, in March 2015,
15 Defendants Pham and Corn negligently interpreted a left deep neck mass biopsy taken
16 from Plaintiff Logan Magney as acute myeloid leukemia. Again, in April 2015, Defendants
17 Pham and Yin negligently interpreted a needle core biopsy taken from Logan Magney as
18 residual acute myeloid leukemia.
19

20 5.2. Based upon the negligent interpretations, Plaintiff Logan Magney underwent
21 treatment including chemotherapy.
22

23 5.3. Subsequently, pathological interpretation from University of Washington
24 Children's Hospital and St. Jude's Children's Hospital interpreted Logan Magney's
25
26

1 pathology specimens as a reactive or inflammatory process and not acute myeloid
2 leukemia. As a result, the child's diagnosis was reversed and treatment for acute myeloid
3 leukemia discontinued.

4
5
6 **VI. MEDICAL NEGLIGENCE**

7 6.1. Defendant Pham failed to exercise that degree of care, skill and learning
8 expected of reasonably prudent healthcare providers in the same profession or class in the
9 state of Washington acting in the same or similar circumstances. Such conduct proximately
10 caused severe injuries and damages to Plaintiffs. Defendant Pham's conduct violated RCW
11 7.70 and other applicable laws.

12
13
14 6.2. Defendant Corn failed to exercise that degree of care, skill and learning
15 expected of reasonably prudent healthcare providers in the same profession or class in the
16 state of Washington acting in the same or similar circumstances. Such conduct proximately
17 caused severe injuries and damages to Plaintiffs. Defendant Corn's conduct violated RCW
18 7.70 and other applicable laws.

19
20 6.3. Defendant Yin failed to exercise that degree of care, skill and learning
21 expected of reasonably prudent healthcare providers in the same profession or class in the
22 state of Washington acting in the same or similar circumstances. Such conduct proximately
23 caused severe injuries and damages to Plaintiffs. Defendant Yin's conduct violated RCW
24 7.70 and other applicable laws.
25
26

1
2 **VII. MEDICAL NEGLIGENCE OF INCYTE DIAGNOSTICS**

3 7.1. Defendant Incyte Diagnostics, through its employees, agents and members,
4 including, but not limited to, Defendants Pham, Yin and Corn, failed to exercise the degree
5 of care, skill and learning expected of reasonably prudent healthcare providers in the same
6 profession or class in the state of Washington acting in the same or similar circumstances.
7 Such conduct proximately caused severe and permanent injuries and damages to Plaintiffs.
8 Defendant's conduct violated RCW 7.70 and other applicable laws.
9

10
11 7.2. **Vicarious Liability**. Defendant Incyte Diagnostics is vicariously liable for all
12 acts and omissions of its employees, agents and members including, but not limited to,
13 Defendants Pham, Yin and Corn under the doctrines of Respondeat Superior, Ostensible
14 Agency or Apparent Agency.
15

16
17
18 **VIII. INJURIES AND DAMAGES**

19 8.1. The acts and omissions of Defendants directly and proximately caused
20 Plaintiffs to suffer severe and permanent injuries, both mental and physical, pain and
21 suffering and mental anguish as well as loss of consortium.
22

23 8.2. Plaintiffs have and will incur economic damages including, but not limited to,
24 medical expenses and other expenses in an amount that will be proven at trial.
25

26 8.3. Plaintiffs are entitled to prejudgment interest on liquidated sums from the
27

1 time the expenses were incurred to the time of trial at the appropriate and proper rate of
2 interest.

3
4 WHEREFORE, having set forth in their Complaint, Plaintiffs request this Court enter
5 judgment against Defendants for:
6

- 7 (1) All injuries and damages sustained by Plaintiffs in amounts to be proven at
8 trial;
9
10 (2) Reasonable costs and fees incurred herein; and,
11 (3) Such further relief as justice requires.
12

13
14 DATED this 23 day of January, 2017.

15
16 THE MARKAM GROUP, INC., P.S.
17

18
19 By: Collin M. Harper
20 MARK D. KAMITOMO, WSBA No. 18803
21 COLLIN M. HARPER, WSBA No. 44251
22 Attorneys for Plaintiffs
23
24
25
26
27

JAN 24 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AUMI I. CORN, M.D.,
LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. **17200266-1**

DECLARATION OF
COLLIN M. HARPER

Collin M. Harper, declares and states as follows:

I am one of the attorneys representing the Plaintiffs in this matter. I have discussed with my client the provisions of RCW 7.70A.020 regarding the election to arbitrate such dispute. Plaintiff has elected not to submit this dispute to arbitration under such chapter.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Spokane, Washington on January 24, 2017.

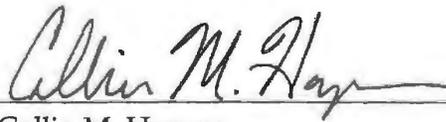

Collin M. Harper

EXHIBIT A

THE MARKAM GROUP, INC., P.S.
ATTORNEYS AT LAW
421 West Riverside, Suite 1060
Spokane, WA 99201
(509) 747-0902 FAX (509) 747-1993

RECEIVED

JAN 23 2018

The Markam Group, Inc. P.S.
Attorneys at Law

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,
COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY
and EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM, M.D.; AUMI I. CORN,
M.D.; LIQUN YIN, M.D; and INCYTE
DIAGNOSTICS, a Washington
Corporation

Defendants.

No. 17-2-00266-1

DEFENDANTS TRUC PHAM, M.D. and
INCYTE DIAGNOSTICS SECOND
INTERROGATORIES AND REQUEST
FOR PRODUCTION TO PLAINTIFFS

TO: LOGAN MAGNEY, CALEB MAGNEY, BRIAN MAGNEY, AND
EMILY MAGNEY, THE ABOVE NAMED PLAINTIFFS;

AND TO: YOUR COUNSEL OF RECORD, MARK D. KAMITOMO and COLLIN
M. HARPER.

Pursuant to Rules 26, 33, and 34 of the Civil Rules for the Superior Court, Defendants
Truc Pham, M.D. and Incyte Diagnostics, submit the following Interrogatories and Requests
for Production of Documents.

DEFENDANTS PHAM & INCYTE DIAGNOSTICS
SECOND INTERROGATORIES AND REQUESTS FOR
PRODUCTION TO PLAINTIFFS- PAGE 1

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.

618 WEST RIVERSIDE AVENUE, SUITE 210
SPOKANE, WASHINGTON 99201-5917-2900

EXHIBIT 4

1 Pursuant to the provisions of Civil Rules 26, 33 and 34, Defendant request that
2 Plaintiffs answer in writing under oath each of the Interrogatories and produce pursuant to the
3 Requests for Production the following-described documents at the offices of Etter, McMahon,
4 Lamberson, Van Wert & Oreskovich, P.C. within thirty (30) days of service.
5
6

7 SCOPE OF ANSWERS

8 THE FOLLOWING INTERROGATORIES AND REQUESTS FOR PRODUCTION
9 ARE CONTINUING IN CHARACTER, AND IN THE EVENT YOU DISCOVER
10 FURTHER INFORMATION OR DOCUMENTATION WHICH ALTERS, MODIFIES,
11 DELETES OR AUGMENTS THE ANSWERS GIVEN NOW OR ANY TIME
12 HEREAFTER, YOU ARE TO PROVIDE SUCH INFORMATION BY SUPPLEMENTAL
13 ANSWERS AND/OR PRODUCTION OF SUCH DOCUMENTS.

14 Where knowledge or information, or possession or control by the Plaintiffs are
15 requested or inquired of, such request or inquiry includes knowledge, information, possession
16 or control of or by Plaintiffs' agents, servants, representatives, and, unless privileged,
17 Plaintiffs' attorney.
18

19 If you cannot answer the following Interrogatories and Requests for Production in full,
20 after exercising due diligence to secure the information to do so, so state and answer to the
21 extent possible, specifying your inability to answer the remainder, and stating whatever
22 information or knowledge you have concerning the unanswered portion.
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26 The answers should be subscribed and sworn to under oath by the person to whom they
27 are propounded.
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DEFINITIONS

For the purpose of these Interrogatories and Requests for Production, the following definitions apply;

1. **Doctor; Medical Personnel.** The terms “doctor” and “medical personnel” include, but are not limited to, any medical doctor, doctor of dental surgery, doctor of dental medicine, oral and maxillofacial surgeon, psychiatrist, psychologist, other mental health care provider, nurse practitioner, chiropractor, osteopath, physical therapist, naturopath or healer.
2. **Occurrence.** “This occurrence” or “the occurrence” refers to the incident or occurrence that is the subject of this action.
3. **And/Or.** “And” or “Or” means “and/or,” with the singular form being deemed to include the plural and vice versa.
4. **Complaint.** “Complaint” means the Complaint for Medical Negligence and Damages served on Defendants by Plaintiffs, which was filed in Spokane County Superior Court, Cause No. 17-2-00266-1.
5. **Document(s).** The terms “document” and “documents” include, but are not limited to, writings, drawings, all paper material of any kind, whether written, typed, printed, punched, filmed or marked in any way; recording tapes or wires, films, photographs, charts, graphs, movies, or any graphic matter however produced or reproduced; all mechanical or electronic sound recordings or transcripts thereof; and every type of data compilation including all forms of computer storage and retrieval.

1 6. **You.** "You" means the Plaintiffs individually and in any capacity in a company and
2 includes each of her directors, officers, agents, employees, attorneys and representatives.
3

4 PROCEDURES

5 In answering any of these Interrogatories, if you rely upon any testimony, whether given
6 at a deposition, investigation, hearing or otherwise, you are to set forth separately for each
7 such Interrogatory: the identity of the person testifying, the date upon which he or she
8 testified, the identity of the document constituting the transcript of the testimony and the page
9 number or numbers of the transcript on which such testimony appears.
10
11

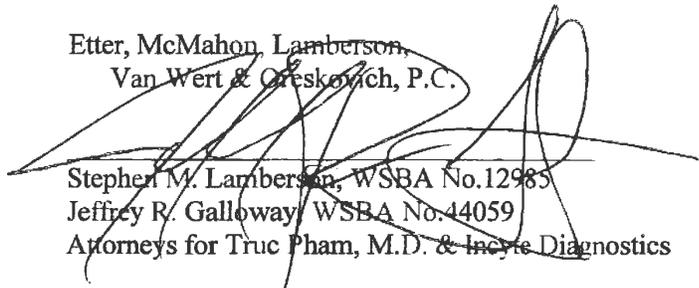
12
13 If you claim that an answer, either in whole or in part, to any Interrogatory or portion
14 thereof, or that production of a document, either in whole or in part, in response to any
15 Request for Production, is subject to any privilege or otherwise objectionable or protected
16 from discovery, you are to identify the subject matter, the answer or production to which such
17 privilege, objection or protection is thought to apply, and state the ground or basis for each
18 such claim, objection, privilege or protection. In the case of Interrogatories, the party or
19 attorney making the objection shall sign the Certification of Compliance with Civil Rule
20 26(g). All portions of an Interrogatory not regarded as calling for a protected or objectionable
21 response are to be answered fully.
22
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27 By these Requests for Production, you are asked to produce for inspection and copying
28 each and every one of the documents and other tangible things identified below by item or
29 category, which you have in your possession or custody or under your control. The place for
30
31
32

1 the production of documents shall be at the offices of Etter, McMahon, Lamberson, Van Wert
2 & Oreskovich, P.C., 618 W. Riverside Avenue, Suite 210, Spokane, Washington 99201.
3

4 Dated this 23 day of January, 2018.

5
6 Etter, McMahon, Lamberson,
7 Van Wert & Oreskovich, P.C.

8
9 
10 Stephen M. Lamberson, WSBA No. 12985
11 Jeffrey R. Galloway, WSBA No. 44059
12 Attorneys for Truc Pham, M.D. & Incyte Diagnostics

13 **INTERROGATORIES & REQUESTS FOR PRODUCTION OF DOCUMENTS**

14
15 **INTERROGATORY NO. 44:** Please provide the name and address of the marital
16 counselor Emily Magney identified in her deposition.
17

18 **ANSWER:**

19
20
21 **REQUEST FOR PRODUCTION NO. 23:** Please produce legible copies of any and
22 all records from the marital counselor identified in the preceding interrogatory.
23

24 **RESPONSE:**

25
26
27 **INTERROGATORY NO. 45:** Please itemize all out of pocket expenses incurred by
28 Plaintiffs as a result of the alleged negligence.
29

30 **ANSWER:**

ATTORNEY'S CR 26 CERTIFICATION

The undersigned attorneys for plaintiffs, Mark D. Kamitomo and Collin M. Harper have read the foregoing responses and certify that they are in compliance with Civil Rule 26(g).

DATED this _____ day of _____, 2018.

Mark D. Kamitomo, WSBA #18803
Collin M. Harper WSBA #44251
Attorneys for Plaintiffs

1 **CERTIFICATION OF SERVICE**

2 I caused to be served a true and correct copy of the foregoing by the method indicated
3
4 below, and addressed to the following:

5
6 Mark Kamitomo
7 Collin Harper
8 The Markam Group, Inc. P.S.
9 421 West Riverside, Suite 1060
10 Spokane, WA 99201

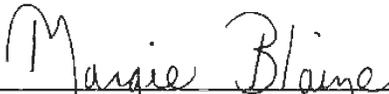
- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Via Electronic Mail

11 Steven J. Dixson
12 Witherspoon Kelley
13 422 W. Riverside Ave., Suite 1100
14 Spokane, WA 99201

- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Via Electronic Mail

15
16
17 I declare under penalty of perjury under the laws of the State of Washington that the
18 foregoing is true and correct.

19
20 Dated this 3rd day of January 2018 Spokane, Washington.

21
22 
23 _____
24 Margie Blaine

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB)	
MAGNEY, a minor; BRIAN MAGNEY)	
and EMILY MAGNEY,)	
)	NO. 17-2-00266-1
Plaintiffs,)	
vs.)	
)	
TRUC PHAM, M.D.; AYUMI I. CORN,)	
M.D.; LIQUN YIN, M.D.; and)	
INCYTE DIAGNOSTICS, a)	
Washington corporation,)	
)	
Defendants.)	

VIDEOTAPED DEPOSITION OF BRIAN MAGNEY

Videotaped deposition upon oral examination of BRIAN MAGNEY, taken at the request of the Defendants before Amy J. Brown, RMR, CRR, CLR, a Certified Court Reporter, CCR No. 2133, at the law offices of The Markam Group, 421 W. Riverside Avenue, Suite 1060, Spokane, Washington, commencing at or about 2:20 p.m. on November 14, 2017, pursuant to the Washington Rules of Civil Procedure.

1 when you, presumably, reviewed the results of the
2 testing?

3 A. Right.

4 Q. Do you have a regular primary care doctor that
5 you go to for annual physical exams?

6 A. Keith Morton.

7 Q. Where does Dr. Morton practice?

8 A. Rowan Internal Medicine.

9 Q. How long has Dr. Morton been your primary
10 physician?

11 A. The last couple of years, post Logan.

12 Q. So sometime since early 2014?

13 A. Yes.

14 Q. Do you see any other physicians on a regular
15 basis?

16 A. No.

17 Q. Have you ever been treated for mental health or
18 psychiatric condition?

19 A. No.

20 Q. As a result of Logan's illness, treatment and
21 follow-up, did you ever seek mental health therapy or
22 counseling?

23 A. No.

24 Q. Earlier today your wife mentioned some marital
25 counseling in the late summer/early fall of 2014. Can

1 risk. I believe that was like -- it's called like the
2 FLT3 chromosome, if I remember right. And then we were
3 told there also would be some other combinations of the
4 testing that would have to be done that could push him
5 to high risk or low risk.

6 The first round of treatment was not different
7 for low risk or high risk, so we wouldn't find out the
8 results of whether he went on the high risk or low-risk
9 path, which made the clinical trial -- this is the hard
10 part for me because this was the hardest decision we've
11 ever made.

12 So we had to decide before his treatment
13 started if we wanted to go on the trial or not, and we
14 would have randomized into a fourth drug or not for that
15 first round of treatment that hadn't proved successful,
16 but if we came back with that FLT3, the drug that we
17 would have had the option to add through the high-risk
18 side had shown success.

19 So without knowing whether he would be low risk
20 or high risk, we had to decide if we wanted to give him
21 the chance to take a fourth drug that may or may not
22 harm him or hurt him in that first round.

23 And so we were given a lot of information in
24 that initial meeting about that clinical trial, as well.
25 And the reason -- and that was a big part of the second

1 Logan.

2 A. So that first round was ten days, three drugs.
3 One drug was every day, the other ones were not. I
4 don't remember exactly when those were. He did pretty
5 good through the first part of it. As he was getting
6 chemo for the first time, you know, still a smile, still
7 was doing all right.

8 He was -- you know, it's hard because most of
9 what we dealt with is just normal stuff, him puking up
10 his stuff or him having a fever. That was normal. You
11 know, that was pretty typical all the time. So, you
12 know, he would puke and, you know, he'd have a fever,
13 he'd get additional drugs here and there, whether it
14 was, you know, antibiotics or stomach stuff or whatever.

15 Towards the end of the first ten days of
16 treatment, you know, that's when his blood counts go to
17 zero, so he has basically no immune system, and that
18 period of time after treatment is when -- when they get
19 really sick. And, you know, Emily had mentioned some of
20 the stuff that we had to deal with around, you know, his
21 highlight of his days was to walk around the floor and
22 wave at the nurses at the nurse station.

23 And he'd push this little alligator walker, and
24 he got a lot of balloons, so he'd carry one of those
25 around with him and wave at all of the nurses and stuff.

1 And so when he had his little stomach -- his little
2 stomach infection, he couldn't leave the room and it
3 limited who could come see him, so that was really hard.

4 And, you know, it was a waiting game of when
5 his blood count numbers got to a level where we could
6 take a brief visit home. I don't recall whether it
7 was -- I think it was after round 1, but there was one
8 night that we had -- one day into the evening where his
9 fever was 105 and he literally was laying in his crib
10 just shaking.

11 And Dr. Trobaugh wasn't on call that night. It
12 was one of her colleagues, and basically they
13 just -- they just said that he might just start seizing
14 out at some point and there really wasn't a lot they
15 could do other than alternating Tylenol and ibuprofen.
16 They had to bring in a mobile x-ray machine and take an
17 x-ray of his lungs to make sure his lungs weren't
18 filling up with fluid.

19 You know, so we had to deal with that stuff
20 pretty much the whole recovery phase. And then -- and
21 then you get to a point where he's feeling better and
22 he's walking around again and his blood count numbers
23 aren't good enough to go home, so he's sitting around
24 for days feeling okay and running around wanting to get
25 out, and we're just waiting until his numbers are where

1 they need to be to send us home for a couple of days.

2 Q. Okay. We spent some time talking with your
3 wife earlier today about this chemotherapy induction and
4 the recovery.

5 Would it be a fair characterization, as your
6 wife did, to say there was some good days and there were
7 some bad days for Logan during this time period?

8 A. Good relative to the bad. So a good day was
9 not a normal one-and-a-half-year-old's good day. A good
10 day was he kept breakfast down, he didn't have a fever,
11 you know, he got to walk around. You know, he
12 still -- you know, he still wasn't good, but it was
13 better than the bad days. I mean, he was smiling more,
14 he was happier, he was feeling better.

15 Q. Describe for me the physical layout of the room
16 there at Sacred Heart that you guys were in.

17 A. We had a double room, basically, where we had
18 our normal hospital room that had the crib, it had a
19 bench that turned into a bed that Emily slept on. It
20 had, you know, their monitors and stuff they had to hook
21 up to him next to his crib, and then we had a door that
22 went into an almost like a hospital waiting room which
23 had a couch that turned into a hide-a-bed, it had three
24 or four sitting chairs and a table and a TV.

25 Q. When you stayed the night there, is that the

1 that maybe it just is -- recalling it twice, but I think
2 he did.

3 His recovery was similar. I mean, it's
4 just -- his immune system is so drained that he's sick,
5 he's running fevers, is the norm, he's puking, he's not
6 really keeping stuff down. And then as his counts
7 started to grow, he starts to come to life a little bit
8 more.

9 I do recall -- I don't know how many times we
10 had to do this, but he had to get blood transfusions,
11 platelet transfusions during those times when his counts
12 were so low. He had to get those done, and you could
13 just see him going from, you know, about as white as
14 that piece of paper to, you know, some color back in his
15 face.

16 So those, those helped him and those were in
17 that recovery -- I believe those were in the recovery
18 phase, and I don't recall if it was after both rounds or
19 just one or the other.

20 Q. Was there anything in chemotherapy round 2 that
21 was out of the ordinary or that doctors had explained to
22 you you could reasonably expect Logan to experience?

23 A. Not that I recall.

24 Q. At some point during the second round of
25 chemotherapy, did it come to your attention that Logan

1 doesn't -- you know, she's being told that he doesn't
2 have it and that we're stopping treatment. That was
3 kind of it, that I remember, in that meet -- in that
4 period of time.

5 Q. What was your reaction to Dr. Trobaugh telling
6 you that you were stopping treatment for your son Logan?

7 A. Well, I think I was more angry that she told
8 Emily when I wasn't there. You know, that -- I thought
9 that was disappointing because it's really big news to
10 pass along.

11 But you know, there just -- again, there was
12 just that uncertainty. I mean, we literally by the time
13 we got through round 2, we were so dialed into the
14 process, we're getting through four rounds of chemo,
15 everything looks good, he's going to be cured. We kind
16 of wrapped our heads around after the two and a half
17 months that we've been doing this that this is all going
18 the way that it -- that it's supposed to go to be okay.

19 And when we came in -- when she came in and
20 said we're stopping treatment and we did all this for
21 nothing, you know, we're like, "Well, what are you
22 talking about?" You know, and we just didn't -- we
23 didn't know what to do. We didn't know.

24 You know, you would think, from an outsider,
25 that we would have been like, oh, so much relief. There

1 was no relief. At that point in time it was just more
2 questions. After we had gone through months of
3 answering so many questions and stuff to just have more
4 at this point, it was just depressing. It just was hard
5 to -- hard to wrap our heads around what the right path
6 forward was going to be to give Logan the best chance to
7 survive, at that point still, in our minds.

8 Q. Did Dr. Trobaugh share with you any details of
9 this e-mail that she received?

10 A. I don't recall her specifically talking in that
11 meeting with me about anything in that e-mail
12 specifically.

13 Q. Okay. Separate and apart from that meeting,
14 has Dr. Trobaugh ever shared with you the contents of
15 the e-mail that she received regarding Logan's diagnosis
16 that maybe in fact he did not have AML?

17 A. Not in details, no.

18 Q. Okay. Did Dr. Trobaugh share with you anything
19 at all regarding the basis for the other pathologist's
20 conclusion that Logan did not have AML, other than that
21 she received an e-mail?

22 A. No. Our understanding was is that the -- by
23 going on the trial, every kid that went on the trial,
24 their slides were reviewed by the pathologists that were
25 part of the trial, and that's what brought this up, was

1 whether or not Logan is left- or right-handed?

2 A. No, I don't.

3 Q. Okay. Is he, to your observation, able to
4 throw a ball with both his left and right hand?

5 A. Yeah, better than most adults can.

6 Q. And he is able to ride a bike and play at the
7 lake with his brother; correct?

8 A. Yes.

9 Q. Okay. Can you tell me how Logan's illness has
10 impacted you personally?

11 A. So as a dad, your job is to protect your
12 family, and that was kind of taken away, and I felt
13 helpless and it was -- it was devastating going through
14 treatment with him because we were hopeless. There was
15 nothing we could do. Just every night you just wish you
16 could just change places with him and take away the pain
17 or do something for him.

18 It's hard -- it's really hard today because you
19 kind of see the worst possible scenario no matter what
20 happens. So whether it's the kids playing on the jungle
21 gym, whether it's somebody has a stuffy nose, somebody
22 has a cough, the first thing that comes to mind is
23 they're going to fall and break their neck or they're
24 going to end up with a major illness that's going to do
25 something to them.

1 It just has changed that whole perspective on,
2 you know, it's made me more of a paranoid parent that I
3 worry that something bad is going to happen all the
4 time. You know, it's just -- you know, but it
5 also -- it also made me realize how short life can be.
6 And it wasn't just Logan up there; it was all the other
7 kids that were up there.

8 You know, you see these kids and you go through
9 and you go, some of these kids aren't going to make it.
10 And you meet their parents and you get to know them
11 because you're up there every day and it
12 just -- everything hits me harder than it used to, you
13 know, and just really trying to live every day for what
14 we have. And you know, it's just hard because, like I
15 said, it's just every corner I turn around it's like
16 worried that something really bad is going to be
17 happening.

18 Q. Have you sought any mental health treatment or
19 counseling as a result of this change in your own world
20 perception?

21 A. No.

22 Q. When you say you see kids on the jungle gym and
23 you worry about them falling or breaking their neck or
24 every sniffle is going to be a major illness, is that
25 something you perceive for your own kid, or all the kids

1 the block as a family or whatever it is, you know, those
2 things are -- before maybe it was, you know, "You go
3 take them," or whatever. Now it's more, no, I mean, who
4 knows what's going to happen tomorrow so let's all go,
5 you know.

6 Q. Has it made you more appreciative of the time
7 you do have with your family?

8 A. Absolutely.

9 Q. And I don't mean to prod or pry, but are you
10 and Emily still intimate?

11 A. Yes.

12 Q. Okay. And you have not sought marital
13 counseling as a result of Logan's illness in the spring
14 of 2015?

15 A. No.

16 Q. And neither of you have sought independent
17 mental health counseling or psychotherapy as a result of
18 Logan's illness; correct?

19 A. No.

20 Q. Has any medical professional offered you an
21 opinion that Logan's overall life expectancy is any
22 shorter as a result of his chemotherapy?

23 A. No.

24 Q. I asked your wife this question, and I
25 understand the answer may seem ridiculous, but I have to

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB)	
MAGNEY, a minor; BRIAN MAGNEY)	
and EMILY MAGNEY,)	
)	NO. 17-2-00266-1
Plaintiffs,)	
vs.)	
)	
TRUC PHAM, M.D.; AYUMI I. CORN,)	
M.D.; LIQUN YIN, M.D.; and)	
INCYTE DIAGNOSTICS, a)	
Washington corporation,)	
)	
Defendants.)	

VIDEOTAPED DEPOSITION OF EMILY MAGNEY

Videotaped deposition upon oral examination of EMILY MAGNEY, taken at the request of the Defendant before Amy J. Brown, RMR, CRR, CLR, a Certified Court Reporter, CCR No. 2133, at the law offices of The Markam Group, 421 W. Riverside Avenue, Suite 1060, Spokane, Washington, commencing at or about 9:03 a.m. on November 14, 2017, pursuant to the Washington Rules of Civil Procedure.

1 the diagnosis actually is --

2 Q. Okay. I'll ask him --

3 A. -- or was.

4 Q. -- in his -- sorry.

5 A. Sorry. Is or was.

6 Q. Is it something that's ongoing, as far as you
7 know?

8 A. We just found out recently. Don't know how
9 long it's been going on.

10 Q. What are the symptoms?

11 A. Irregular heartbeat.

12 Q. Anything else in terms of his health?

13 A. No.

14 Q. In your -- in your complaint you've alleged
15 that the acts and omissions of defendants, my client,
16 and other defendants, caused plaintiffs to suffer severe
17 and permanent injuries, both mental and physical pain
18 and suffering and mental anguish, as well as loss of
19 consortium.

20 So let's first talk about mental and physical
21 injuries. What do you claim as a result of -- what do
22 you claim are physical and mental injuries from this
23 alleged negligence of the defendants?

24 A. As in me specifically or --

25 Q. As in -- we'll start with you, yeah.

1 A. Okay. So I guess it's just primarily a mental
2 head game. I don't know now -- I'm sorry. I don't know
3 now, like, when we go into the doctor, you know, is
4 everything going to be okay. Your head kind of goes to
5 like the worst, and it's hard to come back on, like,
6 just how special today really is and that he only went
7 through the two rounds. We didn't go through three and
8 four. Would he have made it through three and four?

9 It's just primarily mental, and during that
10 time -- I mean, family is so important to me -- we were
11 just trying to get by, you know, day to day, and Caleb
12 was separated from us at -- you know, for a significant
13 amount of time. Thank you.

14 Now sometimes, like, for him, he'll ask if I go
15 just to take Logan for a well-child check, like, "Are
16 you coming back, mom?" And it's like I want to say, say
17 the answer is always going to be yes, but you just, you
18 don't know.

19 Q. We can stop now if you'd like to take a break.

20 A. It's okay.

21 It was, you know, a significant amount of
22 stress during that -- during that time, especially the
23 loss of sleep, the not being together as a family, the
24 just the care. You know, even when we got sent home
25 after the first -- the first round of treatment and the

1 expectation that you'll be okay as parents, you know,
2 giving him this other antibiotic for the infection he
3 had going on, and that backpack, and just kind of the
4 stress of, like, well, what if we don't do it right, and
5 again, we're not medical professionals.

6 And there were times where I felt like I was on
7 a fast track, like, nursing school and how to change
8 his -- how to change his line, how to care for it, what
9 are the other things to look for if he strikes a really
10 high fever, you call the ER and get down there
11 immediately.

12 When we were at the hospital, I don't remember
13 how far into it, but I'm so thankful that my mom or
14 Brian's mom or even him was there so that I could either
15 walk, get out of the room and walk the hospital floor
16 for an hour, or take time to go outside myself, like,
17 because I needed that. It was hard at the same time to
18 be away from him, but I, I needed that, that break.
19 Yeah, I was off work from March until the end of the
20 summer that year.

21 I mean, as I mentioned, too, earlier, it's like
22 he just -- he still doesn't -- he still doesn't sleep
23 through the night. We don't know what goes on in his
24 head. Is he -- you know, is that from the time in the
25 hospital and all the interruptions? Is he scared

1 because he doesn't know who's going to come through the
2 door and interrupt? Does he see things? Is he,
3 like -- do those memories come back and is he like
4 reliving some of that?

5 And the whole, like, comfort for him and how he
6 can't self-soothe and he has, like, that need for -- he
7 needs somebody to be there. I just -- it's -- we don't
8 know how long, you know, how long is that going to go
9 on. What's going to happen as he grows up to be, you
10 know, a young boy? Is he still going to be going
11 through that, or not?

12 There's just always that question in the back
13 of your head. It's like, is everything going to be
14 okay? And during all this I'm outside, you just put up
15 this, you know, this cover and strength and support for
16 your child, but on the inside you're not like that.

17 On occasion when Logan does sleep through the
18 night or gets a longer stretch, I still wake up myself.
19 I don't know if it's a body clock thing or just the
20 physicality and being ready, like, to be woken up, but
21 I, I can't sleep through the night myself anymore.

22 I feel like we have put even more effort into
23 being a family and having time together after this. I
24 just -- how precious life really is.

25 You know, we talk about Logan's arm and

1 shoulder and everything he's been through, and I think
2 absolutely for Brian and myself, we just want his life
3 to be as normal as possible.

4 You know, sometimes I wonder about, like, even
5 the day-to-day stuff and the school, is he, because he
6 was, you know, in the hospital for such a long amount of
7 time during, like, some very important like
8 developmental -- like at that age, is he going to learn
9 slower? Is he going to be made fun of because he's got
10 a winged scapula or can't, you know, can't reach and
11 can't play as hard as everyone else.

12 I really worry about how cautious and afraid he
13 is right now because I don't want him to be, so. I
14 don't want him to be scared. I don't want Caleb to be
15 scared that we're not -- we're not coming back after
16 going to the doctor's. The times Caleb could come
17 in -- come to the hospital and visit, there were a few
18 nights we made a, like, sleep-over out of it so that we
19 could be together.

20 And during those times where we didn't do that
21 and he came down for like a visit just during the day, I
22 would try to, you know, take Caleb down to the cafeteria
23 for ice cream or take him across the street to go play
24 so that he had that normal, like, that normal time and
25 not all this time where whenever I see mom or dad

1 they're always with Logan, or dad is just home with me
2 and where is mom and Logan? And why is it that Logan is
3 getting all this attention right now and, you know, does
4 anyone, like, care and love me?

5 We tried to make it as normal for Caleb as we
6 could and that we stuck to the daycare during that time,
7 and my mom those two days a week.

8 It was after the first round of treatment, I
9 don't remember how many days after, and Logan got sick
10 and then he got sicker, and he just, he had a fever that
11 could not be beat. It would escalate and they were on
12 the clock with Tylenol and Advil and in between, well,
13 now he needs a transfusion or this and that and we've
14 got to get it down.

15 And there was one night that it peaked to like
16 105 and the nurse called, like, a different doctor, a
17 different oncologist that was on call that night, and he
18 had said something about a seizure and he may or may not
19 seize, and then they brought up, like, this huge x-ray,
20 mobile x-ray machine to take an x-ray.

21 I mean, that night in particular was just,
22 like, is he even going to make it through the night?
23 Are we going to lose him?

24 Q. Can I ask you a few follow-up questions? Do
25 you want to take a little break? Would you like to --

1 A. No, I'm okay.

2 Q. Okay. Just follow up on a couple of things
3 that you mentioned.

4 Your -- you mentioned that you have some sleep
5 issues. Have you seen a healthcare provider for those
6 sleep issues?

7 A. No.

8 Q. You've talked about your, your -- some of the
9 emotions that you felt since this has happened up until
10 now. Have you seen any mental health counseling for
11 that?

12 A. No.

13 Q. As far as Logan's learning, has any healthcare
14 provider suggested that he does have a learning
15 disability?

16 A. No one has.

17 Q. You talked earlier, and then earlier
18 even -- even earlier today about you feel that he is
19 more cautious and maybe afraid when he's out and about.

20 Is, is it possible that that's just the nature
21 of his personality as a young kid?

22 MR. KAMITOMO: Form.

23 A. Kids go through -- go through phases, but prior
24 to treatment this is not -- this was not Logan.

25 Q. Okay. What do you believe and allege in this



☛ [Licenses, Permits and Certificates](#) > [Professions - New, Renew or Update](#) > [Mental Health Counselor](#) > [Counselor Client Privilege Information](#)

Mental Health Counselor

Counselor Client Privilege Frequently Asked Questions

Legislation passed a new privilege law. This law hasn't been tested in the court system. If you have any questions about the law, contact your attorney for legal advice ([Substitute Senate Bill 5931](#) [↗](#), codified at [RCW 5.60.060\(9\)](#) [↗](#)).

What does the new law do?

It creates testimonial privilege for licensed mental health counselors, licensed independent clinical social workers and licensed marriage and family therapists.

Providers may not disclose, or testify about, any information they learned about their client regardless of how they got the information. All information needed to provide the counseling service is considered privileged.

When does it take effect?

The rule took effect on July 26, 2009.

The law specifically refers to "independent" licensed social workers. Is it limited to the clients of licensed independent social workers, as distinct from a licensed advanced social worker?

Yes, the rule specifically applies to only licensed mental health counselors, licensed marriage and family therapists and licensed independent clinical social workers. It doesn't apply to licensed advanced social workers.

Does this cover the full record of care for a client I began to see before the privilege came into effect?

After July 26, you cannot be compelled to testify about your client's personal information.

Is the privilege weakened if the work with a client occurs in the course of a group with other clients and/or non-privileged professionals?

This privilege doesn't apply to other clients and non-privileged professionals. Clients and non-privileged professionals can be compelled to testify.

When am I still required to release information?

- When you have written authorization from the person or, in the case of death or disability, the person's representative.
- If the person waives the privilege by bringing charges against you.
- In the response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report ([RCW 18.130.050](#) [↗](#)).
- As required under state law ([Chapter 26.44](#) [↗](#) or [74.34 RCW](#) [↗](#) or [RCW 71.05.360 \(8\) and \(9\)](#) [↗](#)).
- When you believe disclosure will avoid or minimize an imminent danger to the health or safety of an individual. However, there is not obligation on the part of the provider to disclose.

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EXHIBIT 7

WA F. B. Rep., 2010 Reg. Sess. S.B. 5931

 Image 1 within document in PDF format.

Washington Final Bill Report, 2010 Regular Session, Senate Bill 5931

February 15, 2010

Washington Legislature

Sixty-first Legislature, Second Regular Session, 2010

Synopsis as Enacted

Brief Description: Regarding licensed mental health practitioner privilege.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Murray, Delvin and Kline).

Senate Committee on Judiciary

House Committee on Judiciary

Background: The judiciary has the power to compel witnesses to appear before the court and testify in judicial proceedings. However, the common law and statutory law recognize exceptions to compelled testimony in some circumstances, including testimonial privileges. Privileges are recognized when certain classes of relationships or communications within those relationships are deemed of such societal importance that they should be protected.

The Washington Legislature has established a number of testimonial privileges in statute, including communications between the following persons: (1) spouses or domestic partners; (2) attorney and client; (3) clergy and penitent; (4) physician and patient; (5) psychologist and client; (6) optometrist and client; (7) law enforcement peer support counselor and a law enforcement officer; and (8) sexual assault advocate and victim.

Licensed mental health counselors, marriage and family therapists and social workers currently are required to hold information received in the rendering of professional services as confidential, with some specified exceptions. However, mental health counselors', marriage and family therapists' and social workers' communications with their clients are not currently afforded testimonial privilege.

Summary: Mental health counselors, independent clinical social workers, and marriage and family therapists licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the counselor in a professional capacity when the information was necessary to enable the counselor to render professional services to those persons.

Exceptions to the testimonial privilege include (1) the client provides written authorization to disclose the information or to testify; (2) the client brings charges against the mental health practitioner; (3) the Secretary of Health subpoenas information pursuant to a complaint or report under the Uniform Disciplinary Act; (4) the information is required to be disclosed under statutory mandatory reporting provisions; and (5) the practitioner reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of an individual, however there is no obligation to disclose in this situation.

Votes on Final Passage:

Senate	49	0	
House	97	0	(House amended)
Senate	44	1	(Senate concurred)

Effective: July 26, 2009

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

WA F. B. Rep., 2010 Reg. Sess. S.B. 5931

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WA S. B. Rep., 2009 Reg. Sess. S.B. 5931

Washington Senate Bill Report, 2009 Regular Session, Senate Bill 5931

February 20, 2009
Washington Senate
Sixty-first Legislature, First Regular Session, 2009

As Reported by Senate Committee On:

Judiciary, February 20, 2009

Title: An act relating to mental health counselor privilege.

Brief Description: Regarding mental health counselor privilege.

Sponsors: Senators Murray, Delvin and Kline.

Brief History:

Committee Activity: Judiciary: 2/17/09, 2/20/09 [DPS].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5931 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Regala, Vice Chair; Carrell, Hargrove, Kohl-Welles, Roach and Tom.

Staff: Kim Johnson (786-7472)

Background: The judiciary has the power to compel witnesses to appear before the court and testify in judicial proceedings. However, the common law and statutory law recognize exceptions to compelled testimony in some circumstances, including testimonial privileges. Privileges are recognized when certain classes of relationships or communications within those relationships are deemed of such societal importance that they should be protected.

The Washington Legislature has established a number of testimonial privileges in statute, including communications between the following persons: (1) spouses or domestic partners; (2) attorney and client; (3) clergy and penitent; (4) physician and patient; (5) psychologist and client; (6) optometrist and client; (7) law enforcement peer support counselor and a law enforcement officer; and (8) sexual assault advocate and victim.

Licensed mental health counselors, marriage and family therapists and social workers currently are required to hold information received in the rendering of professional services as confidential, with some specified exceptions. However, mental health counselors', marriage and family therapists' and social workers' communications with their clients are not currently afforded testimonial privilege.

Summary of Bill (Recommended Substitute): Mental health counselors, independent clinical social workers, and marriage and family therapists licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the counselor in a professional capacity when the information was necessary to enable the counselor to render professional services to those persons.

Exceptions to the testimonial privilege include (1) the client provides written authorization to disclose the information or to testify; (2) the client brings charges against the mental health practitioner; (3) the Secretary of Health subpoenas information pursuant to a complaint or report under the Uniform Disciplinary Act; (4) the information is required to be disclosed under statutory mandatory reporting

EXHIBIT 9

provisions; and (5) the practitioner reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of an individual, however there is no obligation to disclose in this situation.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Substitute): Licensed independent clinical social workers and licensed marriage and family therapists are also provided testimonial privilege.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Original Bill: PRO: The intent of the bill is to also include licensed independent clinical social workers and licensed marriage and family therapists. Licensed clinical psychotherapists have privilege in 47 other states. You should also note that we have privilege under federal law. This is an important issue for mental health counselors, marriage and family therapists, and independent clinical social workers to be able to really help their clients without the fear of any information they've disclosed being divulged in a court of law. Licensed psychotherapists have privilege in 48 other states. Privacy and privilege is a cornerstone of the work that we do. I've had people be shocked by the fact that we do not have privilege and subsequently refuse treatment.

Persons Testifying: PRO: Laura Groshong, Washington State Society for Clinical Social Work; Adrian R. Magnuson-Whyte, Washington Mental Health Counselors Association; Carey Morris, Marriage and Family Therapists.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

WA S. B. Rep., 2009 Reg. Sess. S.B. 5931

WA H.R. B. An., 2009 Reg. Sess. S.B. 5931

Washington Bill Analysis, 2009 Regular Session, Senate Bill 5931

March 25, 2009

Washington House of Representatives, Office of Program Research
Sixty-first Legislature, First Regular Session, 2009

Judiciary Committee

SSB 5931

Title: An act relating to licensed mental health practitioner privilege.

Brief Description: Regarding licensed mental health practitioner privilege.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Murray, Delvin and Kline).

Brief Summary of Substitute Bill

- Establishes an evidentiary privilege for licensed mental health counselors, licensed marriage and family therapists, and licensed independent clinical social workers.
- Moves the provision requiring these providers to maintain the confidentiality of client information from the licensing chapter covering these providers to the chapter governing evidentiary privileges in legal proceedings.

Hearing Date: 3/25/09

Staff: Edie Adams (786-7180)

Background:

Mental health counselors, marriage and family therapists, and social workers are licensed by the Department of Health. Licensed social workers include independent clinical social workers and advanced social workers. These licensed providers must maintain the confidentiality of information received from their clients that was necessary in providing professional services to them. There are exceptions when: (1) the client authorizes the release; (2) the client brings charges against the licensee; (3) the Secretary of Health subpoenas the records; (4) the licensee must report child abuse, vulnerable adult abuse, or testimony and records at a probable cause hearing regarding involuntary detention; or (5) the licensee reasonably believes that disclosure will avoid or minimize an imminent danger to the client or another person.

Although this confidentiality statute contains a reference to "privilege," the statute does not explicitly state that there is an evidentiary privilege for client communications received by these licensed providers in the course of providing professional services to the client.

The judiciary has inherent power to compel witnesses to appear and testify in judicial proceedings so that the court will receive all relevant evidence. However, the common law and statutory law recognize evidentiary or testimonial privileges as exceptions to compelled testimony. Privileges are generally disfavored in the common law because they impede the court's truth-finding function. Privileges are recognized when certain classes of relationships or communications within those relationships are deemed of such importance that they should be protected.

Washington statutory law establishes a number of privileges, including privileges for communications between the following persons: (1) clergy and penitent; (2) attorney and client; (3) spouses or domestic partners; (4) physician and patient; (5) psychologist and client; (6) optometrist and client; (7) law

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Washington House Bill Analysis, 2009 Reg. Sess. S.B. 5931, Washington House Bill...

enforcement and firefighter peer support counselor and a law enforcement officer or firefighter; and (8) sexual assault advocate or domestic violence advocate and victim.

Summary of Bill:

The provision requiring licensed mental health counselors, licensed marriage and family therapists, and licensed social workers to maintain the confidentiality of information received from their clients is removed from the licensing chapter covering these providers.

The statute governing evidentiary privileges in legal proceedings is amended to provide that licensed mental health counselors, licensed marriage and family therapists, and licensed independent clinical social workers may not disclose or be compelled to testify about information received from their clients that was necessary in providing professional services to them, subject to listed exceptions. Licensed advanced social workers are not covered by the privilege and the requirement to maintain the confidentiality of client information.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

WA H.R. B. An., 2009 Reg. Sess. S.B. 5931

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WA H.R. B. Rep., 2009 Reg. Sess. S.B. 5931

Washington House Bill Report, 2009 Regular Session, Senate Bill 5931

March 26, 2009

Washington House of Representatives
Sixty-first Legislature, First Regular Session, 2009

As Reported by House Committee On:

Judiciary

Title: An act relating to licensed mental health practitioner privilege.

Brief Description: Regarding licensed mental health practitioner privilege.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Murray, Delvin and Kline).

Brief History:

Committee Activity:

Judiciary: 3/25/09, 3/26/09 [DPA].

Brief Summary of Substitute Bill

(As Amended by House)

- Establishes an evidentiary privilege for licensed mental health counselors, licensed marriage and family therapists, and licensed independent clinical social workers.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 10 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

Staff: Edie Adams (786-7180)

Background:

Mental health counselors, marriage and family therapists, and social workers are licensed by the Department of Health. Licensed social workers include independent clinical social workers and advanced social workers. These licensed providers must maintain the confidentiality of information received from their clients that was necessary in providing professional services to them. There are exceptions when: (1) the client authorizes the release; (2) the client brings charges against the licensee; (3) the Secretary of Health subpoenas the records; (4) the licensee must report child abuse, vulnerable adult abuse, or testimony and records at a probable cause hearing regarding involuntary detention; or (5) the licensee reasonably believes that disclosure will avoid or minimize an imminent danger to the client or another person.

Although this confidentiality statute contains a reference to "privilege," the statute does not explicitly state that there is an evidentiary privilege for client communications received by these licensed providers in the course of providing professional services to the client.

The judiciary has the inherent power to compel witnesses to appear and testify in judicial proceedings so that the court will receive all relevant evidence. However, the common law and statutory law recognize evidentiary or testimonial privileges as exceptions to compelled testimony. Privileges are generally

disfavored in the common law because they impede the court's truth-finding function. Privileges are recognized when certain classes of relationships or communications within those relationships are deemed of such importance that they should be protected.

Washington statutory law establishes a number of privileges, including privileges for communications between the following persons: (1) clergy and penitent; (2) attorney and client; (3) spouses or domestic partners; (4) physician and patient; (5) psychologist and client; (6) optometrist and client; (7) law enforcement and firefighter peer support counselor and a law enforcement officer or firefighter; and (8) sexual assault advocate or domestic violence advocate and victim.

Summary of Amended Bill:

Privilege is established for licensed mental health counselors, licensed marriage and family therapists, and licensed independent clinical social workers. These professionals may not disclose or be compelled to testify about information received from their clients that was necessary in providing professional services to them. The privilege is subject to the same exceptions that apply under the statute that requires these professionals to maintain the confidentiality of this information.

Amended Bill Compared to Original Bill:

The amended bill restores the confidentiality provision to the licensing statute governing mental health counselors, marriage and family therapists, and social workers.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The privilege created in this bill brings the state law in line with federal law and is an important protection for counselors and therapists and their clients. It is inappropriate to require these professionals to testify about confidential communications. This bill is especially important for veterans who often fear that the decisions they made while performing their duties on behalf of this country would not be understood by those who have not been in the position of making quick life and death decisions. They are fearful to talk about those decisions even though the treatment they are seeking is primarily to deal with the mental and spiritual concerns that result from their service to this country. Domestic violence victims also have a fear that the abuser will find out they are receiving mental health treatment and will use the court process to continue the abuse.

Confidentiality and privilege are both mentioned in the current law and most people are surprised that counselors, therapists, and their clients are not protected by a privilege. Therapy and counseling are supposed to provide a safe and confidential way to deal with sensitive issues. However, therapists and counselors are being called to testify in court about confidential communications often in family law cases that involve custody disputes between parents. As a result, a parent may file disciplinary charges against the therapist or counselor, putting his or her professional license in jeopardy.

Persons Testifying: Carey Morris, Washington Association for Marriage and Family Therapy; Hoyt Suppes, National Association of Social Workers, Washington Chapter; and Adrian Magnuson-White, Washington Mental Health Counselors Association.

Persons Signed In To Testify But Not Testifying: None.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN
MAGNEY and EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM, M.D.; AUMI I.
CORN, M.D.; LIQUN YIN, M.D; and
INCYTE DIAGNOSTICS, a
Washington Corporation

Defendants.

NO. 17-2-00266-1

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER

Defendants DR. TRUC PHAM, M.D. and INCYTE DIAGNOSTICS (collectively
"Defendants") by and through their attorneys of record, Stephen M. Lamberson and Jeffrey
R. Galloway of Etter, McMahon, Lamberson, Van Wert & Oreskovich, P.C., hereby submit
the following response in opposition to Plaintiffs' Motion for Protective Order.

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I. FACTS

- 1. On January 24, 2017, Plaintiffs’ filed a complaint for Medical Negligence and Damages. (Ct. Rec. No. 1.)
- 2. In the Complaint, the Plaintiffs’ allege damages for “mental anguish”. (*Id* at ¶ 8.1.)
- 3. On January 23, 2018 Defendants’ served the Plaintiffs’ with Second Interrogatories and Requests for Production requesting Plaintiffs’ marital counseling records. (Ct. Rec. No. 80 at ¶ 5, Ex. 4.)
- 4. During her deposition, Emily Magney revealed that she has seen a marriage counselor.

II. ARGUMENT

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” CR 26(b)(1); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 856, 292 P.3d 779 (2013). When a plaintiff claims emotional distress, mental health records and provider testimony are relevant because the plaintiff’s mental health is at issue. *Lodis*, 172 Wn. App. at 856, 292 P.3d 779.

A. The language of RCW 5.60.060(9)(a)-(e) is not dispositive in light of widespread jurisprudence recognizing waiver of various privileges upon allegations of mental anguish.

RCW 5.60.060(9)(a)-(e) does not, by its plain language, include an exception for waiver of privilege upon the filing of an action for personal injuries or wrongful death. Compare RCW 5.60.060(9)(a)-(e), with RCW 5.60.060(4)(b). However, that does not end the inquiry as to whether a plaintiff, upon allegations of mental anguish, waives the privilege protecting marital counseling records, which are directly relevant to establishing a baseline

1 for the emotional and mental health of the Plaintiffs, as well as causation and damages. See
2
3 *Lodis*, 172 Wn. App. at 856, 292 P.3d 779.

4 Plaintiffs devote significant argument pertaining to the language of RCW 5.60.060 and
5 elementary principles of statutory interpretation. In doing so, Plaintiffs indicate that “the
6 purpose of the psycho-therapist privilege (codified in Washington as RCW 5.60.060(9)), as
7 explained by the United States Supreme Court, indicates that RCW 5.60.060(9) should not be
8 automatically waived when a person brings a personal injury suit.” See Memo in Support of
9
10 Pltf.’s Mot. for a Protective Order at 12. While no Washington court has yet addressed the
11
12 issue of whether the privilege recognized by RCW 5.60.060(9) is waived upon allegations of
13
14 mental anguish, courts in this state have long recognized such a waiver with regard to the
15
16 physician-patient relationship and psychologist-patient privilege. See *Lodis*, 172 Wn. App. at
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18 855, 292 P.3d 779 (waiver of psychologist-patient privilege); see also *Carson v. Fine*, 123
19
20 Wn.2d 206, 213, 867 P.2d 610 (1994) (waiver of physician-patient privilege). In fact, even
21
22 before the legislature codified the waiver rule with respect to the physician-patient privileges,
23
24 Washington courts recognized such waivers when the plaintiff put his or her medical
25
26 condition at issue in a judicial proceeding. See *Carson*, 123 Wn.2d at 213, 867 P.2d 61
27
28 (noting that the waiver found in RCW 5.60.060(4)(b) “is a codification of existing
29
30 *Washington case law* which holds that waiver occurs even without plaintiff’s express
31
32 consent.”).

In addition to Washington authority, a substantial number of courts outside of this state
have expressly recognized a waiver of the psychotherapist-patient privilege, which the

1 Plaintiffs concede is governed by RCW 5.60.060(9), in circumstances similar to this case.
2
3 See *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (“Numerous courts since
4 *Jaffee* have concluded that, similar to attorney-client privilege that can be waived when the
5 client places the attorney's representation at issue, a plaintiff waives the psychotherapist-
6 patient privilege by placing his or her medical condition at issue.”); see also *Arzola v.*
7 *Reigosa*, 534 So. 2d 883, 883 (Fla. Dist. Ct. App. 1988) (directing production of
8 psychotherapist-patient privileged records once plaintiff required “post-accident mental
9 anguish damages.”); *Dudley v. Stevens*, 338 S.W.3d 774, 777 (Ky. 2011) (“It would be
10 fundamentally unfair to permit Appellant to allege and prove mental anguish caused by the
11 negligence while denying the Real Parties in Interest from reviewing her mental health
12 records for the possibility of pre-existing mental conditions.”); *Doe v. Oberweis Dairy*, 456
13 F.3d 704, 718 (7th Cir. 2006) (“If a plaintiff by seeking damages for emotional distress
14 places his or her psychological state in issue, the defendant is entitled to discover any records
15 of that state.”); *Maynard v. City of San Jose*, 37 F.3d 1396, 1402 (9th Cir. 1994) (“Maynard
16 waived any privilege protecting his psychological records when he put his emotional
17 condition at issue during the trial.”).

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26 Despite the assertions of Plaintiffs, the plain language of RCW 5.60.060 is not
27 dispositive in this Court's analysis as to whether the privilege at issue herein was waived by
28 the Plaintiffs' allegations of mental anguish. As will be described more fully below,
29 Washington courts have recognized such waivers in the context of the physician-patient and
30 psychologist-patient privileges. Moreover, many courts outside of the state have applied the
31
32

1 waiver rule to the psychotherapist-patient relationship. Because the language of the statute is
2 not dispositive, this court should deny Plaintiffs' Motion for a Protective Order.
3

4 **B. The Plaintiffs waived privilege by claiming mental anguish in their Complaint.**

5 The Complaint filed by the Plaintiffs alleges damages for "mental anguish". (Compl. at
6 ¶ 8.1.) In claiming "mental anguish", the Plaintiffs have made a claim for emotional harm.
7
8 See *Lodis*, 172 Wn. App. at 856, 292 P.3d 779. Mental health treatment is relevant for a
9 claim of emotional harm and waives any privilege of mental health records. See *id.*
10
11

12 Washington statutes protect confidential physician-patient (RCW 5.60.060(4)),
13 psychologist-patient (RCW 18.83.110) and marriage therapist (RCW 5.60.060(9)),
14 communications. However, Washington courts have carved out an exception for when
15 plaintiffs' put their mental health at issue, regardless of what type of mental health specialist
16 they see. See *Lodis*, 172 Wn. App. at 856, 292 P.3d 779 (Plaintiffs waive their psychologist-
17 patient privilege when they voluntarily put their physical or mental health at issue in a
18 judicial proceeding.); *Carson*, 123 Wn.2d at 213-14, 867 P.2d 610 ("[A] patient voluntarily
19 placing his or her physical or mental condition in issue in a judicial proceeding waives the
20 privilege with respect to information relative to that condition.").
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26 In *Lodis*, the court held that "when a plaintiff puts his mental health at issue by alleging
27 emotional distress, he waives his psychologist-patient privilege for relevant mental health
28 records." *Lodis*, 172 Wn. App. at 856, 292 P.3d 779. The court went on to state that "the
29 defendant is entitled to discover any records relevant to the plaintiff's emotional distress."
30
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32

1 *Id.*¹

2 The Plaintiffs' "[w]aiver occurs because the purpose of the privilege no longer exists."

3
4 *Carson*, 123 Wn.2d at 214, 867 P.2d 610. In *Carson*, the court aptly stated:

5
6 The whole reason for the privilege is the patient's supposed unwillingness that
7 the ailment should be disclosed to the world at large; hence the bringing of a
8 suit in which the very declaration, and much more the proof, discloses the
9 ailment to the world at large, is of itself an indication that the supposed
10 repugnancy to disclosure does not exist.

11 *Id.* (quoting 8 J. Wigmore Evidence § 2389, at 855 (1961)).

12 In this case, both in depositions and through their Complaint, the Plaintiffs have placed
13 their mental health at issue in the case, and, thereby put it out for the "world at large". *See id.*

14 As such, they are not entitled to claim privilege to certain mental health records. *See Lodis*,
15 172 Wn. App. at 856, 292 P.3d 779.

16
17
18 In their Motion for a Protective Order, Plaintiffs raise the point that they are only
19 seeking damages for mental anguish relating to Logan and his alleged misdiagnosis, and thus,
20 the marriage counseling records have no relevance. Notably however, this fact alone has no
21 effect on the discovery of the marriage counseling records. *See Lodis*, 172 Wn. App. at 856,
22 292 P.3d 779 (broadly holding that "[w]hen Lodis made a claim for emotional harm
23 damages, he waived his psychologist-patient privilege, and the records related to his mental
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28 ¹ The Plaintiffs place substantial reliance upon *Jaffee v. Redmond*, 518 U.S. 1, 10-11, 116 S.
29 Ct. 1923, 135 L. Ed. 2d 337 (1996), under which the Supreme Court of the United States
30 emphasized the importance of confidentiality and trust in a psychotherapist-patient
31 relationship. Nevertheless, the *Lodis* court, with citation to *Jaffee*, held that psychologist-
32 patient records become immediately discoverable when a Plaintiff puts his or her mental
health at issue, despite the confidential nature of the relationship.

1 health became discoverable.”). By alleging emotional harm, Plaintiffs have put their entire
2 emotional and mental health at issue in this case. *See id.* In doing so, records pertaining to
3 the emotional and mental health of the Plaintiffs, such as those sought herein, became
4 discoverable by operation of law. *See id.* Accordingly, because the records sought are
5 directly “relevant in showing causation or the degree of the alleged emotional distress” they
6 are subject to discovery. *Id.*; *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636–37 (N.D. Cal. 2003).

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10 The Plaintiffs’ Motion for a Protective Order should be denied.

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12 **C. This case is still in the discovery phase.**

13 The Washington State Supreme Court has noted that the aim of the liberal federal
14 discovery rules is to “make a trial less a game of blindman's bluff and more a fair contest
15 with the basic issues and facts disclosed to the fullest practicable extent.” *Gammon v. Clark*
16 *Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d
17 685 (1985) (citing *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983,
18 2 L. Ed. 2d 1077 (1958)). The availability of liberal discovery means that civil trials:
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22 no longer need be carried on in the dark. The way is now clear ... for the
23 parties to obtain the fullest possible knowledge of the issues and facts before
24 trial.

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26 *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).

27 This case is still in the discovery phase, therefore, the proper time for the plaintiffs to
28 object to the relevance of their marriage counseling records is at trial. *See Lodis*, 172 Wn.
29 App. at 856, 292 P.3d 779. “The standard of relevance for purposes of discovery is much
30 broader than the standard required under the evidence rules for admissibility at trial . . . [and]
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so long as ‘the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence’”, it is discoverable. *See Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984) (quoting CR 26(b)(1)); *see also Matter of Firestorm 1991*, 129 Wn.2d 130, 152, 916 P.2d 411 (1996) (“the purpose of civil discovery is to disclose to the opposing party all information that is relevant, [or] potentially relevant.”).

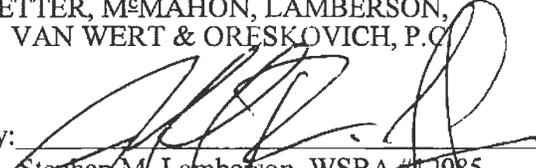
Here, this case is still in the discovery phase. The liberal rules of discovery instruct that relevant, or even potentially relevant, evidence is subject to disclosure. By placing mental health at issue in this case, the Plaintiffs records pertaining to mental health became directly relevant to causation and the degree of damages. Accordingly, any objections and rulings thereon, as to the relevance of such material should properly be made at a later date once it has been disclosed.

III. CONCLUSION

Based on the foregoing argument and authority, Defendants request that this Court enter an order DENYING Plaintiffs’ Motion for Protective Order.

RESPECTFULLY SUBMITTED this 20 day of April, 2018.

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.

By: 
Stephen M. Lamberson, WSBA #12985
Jeffrey R. Galloway, WSBA #44059
*Attorneys for Defendants Dr. Pham and Incyte
Diagnostics*

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CERTIFICATION OF SERVICE

I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Mark Kamitomo
Collin Harper
The Markam Group, Inc. P.S.
421 West Riverside, Suite 1060
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of April 2018, in Spokane, Washington.



Margie Blaine

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AYUMI I. CORN,
M.D., LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. 17-2-00266-1

REPLY IN SUPPORT OF MOTION
FOR A PROTECTIVE ORDER RE:
EMILY AND BRIAN MAGNEY'S
MARRIAGE COUNSELING
RECORDS

REPLY

Plaintiffs submit the following Reply in Support of their Motion for a Protective Order Re: Emily and Brian Magney's Marriage Counseling Records. Lacking any authority, Defendants have argued that this Court should look past the plain language of RCW § 5.60.060(9) (the counselor/therapist privilege) to the statutory language of a different privilege, the physician-patient privilege, and apply the automatic waiver provision found

Reply in Support of Pltfs. Mot. for a Protective Order - 1

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1 therein, RCW § 5.60.060(4)(b). In making this argument, Defendants have incorrectly
2 argued that prior to the Washington State Legislature (“Legislature”) enacting the
3 automatic waiver in 1986, Washington courts recognized such waivers when the plaintiff
4 put his or her medical condition at issue in a judicial proceeding. *Def. Resp. to Plaintiffs’ Mot.*
5 *for a Prot. Order*, April 20, 2018, p. 3, lines 19-26. Defendants’ statement is simply incorrect;
6 prior to the enactment of the automatic waiver in 1986, the Washington State Supreme
7 Court held on multiple occasions that the physician-patient privilege was not waived until
8 the plaintiff introduced testimony from their own physician regarding a given condition in
9 support of plaintiff’s case. Simply alleging an injury did not waive the physician-patient
10 privilege.
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14 This distinction is significant, because as with the pre-1986 physician-patient
15 privilege, it is undisputed that RCW § 5.60.060(9) contains no provision for waiver other
16 than waiver by consent of the patient. Thus, contrary to Defendants’ claim, the history of
17 the physician-patient privilege supports Plaintiffs’ argument that the Magney’s marital
18 counseling records are privileged and should not be disclosed. Plaintiffs therefore
19 respectfully submit that this Court should enforce the plain language of RCW § 5.60.060(9)
20 by holding that the Magneys have not waived the privilege to their marital counseling
21 records by bringing this suit and claiming damages for mental anguish arising from the
22 injury to their child, Logan, and grant Plaintiffs’ motion for a protective order.
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1 A. The History Of The Physician-Patient Privilege Demonstrates That
2 The Court Should Not Look Past The Express Language Of RCW §
3 5.60.060(9) To Find That The Magneys Have Waived The Privilege To
4 Their Marital Counseling Records.

5 Contrary to the argument of Defendants, it is the Legislature, not the courts of this
6 state that created the physician-patient privilege and the provision for automatic waiver.

7 Prior to 1986, the physician-patient privilege (RCW § 5.60.060(4)) was as follows:

8 A regular physician or surgeon shall not, without the consent of his patient,
9 be examined in a civil action as to any information acquired in attending such
10 patient, which was necessary to enable him to prescribe or act for the patient.

11 Phipps v. Sasser, 74 Wn.2d 439, 450, 445 P.2d 624 (1968). In 1966, the Washington State
12 Supreme Court first examined the issue of whether a party waived the physician-patient
13 privilege in a personal injury suit by something short of introducing testimony from their
14 own physician regarding an injury or illness in the case, Bond v. Indep. Order of Foresters,
15 69 Wn.2d 879, 879, 421 P.2d 351 (1966).

17 In the Bond case, a husband and wife brought a personal injury suit against the
18 wife's employer after the wife was injured by a falling pane of glass at her workplace. Id.
19 During the wife's deposition, she was asked and **provided the names of two physicians**
20 **who had treated her for the injuries she sustained in the accident.** Id. at 879 – 880
21 **[emphasis added]**. The defendants then took the deposition of one of the physicians,
22 during which the plaintiffs' counsel refused to permit the physician to answer questions
23 regarding conversations with and treatment of the patient, citing the physician-patient
24 privilege. Id. at 880. The Washington State Supreme Court held that bringing suit for

1 personal injury did not result in an automatic waiver of the physician-patient privilege
2 because such a waiver was not included in the statutory text of the privilege. Id. at 880-881.

3 In so holding, the Washington State Supreme Court explained,

4 The bringing of an action for personal injuries does not constitute a waiver of
5 the statute. **The legislature expressly provided that a regular physician or
6 surgeon shall not be examined [i]n a civil action as to any information
7 acquired in attending a patient, without such patient's consent. This
8 legislative enactment is a clear and positive mandate.**

9 Id. at 881 [**emphasis added**]. The Washington State Supreme Court acknowledged that in
10 other jurisdictions, the physician-patient privilege was automatically waived upon the
11 institution of a personal injury lawsuit, but reasoned,

12 We are aware that in several jurisdictions the physician-patient privilege
13 statutes specifically provide that the privilege is waived when a civil action
14 for personal injuries is instituted. **Whether RCW 5.60.060(4) should be so
15 amended is a legislative function which rests within the sole discretion of
16 the legislature.**

17 Id. at 882 [**emphasis added**]. Thus, the Bond case clearly demonstrates that Defendants'
18 argument that Washington courts recognized waiver by a plaintiff of the physician-patient
19 privilege simply by putting a medical condition at issue is incorrect.

20 The same issue was again addressed by the Washington State Supreme Court in the
21 case, Phipps v. Sasser, 74 Wn.2d 439, 445 P.2d 624 (1968). In the Phipps case, two different
22 Plaintiffs who had each brought personal injury actions refused to permit the depositions
23 of their treating physicians, citing the physician-patient privilege. Phipps, 74 Wn.2d at 441-
24 442. In both instances, the physicians had provided treatment for the injuries alleged to be
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1 the result of the defendants' negligence. Id. Once again, the Washington State Supreme
2 Court stated that bringing a lawsuit for personal injury did not automatically waive the
3 physician-patient privilege because such a waiver was not set forth in the statute. Id. at 445.
4 Instead, the Court explained that a plaintiff did not waive the physician-patient privilege
5 unless a plaintiff intended to introduce a physician's testimony in support of their own
6 case, which could be indicated by the disclosure of the physician as a witness by the
7 plaintiff. Id. at 446. In other words, the physician-patient privilege was only waived once
8 the plaintiff indicated they intended to introduce the testimony of their physician in
9 support of their own case, thereby consenting to waiver of the physician-patient privilege.
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12 The reasoning of the Washington State Supreme Court was again, that the physician-
13 patient privilege was created by statute, not common-law, thus only the Legislature could
14 create an automatic waiver when a person brought a personal injury lawsuit. Id. at 445. The
15 Court further stated,
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18 **The rule of privilege embodied in RCW 5.60.060(4) reflects the considered**
19 **judgment of one branch of our tripartite-structured government,**
20 **traditionally regarded as constitutionally separate, independent and equal.**
21 **Such legislative judgments merit, even require, the exercise of judicial self-**
22 **restraint of a very high order.⁵ It is our duty when confronted with a valid**
23 **act such as this to give effect to the legislative intent embodied therein,**
24 **refraining from substituting our judgment in the matter, whatever that**
25 **may be, for that of the legislature.**

26 Id. at 444 [**emphasis added**]. It was also noted that the Legislature understood the contours
27 of the physician-patient privilege and its waiver because it had enacted other legislation
28 instituting the waiver of the privilege in worker's comp. claims but made no such change

1 applicable to personal injury suits. *Id.* at 445. Finally, the Legislature noted that if a change
2 to the physician-patient privilege were necessary, such a change should come from the
3 Legislature who enacted the statutory privilege, rather than from a court. *Id.* at 448.

4 Up until 1986, when the Legislature added the 90-day automatic waiver, a party did
5 not waive the physician-patient privilege unless and until they introduced testimony from
6 their own physician in support of their case. *Bond, Phipps, supra*. This was because the
7 Legislature had created the physician-patient privilege and the plain language of the
8 privilege did not include a waiver in any circumstances short of the plaintiff relying on
9 their own physician in support of their case. As a result, the Washington State Supreme
10 Court was unwilling to carve out an automatic waiver to the physician-patient privilege
11 when a party brought a lawsuit for personal injury. Instead, the Court left it up to the
12 Legislature to carve out such an exception.

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16 As with the pre-1986 physician-patient privilege, the Legislature did not include an
17 automatic waiver to RCW § 5.60.060(9) when a party brings a personal injury lawsuit in the
18 plain language of RCW § 5.60.060(9). RCW § 5.60.060(9)(a-e). Similar to the pre-1986
19 physician-patient privilege RCW § 5.60.060(9) explicitly states that a counselor, social
20 worker, or therapist may not be compelled to disclose or testify regarding information
21 obtained from the person(s) who were treated, without the consent of the person treated.
22 RCW § 5.60.060(9), *supra*. Here, the Magneys have not expressly consented to waiver of the
23 privilege to their marital counseling records, nor have they implicitly consented to such a
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1 waiver by relying on the testimony of their marital counselors, or any other type of
2 counselor or therapist, in support of their claims. Put more succinctly, the Magneys have
3 not placed their marital counseling records at issue nor do they intend to have any of the
4 treating counselors testify at trial. This Court should grant Plaintiffs' Motion for a
5 Protective Order and refrain from carving out an exception to RCW § 5.60.060(9) not set
6 forth in the plain language of the statute just as the Washington State Supreme Court
7 refused to do for the physician-patient privilege.
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10 B. The Case Law Cited By Defendants Does Not Support Finding That
11 The Magneys Have Waived The Privilege Of Their Marital Counseling
12 Records.

13 Defendants cite to only two Washington cases in their Response, Lodis v. Corbis and
14 Carson v. Fine, neither of which supports that the Magneys have waived the privilege to
15 their marital counseling records found in RCW § 5.60.060(9) because neither case addresses
16 RCW § 5.60.060(9). The Carson case deals solely with the physician-patient privilege (RCW
17 § 5.60.060(4)) and Lodis deals with both the physician-patient privilege and the
18 psychologist-patient privilege (RCW § 18.83.110). As is demonstrated below, neither case
19 supports Defendants' argument that this Court should look outside the plain language of
20 RCW § 5.60.060(9) in order to determine that the Magneys have waived the privilege to
21 their marital counseling records.
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24 Carson v. Fine actually supports the argument set forth herein that the plain
25 language of RCW § 5.60.060(9) is dispositive as to whether the Magneys have waived the
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1 counselor/ therapist privilege, and that they have not done so by bringing this suit. In
2 Carson v. Fine, the issue addressed by the Washington State Supreme Court was whether
3 or not a plaintiff who had agreed to a court order waiving her physician-patient privilege,
4 "... with regard to all physicians who had provided her care or treatment,..." had waived
5 her physician-patient privilege as to adverse testimony from one of her treating physicians.
6 Carson v. Fine, 123 Wn.2d 206, 210-12, 867 P.2d 610 (1994). The Washington State Supreme
7 Court noted that the plaintiff had brought her suit prior to amendment of the physician-
8 patient privilege in 1986 to include automatic waiver thus she had waived her privilege not
9 by bringing suit, but by agreeing to the court order waiving her physician-patient privilege.
10 Id. at 213, fn. 1.

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14 The additional language in Carson regarding the effect of the 1986 amendment, a
15 sentence of which Defendants quoted out of context in their Response, is dicta because the
16 1986 amendment was not at issue in the Carson case. Regardless, this dicta supports
17 Plaintiffs' position and not Defendants'. Defendants quote the following from Carson, "The
18 amendment is a codification of existing Washington case law which holds that waiver
19 occurs even without plaintiff's express consent." *Def. Resp. to Plaintiffs' Mot. for a Prot.*
20 *Order*, April 20, 2018, p. 3, lines 27-29. However, Defendants leave out the next sentence in
21 the decision which provides an explanation of the circumstances in which the physician-
22 patient privilege was waived without a plaintiff's express consent prior to the 1986
23 amendment. The sentences together read:
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28 *Reply in Support of Pltfs. Mot. for a Protective Order - 8*

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1 The amendment is a codification of existing Washington case law which
2 holds that waiver occurs even without plaintiff's express consent.
3 Specifically, **this court has held that the introduction by the patient of
4 medical testimony describing the treatment and diagnosis of an illness
5 waives the privilege as to that illness, and the patient's own testimony to
6 such matters has the same effect.** *Randa*, at 421, 312 P.2d 640; *McUine v.*
Fuqua, 42 Wash.2d 65, 76, 253 P.2d 632 (1953).

6 Carson, 123 Wn.2d at 213 [emphasis added].

7 The sentence purposefully omitted by Defendants clearly shows that the Court in
8 Carson was restating the well-established rule, set forth above, that prior to the 1986
9 amendment of the physician-patient privilege, a plaintiff did not waive the privilege by
10 bringing suit until they introduced medical testimony describing the treatment and
11 diagnosis of the illness, i.e. testimony from their own physician. *Id.*; see also Randa v. Bear,
12 50 Wn.2d 415, 312 P.2d 640 (1957)(where the plaintiff waived the physician-patient privilege
13 without expressly doing so by bringing suit to enforce a contract for medical services where
14 the plaintiff knew that in order to meet her burden she, and likely her physician, would
15 have to testify that the medical treatment in question was necessary and that the charges
16 for such treatment were reasonable) and McUine v. Fuqua, 42 Wn.2d 65, 76, 253 P.2d 632
17 (1953)(where the plaintiff waived the physician-patient privilege without expressly doing so
18 by introducing the testimony of three of his physicians regarding the plaintiff's ailments
19 and disabilities in support of his own case). Thus, the Carson case supports Plaintiffs
20 argument that the Court must not look outside the plain language of RCW § 5.60.060(9) in
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1 determining whether the Magneys have waived the counselor/ therapist privilege because
2 the plain language of the statute does not provide for a waiver.

3 Similarly, the Lodis case is of no assistance to Defendants. First, the court in Lodis
4 was addressing different privileges than the counselor/ therapist privilege. Second, the
5 court based its decision on the fact that the Washington State Supreme Court had
6 previously concluded that the psychologist-patient privilege afforded a patient the same
7 protections as the physician-patient privilege, citing the case Petersen v. State, 100 Wn.2d
8 421, 429, 671 P.2d 230 (1983). Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 854–55, 292
9 P.3d 779 (2013). At the time the Peterson case was decided in 1983, the protections provided
10 by the physician-patient privilege and psychologist-patient privilege were essentially the
11 same as there was no provision for automatic waiver of the physician-patient privilege in
12 RCW § 5.60.060(4). Compare pre-1986 RCW § 5.60.060(4) with RCW § 18.83.110. Thus,
13 contrary to Defendants' assertion otherwise, Lodis does not support Defendants' position
14 that the language of RCW § 5.60.060(9) is not dispositive of whether waiver has occurred.
15 The plain language of the physician-patient privilege, RCW § 5.60.060(4), and the
16 counselor/ therapist privilege set forth in RCW § 5.60.060(9) has never been similar. When
17 the Legislature enacted RCW § 5.60.060(9) it did so knowing that the exceptions to the
18 privilege set forth in the plain language of RCW § 5.60.060(9) were completely different
19 than the exceptions to the physician-patient privilege, also set forth in RCW § 5.60.060. See,
20 Exhibits 8 – 11 to Pltf's Memo. in Supp. of Mot. for a Prot. Order.

1 Finally, the extra jurisdictional authority cited by the Defendant has no bearing
2 whether the Court should carve out an exception to RCW § 5.60.060(9) that the Legislature
3 did not. Two cases cited by the Defendant, Schoffstall v. Henderson, 223 F.3d 818 and Doe
4 v. Oberweis Dairy, 456 F.3d 704 are cases regarding the federal psychotherapist privilege,
5 which was created by the United States Supreme Court in Jaffee v. Redmond, 518 U.S. 1,
6 10-11, 116 S. Ct. 1923, 1928-29, 135 L. Ed. 2d 337 (1996). They have no application to the
7 Washington State counselor/ therapist privilege created by our Legislature. Two more of
8 the cases, Arzola v. Reigosa, 534 So.2d 883 (Fla. Dist. Ct. App. 1988) and Dudley v. Stevens,
9 338 S.W. 3d 774 (Ky. 2011) are state court cases out of states whose psychotherapist-
10 privilege statutes both contain provisions that the privilege is waived. *See*, Fla. Stat. Ann. §
11 90.503(4)(c)(For communications relevant to an issue of the mental or emotional condition
12 of the patient in any proceeding in which the patient relies upon the condition as an
13 element of his or her claim or defense or, after the patient's death, in any proceeding in
14 which any party relies upon the condition as an element of the party's claim or defense.)
15 *and* KRE 507(c)(3)(If the patient is asserting that patient's mental condition as an element of
16 a claim or defense, or, after the patient's death, in any proceeding in which any party relies
17 upon the condition as an element of a claim or defense.)

18 The case Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th Cir. 1994) is a federal
19 case decided two years prior to the United States Supreme Court's creation of the
20 psychotherapist privilege in the Jaffee case in 1996 and is no longer controlling law

1 regarding the circumstances in which the psychotherapist privilege is waived in the 9th
2 Circuit. See, Fitzgerald v. Cassil, 216 F.R.D. 632, 636 (N.D. Cal. 2003). In fact, the court in
3 Fitzgerald ruled that the federal psychotherapist privilege is only waived if the plaintiff
4 affirmatively relies on communications with the psychotherapist in furtherance of their
5 own case. Id. at 638. The court in Fitzgerald cited several other federal cases which reached
6 the same holding. Id. at 636. Thus, the Maynard case provides no support for Defendants'
7 argument either.
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10 Defendants citation to these extra jurisdictional cases illustrates the fallacy of
11 Defendants' argument that this Court can look outside the plain language of RCW §
12 5.60.060(9) to find that the Magneys have waived their counselor/ therapist privilege by
13 claiming mental anguish for the harm caused to their child. Defendants have failed to cite
14 to a single Washington state case in which a Court found that the counselor/ therapist
15 privilege is waived by anything other than the waivers specifically set forth in the statute.
16
17 The Washington cases Defendants rely upon actually support Plaintiffs' argument that only
18 the Legislature can create a waiver of RCW § 5.60.060(9) in which the privilege is waived by
19 anything other than a plaintiff introducing the testimony of their own counselor/ therapist
20 in support of their case. The federal cases cited to by Defendant are inapplicable because
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22 the federal psychotherapist privilege is court created, not legislatively. Thus, it is within the
23 province of the courts to carve out the waivers to the privilege. The plain language of the
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25 statutory psychotherapist privileges in Florida and Kansas, the states where the remaining
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1 two cases Defendants rely upon are from, differs substantially from the plain language of
2 RCW § 5.60.060(9). In Florida and Kansas, the state legislatures have put specific language
3 in their psychotherapist privilege statutes which provides for waiver where a plaintiff
4 includes their mental health as an element of their claim. The Washington State Legislature
5 has not seen fit to include such a waiver in RCW § 5.60.060(9). As was set forth in the Bond
6 case, it is the function of the Legislature, not the courts, to determine whether RCW §
7 5.60.060(9) should be waived in any circumstances short of the plaintiff introducing the
8 testimony of their own counselor/ therapist in support of their case. Bond, 69 Wn.2d at 879.

11 C. The Court Should Consider The Relevance Of Any Information
12 Within The Magney's Marriage Counseling Records By In-Camera
13 Review Prior To Issuing Any Ruling Finding That The Magneys Must
14 Disclose Their Marital Counseling Records In Order To Maintain
15 Their Claims For Mental Anguish.

16 If the Court is inclined to rule that the Magneys have waived the privilege to their
17 marriage counseling records by claiming damages for mental anguish related to the injury
18 suffered by their child, the Court should review the records in-camera to ensure that only
19 information relevant to the Magney's claims for mental anguish arising out of the
20 misdiagnosis of Logan Magney is discoverable by the Defendants. In the Lodis case cited
21 by Defendants, the Court noted that even in the instance of relevant, discoverable records
22 the court is still free to conduct in-camera review, seal records, and/ or limit the use of such
23 records at trial, to protect the plaintiff's privacy. Lodis, 172 Wn. App. at 855-56. The
24 reasoning of the United States Supreme Court for creating a psychotherapist privilege
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1 demonstrates the basis for the utmost protection of the Magney's privacy interest in their
2 marital counseling records. Jaffee v. Redmond, 518 U.S. 1, 10–11, 116 S. Ct. 1923, 1928–29,
3 135 L. Ed. 2d 337 (1996). In fact, the Lodis case cited to Doe v. Oberweis Dairy, which noted
4 that there is no greater invasion of privacy than to make a plaintiff's psychotherapy records
5 discoverable by a defendant. Lodis, 172 Wn. App. at 855-56, *citing*, Doe, 456 F.3d at 718.
6

7 The Court will find that there is no information contained within the Magney's
8 marital counseling records because the counseling took place before Logan was
9 misdiagnosed with AML and the Magney's claims for mental anguish are limited to mental
10 anguish caused by the misdiagnosis and subsequent treatment of Logan. In-camera review
11 will protect the Magneys privacy interest to the information in their marital counseling
12 records that is irrelevant to this case.
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15 16 CONCLUSION

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18 The Defendants have provided the Court with no basis for looking outside the plain
19 language of RCW § 5.60.060(9) to find that the Magneys waived the counselor/ therapist
20 privilege to their marital counseling records. In fact, the authority cited by Defendants
21 supports Plaintiffs argument that the Magneys have not waived the privilege rather than
22 Defendants' argument to the contrary. For the above stated reasons, and those set forth in
23 within Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Protective Order, the
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1 Court should grant Plaintiffs' Motion and enter a protective order holding that the
2 Magney's marital counseling records are privileged and undiscoverable.
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5 RESPECTFULLY SUBMITTED this 25 day of April, 2018.
6

7 THE MARKAM GROUP, INC., P.S.
8

9
10 By: 
11 MARK D. KAMITOMO, WSBA No. 18803
12 COLLIN M. HARPER, WSBA No. 44251
13 Attorneys for Plaintiffs
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DECLARATION OF SERVICE

I caused to be served the copy of the foregoing document by the method indicated below, and addressed to the following:

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I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 25th day of April, 2018, at Spokane, Washington.

Mary A. Rua
Mary A. Rua

Bench Copy: Honorable Julie M. McKay

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 2 IN AND FOR THE COUNTY OF SPOKANE

3 LOGAN MAGNEY, a minor, CALEB)
 4 MAGNEY, a minor; BRIAN MAGNEY)
 and EMILY MAGNEY,)
 5 Plaintiffs,) NO. 17-2-00266-1
 vs.)
 6 TRUC PHAM M.D.; AYUMI I. CORN,)
 M.D., LIQUN YIN, M.D., and)
 7 INCYTE DIAGNOSTICS, a)
 Washington corporation,)
 Defendants.)

9 VERBATIM REPORT OF PROCEEDINGS

11 BEFORE: The Honorable Julie M. McKay
 12 DATE: April 30, 2018

13 APPEARANCES:

14 For the THE MARKHAM GROUP
 15 Plaintiffs: BY: COLLIN HARPER
 421 W. Riverside, Ste. 1060
 16 Spokane, WA 99201

17 For the ETTER, MCMAHON, LAMBERSON, VAN WERT
 18 Defendants & ORESKOVICH
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 19 Incyte 618 W. Riverside Avenue, Ste. 210
Diagnostics: Spokane, WA 99201

21 For the WITHERSPOON KELLEY
 22 Defendants BY: STEVE DIXSON
Corn & Yin: 422 W. Riverside Avenue, Ste. 1100
 Spokane, WA 99201

24 REPORTED BY:
 25 MARK SANCHEZ, RPR
 WA LIC #3419

1 THE COURT: This is case No. 17-2-00266-1,
2 in re the mater of Logan and Caleb and Brian and Emily
3 Magney. Am I pronouncing their name correctly?

4 MR. HARPER: Yes.

5 THE COURT: Okay. They are the plaintiffs
6 in this matter represented by Collin Harper. Doctors
7 Pham, Corn, Yin and Incyte Diagnostics are the
8 defendants here represented by Jeffrey Galloway and, I'm
9 sorry.

10 MR. DIXSON: Steve Dixson, your Honor.

11 THE COURT: Steve Dixson. Thank you. This
12 is the time and place that has been set for a motion for
13 protective order by the plaintiffs. It is your motion,
14 Mr. Harper.

15 MR. HARPER: Thank you, your Honor. May it
16 please the court, Collin Harper here on behalf of the
17 plaintiffs. I believe this is my first time appearing
18 in front of your Honor so I'm pleased to introduce
19 myself. Before I begin, your Honor, do you have any
20 questions?

21 THE COURT: Not particularly. It was
22 briefed very well so I'll have you address what issues
23 you think you need to.

24 MR. HARPER: Very good. Thank you, your
25 Honor. So just by way of a little bit of background,

1 this is a medical negligence case that arises out of a
2 misdiagnosis of the youngest child, Logan Magney, with
3 AML, and that occurred when he was a little over a year
4 old. As a result, he was unnecessarily hospitalized and
5 treated with two rounds chemotherapy.

6 As you know from reading the briefing, all
7 four of the Magneys have claimed damages in this case.

8 The parents' damages are for pain and suffering and
9 mental anguish. And one of the critical things here is
10 they haven't claimed any damages for loss of consortium
11 in their marriage. The damages are specifically related
12 to their relationship with Logan and the events that
13 occurred as a result of the misdiagnosis.

14 During the parents' depositions, the parents
15 answered questions which indicated they had undergone
16 marital counseling before. Before Logan's misdiagnosis,
17 there was no marital counseling, no other forms of
18 counseling after the misdiagnosis that is the basis of
19 this action. So we were served discovery requests
20 requesting the parents' marital counseling records,
21 again for counseling that occurred prior to the
22 misdiagnosis.

23 It's undisputed that the therapist/counselor
24 privilege, which is codified at 5.60.060(9), does not
25 include a provision for waiver automatically when you

1 file a claim for personal injury in the same way that
2 the physician/patient privilege does. And so it's our
3 argument here today that the Magneys have not waived
4 their privilege to their marital counseling records.

5 What you're going to hear from the
6 defendants as far as the argument goes, is that you
7 should look outside the statutory text. And
8 specifically, you should apply the same automatic waiver
9 that's found in the physician/patient privilege to the
10 marital counseling or therapist privilege, and find that
11 the privilege was waived by the fact that the case was
12 brought and the Magneys have claimed damages for pain
13 and suffering and mental anguish.

14 There's no authority cited supporting this
15 argument. Defendants cite to two cases, the *Corbis*
16 case, the *Lotus v. Corbis* case, which deals with the
17 psychologist/patient privilege, and the *Carson v. Fine*
18 case, which deals with the physician/patient privilege.
19 But again, we're talking about a completely different
20 privilege here. But codified in the same statute,
21 actually, and that may become important.

22 So the argument is look to the
23 physician/patient privilege and apply the same waiver
24 that the legislature codified in 1986, that when you
25 bring an action for personal injury 90 days thereafter,

1 your privilege has been waived. If you look at the --
2 did your Honor have a question?

3 THE COURT: Well, I was going to ask you.
4 Because I understand what your arguments are. But from
5 your perspective, it is due to strict reading of the
6 statute due to legislative history and then the case law
7 that you are citing to at this time. There's no
8 circumstances under which, without the plaintiffs in
9 this instance specifically waiving, it's just we don't
10 get it, period. Is that what your argument is?
11 Regardless of whether it may directly affect the issue
12 at hand.

13 For instance, and I'm going to give you a
14 for instance because I was trying to mull my way through
15 this. If, in fact, the marital counseling would
16 indicate that part of their marital issues had to do
17 with the children, perhaps not even wanting or having
18 children, do you not think that would be relevant to
19 this particular case?

20 MR. HARPER: So two things. I think that --
21 I'll start with this. It's well recognized, and it's
22 set forth both in the legislative history and in the
23 cases I've cited, that privileges are strictly construed
24 because they can result in the withholding of relevant
25 information. So it is certainly possible, generally

1 speaking, that there could be information in marital
2 counseling records that is relevant to a case like this.
3 Now, I don't believe that's the case with the Magneys'
4 records.

5 As to instances that the marital counseling
6 privilege can be waived, I think there's two. I think
7 the first is simply as it's been codified, there is, you
8 know, the set five times it can be waived. But then if
9 you look the cases regarding the physician/patient
10 privilege, they talk about the fact that all privileges
11 can be waived when the individual sort of takes that
12 action they know is gonna result in waiver. In other
13 words, introducing the information themselves in support
14 of their own case. So I don't think we're strictly
15 limited to those five instances.

16 I think that, for instance, if the Magneys
17 were to introduce testimony from a different marital
18 counselor, or if the Magneys were to describe the events
19 that occurred or discussions that were had in their
20 marital counseling, that would result in automatic
21 waiver of this privilege. Similar to, for instance, if
22 a person who claimed the priest confessional privilege
23 said, "My statements with my priest in confession are
24 privileged." If that individual, though, within their
25 own rights, said, "I'm gonna rely on what I said to that

1 priest in the support of my own case," of course that
2 results in waiver.

3 But generally speaking, to take that jump
4 and say, "Well, the fact that you filed suit putting at
5 issue something that we may find information relevant in
6 your records, you've now waived that privilege," going
7 back to the patient -- or I'm sorry, going back to the
8 priest confessional privilege, just because you put at
9 issue something in your case that you may have discussed
10 with your priest doesn't result in waiver of that
11 privilege. It's not until you, yourself, introduce that
12 testimony either by discussing it yourself or calling
13 your priest to the stand to testify on your behalf.

14 And so I think that if you actually look at
15 the cases that were cited to, especially the *Carson v.*
16 *Fine* case, what you see in the history of the
17 physician/patient privilege is prior to the legislature
18 writing in the amendment to the privilege in 1986 that
19 said you automatically waive your privilege 90 days
20 after bringing a personal injury claim.

21 The courts have actually reviewed this. The
22 Washington state Supreme Court actually reviewed this
23 very issue twice prior to the physician/patient
24 privilege containing that automatic waiver and said
25 we're not gonna read that into it, that's for the

1 legislature to do. So until you take either that action
2 of affirmatively consenting to introduction of your
3 records, or the other action which is sort of relying on
4 them in a way that you know is gonna result in waiver,
5 that is introducing it yourself, we're not gonna go
6 there. It's not waived until you do those things and
7 we're not gonna write something into the legislation
8 that's not already there.

9 So as a result, we'd ask for our motion for
10 protective order be granted and that these records not
11 be discoverable. In the alternative, if your Honor does
12 have questions about whether or not there is relevant
13 information within these records and is inclined to
14 potentially grant this motion, we'd request that you
15 review the records in camera and determine whether or
16 not there is any relevant information therein.

17 And I just want to point out that we're
18 discussing not general medical records, but marital
19 counseling records, which are significantly different in
20 that in order to get full and good marital counseling,
21 you sort of have to divulge all relevant information.
22 And that's one of the reasons the cases talk about why
23 confidentiality is so important.

24 And in addition to that, both of these
25 parents have independent marital counseling, which means

1 neither of them knows what the other said in their
2 counseling sessions. So again, the privacy and
3 significant -- well, the expectation of privacy and the
4 significant sensitive type of information contained
5 within these records would warrant in camera review.

6 THE COURT: Do you have any idea, at this
7 stage in the game, the extent of the records that we're
8 talking about?

9 MR. HARPER: How voluminous they are?

10 THE COURT: Correct.

11 MR. HARPER: I don't believe they are more
12 than 40 to 50 pages.

13 THE COURT: From both counselors.

14 MR. HARPER: From both counselors.

15 THE COURT: Okay.

16 MR. HARPER: We named three counselors that
17 they had had counseling from. The first, I believe one
18 a gentleman named Mr. Steel (Phonetic). They only went
19 for an intake, and as far as we have been informed by
20 Mr. Steel he does not have any records.

21 THE COURT: Mr. Steel or Mr. Silk?

22 MR. HARPER: Maybe it's Mr. Silk. I think
23 that's probably correct, Richard Silk.

24 THE COURT: Don't hold me to the names as I
25 was reading. But okay, you are referring to whomever

1 just did an intake.

2 MR. HARPER: Yes.

3 THE COURT: Thank you.

4 MR. HARPER: Thank you, your Honor.

5 MR. GALLOWAY: Good afternoon, your Honor,
6 Jeff Galloway here on behalf of Dr. Pham and also
7 Incyte.

8 Your Honor, with your questions you hit nail
9 on head. Plaintiffs, in their complaint, have claimed
10 mental anguish, emotional distress, one in the same, and
11 also a loss consortium. We heard from Mr. Harper today
12 they're not claiming loss of consortium between husband
13 and wife. But as I tumbled through this, I think what
14 they're trying to claim is a loss of consortium between
15 parent and child and maybe between siblings.

16 But what's really important here is, first,
17 they're claiming emotional distress damages, mental
18 anguish, pain and suffering. And so I have a duty to my
19 client, and I have the right under the rules of
20 discovery, to inquire as to whether there may be other
21 causes of that mental anguish, other causes of the
22 emotional distress.

23 And so therein lies our dilemma. These
24 records, I don't know what they say. I've not seen
25 them. But they testified in their deposition that we've

1 got these stressors between husband and wife, but we've
2 also got stressors as to how Logan is now. And just
3 like you said, maybe they didn't want to have kids,
4 maybe they did. Maybe there are some other issues
5 there. But without getting into those records, I don't
6 know that. I don't have the ability to look at them
7 other than through discovery.

8 And so these records really are relevant as
9 to when you put your emotional distress, and your
10 physical and emotional well being at issue in a lawsuit,
11 I'm allowed to look at your history, your emotional
12 distress history, your psychological history, and
13 determine whether or not there may be other causes.
14 Similar to a case when someone says well as a result of
15 X, Y and Z, I'm now really depressed. I didn't need to
16 go in and say actually you were depressed beforehand,
17 and maybe it was a death in the family, maybe it was
18 some other cause.

19 And then that goes to the weight of the
20 evidence; what does a jury determine is the cause of
21 this source? I mean, when you remember, we're here in
22 discovery, we're not at trial. So we're not doing a 403
23 analysis of are they prejudicial, do they outweigh the
24 relevance at trial. We're here at the discovery phase.
25 And so under 26, it's is the discovery of the

1 information likely to lead to the admissibility of
2 relevant evidence at trial. And that's really where
3 we're at here; are these records relevant. Clearly they
4 are when they put their emotional distress and mental
5 health, well being, at issue.

6 And so we're not here at trial. I think it
7 would be premature to say that these are not relevant,
8 that these are excluded records, that they should not be
9 admitted at trial. We're not here at trial. We're here
10 on the discovery motion. And the rules of discovery, as
11 your Honor knows, we're -- we are meant to facilitate
12 open discovery so that all the cards can be laid on the
13 table before we get to trial so we all know what we're
14 playing with here.

15 I think it's disingenuous to carve out and
16 say, well, we're really not talking about this loss of
17 consortium claim, we're only talking this other part, so
18 that way you can't get in all this bad stuff, or really
19 all this marital counseling. We don't know what they
20 say but we're entitled to know what they say. Those are
21 the damages that have been claimed through the
22 complaint, they've been testified to in their deposition
23 that they have this loss of consortium claim. It has to
24 deal with -- I'm hearing today that it doesn't have to
25 deal with the marriage between the husband and wife.

1 But simply because they went and saw a marital counselor
2 doesn't protect it. There's still psychological records
3 dealing with their mental health and well being, and so
4 we have the right -- in defending my client, I have to
5 bring up other sources if there are any. It's a simple
6 causation argument.

7 THE COURT: So I have a question for you.
8 Obviously the privilege exists as it is outlined in
9 5.60.060. If I find that I believe it has been waived
10 for purposes of discovery, does that mean that the
11 privilege is gone completely for trial purposes? Or do
12 you then get into other evidentiary issues, evidentiary
13 rules, to determine whether it would be relevant for
14 trial purposes?

15 MR. GALLOWAY: Your Honor, I think that at
16 that point it then becomes subject to a motion in
17 limine. I had a case just earlier this month, same
18 issue, loss of consortium claim. We got marital
19 counseling records which were very damaging to the
20 plaintiffs; didn't want to be in the marriage, doesn't
21 love her husband any more. And it came up in trial, and
22 that was a Grant County case, but in that case the judge
23 really ruled that they were inadmissible for purposes of
24 trial because the prejudice was far greater than the
25 evidence. So it was a 403 analysis.

1 But I think that your Honor can deny the
2 motion for protective order today and then we go through
3 discovery. That doesn't mean that they're automatically
4 admitted at trial. We still have to walk through
5 whether they're relevant at trial depending on how the
6 testimony comes out. But right now we're at the
7 discovery phase. We've taken her deposition, but I
8 don't know what Mrs. or Mr. Magney's gonna say at trial.
9 Have a pretty good idea, but I don't know how the
10 evidence is gonna be presented at trial when we get
11 there. So to hamstring us now and say, well, you can't
12 get these records, I think that that really is a ruling
13 for trial purposes, admissibility at trial, that should
14 be reserved for trial. But at this point, I think that
15 the discovery rules do allow me to get those. Because I
16 agree, the privilege is there.

17 But it's my position that that privilege has
18 been waived because you have put your mental and
19 emotional health by way of pleading pain and anguish,
20 emotional distress, and also loss of consortium. And so
21 therein you've waived the privilege by that. Now if
22 they don't -- if they don't seek those damages, we're
23 not here. But they are seeking those damages and so
24 that's what puts in -- these records directly at issue
25 in this case.

1 THE COURT: You can keep going, I forgot
2 what my question was.

3 MR. GALLOWAY: Okay. I believe that's
4 what -- unless your Honor has any further questions or
5 remembers her question, I think that's it.

6 But really the crux of the issue here, your
7 Honor, is we're at the discovery phase. They've
8 alleged, as a result of this alleged negligence, that
9 they've suffered mental and emotional harm, loss of
10 consortium, which I now believe really relates to the
11 parent/child relationship. But those records are
12 directly relevant to this litigation. And so to rule
13 prematurely, at least at the discovery phase, that we
14 can't get them, that they're not admissible and they're
15 not relevant, I think is improper. And so for those
16 reasons, we would ask that the motion for protective or
17 be denied.

18 THE COURT: I do have a question for you,
19 and it was with regards to counsel's request that this
20 be reviewed in camera based upon the sensitive nature of
21 what might be coming out. In other words, neither of
22 the plaintiffs know what the other's records say at this
23 point in time. And to potentially have something
24 completely irrelevant to this lawsuit but very relevant
25 to their relationship come out in litigation, your

1 position with regards to that.

2 MR. GALLOWAY: And your Honor, with all due
3 respect, I'm very sensitive to plaintiffs' position.
4 I'm not here to break up a family, that's not my intent.
5 But Mr. and Mrs. Magney have sued my client alleging
6 emotional distress. And so with all due respect, I'm
7 very sensitive to what may or may not be in these
8 records. But that's not a decision that I've made, it's
9 not a decision that my client has made. They have
10 chosen to see separate counselors and then they made an
11 affirmative action to sue my client and allege emotional
12 distress damages.

13 So I believe that an in camera review, if
14 that's where the court's going, then I'll take what I
15 can get, I guess. But I do think that it's really
16 premature and that these records should be released.
17 And then relevance comes in in a motion in limine and
18 really at trial. I don't think that this is the time to
19 determine if they're admissible for trial purposes.

20 THE COURT: Thank you. Mr. Harper.

21 MR. HARPER: Thank you, your Honor. In
22 listening to Mr. Galloway's argument, one of the things
23 that struck me was he talked about the fact that records
24 may be relevant and therefore he needs to see them to
25 determine whether or not there's any information in them

1 that might be relevant to this case. It's well settled,
2 and it's set forth again even in the legislative
3 history, that privileges are looked upon unfavorably
4 and are strictly construed because they can result in
5 the withholding of potentially relevant information. So
6 whether or not these records are potentially relevant to
7 this case is not determinative of whether or not they're
8 privileged.

9 There was also no dispute that they are
10 privileged under the therapist/counselor privilege, and
11 that none of the provisions set forth within the statute
12 for the therapist/counselor privilege have occurred in
13 this case so they haven't been waived under anything set
14 forth in the statute. Instead the argument is, well,
15 there's other types of records that are automatic --
16 that the privilege is automatically waived for when you
17 bring this type of a lawsuit, specifically medical
18 records under the physician/patient privilege. That was
19 set forth in the statute.

20 And I'd like to read a quote from one of the
21 cases dealing with the physician/patient privilege prior
22 to the codification of the amendment in 1986. And what
23 the court, Washington state Supreme Court in reviewing
24 this very issue, whether or not you waived your
25 privilege by bringing suit to medical records prior to

1 that amendment, the Supreme Court said it's our duty,
2 when confronted with a valid act such as this, to give
3 effect to the legislative intent embodied therein,
4 refraining from substituting our own judgment in the
5 matter, whatever that may be for the legislature. And
6 what the Supreme Court was saying was we understand
7 there's other jurisdictions that waive this privilege
8 when you bring a personal injury lawsuit. Our
9 legislature hasn't put that into the statute, therefore
10 we're not gonna stand in the legislature's shoes.

11 This privilege, because of the language used
12 in the statute, is not waived unless you either consent,
13 as set forth in the statute, or you waive it in the same
14 way as you waive the other -- any other type of
15 privilege, by relying on that information, such as
16 talking about it in trial or calling your physician to
17 testify about it in trial, where you know that that
18 privilege is gonna be waived in those circumstances.
19 But otherwise, the Supreme Court refused to step into
20 the shoes of the legislature and create that type of a
21 waiver for the physician/patient privilege.

22 So it's then altered in 1986, the automatic
23 waiver provision is put in. The reason I provided the
24 legislative history was because the therapist/counselor
25 privilege was enacted 20 years later. And in every one

1 of those legislative history documents I provided, the
2 legislature talks about knowing that the
3 physician/patient privilege exists. The importance of
4 this particular privilege, set apart from the
5 physician/patient privilege. And then it's enacted into
6 the exact same statute, all of this suggesting that the
7 legislature knew, very well, that they were enacting a
8 privilege that was not waived in the same way as the
9 physician/patient privilege.

10 It would have been very simple to include F
11 to the statute, and F being this privilege is waived in
12 the same way as the physician/patient privilege. Or
13 even copying the language from the physician/patient
14 privilege. It wasn't done. And I believe that by not
15 doing that, the intention was that it would not be
16 waived in the same circumstances as the
17 physician/patient privilege.

18 And as your Honor noted, we're talking about
19 extremely sensitive information. I think Mr. Galloway
20 used the term "I'm not here to wreck a marriage or a
21 family." That's the type of information that could be
22 contained within marital counseling records that these
23 two individuals don't know what the other talked about.
24 Their marriage -- they are married today. They are
25 currently the parents of two young children.

1 I think your Honor asked about, well, is
2 there maybe potential information within these records
3 talking about their kids. Logan was about one years old
4 when he was misdiagnosed with AML so he was in his
5 infancy when this marital counseling was going on. It's
6 hard to think about the circumstance which a parent is
7 gonna tell a marital counselor, "I have a bad
8 relationship with my child."

9 THE COURT: And I'm not sure that I even
10 knew what the stage of the marital -- when it happened.
11 So I didn't look that carefully at it.

12 MR. HARPER: I appreciate that. And so
13 maybe just -- so Logan was misdiagnosed just after he
14 had turned one. All of the marital counseling occurred
15 before that happened. So the marital counseling, Logan
16 would have been one year old or less when that was going
17 on.

18 THE COURT: So you also make a distinction
19 of the *Lodis* case that is cited by the defense here, and
20 I did look at that case as well as the *Carson* case. And
21 I'm not going to get the code section, but Title 18 that
22 is the psychologist/patient privilege is very -- it's a
23 two-liner, if I remember correctly. Doesn't address any
24 kind of waiver of the privilege in any nature, whether
25 it be for civil suit or for just the individual as it is

1 in sub 9 for a mental health counselor. And *Corbis*
2 basically said it's not privileged information. So
3 isn't that more akin to the mental health person than it
4 is the doctor? The physician.

5 MR. HARPER: I think it's really important
6 to go back and actually look at the case that's *Lodis* is
7 citing to. So *Lodis* -- in the *Lodis* case, your Honor is
8 correct. They say the physician/patient privilege and
9 the psychology -- psychologist/patient privilege are
10 basically treated the same way by the Washington state
11 Supreme Court. If you go and look at the case they cite
12 to, that case was actually decided pre-amendment to the
13 physician/patient privilege, so pre-1986. So at the
14 time that the Washington state Supreme Court said the
15 physician/patient privilege and the psychologist/patient
16 privilege afford the same protection, the statutes
17 looked very, very similar.

18 Now, after that the physician/patient
19 privilege is amended and the psychologist/patient
20 privilege is not. But the case law remains that we're
21 treating these two privileges similarly. And one of the
22 other parts of the reasoning in that case is that, you
23 know, there's no case law out there suggesting to us
24 that we treat this privilege any differently. In this
25 particular case, there's actually no case law that Mr.

1 Galloway has cited to suggesting that this privilege
2 should be treated in the same way as the
3 psychologist/patient privilege or the physician/patient
4 privilege.

5 And in fact, again going back to the
6 legislative history, which indicates that the
7 legislature knew exactly what they were enacting, knew
8 about the physician/patient privilege, I think it's -- I
9 think it's very easy to draw a distinction, then,
10 between this circumstance and the *Lodis* case, wherein
11 the *Lodis* case the court is relying on a Washington
12 state Supreme Court case that was decided when the two
13 statutes looked similar.

14 And here we have a statute that has never
15 looked the same as the physician/patient privilege. At
16 the time this statute was enacted, the physician/patient
17 privilege had the automatic 90-day waiver in it for 20
18 years. And so I just think that that's very
19 distinguishable from a case where these -- where the two
20 statutes looked similar at one time, and actually looked
21 similar for 30 to 40 years. I think I went back and
22 looked this morning because I was curious about the same
23 thing, and the psychologist/patient privilege is quite
24 old just like the physician/patient privilege. But here
25 we have a new privilege that the legislature enacted, I

1 believe it was in the late '90s, and they did not
2 include the provision for automatic waiver.

3 THE COURT: Thank you. And I'm going to
4 have Mr. Galloway address *Lodis* and then I'll give you
5 the final say. I know this is a little bit unusual, but
6 you got me on an afternoon where I had nothing to do but
7 read. So please don't use this as a method for future
8 motion practice before the court.

9 MR. GALLOWAY: I'll be focused in my
10 remarks.

11 THE COURT: Thank you.

12 MR. GALLOWAY: We look at the
13 psychologist/patient privilege, and just for the record
14 it's 18.83.110. And then we look at the *Lodis* case,
15 which is cited in our briefing. The *Lodis* case is a
16 2013 case, so it's a very recent case, relatively
17 speaking, within the last five years. And it
18 affirmatively says that if you put your mental health at
19 issue, you waive the privilege. And it would just be
20 fundamentally unfair to put your mental health at issue
21 and then not allow defendants access to the information
22 to determine whether or not that's a valid claim or not.
23 And that's really what this case hinges on. If you're
24 gonna put it at issue, then you've opened it up, you've
25 waived the privilege. And so for those reasons, we

1 believe *Lodis* is directly on point. The mental health
2 counselor privilege is akin to the psychologist
3 privilege, akin to the doctor/patient privilege. And so
4 the *Lodis* case is directly on point. Says just that; if
5 you're gonna put it at issue, which the Magneys have
6 done in this case, then you've waived the privilege.

7 THE COURT: Thank you.

8 MR. HARPER: Thank you, your Honor.

9 THE COURT: Mr. Harper.

10 MR. HARPER: The last word, I appreciate it.

11 THE COURT: You definitely get the last
12 word.

13 MR. HARPER: So I have to disagree with the
14 assertion that the *Lodis v. Corbis* case is directly on
15 point in this issue. And I'll just start with the
16 easiest place to start with. It's talking about a
17 wholly separate privilege. It's a privilege, as you
18 mentioned, was codified, I think, under code 18. We're
19 here under RCW 5.60.060(9). So it's a wholly separate
20 privilege.

21 And I go back to the cases that the *Lodis*
22 case is citing to. If your Honor has any questions
23 about this, I'd encourage to you review these cases
24 before ruling on this. Because I think it is important
25 in understanding how the *Lodis* -- the court in *Lodis*

1 came to its conclusion. Those cases were decided prior
2 to the legislature enacting the amendment in 1986 that
3 set forth automatic waiver. The privileges looked the
4 same at that time, so it made sense for the court to say
5 we think these privileges are basically providing the
6 same amount of protection. Prior to that 1986
7 amendment, the Washington state Supreme Court looked at
8 the physician/patient privilege, which lacked the
9 amendment, several times.

10 I think there's actually four cases that
11 have been mentioned here. Two of them the court
12 specifically dealing with whether or not you
13 automatically waive the physician/patient privilege when
14 you brought a lawsuit, putting at issue those medical
15 conditions. In fact, in the two cases the plaintiffs
16 had put at issue medical conditions that the defendants
17 sought depositions of their physicians for. And in both
18 of those instances, the Washington state Supreme Court
19 said no, there's no automatic provision for waiver here.
20 So even though you've put at issue a condition for which
21 the medical records defendants seek are related, until
22 you either call a physician to testify on your behalf,
23 or you yourself testify as to communications with that
24 physician for treatment, this privilege isn't waived.

25 And we're not gonna step into the shoes of

1 the legislature and carve out, and that's the exact same
2 language that the defendants use in their brief, carve
3 out a waiver to this privilege. The Washington state
4 Supreme Court refused to do that. So here that's
5 exactly what you're being asked to do. You're being
6 asked to find that this privilege is waived under
7 circumstances that are not set forth in the statute,
8 without a citation to any Washington or even outside
9 authority, saying that this privilege is waived simply
10 by bringing a lawsuit and putting at issue conditions to
11 which your therapy records or marital counseling records
12 could be relevant to.

13 THE COURT: I think all three of you can
14 tell where the court was going kind of back and forth
15 with this. I have 5.06.060 here in front of me and have
16 highlighted the difference between subsection (4), the
17 physician/patient, and subsection (9), the mental health
18 counselor, independent clinical social worker, or
19 marriage and family therapist information, and what can
20 waive that. I did read the case law cited, *Lodis* and
21 *Carson* as well as *Tesoro*, which isn't probably as
22 important to this court as the *Lodis* and the *Carson*
23 cases.

24 What is very clear is the distinction being
25 made by the plaintiff. Plaintiff is saying look at the

1 plain language of the statute, look at the legislative
2 history. I have that information. I, frankly, do
3 appreciate that. And then review of the cases about
4 waiver of a privilege prior to the statutory changes of
5 the patient/physician privilege.

6 And then the defense, on the other hand, is
7 saying, look, we are at the discovery period of this.
8 And for discovery purposes, when emotional distress is
9 put at issue, mental health records become relevant,
10 basing that off the *Lodis* case, as has been argued here.
11 And that really the standard is so long as the
12 information sought appears to be reasonably calculated
13 to lead to the discovery of admissible evidence, it is
14 discoverable.

15 So it comes down to whether this court finds
16 that the psychologist/patient privilege is more akin to
17 the mental health counselor or marriage counselor versus
18 the patient/physician privilege. The *Lodis* case is
19 pretty clear that when you put mental health at issue,
20 the psychologist/patient privilege is waived and those
21 records are discoverable.

22 Under these circumstance, I am going to find
23 that the privilege is waived based upon the fact that
24 the mental health or anguish here has been put at issue.
25 So I am going to deny the request for a protective

1 order.

2 I also was contemplating the in camera
3 review because I think that make a bit of sense, as
4 well. However, I'm not sure that is a very practical
5 solution in these circumstances. The court is making a
6 determination as to what is potentially relevant in a
7 case I have not touched, other than for this particular
8 motion and looking at the complaint.

9 In tossing that back and forth, I am not, at
10 this point in time, inclined to do an in camera review
11 of the records. Now, that in no way indicates that,
12 going forward, this is information that would be
13 admissible at trial based upon other issues. You may
14 not ever get there. The information could be
15 potentially more prejudicial than probative. But I
16 don't even know what's there so it may not even be an
17 issue moving forward. So for discovery purposes, I'm
18 going to allow it.

19 Obviously I am concerned about the sensitive
20 nature of the records. But, I'm not sure you can keep
21 the records from the plaintiffs. I suppose that's
22 plaintiffs' prerogative there. They're entitled to look
23 at their own records, I would suppose at that point in
24 time, but I'm just kind of theorizing here . Having
25 really nothing to do with the defense because the

1 defense is going to be dealing with them through
2 discovery versus what the plaintiff may choose to see.

3 Do those meanderings make any kind of sense,
4 counsel?

5 MR. HARPER: May I inquire of the court one
6 thing? Understanding your ruling today. Would the
7 court be inclined to enter an order that the records are
8 discoverable to be produced within, say, 30 days? And I
9 make this request because, as Mr. Galloway said, if the
10 adults had not put, you know, their mental anguish and
11 suffering at issue, we wouldn't be here, we wouldn't be
12 asking for these records. I think given the nature of
13 the type of records that they are, and the sensitive
14 nature of it, and the fact they were privileged, I'm not
15 entirely sure that my clients will agree to produce
16 them. Understanding what that may mean for them, for
17 their case.

18 THE COURT: Sure.

19 MR. HARPER: So what I would propose is that
20 the records are to be produced within 30 days.

21 MR. GALLOWAY: Your Honor, I understand the
22 court's ruling. I understand Mr. Harper's predicament.
23 I'm not -- these discovery requests have been
24 outstanding for quite some time. So I would -- if we
25 could just shorten it to two weeks, I think they -- that

1 is ample time to discuss the case with clients and make
2 an informed decision. But we'd like to get this case
3 rolling. And this has been on a outstanding request, so
4 we would ask for two weeks. But...

5 MR. HARPER: We can just continue the trial
6 date, I believe, until a year from now. And we have not
7 been able to secure expert depositions yet. So while
8 the discovery requests have been with us, of course we
9 brought this motion which delayed production, as well.
10 I don't think that there's any imperative need for them
11 right away.

12 THE COURT: Here's my ruling on that. Based
13 upon the sensitive nature of these records, I am going
14 to give plaintiffs 30 days to produce those and make the
15 decision. The chips will fall where they fall based
16 upon the decision made.

17 MR. HARPER: Thank you, your Honor.

18 THE COURT: I don't know whether you have an
19 order here today or whether you need to go back to your
20 offices to do that, but I am in chambers.

21 MR. GALLOWAY: I'll take a stab at it.

22 MR. HARPER: I have an order that we can
23 work out.

24 MR. GALLOWAY: We can work out something and
present it.

25 THE COURT: Thank you.
(In Recess.)

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LAWSON, VAN WERT
& ORESKOVICH, P.C.

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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM, M.D.; AYUMI I. CORN,
M.D.; LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington
corporation,

Defendants.

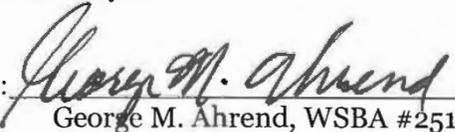
No. 17-2-00266-1

NOTICE OF DISCRETIONARY
REVIEW TO THE COURT OF
APPEALS, DIVISION III

Plaintiffs, Logan Magney, a minor; Caleb Magney, a minor; Brian Magney and
Emily Magney, through undersigned co-counsel, seek review by the Court of Appeals,
Division III, of the Order Re: Plaintiffs' Motion for Protective Order, dated May 4, 2018.
A copy of the order is attached to this notice.

DATED this 24th day of May, 2018.

AHREND LAW FIRM PLLC
Co-Attorneys for Plaintiffs

By: 
George M. Ahrend, WSBA #25160

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Moses Lake, WA 98837
(509) 764-9000 • (509) 464-6290 Fax
Email gahrend@ahrendlaw.com

NO. 17-2-00266-1
NOTICE OF DISCRETIONARY REVIEW
Page 1 of 3

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2 Co-Attorneys for Plaintiffs

3 By: 

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8 (509) 747-0902 • (509) 747-1993 Fax
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10 Email collin@markamgrp.com

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19 & Oreskovich P.C.
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23 **Co-Counsel for Plaintiffs:**

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Co-Counsel for Plaintiffs

George M. Ahrend, WSBA #25160
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Co-Counsel for Plaintiffs

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DECLARATION OF SERVICE

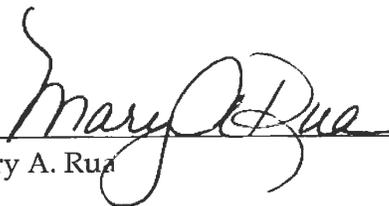
I caused to be served the copy of the foregoing document by the method indicated below, and addressed to the following:

Stephen Lamberson [] U.S. Mail
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Van Wert & Oreskovich, P.C. [] Hand Delivery
Bank of Whitman Building, 2nd Floor [] Messenger Delivery
618 W. Riverside Avenue
Spokane, WA 99201

Steven J. Dixon [] U.S. Mail
Witherspoon · Kelley [] Fax/Email
422 W. Riverside Avenue, Suite 1100 [] Hand Delivery
Spokane, WA 99201 [] Messenger Delivery

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 24th day of May, 2018, at Spokane, Washington.



Mary A. Rua

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MAY 04 2010

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AYUMI I. CORN,
M.D., LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. 17-2-00266-1

ORDER RE: PLAINTIFFS'
MOTION FOR PROTECTIVE
ORDER

This matter came before the Court upon Plaintiffs' Motion for a Protective Order.
The Court having heard oral argument and further having considered the records and files
herein, now makes the following findings:

ORDER - 1

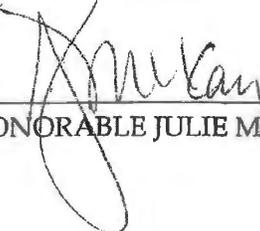
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THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

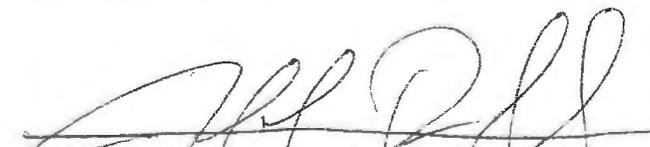
Plaintiff's Motion for a Protective Order is denied. The Court will not conduct in-camera review. Plaintiffs are to produce their marital counseling records within 30 days from the date of entry of this Order

DONE IN OPEN COURT THIS 4 day of ^{May} April, 2018.


HONORABLE JULIE M. MCKAY

Presented by:
The Markam Group, Inc., P.S.


Mark D. Kamitomo, WSBA No. 18803
Collin M. Harper, WSBA No. 44251
Attorney for Plaintiffs


Jeffrey R. Galloway #4054
Counsel for D. Pham & Eucyte


Steven J. Dixon, WSBA #38101
Counsel for Defendants
Corn + Yir

ORDER - 2

THE MARKAM GROUP, INC., P.S.
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THE MARKAM GROUP, INC., P.S.

SPOKANE COUNTY CLERK

5/24/2018

FILING FEE MOT FOR DISCRETIONARY REVIEW

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SPOKANE SUPERIOR COURT
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Rcpt. Date: 05/25/2018
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Item	Case Number	Amount
01	17-2-00266-1	\$290.00
	1116: Fee-Appellate Filing	
	\$AFF	
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Total Due:	\$290.00
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JUN 29 2018

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AYUMI I. CORN,
M.D., LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. 17-2-00266-1

ORDER RE: PLAINTIFFS'
MOTION FOR LIMITED STAY OF
DISCOVERY OF MARITAL
COUNSELING RECORDS

This matter came before the Court on Plaintiffs' Motion for Limited Stay of Discovery of Marital Counseling Records pending discretionary review of this Court's Order Re: Plaintiffs' Motion for Protective Order, dated May 4, 2018.

The parties appeared through counsel at a hearing on June 29, 2018. Based on the pleadings filed herein and the argument of counsel, the Court orders the following for good cause shown:

Plaintiffs' motion is GRANTED. Plaintiffs may withhold disclosure of marital

ORDER - 1

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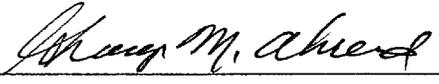
1 counseling records pending a final decision on discretionary review. The parties shall file a
2 status report regarding discretionary review within 60 days of the date of this order
3
4

5 DONE IN OPEN COURT THIS 28 day of June, 2018.
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8 
9 _____
10 HONORABLE JULIE M. MCKAY

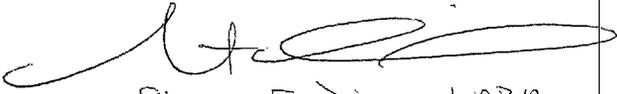
11 Presented by:

12 AHREND LAW FIRM, PLLC

13
14 
15 _____
16 George M. Ahrend, WSBA No. 25160
17 Attorney for Plaintiffs

18 THE MARKAM GROUP, INC., P.S.

19
20 
21 _____
22 Mark D. Kamitomo, WSBA No. 18803
23 Collin M. Harper, WSBA No. 44251
24 Attorney for Plaintiffs

25 
26 Steven J. Dixon, WSBA
27 Counsel for Defendants #38101
28 Corn + Yin

29 
30 _____
31 Counsel for Pham + Fuente

The Court of Appeals

of the
State of Washington
Division III

FILED
Sep 05, 2018
Court of Appeals
Division III
State of Washington

LOGAN MAGNEY, et al.,)
)
 Petitioners,)
)
v.)
)
TRUC PHAM, M.D., et al.,)
)
 Respondents.)
_____)

No. 36103-9-III

COMMISSIONER’S RULING

Brian and Emily Magney are the parents of Logan Magney and, with him, are the plaintiffs in this lawsuit for medical malpractice against Truc Pham, M.D., et al. (hereinafter referred to collectively as Dr. Pham). The parents sought damages for injury, including emotional injury, to the parent-child relationship, that allegedly occurred as a result of Dr. Pham’s misdiagnosis of Logan’s condition. They now seek discretionary review of the Spokane County Superior Court’s May 4, 2018 Order that (1) denied their motion for a protective order and directed them to produce their marital counseling records for counseling they received prior to the alleged malpractice, and (2) denied their

No. 36103-9-III

request, in the alternative, that the superior court conduct an in camera review of those records to determine whether they contain relevant evidence.

The Magneys contend the superior court committed probable error that substantially alters the status quo or substantially limits their freedom to act. RAP 2.3(b)(2). They point out that none of the specific exceptions contained in RCW 5.60.060(9) apply here. While a statutory waiver of the *physician-patient* privilege applies in cases in which a plaintiff files suit for personal injury or wrongful death, *see* RCW 5.60.060(4)(b), the legislature has not provided for such a waiver of the marital counseling privilege. The Magneys further argue that the court cannot reasonably find an implied waiver because they did not allege in their complaint any injury to their marital relationship. At a minimum, they assert that the privilege required the superior court to examine the records in camera to determine whether they are relevant.

Dr. Pham counters that the Magneys impliedly waived the privilege when they brought this lawsuit, which asked for damages for emotional distress. He asserts the counseling records will establish a baseline to measure the Magneys' emotional state before the alleged malpractice. The superior court denied in camera review on the ground that a determination of whether the records are relevant and admissible depends on facts the defense has not yet developed.

Dr. Pham relies on *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 855-56, 262

No. 36103-9-III

P.3d 779 (2013). There, the plaintiff had sued for damages for emotional distress allegedly caused by the employer's age discrimination. The court held that the plaintiff had waived the psychologist-patient privilege when he put his emotional health at issue. It stated that "such records . . . are relevant in showing causation or the degree of emotional distress." *Id.* at 856. The court also recognized that "the judge is still authorized to conduct an in camera review, seal the records, or limit their use at trial as necessary to protect the plaintiff's privacy." *Id.* at 855.

The Magneys distinguish *Lodis* on the basis it involves a different statute which provides that disclosure of *psychologist-patient* communications is subject to the same conditions as confidential communications between attorney and client. *See* RCW 18.83.110. They assert that because the courts have never used the test for waiver of the attorney-client privilege as the test for waiver of the marital counseling privilege, the court should not do so here. However, the argument that no direct authority on an issue exists does not support a claim of probable error under RAP 2.3(b)(2).

This Court has concluded that *Lodis* is persuasive, analogous authority that supports the superior court's Order here. As with the psychologist-patient records in *Lodis*, the marital counseling records here "are relevant in showing causation or the degree of emotional distress." 172 Wn. App. at 855. Given that authority, this Court cannot say that the superior court committed probable error under RAP 2.3(b)(2).

No. 36103-9-III

The Magneys also have not established the additional requisite of RAP 2.3(b) that the error substantially alter the status quo or limit the party's freedom to act. While the records may contain material that is of a personal nature, the Magneys can move to seal the records and to limit their use in court. As for the superior court's refusal to first conduct an in camera review, its reasons for refusal do not constitute an abuse of discretion. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000).

Accordingly, IT IS ORDERED, the Magneys' motion for discretionary review is denied.

A handwritten signature in black ink, appearing to read "Monica Wasson", written over a horizontal line.

Monica Wasson
Commissioner

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LOGAN MAGNEY, a minor; CALEB
MAGNEY, a minor; BRIAN MAGNEY and
EMILY MAGNEY,

Plaintiffs,

vs.

TRUC PHAM M.D.; AYUMI I. CORN,
M.D., LIQUN YIN, M.D.; and INCYTE
DIAGNOSTICS, a Washington corporation,

Defendants.

No. 17-2-00266-1

ORDER RE: PLAINTIFFS'
MOTION FOR PROTECTIVE
ORDER

This matter came before the Court upon Plaintiffs' Motion for a Protective Order.

The Court having heard oral argument and further having considered the records and files
herein, now makes the following findings:

~~_____

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ORDER - 1

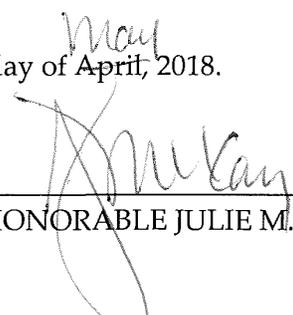
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THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Plaintiffs' Motion for a Protective Order is denied. The Court will not conduct in-camera review. Plaintiffs are to produce their marital counseling records within 30 days from the date of entry of this Order

DONE IN OPEN COURT THIS 4 day of ^{May} April, 2018.


HONORABLE JULIE M. McKAY

Presented by:
The Markam Group, Inc., P.S.



Mark D. Kamitomo, WSBA No. 18803
Collin M. Harper, WSBA No. 44251
Attorney for Plaintiffs



Jeffrey R. Galloway #4059
Counsel for Dr. Pham & Encyte



Steven J. Dixon, WSBA #38101
Counsel for Defendants
Corn + Yir

AHREND LAW FIRM PLLC

December 19, 2018 - 1:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36103-9
Appellate Court Case Title: Brian Magney, et ux, et al v. Truc Pham, M.D., et al
Superior Court Case Number: 17-2-00266-1

The following documents have been uploaded:

- 361039_Other_Filings_20181219132658D3007105_4347.pdf
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Other Filings - Other
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- aliciaa@witherspoonkelley.com
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- mark@markamgrp.com
- mary@markamgrp.com
- maryf@witherspoonkelley.com
- mblaine@ettermcmahon.com
- sjd@witherspoonkelley.com

Comments:

Record Appendix to Motion for Discretionary Review

Sender Name: George Ahrend - Email: gahrend@ahrendlaw.com

Address:

100 E BROADWAY AVE

MOSES LAKE, WA, 98837-1740

Phone: 509-764-9000

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