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

SUPREME COURT OF WASHINGTON

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

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

COMBINED REPLY IN SUPPORT OF DISCRETIONARY REVIEW

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Plaintiffs-Petitioners Brian and Emily Magney (the "Magneys") submit this combined reply to Respondents' Opposition to Petitioners' Motion for Discretionary Review filed on behalf of Defendants-Respondents Truc Pham MD and Incyte Diagnostics ("Pham & Incyte"), and the Answer to Petitioners' Motion for Discretionary Review filed on behalf of Defendants-Respondents Ayumi I. Corn MD and Liquin Yin MD ("Corn & Yin"):

I. REPLY

A. This case presents competing views regarding the circumstances and scope of implied waiver of a statutory privilege in sharp relief, and review should be granted to provide guidance to the bench and bar.

The threshold for obtaining discovery is establishing that the requested information is "not privileged" and "relevant." *See* CR 26(b)(1). This review presents dramatically different views regarding both the privilege and relevance aspects of discovery that go beyond the facts of this case.

The Magneys contend that, in the absence of an express statutory waiver, the privilege for marital counseling records is not impliedly waived unless the plaintiff introduces testimony regarding a marital relationship or seeks damages for injury to the marital relationship. This approach to implied waiver of a statutory privilege is grounded in this Court's precedent regarding waiver of the

physician-patient privilege, decided before the Legislature amended the physician-patient privilege statute to provide for an express waiver. *See Bond v. Independent Order of Foresters,* 69 Wn. 2d 879, 880-82, 421 P.2d 351 (1966); *Phipps v. Sasser,* 74 Wn. 2d 439, 443-44, 445 P.2d 624 (1968). Under this approach, the ***conduct of the person who holds the privilege*** is the basis for implied waiver, and the scope of the implied waiver is limited to the precise condition placed in issue by that person's conduct. This approach properly balances the role of the Legislature in protecting certain types of relationships and communications with the role of the courts in overseeing litigation. *See Carson v. Fine,* 123 Wn. 2d 206, 213-14, 867 P.2d 610 (1994); *Phipps,* 74 Wn. 2d at 445; *McUne v. Fuqua,* 42 Wn. 2d 65, 74-76, 253 P.2d 632 (1953).

In contrast, Pham & Incyte and Corn & Yin contend that any lawsuit requesting general damages for emotional distress impliedly waives the marital counseling privilege in order to provide a "baseline" for the plaintiff's mental state and "to explore other possible sources of mental anguish." Pham & Incyte Opposition, at 11; *accord id.* at 12-13; Corn & Yin Answer, at 9 (arguing "all potential sources of emotional distress become highly relevant to the dispute"). Under this approach, the ***need of the party resisting***

the privilege is the basis for implied waiver and there are no apparent limits on the scope of the waiver other than the opposing party's alleged need.

With respect to the issue of relevance, the Magneys contend that, even when the applicable privilege has been impliedly waived, the waiver is not absolute. Only relevant information is subject to disclosure, and when there is a dispute regarding relevance, the party holding the privilege is entitled to in camera review to ensure that only relevant information is disclosed and to redact or withhold irrelevant information. *See Youngs v. Peacehealth*, 179 Wn. 2d 645, 659, 316 P.3d 1035 (2014); *Cedell v. Farmers Ins. Co.*, 176 Wn. 2d 686, 702, 295 P.3d 239 (2013); *Fellows v. Moynihan,* 175 Wn. 2d 641, 285 P.3d 864 (2012).

For their part, Pham & Incyte and Corn & Yin seem to assume, but they do not establish, that all information contained in the Magneys' marital counseling records is ipso facto relevant. *See* Pham & Incyte Opposition, at 1 & 7; Corn & Yin Answer, at 1 & 8-10. Pham & Incyte acknowledge, and Corn & Yin do not dispute, that the lower courts did not conduct or require in camera review. *See* Pham & Incyte Opposition, at 15. Yet, without such review, there is no limit on their ability to obtain irrelevant information.

B. Pham & Incyte and Corn & Yin do not meaningfully engage with the reasons why *Lodis v. Corbis Holdings, Inc.,* is inapplicable and incorrectly decided.

In their motion for discretionary review, the Magneys pointed out how *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.3d 779 (2013), is distinguishable because it involved the psychologist-client privilege, RCW 18.83.110, which differs markedly from the text of the marital counseling privilege, RCW 5.60.060(9). The psychologist-client privilege incorporates the attorney-client privilege and applies it to the psychologist-client relationship "to the same extent and subject to the same conditions" as the attorney-client relationship. RCW 18.83.110. Courts have greater latitude to find implied waiver of the attorney-client privilege because it is a common law privilege rather than solely a creature of statute. *See Phipps*, 74 Wn.2d at 444. For this reason, *Lodis* does not control implied waiver of the marital counseling privilege statute.

The Magneys also noted that *Lodis* was incorrectly decided because it relies on an inapt analogy between the physician-patient privilege and the psychologist-client privilege, based on an outdated version of the physician-patient privilege statute. They further noted that *Lodis* was incorrectly decided because it did not apply the

correct implied waiver analysis, which is limited in scope to the condition at issue. *See* Magney Motion, at 19-20.

In response, while Pham & Incyte and Corn & Yin rely principally on *Lodis,* they do not address the distinctions between this case and *Lodis* or problems with the reasoning of *Lodis*. Their arguments demonstrate the pernicious effect of the *Lodis* decision and its departure from this Court's precedent regarding implied waiver of a statutory privilege, bolstering the grounds for review.

C. Pham & Incyte and Corn & Yin avoid dealing with the text of the marital counseling privilege statute.

In their motion for discretionary review, the Magneys quoted and discussed the text of the marital privilege statute at length. *See* Magneys' Motion, at 3 (quoting text of RCW 5.60.060(9)); *id.* at 8-11 (discussing text). They pointed out how the statute contains a number of express exceptions, one of which is based on principles of waiver, but none of which are applicable here. *Id.* at 9-11. Under the principle of statutory construction known as *expressio unius est exclusio alterius*, the enumeration of statutory exceptions precludes additional implied judicial exceptions. *Id.* The statutory list demonstrates that the legislature carefully considered the scope of the statute. *Id.* Pham & Incyte and Corn & Yin do not dispute any of this analysis.

D. Pham & Incyte's attempt to distinguish this Court's precedent bolsters the Magneys' arguments against expansive implied waiver of a statutory privilege.

In their motion for discretionary review, the Magneys discussed this Court's precedent regarding the limits on judicial authority to imply waiver of a statutory privilege that has no counterpart at common law. *See* Magneys' Motion, at 11-14 (discussing *Bond* and *Phipps, supra*). Corn & Yin do not address this authority.

Pham & Incyte attempt to distinguish *Bond* and *Phipps* on grounds that they involve the former physician-patient privilege statute, which has subsequently been amended to provide for express waiver. *See* Pham & Incyte Opposition, at 9-10. The fact that *Bond* and *Phipps* involved the former physician-patient privilege statute, rather than the marital counseling privilege statute, is immaterial because both privileges are wholly creatures of statute. There is no reason to treat the implied waiver analysis differently under either statute. Pham & Incyte's attempted distinction highlights an important distinction between this case and *Lodis,* which involves a statutory privilege, (psychologist-client), which incorporates a common law privilege, (attorney-client), over which the Court has greater authority, as noted above.

Pham & Incyte's attempt to distinguish *Bond* and *Phipps* also emphasizes a crucial point. The Legislature amended the physician-patient privilege statute to provide for express waiver when a plaintiff files a personal injury lawsuit, and further amended the statute to expand upon the scope of the waiver, precisely because the Court's authority to imply a waiver is limited and the scope of such waiver is narrow. *See* Magneys' Motion, at 13 n.3 (tracing legislative history of statutory physician-patient privilege). No such express waiver exists in the text of the marital counseling privilege statute. In the absence of such legislative direction, there is no basis to depart from this Court's precedent regarding the circumstances and scope of an implied waiver of a statutory privilege.

E. Pham & Incyte and Corn & Yin improperly attempt to re-define the harm involved in this case in order to expand upon the scope of implied waiver of a statutory privilege.

In their motion for discretionary review, the Magneys discussed this Court's precedent limiting the scope of an implied waiver of a statutory privilege, where such implied waiver is otherwise appropriate. *See* Magneys' Motion, at 14-16 (discussing *Carson, Phipps,* and *McUne*, *supra*). Under this authority, implied waiver occurs only where the plaintiff offers testimony about a

privileged condition, and the scope of the waiver is limited to the precise condition at issue.

Throughout their briefing, Pham & Incyte and Corn & Yin try to avoid this limit on the scope of an implied waiver by re-framing the Magneys' injury at a high level of generality. The Magneys have only sought to recover damages authorized by RCW 4.24.010 for injury to their child. *See* WPI 32.06.01. They have not sought to recover damages for loss of spousal consortium. *See* WPI 32.04. Nonetheless, Pham & Incyte and Corn & Yin abstract both types of injury and damage—injury to child and loss of spousal consortium—in order to describe them both in terms of "emotional distress" or "mental anguish." They assume all types of emotional distress are the same, and that a jury cannot evaluate a claim for injury to child without having information about all potential sources of emotional distress, including, but certainly not limited to, privileged marital counseling records.

This approach is contrary to this Court's precedent limiting the scope of implied waiver of a statutory privilege to the precise condition at issue. Moreover, there are no principled limits to this approach. Any claim of general damages for emotional distress would justify an implied waiver of any and every statutory privilege

protecting an emotionally-laden relationship or emotionally-laden communications, including, but not limited to, the spouse/domestic partner privilege, RCW 5.60.060(1); the attorney-client privilege, RCW 5.60.060(2); the confessional privilege, RCW 5.60.060(3); and a host of others. To address the consequences of such an approach, review should be granted.

F. Contrary to Corn & Yin, *In re JF* did not involve any issue of implied waiver and the case is unhelpful in resolving this review.

Corn & Yin cite the Division I decision in *In re JF,* 109 Wn. App. 718, 729, 37 P.3d 1227 (2001), for the proposition that "Washington courts have held that, even though a privilege statute does not specifically authorize waiver, implied waiver can be found in the litigation context." Corn & Yin Answer, at 14. This mis-states the *JF* decision.

JF was a dependency proceeding, and the state subpoenaed records of counseling provided to the mother and her child. *See* 109 Wn. App. at 721. The mother argued that the records were privileged under former RCW 18.19.180 and that there could be no implied waiver. *See id.* at 729. However, the Court found that the records were not privileged and did not address the issue of implied waiver.

Among other things, the relevant privilege statute provided for express waiver "[i]n response to a subpoena from a court of law" or "[a]s required under chapter 26.44 RCW," regarding reports of child abuse and neglect. RCW 18.19.180(4) & (5) (brackets added). The appellate court affirmed an order compelling disclosure of the parent-child counseling records at issue in *JF,* reasoning that "direct support for the ruling is found in the counselor-patient privilege statute itself." *JF,* 109 Wn. App. at 730. Contrary to Corn & Yin, the Court did not address the issue of implied waiver, nor did it purport to alter this Court's precedent addressing implied waiver of a statutory privilege.

VI. CONCLUSION

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

DATED this 4th day of February, 2019.

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CERTIFICATE OF SERVICE

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

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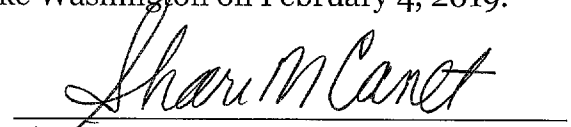
Signed at Moses Lake Washington on February 4, 2019.



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