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

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THE SUPREME COURT OF WASHINGTON

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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.*

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REPLY BRIEF OF PETITIONERS

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## I. REPLY INTRODUCTION

Plaintiffs-Petitioners, Brian and Emily Magney (the “Magneys”), submit the following reply to the Brief of Respondents filed on behalf Defendants-Respondents Truc Pham and Incyte Diagnostics (collectively “Incyte”).<sup>1</sup>

In its response brief, Incyte proposes that the marital counseling privilege codified at RCW 5.60.060(9) should be deemed to be impliedly waived any time a person makes a claim for general damages, “[i]n order to provide a baseline for [that person’s] mental state, and to explore other possible sources of mental anguish[.]” Incyte Br., at 3 (brackets added); *accord id.* at 10-11 & 26-27. Incyte’s approach should be rejected because it lacks principled limits, and would render most, if not all, statutory privileges meaningless in personal injury litigation. It would justify finding an implied waiver of any privileges that protect emotionally-laden communications or information, including the spouse and domestic partner privilege, RCW 5.60.060(1); the attorney-client privilege, RCW 5.60.060(2); the priest-penitent privilege, RCW 5.60.060(3); the peer support group counselor privilege, RCW 5.60.060(6); the sexual assault

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<sup>1</sup> Defendants-Respondents Ayumi Corn and Liqun Yin have not filed a brief on the merits, nor have they joined the brief filed by Incyte.

advocate privilege, RCW 5.60.060(7); the domestic violence advocate privilege, RCW 5.60.060(8); and the addiction recovery privilege, RCW 5.60.060(10), among others. Incyte's proposal pays no heed to the relationships that these privileges are designed to protect, and treats all privileges like the physician-patient privilege, despite the different statutory language and history of the physician-patient privilege, which has been amended by the Legislature to provide for an expansive automatic waiver 90 days after filing a personal injury lawsuit. *See* RCW 5.60.060(4) (codified as amended by Laws of 1986, ch. 305, § 101, and Laws of 1987, ch. 212, § 1501).

For their part, the Magneys propose that there is no automatic implied waiver of the marital counseling privilege. The privilege should only be deemed to be impliedly waived if and when a person introduces testimony regarding their marital relationship or seeks damages for injury to their marital relationship. This approach is grounded in the text of the marital counseling privilege statute, RCW 5.60.060(9), as well as this Court's precedent regarding implied waiver of statutory privileges. This approach properly balances the need to protect the privileged relationship with the need for information to defend a personal injury lawsuit.

## II. REPLY ARGUMENT

- A. While Incyte relies primarily on the Court of Appeals decision in *Lodis v. Corbis Holdings, Inc.*, it does not meaningfully address the distinctions between this case and *Lodis*, or the problems with the reasoning of the lower court’s decision.**

In support of its approach to waiver of statutory privileges, Incyte relies primarily on the lower court’s decision in *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.3d 779 (2013). *See* Incyte Br., at 3-12. However, Incyte cannot overcome the distinctions between *Lodis* and this case or the problems with the reasoning in *Lodis*, and it offers no persuasive reason to follow *Lodis* here.

- 1. Incyte cannot overcome the differences between the privilege statute at issue in *Lodis* and the privilege statute at issue in this case.**

In the Magneys’ opening brief, they pointed out how *Lodis* is distinguishable because it involves a different statutory privilege, with a markedly different text. *See* Magneys Br., at 16-19. *Lodis* involved the psychologist-client privilege statute, RCW 18.83.110, which provides that confidential communications between a psychologist and a client shall be privileged “to the same extent and subject to the same conditions as confidential communications between attorney and client.” *See Lodis*, 172 Wn. App. at 854 (citing RCW 18.83.110). The attorney-client privilege statute,

RCW 5.60.060(2), merely codifies the attorney-client privilege as it existed at common law. *See Pappas v. Holloway*, 114 Wn. 2d 198, 202-03, 787 P.2d 30 (1990) (stating “[t]his same privilege afforded the attorney [under RCW 5.60.060(2)] is also extended to the client under the common law rule”; brackets added); *Phipps v. Sasser*, 74 Wn. 2d 439, 444, 445 P.2d 624 (1968) (noting “common-law origin” of attorney-client privilege codified at RCW 5.60.060). When the Legislature defined the psychologist-client privilege by reference to the attorney-client privilege, it essentially incorporated the common-law nature of the privilege. *See N.Y. Life Ins. Co. v. Jones*, 86 Wash.2d 44, 47, 541 P.2d 989 (1975) (stating “[i]f the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law”; brackets added).

In contrast, this case involves the marital counseling privilege, RCW 5.60.060(9), which is separately defined by the Legislature. The marital counseling privilege does not incorporate the psychologist-client privilege or the attorney-client privilege and is wholly statutory. It protects information acquired from persons consulting with a mental health counselor, independent clinical social worker, or marriage and family therapist licensed under

chapter 18.22 RCW. *See id.* It is subject to four express exceptions, including one express exception for waiver, none of which is applicable here. *See* RCW 5.60.060(9)(a)-(d).

Aside from the different privilege statutes and different language used in each statute, the common-law nature of the attorney-client privilege that is incorporated into the psychologist-client privilege gives the Court greater latitude to find an implied waiver of the psychologist-client privilege than it has with respect to wholly statutory privileges such as the marital counseling privilege. *See State v. Maxon*, 110 Wn.2d 564, 569 & nn.14-15, 756 P.2d 1297 (1988) (noting the Legislature’s authority to establish privileges by statute, and Court’s authority to establish privileges at common law); *see also Phipps*, 74 Wn. 2d at 443-44 (discussing former physician-patient privilege statute, and stating “[s]ince the legislature has created a physician-patient privilege, where none existed at common law, and has made its own limitations as to scope and to where it shall not be applicable, any changes should be made by the legislature”; brackets added); *Pappas*, 114 Wn. 2d at 207-09 (adopting new test for implied waiver of common law attorney-client

privilege stated in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), “in the context of the present case”).<sup>2</sup>

In an effort to overcome these distinctions, Incyte argues that the marital counseling privilege is “subsumed by” the psychologist-client privilege. Incyte Br., at 2, 12, 16-17 & 19. While Incyte does not precisely define what it means by “subsumed,”<sup>3</sup> it relies on inapposite federal case law and fallacious reasoning to equate the marital counseling privilege and the psychologist-client privilege. Initially, Incyte cites the U.S. Supreme Court’s decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), and a federal district court case for the propositions that social workers and marriage counselors are protected by the psychotherapist-patient privilege recognized under federal law, and therefore subject to the same waiver analysis under federal law. Incyte Br., at 12-17. While this is true as far as it goes, it is not helpful in deciding what is the correct implied waiver analysis under Washington’s marital counseling privilege statute. There was no issue of state law privilege in the cases cited by Incyte, let alone

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<sup>2</sup> Incyte supports this distinction when it argues that “[s]tatutory privileges that have origins in common law, like the attorney-client privilege and the psychotherapist-patient privilege, judicially can be waived.” Incyte Br., at 22 (brackets added).

<sup>3</sup> The definition of “subsumed” is “to include or place within something larger or more comprehensive : encompass as a subordinate or component element.” *Merriam-Webster Online*, s.v. “subsume” (viewed Sept. 9, 2019; available at [www.m-w.com](http://www.m-w.com)).

Washington state law. *See Jaffee*, 518 U.S. at 15 n.15; *see also Ziemann v. Burlington Cty. Bridge Comm'n*, 155 F.R.D. 497, 504 & 505-06 (D.N.J. 1994) (noting application of federal law to determine whether marital counseling records are privileged).

Next, Incyte claims that mental health counselors, independent clinical social workers, and marriage and family therapists were already protected under state law prior to codification of RCW 5.60.060(9). *See Incyte Br.*, at 12. Incyte cites no authority for this proposition other than RCW 18.83.110. *See id.* Presumably, Incyte means to suggest that confidential communications with, or information obtained by, mental health counselors, independent clinical social workers, and marriage and family therapists was previously protected by the psychologist-client privilege. However, the psychologist-client privilege statute is limited, by its terms, to psychologists, and there appears to be no precedent expanding the scope of the statute to include non-psychologists. Contrary to Incyte's claim, the Legislature added the marital counseling privilege to RCW 5.60.060 precisely because communications with, and information obtained by, such counselors were not previously privileged. The marital counseling privilege was added to RCW 5.60.060 by Senate Bill 5391. *See Laws of 2009*, ch.

424, § 1. The Legislature’s Final Bill Report for S.B. 5931 states “mental health counselors’, marriage and family therapists’ and social workers’ communications with their clients are not currently afforded testimonial privilege.” Wash. Final Bill Rpt., 2010 Reg. Sess. S.B. 5931 (Feb. 15, 2010).<sup>4</sup> The Legislature distinguishes mental health counselors, independent clinical social workers, and marriage and family therapists from psychologists in a way that is incompatible with Incyte’s attempt to equate these different licenses and professions. *See* RCW 18.83.010 (defining the “practice of psychology”); RCW 18.83.020 (prohibiting non-licensed persons from holding themselves out as psychologists); RCW 18.225.010(7)-(9) (defining “independent clinical social work,” “marriage and family therapy,” and “mental health counseling”); RCW 18.225.020 (prohibiting non-licensed persons from holding themselves out as mental health counselors, independent clinical social workers, and marriage and family therapists).

Lastly, Incyte seizes on what it perceives to be overlap between the definitions of mental health counselors, independent clinical social workers, and marriage and family therapists and

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<sup>4</sup> Copies of Laws of 2009, Ch. 424, and Wash. Final Bill Rpt., 2010 Reg. Sess. S.B. 5931 (Feb. 15, 2010) are reproduced in the Appendix to this brief.

psychologists. *See* *Incyte Br.*, at 13-15. Specifically, Incyte notes the definition of “mental health counseling” includes “psychotherapy,” *Id.* at 13 (quoting RCW 18.225.010(9)), and the definition of “marriage and family therapy” includes “application of *psychotherapeutic* and family systems theories and techniques in the delivery of services[.]” *id.* at 14 (quoting RCW 18.225.010(8); emphasis in original; brackets added). This attempt to equate “mental health counseling” and “marriage and family therapy” with the practice of psychology is based on the fallacy of questionable classification because it assumes that the existence of any overlap between the different professions requires them to be treated the same. Moreover, it ignores the distinction that the Legislature has already made between these professions, both in terms of licensing and privileges.

Incyte goes on to argue that it is incongruous to give marital counselors greater protection from implied waiver of the privilege than psychologists. While that is the prerogative of the Legislature, the alleged incongruity rests upon the flawed premise that *Lodis* applied the correct waiver analysis to psychologists.

2. **Contrary to Incyte, *Lodis* was not correctly decided simply because the Court of Appeals chose to follow one of several strands of federal authority regarding implied waiver of the federal common-law psychotherapist-patient privilege; the lower court failed to follow controlling Washington authority regarding implied waiver of statutory privileges.**

Incyte states that *Lodis* “was correctly decided by both the Superior Court and Court of Appeals because the holding relied on the broad approach to waiver under federal law.” Incyte Br., at 4. Incyte acknowledges that there are competing strands of federal authority regarding implied waiver of the psychotherapist-patient privilege under federal law. *See id.* at 7 (citing *Lodis*, 172 Wn. App. at 855, and *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-37 (N.D. Cal. 2003)); *see also* Magneys Br., at 20-22 (discussing federal authority and *Fitzgerald*). One strand of federal authority—the broad approach referenced by Incyte—holds that “a simple allegation of emotional distress in a complaint constitutes waiver” of the federal psychotherapist-patient privilege. 216 F.R.D. at 636. The second strand—a middle ground approach—finds “waiver when the plaintiff has done more than allege ‘garden-variety’ emotional distress.” *Id.* at 637.<sup>5</sup> Under the third strand—a narrow approach—“there must be an

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<sup>5</sup> “Garden-variety” emotional distress is defined as “ordinary or commonplace emotional distress,’ that which is ‘simple or usual.’” *Fitzgerald*, 216 F.R.D. at 637.

affirmative reliance on the psychotherapist-patient communications before the privilege will be deemed waived.” *Id.* at 636.

Neither *Lodis* nor *Incyte* justify the broad approach to waiver apart from citation to *Fitzgerald*. *See Lodis*, 172 Wn. App at 855-56; *Incyte Br.*, at 7-8. However, *Fitzgerald* rejected the broad approach because of “the potential for abuse,” which the court described as “substantial,” and it “is not necessary to achieve basic fairness to the defendant.” 216 F.R.D. at 638. *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.* at 638. To avoid these problems, *Fitzgerald* adopted the narrow approach.

The narrow approach under federal law is also consistent with existing Washington precedent. It appears that the parties in *Lodis* did not bring existing Washington precedent to the appellate court’s attention. *See* 172 Wn. App. at 855. However, in this case, the Magneys have pointed out how existing Washington precedent limits implied waiver of a statutory privilege to circumstances where the plaintiff introduces testimony or seeks damages regarding the privileged relationship, and further limits the scope of the implied

waiver to the condition that is the subject of the testimony or damage request. See *Magneys Br.*, at 8-13 (citing *Carson v. Fine*, 123 Wn. 2d 206, 213-14, 867 P.2d 610 (1994); *Phipps*, 74 Wn. 2d at 445-48; *Bond v. Independent Order of Foresters*, 69 Wn. 2d 879, 880-81, 421 P.2d 351 (1966); *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); and *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)).

Incyte tries to distinguish these cases on grounds that they “define the scope of admissibility” of privileged information rather than “the scope of the waiver” of the privilege. See *Incyte Br.*, at 23-26. This distinction lacks merit because the question of admissibility hinges on the scope of the waiver.<sup>6</sup> The cases otherwise support the *Magneys*’ argument that implied waiver is limited to circumstances where the plaintiff introduces testimony or seeks damages regarding the privileged relationship, and the scope of the waiver is limited to the condition that is the subject of the testimony or damage request:

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<sup>6</sup> Discoverability likewise hinges upon the scope of the waiver. See CR 26(b)(1) (providing “[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action”; emphasis added).

- *Carson*, 123 Wn. 2d at 213 (stating “this court has held that the introduction by the patient of medical testimony describing the treatment and diagnosis of an illness waives the privilege as to that illness, and the patient's own testimony to such matters has the same effect”; citing *Randa* and *McUne*); *id.* at 214 (stating “[a] waiver of this privilege as to one of plaintiff's physicians also constitutes a waiver as to other physicians who attended the plaintiff *with regard to the disability or ailment at issue*”; brackets & emphasis added; citing *McUne* and *Tradewell*);
- *Phipps*, 74 Wn. 2d at 445-48 (rejecting “blanket waiver by commencing the action” for personal injuries; instead basing waiver on plaintiff's intent to call treating physician as a witness);
- *Bond*, 69 Wn. 2d at 881 (rejecting “contention that the bringing of an action for personal injuries constitutes a waiver of the [former] statutory physician-patient privilege” and noting “the mere bringing of an action does not constitute a waiver of the privilege”; noting the scope of the waiver is limited to “the ailment for which [the plaintiff] was treated; brackets added; citing *Randa* and *McUne*);
- *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, and the patient's own testimony to such matters may have the same effect” and finding no waiver when evidence was elicited on cross examination; citing *McUne*; brackets added)
- *McUne*, 42 Wn. 2d at 74-77 (stating “[w]hen a patient permits his physician to testify without objection, he of course waives the privilege as to that physician”; “appellant must be deemed to have waived the privilege as to any medical testimony which tends to contradict or impeach medical testimony which he has himself offered”; and noting scope of the waiver is

limited to “the same ailments and disabilities”; brackets added).

- *Quick’s Estate*, 161 Wash. at 546 (finding waiver where plaintiff offered testimony from two physicians regarding decedent’s mental condition); and
- *Tradewell*, 9 Wn. App. at 824 (finding waiver where criminal defendant called physician to testify on his behalf, and holding that waiver extended to all physicians who treated the patient for the same ailment or disability; citing *McUne* and *Quick’s Estate*).<sup>7</sup>

**B. Under the proper analysis of implied waiver, the fact that the Magneys are seeking damages for injury to their child does not impliedly waive their marital counseling privilege because loss of parental consortium and marital consortium do not involve the same condition or injury.**

Incyte argues that loss of parental consortium involves an element of mental anguish and that it should be able to invade the marital counseling privilege to explore any other “potential causes” of mental anguish that may have been suffered by the Magneys in the

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<sup>7</sup> Incyte does not try to defend the incorrect statement in *Lodis* that “[t]he Washington Supreme Court recognizes that the physician-patient and psychologist-client privilege provide essentially the same protection.” 172 Wn. App. at 855 (citing *Petersen v. State*, 100 Wn. 2d 421, 429, 671 P.2d 230 (1983); brackets added); see also *Magneys Br.*, at 19 (discussing this issue). Since *Petersen* was decided, the physician-patient privilege statute has been amended twice, and now provides for automatic waiver of the privilege as to all physicians and all conditions 90 days after filing a personal injury lawsuit, unlike the psychologist-client privilege statute at issue in *Lodis* and the marital counseling privilege statute at issue in this case. See Laws of 1986, ch. 305, § 101, and Laws of 1987, ch. 212, § 150 (codified at RCW 5.60.060(4)). In addition, since *Petersen* was decided, the analysis of implied waiver of the attorney-client privilege has been modified by *Pappas*, 114 Wn. 2d at 207-09, which followed *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).

past. *Incyte Br.*, at 26-27. By defining the condition or injury in question at this high level of generality, Incyte seeks to avoid the effect of this Court’s implied waiver precedent limiting the scope of the waiver to the condition or injury at issue. *See supra*. In this way, Incyte also attempts to collapse different types of injury that a jury is fully capable of segregating. *Cf. Hinzman v. Palmanteer*, 81 Wn. 2d 327, 329, 501 P.2d 1228 (1972), *disapproved on other grounds by Wooldridge v. Woolett*, 96 Wn. 2d 659, 638 P.2d 566 (1981) (holding that “the loss of love and companionship” of a child and “destruction of parent-child relationship” are distinct injuries that the jury could consider and for which it could award damages); *Kirk v. Washington State Univ.*, 109 Wn.2d 448, 459-62, 746 P.2d 285 (1987) (holding “loss of enjoyment of life” is distinct from other types of noneconomic damages); *Gray v. Washington Water Power Co.*, 30 Wash. 665, 674, 71 P. 206, 209 (1903) (holding “disfigurement” is distinct from other types of noneconomic damages); RCW 4.56.250(1)(b) (defining noneconomic damages). The Court should reject Incyte’s attempt to redefine the Magneys’ injury as unspecified mental anguish.

**C. The Court should reject Incyte’s alternative request to extend the implied waiver analysis from *Hearn v. Rhay* beyond the attorney-client privilege.**

As an alternative to the implied waiver analysis of the psychologist-client privilege in *Lodis*, Incyte invites the Court to apply the implied waiver analysis of the attorney-client privilege from *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). *See* Incyte Br., at 28-36. 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 Wash.2d at 207. The *Hearn* test has never been applied by Washington courts beyond the attorney-client privilege, as Incyte concedes. *See* Incyte Br., at 36. This Court has only applied the *Hearn* test in one case, and twice emphasized that its application was limited “in the context of the present case” and “to the present case.” *Id.* at 208. The Court noted that the *Hearn* test allows a party’s alleged need to overcome the privilege and “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.” *Id.* at 207-08

(quotation omitted); *see also Dana v. Piper*, 173 Wn. App. 761, 773-74 & n.11, 295 P.3d 305, *rev. denied*, 178 Wn. 2d 1006 (2013) (noting “sharp criticism” of *Hearn*); *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 825, 381 P.3d 111, 120 (2016) (noting *Dana* and *Pappas* applied *Hearn* “with caution”); *Magneys’ Br.*, at 17-18 (discussing *Hearn*).

Incyte argues the *Hearn* test for implied waiver should be applied to the marital counseling privilege “because other courts have held the attorney-client privilege and the psychotherapist-patient privilege are waived under a similar analysis.” *See id.* at 33-34. However, several of the cases cited by Incyte in support of this proposition merely involve the broad approach to waiver of the federal psychotherapist-patient privilege discussed above, without citing *Hearn*. *See Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000); *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006).

Another case cited by Incyte rejects the broad approach to waiver of the federal privilege, again without citing *Hearn*:

The Court recognizes that, at first blush, it may appear anomalous that a plaintiff who seeks damages for emotional pain and suffering may be privileged from producing medical records that may shed light on that claim. However, that is no more anomalous than allowing a defendant in a patent case to deny willful infringement and at the same maintain the

privilege in an opinion letter of counsel that might shed light on that claim. In both instances, that is the price that we pay for recognizing a privilege, a price that the law deems necessary in order to obtain the supervening private and public benefits that inure from recognition of the privilege. In short, plaintiff who alleges emotional pain and suffering damages certainly puts his mental state at issue; but by doing so, he does not ipso facto give up the privilege in confidential communications with psychotherapists concerning his mental state.

*Hucko v. City of Oak Forest*, 185 F.R.D. 526, 531 (N.D. Ill. 1999).

Only one case cited by Incyte, a New York trial court decision, appears to follow the implied waiver analysis from *Hearn*. See *LeVien v. LaCorte*, 168 Misc. 2d 952, 957-59 (N.Y. Sup. Ct. 1996). *LeVien* involved a New York psychologist-client privilege statute that incorporated the attorney-client privilege, similar to Washington's psychologist-client privilege statute:

CPLR 4507 provides in pertinent part that “[t]he confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.”

*Id.*, 168 Misc. 2d at 954 (quotation & brackets in original). Because it involved a privilege statute that differs markedly from Washington's marital counseling privilege, *LeVien* is distinguishable for the same reasons as *Lodis*. In addition, because it differs from prior Washington precedent regarding implied waiver of statutory

privileges, *LeVien* should not be followed in Washington for the same reasons that *Lodis* should be disapproved. The Court should decline to apply the *Hearn* test for implied waiver in this case.<sup>8</sup>

DATED this 11th day of September, 2019.

s/George M. Ahrend \_\_\_\_\_  
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<sup>8</sup> Even if the Court were to apply the *Hearn* test here, Incyte's argument that the Magneys' placed their privileged marital counseling records at issue by making a claim for injury to their child rests upon the improper equivocation between loss of parental consortium and marital consortium.

**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:

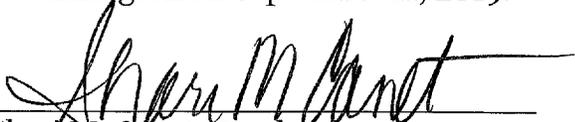
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and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

Mark D. Kamitomo at [mark@markamgrp.com](mailto:mark@markamgrp.com)  
Collin M. Harper at [collin@markamgrp.com](mailto:collin@markamgrp.com)

Signed at Moses Lake Washington on September 11, 2019.

  
\_\_\_\_\_  
Shari M. Canet, Paralegal

# **APPENDIX**

Wash. Final Bill Rpt., 2010 Reg. Sess. S.B. 5931 (Feb. 15, 2010)...	A-1
Laws of 2009, ch. 424 .....	A-3

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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2009 Wash. Legis. Serv. Ch. 424 (S.S.B. 5931) (WEST)

WASHINGTON 2009 LEGISLATIVE SERVICE

60th Legislature, 2009 Regular Session

Additions are indicated by **Text**; deletions by

**Text** . Changes in tables are made but not highlighted.

Vetoed provisions within tabular material are not displayed.

CHAPTER 424

S.S.B. No. 5931

EVIDENCE—COUNSELORS AND COUNSELING—PRIVILEGES AND IMMUNITIES

AN ACT Relating to licensed mental health practitioner privilege; and amending RCW 5.60.060.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec. 1.** RCW 5.60.060 and 2008 c 6 s 402 are each amended to read as follows:

<< WA ST 5.60.060 >>

(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 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 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 70.96A.140 or 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 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 sheriff, police chief, fire chief, or chief of the Washington state patrol, 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 or firefighter.

(b) For purposes of this section, “peer support group counselor” means a:

(i) Law enforcement officer, firefighter, civilian employee of a law enforcement agency, or civilian employee of a fire department, 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

(ii) Nonemployee counselor who has been designated by the sheriff, police chief, fire chief, or chief of the Washington state patrol 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 rape crisis center, 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(12). 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.

Approved May 8, 2009.

Effective July 26, 2009.

WA LEGIS 424 (2009)

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