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Supreme Court No. 966699
Court of Appeals No. 361039
Spokane Co. Superior Court Cause No. 17-2-00266-1

THE 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.

BRIEF OF PETITIONERS

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I. ASSIGNMENT OF ERROR

The superior court erred by compelling disclosure of the marital counseling records of Plaintiffs-Petitioners, Brian and Emily Magney (“Magneys”). CP 106-07.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the superior court err in holding that parents who make a claim for injury to their child under RCW 4.24.010 impliedly 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. If the privilege has been impliedly 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?

See Commissioner’s Ruling, Feb. 13, 2019, at 11; Motion for Discretionary Review, Dec. 19, 2018, at 1.

III. 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.¹

During the course of discovery, Defendants-Respondents Truc Pham, M.D., Ayumi I. Corn, M.D., Liqun Yin, M.D., and Incyte Diagnostics (collectively "Defendants") learned that the Magneys had undergone marital counseling prior to the misdiagnosis of their son, and they requested copies of the Magneys' marital counseling records. The Magneys have not had any marriage counseling after the misdiagnosis of their son. *See* Commissioner's Ruling, at 2; RP 3:14-19.

The Magneys' marital counseling records are admittedly privileged² 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:

¹ *See* Commissioner's Ruling, at 2 (stating "[n]othing in the complaint specifically alleges injury to petitioners' marital relationship"); CP 3-8 (complaint); RP 3:8-13.

² *See* Commissioner's Ruling, at 5 (stating "the parties do not dispute that petitioners' marriage counseling records are privileged by statute"); Respondents' Joint Motion to Modify Commissioner's Ruling, Mar. 15, 2019, at 1 (stating "Brian and Emily Magney's marital counseling records are admittedly privileged absent litigation"; hereafter cited as "Mot. Modify").

- (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.

In the superior court, the Magneys filed a motion for a protective order preventing disclosure of the marital counseling

records, and, in the alternative, asking the court to conduct *in camera* review of the records in order to determine relevance, and to redact or withhold irrelevant information. *See* CP 10-102. The superior court denied the motion for protective order and declined to conduct *in camera* review. *See* RP 27:22-24 & 28:9-11 (oral ruling); CP 106-07 (written order).

At the same time, the superior court recognized and expressed concern about “the sensitive nature of the records.” RP 28:19-20 & 30:13. In particular, the court noted that “neither of the plaintiffs [i.e., Brian and Emily Magney] know what the other’s records say at this point in time.” RP 15:21-23 (brackets added).³

The Magneys timely sought discretionary review in the Court of Appeals. After the appellate court initially denied review, the Magneys timely sought discretionary review in this Court under RAP 13.5(b)(2), on grounds that compelling disclosure of their admittedly privileged marital counseling records constitutes probable error that substantially alters the status quo. The

³ Defendants have claimed that the fact that the Magneys met separately with their marriage counselors is unsupported by the record. *See* Mot. Modify, at 12. However, in the superior court, their counsel acknowledged that “[t]hey [i.e., the Magneys] have chosen to see separate counselors[.]” RP 16:9-10 (brackets added).

Commissioner agreed, and granted review. The Court subsequently denied Defendants' motion to modify.

IV. ARGUMENT

A. The superior court erred by compelling disclosure of the Magneys' admittedly privileged marital counseling records based on an implied waiver that is deemed to arise from making a claim for injury to their child.

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.” 5A Wash. Prac., *Evidence Law & Practice* § 501.2 (6th ed.). These privileges are based upon the policy choice that protecting 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 superior court's determination that the marital counseling privilege has been impliedly waived is reviewed de novo. *See Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 822 & 835, 381 P.3d 111 (2016) (involving attorney-client privilege, RCW 5.60.060(2); citing *Pappas v. Holloway*, 114 Wn. 2d 198, 204-09, 787 P.2d 30 (1990)). In this case, the superior court erred because the text of the marital counseling privilege precludes recognition of an automatic implied waiver. The lack of an automatic implied waiver is confirmed by this Court's precedent regarding implied waiver of the former physician-patient privilege statute before the statute was amended by the Legislature to provide for express waiver. Implied waiver of the marital counseling privilege should be limited to circumstances where the plaintiffs introduce testimony regarding their marital relationship or seek damages for injury to their marital relationship, which is not the case here.

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

The marital counseling privilege statute provides for waiver in only one set of circumstances, i.e., when the client brings charges against the counselor. *See* RCW 5.60.060(9)(b). This express waiver of the privilege in the text of the statute limits the Court’s authority to imply waiver under other circumstances. “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. Sommerville*, 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); *Bradley v. Dep’t of Labor & Indus.*, 52 Wn. 2d 780, 784, 329 P.2d

196, 199 (1958) (stating “[t]his conclusion [i.e., that no other exception was intended] is rendered necessary by the familiar rule of statutory construction that the express mention of one thing will be taken to imply the exclusion of another thing”).

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 waives the marital counseling privilege.

2. The lack of an automatic implied waiver of the marital counseling privilege is supported by this Court’s precedent regarding the former physician-patient privilege statute.

In *Bond v. Independent Order of Foresters*, 69 Wn. 2d 879, 421 P.2d 351 (1966), this Court declined to find automatic implied waiver of the former 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 to provide for express waiver as to all conditions 90 days after filing an action for personal injuries.⁴ Nonetheless, in the absence of such express waiver provisions, the legislative deference required by the *Bond* and *Phipps* decisions remains unaffected. Like the physician-patient privilege, the marital counseling privilege is a creature of statute, and courts should defer to the Legislature's exceptions. Because there is no exception 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.

⁴ 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 is no similar language in the marital counseling privilege statute. *See* RCW 5.60.060(9). The full text of the privilege statute, RCW 5.60.060, and the relevant sections of the amendatory session laws are reproduced in the Appendix to this brief.

3. Implied waiver of the marital counseling privilege should be limited to circumstances where plaintiffs introduce testimony regarding their marital relationship or seek damages for injury to their marital relationship, which is not the case here.

Before the Legislature amended the physician-patient privilege statute to provide for express waiver as to all conditions 90 days after filing an action for personal injuries, this Court limited the circumstances and scope of implied waiver of the former physician-patient privilege statute. The Court limited implied waiver of the privilege to circumstances where the plaintiff offered 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 445-48; *Randa v. Bear*, 50 Wn. 2d 415, 421, 312 P.2d 640 (1957); *McUne v. Fuqua*, 42 Wn. 2d 65, 74-76, 253 P.2d 632 (1953); *In re Quick's Estate*, 161 Wash. 537, 545-46, 297 P. 198 (1931).

The Court further limited the scope of the waiver 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”); *Randa*, 50 Wn. 2d at 421 (stating “[t]he introduction by the patient of medical testimony describing the treatment and diagnosis of an illness waives the privilege as to that illness”; brackets added); *McUne*, 42 Wn. 2d at 74-76 (referring

to the “disability or ailment at issue”); *Quick’s Estate*, 161 Wash. at 545-46 (finding waiver as to same condition, i.e., mental capacity of decedent); *see also State v. Tradewell*, 9 Wn. App. 821, 824, 515 P.2d 172, *rev. denied*, 83 Wn. 2d 1005 (1973), *cert. denied*, 416 U.S. 985 (1974) (stating *McUne* and *Quick’s Estate* “appear to support the proposition that waiver of the privilege with respect to one physician also waives the privilege as to subsequent testimony of other physicians who treated the patient for the same ailment or disability”). The foregoing limitations on the circumstances and scope of the implied waiver are consistent with, if not required by, the deference due to the Legislature when interpreting and applying a statutory privilege.

Assuming that an implied waiver of the marital counseling privilege is permitted under some circumstances, there can be no waiver here because the Magneys have not offered, nor do they intend to offer, testimony regarding their marital relationship. 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 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.

In arguing for implied waiver of the Magneys’ marital counseling privilege, Defendants have attempted to re-frame their injury at a higher level of generality, i.e., unspecified emotional

distress rather than injury to their child. *See* Mot. Modify, at 3-5, 6, 9, & 12-13; Joint Reply in Support of Respondents' Joint Motion to Modify Commissioner's Ruling, at 1, 3 & 9 (hereafter "Jt. Reply"). 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 described above, which focuses on the precise condition at issue.

Moreover, there are no principled limits to Defendants' 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, RCW 5.60.060(1); attorney-client communications, RCW 5.60.060(2); and priest-penitent communications, RCW 5.60.060(3). To avoid such results, the Defendants' approach to implied waiver should be rejected.

B. The case on which Defendants rely, *Lodis v. Corbis Holdings*, is both distinguishable and incorrectly decided.

In the superior court and appellate proceedings, Defendants rely primarily on *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.3d 779 (2013), where the appellate court held that a plaintiff who makes a claim for emotional damages in an employment-related lawsuit waives the psychologist-client privilege under RCW 18.83.110. See Mot. Modify, at 2-5, 7, 9-11 & 13; Jt. Reply, at 1, 3, 6-7 & 9-10. *Lodis* is distinguishable because it involves a different statutory privilege, with a markedly different text. *Lodis* is also incorrectly decided because the appellate court ignored the express linkage between the psychologist-client privilege and the attorney-client privilege, and wrongly equated the psychologist-client privilege with the physician-patient privilege. The Court should hold that *Lodis* is not controlling or persuasive, and take this opportunity to disapprove of the decision.

1. *Lodis* is distinguishable because it involves a different statutory privilege, with a markedly different text.

The psychologist-client privilege statute at issue in *Lodis* 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).⁵ 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*, 114 Wn. 2d at 203; *Phipps*, 74 Wn. 2d at 444.

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 (E.D. 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*).

This Court has acknowledged that the *Hearn* test is subject to criticism, primarily because it allows a party's alleged need for

⁵ The full text of RCW 18.83.110 is reproduced in the Appendix.

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*, 195 Wn. App. at 825 (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.

2. *Lodis* is incorrectly decided and should be disapproved.

In *Lodis*, the appellate court failed to acknowledge 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 90 days after 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 incorrectly decided to that extent.⁶

Furthermore, *Lodis* is incorrectly decided because the appellate court did not follow the correct implied waiver analysis that this Court applied to the physician-patient privilege statute 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 scope of the waiver is limited to the condition that is the subject of the testimony. 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 implied waiver of the federal psychologist-client privilege. *See Lodis*, 172 Wn. App. at 855 (citing *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-37 (N.D. Cal. 2003)). Federal courts recognize a psychologist-patient privilege as a matter of federal common law. *See Fitzgerald*, 216 F.R.D. at 635 (discussing *Jaffee v. Redmond*, 518

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.

U.S. 1 (1996)). Under this privilege, some courts take a broad approach to implied waiver, holding that “a simple allegation of emotional distress in a complaint constitutes waiver.” *Id.* at 636. Other courts take a narrow approach, holding “that there must be an affirmative reliance on the psychotherapist-patient communications before the privilege will be deemed waived.” *Id.* Still others stake out a middle ground, holding that waiver does not occur unless the plaintiff alleges more than “‘garden-variety’ emotional distress,” such as emotional distress resulting in a specific psychiatric disorder. *Id.* at 637. There is a lack of consensus regarding the different approaches. *See id.* at 636.

The case on which *Lodis* relied adopted the narrow approach, which appears to be similar to Washington’s analysis of implied waiver under the physician-patient privilege statute before the statute was amended. *See Fitzgerald*, 216 F.R.D. at 638. *Fitzgerald* rejected the broad approach because “the potential for abuse under the broad waiver approach is substantial” and it “is not necessary to achieve basic fairness to the defendant.” *Id.* *Fitzgerald* also rejected the middle ground approach because it “is not sufficiently protective of the psychotherapist-patient privilege” and “it threatens access to

treatment by breaking the ‘imperative need for confidence and trust’ upon which psychotherapy is rooted.” *Id.* (quoting *Jaffee*).

Lodis did not address the similarity between the narrow approach adopted in *Fitzgerald* and this Court’s precedent regarding implied waiver of the physician-patient privilege, nor did it address the rationales for rejecting the broad and middle ground approaches to implied waiver. *Lodis* is obviously not binding on this Court and the decision should not be followed, even if it could be applied to the marital counseling privilege.

C. Even if the marital counseling privilege had been impliedly waived, the superior court erred by declining to conduct *in camera* review to determine whether the Magneys’ marital counseling records were relevant and discoverable.

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* CR 26(b)(1); *Youngs*, 179 Wn. 2d at 659. While discovery orders are subject to review only for an abuse of discretion, the party holding a privilege is entitled to *in camera* review to ensure that only relevant information is

produced and to redact or withhold irrelevant information. *See Cedell v. Farmers Ins. Co. of Washington*, 176 Wn. 2d 686, 701-02, 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); *see also 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 abused its discretion in declining to conduct *in camera* review of their admittedly privileged marital counseling records to determine which, if any, records are relevant and to withhold or redact irrelevant records.

VI. CONCLUSION

The Court should hold that the Magneys did not impliedly waive the statutory privilege that protects their marital counseling records from disclosure by filing a claim for injury to their child. In the alternative, the Court should require *in camera* review of the records to withhold and redact irrelevant information. In either case,

the superior court order compelling discovery of the Magneys' marital counseling records should be vacated.

DATED this 8th day of May, 2019.

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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:

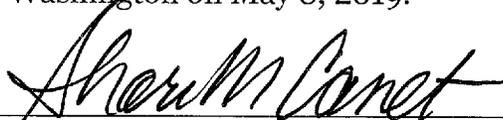
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Collin M. Harper at collin@markamgrp.com

Signed at Moses Lake Washington on May 8, 2019.



Shari M. Canet, Paralegal

APPENDIX

RCW 5.60.060.....	A-1
Laws of 1986, ch. 305, § 101 (amending RCW 5.60.060(4)(b))....	A-5
Laws of 1987, ch. 212, § 1501 (amending RCW 5.60.060(4)(b)) ..	A-7
RCW 18.83.110	A-9

West's Revised Code of Washington Annotated
Title 5. Evidence (Refs & Annos)
Chapter 5.60. Witnesses--Competency (Refs & Annos)

West's RCWA 5.60.060

5.60.060. Who is disqualified--Privileged communications

Effective: June 7, 2018
Currentness

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 71.05 or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 71.05 or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

(3) A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

(4) Subject to the limitations under RCW 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a

waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

(6)(a) A peer support group counselor shall not, without consent of the law enforcement officer, limited authority law enforcement officer, or firefighter making the communication, be compelled to testify about any communication made to the counselor by the officer or firefighter while receiving counseling. The counselor must be designated as such by the agency employing the officer or firefighter prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding officer or firefighter, a witness, or a party to the incident which prompted the delivery of peer support group counseling services to the law enforcement officer, limited authority law enforcement officer, or firefighter.

(b) For purposes of this section:

(i) "Law enforcement officer" means a general authority Washington peace officer as defined in RCW 10.93.020;

(ii) "Limited authority law enforcement officer" means a limited authority Washington peace officer as defined in RCW 10.93.020 who is employed by the department of corrections, state parks and recreation commission, department of natural resources, liquor and cannabis board, or Washington state gambling commission; and

(iii) "Peer support group counselor" means a:

(A) Law enforcement officer, limited authority law enforcement officer, firefighter, or civilian employee of a law enforcement agency, fire department, or state agency who has received training to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity; or

(B) Nonemployee counselor who has been designated by the law enforcement agency, fire department, or state agency to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity.

(7) A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate.

(a) For purposes of this section, "sexual assault advocate" means the employee or volunteer from a community sexual assault program or underserved populations provider, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

(b) A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed.

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

(a) For purposes of this section, “domestic violence advocate” means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by RCW 26.44.030(14). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

(9) 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.

(10) An individual who acts as a sponsor providing guidance, emotional support, and counseling in an individualized manner to a person participating in an alcohol or drug addiction recovery fellowship may not testify in any civil action or proceeding about any communication made by the person participating in the addiction recovery fellowship to the individual who acts as a sponsor except with the written authorization of that person or, in the case of death or disability, the person's personal representative.

Credits

[2018 c 165 § 1, eff. June 7, 2018; 2016 sp.s. c 29 § 402, eff. April 1, 2018; 2016 sp.s. c 24 § 1, eff. June 28, 2016; 2012 c 29 § 12, eff. June 7, 2012; 2009 c 424 § 1, eff. July 26, 2009; 2008 c 6 § 402, eff. June 12, 2008; 2007 c 472 § 1, eff. July 22, 2007. Prior: 2006 c 259 § 2, eff. June 7, 2006; 2006 c 202 § 1, eff. June 7, 2006; 2006 c 30 § 1, eff. June 7, 2006; 2005 c 504 § 705, eff. July 1, 2005; 2001 c 286 § 2; 1998 c 72 § 1; 1997 c 338 § 1; 1996 c 156 § 1; 1995 c 240 § 1; 1989 c 271 § 301; prior: 1989 c 10 § 1; 1987 c 439 § 11; 1987 c 212 § 1501; 1986 c 305 § 101; 1982 c 56 § 1; 1979 ex.s. c 215 § 2; 1965 c 13 § 7; Code 1881 § 392; 1879 p 118 § 1; 1877 p 86 § 394; 1873 p 107 § 385; 1869 p 104 § 387; 1854 p 187 § 294; RRS § 1214. Cf. 1886 p 73 § 1.]

Notes of Decisions (714)

West's RCWA 5.60.060, WA ST 5.60.060

Current with all effective legislation from the 2018 Regular Session of the Washington Legislature.

physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.

PART I ACCELERATED PHYSICIAN-PATIENT PRIVILEGE

Sec. 101. Section 294, page 187, Laws of 1854 as last amended by section 1, chapter 56, Laws of 1982 and RCW 5.60.060 are each amended to read as follows:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian, nor to a proceeding under chapter 71.05 RCW: PROVIDED, That the spouse of a person sought to be detained under chapter 71.05 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2) An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

(3) A clergyman or priest shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

(4) A ((regular)) physician or surgeon or osteopathic 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, (~~but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof~~) except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Within ninety days of filing an action for personal injuries or wrongful death, the claimant shall elect whether or not to waive the physician-patient privilege. If the claimant does not waive the physician-patient privilege, the claimant may not put his or her mental or physical condition or that of his or her decedent or beneficiaries in issue and may not waive the privilege later in the proceedings. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

PART II ATTORNEYS' FEES

NEW SECTION. Sec. 201. A new section is added to chapter 4.24 RCW to read as follows:

The court shall, upon petition by a named party in any tort action, except those provided for in RCW 7.70.070, determine the reasonableness of that party's attorneys' fees. The court shall take into consideration the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent;
- (9) Whether the fixed or contingent fee agreement was in writing and whether the client was aware of his or her right to petition the court under this section.

NEW SECTION. Sec. 202. Section 201 of this act applies to agreements for attorney's fees entered into after the effective date of this section.

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age ~~((or-off))~~ of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of the effective date of this 1987 section, to persons under the age of eighteen years.

PART XV

ACCELERATED WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE

Sec. 1501. Section 294, page 187, Laws of 1854 as last amended by section 101, chapter 305, Laws of 1986 and RCW 5.60.060 are each amended to read as follows:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian, nor to a proceeding under chapter 71.05 RCW: PROVIDED, That the spouse of a person sought to be detained under chapter 71.05 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2) An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

(3) A clergyman or priest shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

(4) A physician or surgeon or osteopathic 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, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) ~~((Within))~~ Ninety days ~~((of))~~ after filing an action for personal injuries or wrongful death, the claimant shall ~~((elect whether or not))~~ be deemed to waive the physician-patient privilege. ~~((If the claimant does not waive the physician-patient privilege, the claimant may not put his or her mental or physical condition or that of his or her decedent or beneficiaries in issue and may not waive the privilege later in the proceedings.))~~ Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

West's Revised Code of Washington Annotated
Title 18. Businesses and Professions (Refs & Annos)
Chapter 18.83. Psychologists (Refs & Annos)

West's RCWA 18.83.110

18.83.110. Privileged communications

Effective: April 1, 2018
Currentness

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, but this exception is subject to the limitations under RCW 71.05.360 (8) and (9).

Credits

[2016 sp.s. c 29 § 414, eff. April 1, 2018; 2005 c 504 § 706, eff. July 1, 2005; 1989 c 271 § 303; 1987 c 439 § 12; 1965 c 70 § 11; 1955 c 305 § 11.]

Notes of Decisions (36)

West's RCWA 18.83.110, WA ST 18.83.110

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