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Washington Supreme Court No. 96669-9
Court of Appeals, Div. III No. 361039-III
Spokane Co. Superior Court 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.

RESPONDENTS AYUMI I. CORN'S AND LIQUIN YIN'S ANSWER
TO PETITIONERS' MOTION FOR DISCRETIONARY REVIEW

STEVEN J. DIXSON, WSBA No. 38101
CASEY M. BRUNER, WSBA No. 50168
WITHERSPOON · KELLEY, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: (509) 624-5265
sjd@witherspoonkelley.com
cmb@witherspoonkelley.com
Counsel for Respondents Corn and Yin

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I. IDENTITY OF RESPONDING PARTY

This answer is respectfully submitted by Respondents Ayumi I. Corn, M.D., and Liqun Yin, M.D. (hereinafter "Respondents"), two of the four named Defendants in the underlying action.

II. RESPONSE

Respondents respectfully ask this Court to deny Petitioners' Motion for Discretionary Review. Petitioners persist in their belief that they can claim generic mental pain and suffering, mental anguish, and loss of consortium, while refusing to disclose relevant information that could rebut their claims. The Superior Court denied Petitioners' motion for a protective order. The Commissioner for the Court of Appeals for Division III denied their request for discretionary review, finding that the Petitioners failed to show the superior court committed probable error and failed to show that the decision substantially alters the status quo or limits the Petitioners' freedom to act. A panel for The Court of Appeals for Division III then refused to modify the Commissioners' ruling. The Superior Court judge, the Commissioner for the Court of Appeals, and the panel of Division III were all correct. The Court of Appels for Division III did *not* commit "probable error" and the decision does not alter the status quo or limit the Petitioners' freedom to act. Petitioners' refusal to accept the three prior decisions, serves only to delay and unnecessarily increase

the cost of litigation. Pursuant to RAP 13.5(b), the Court should deny Petitioner's motion.

III. RELEVANT FACTS

On January 24, 2017, Petitioners filed a complaint for medical negligence. The complaint alleges that the Defendants failed to adhere to the standard of care, which proximately caused injury to minor Petitioner Logan Magney, who was the Defendants' patient. Petitioners Brian and Emily Magney are Logan Magney's parents. In addition to being named parties as Logan's parents, Mr. and Mrs. Magney have their own direct claims against the Respondents. They claim that the Respondents' alleged negligence "directly and proximately caused Plaintiffs to suffer severe and permanent injuries, both mental and physical, pain and suffering and mental anguish as well as loss of consortium." *Complaint*, ¶ 8.1; *Petitioners' Appendix*, A-5.

During discovery, Respondents learned that Brian and Emily Magney had attended marital counseling shortly before Logan Magney was treated. By their own admission, Petitioners are not currently undergoing marital counseling. They stopped attending counseling years ago. Because the previous marital counseling records are either 1) directly relevant to Brian and Emily Magney's claims in the case; or 2) may lead to the discovery of admissible evidence, Respondents requested those

counseling records in discovery. Petitioners objected and moved for a protective order, asking the superior court to categorically bar any discovery of the counseling records. The superior court, having considered the pleadings and arguments of counsel, correctly applied controlling precedent and denied the protective order. The superior court, relying in part on *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 855-56, 262 P.3d 779 (2013), held: "Under these circumstances, I am going to find that the privilege is waived based upon the fact that the mental health or anguish here has been put at issue." VRP, 27:22-25.

Petitioners then moved for discretionary review. The Commissioner was fully briefed and oral argument was heard. The Commissioner then denied the Petitioner's motion. The Commissioner held:

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

The Magneys also have not established the additional requisite of RAP 2.3(b) that the error substantially alter the status quo or limit the party's freedom to act. While the records may contain material that is of a personal nature, the Magneys can move to seal the records and to limit their use in court. As for the superior court's refusal to first

conduct an in camera review, its reasons for refusal do not constitute an abuse of discretion. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000).

Commissioner's Ruling, 3 – 4.

The Petitioners then moved the Court of Appeals for Division III to modify the Commissioner's ruling. Petitioners failed to offer any new facts or law that justified modification of the Commissioner's ruling. On November 30, 2018, the Court of Appeals for Division III denied Petitioners' Petition to Modify the Commissioner's ruling.

The Court of Appeals did not commit probable error in its decision. "Interlocutory review is disfavored . . . [and] is available in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, 593 (2010). The Court of Appeals found *Lodis* to be persuasive and analogous. Therefore, the Court of Appeals found that the superior court was not probably wrong. The Court of Appeals was also correct in that Petitioners have failed to show that the ruling substantially alters the status quo or would limit the parties' freedom to act. Therefore, the Court should deny Petitioners' Motion for Discretionary Review.

IV. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals commit "probable error" in denying Petitioners' request for interlocutory review when interlocutory review is "disfavored" and granted only in "rare circumstances?"

Discretionary review may *only* be accepted if a petitioner can show that the Court of Appeals committed probable error. Here, the Court of Appeals found that the Superior Court properly relied on and applied correct, controlling precedent. Should the Court deny Petitioners' Motion for Discretionary Review?

Discretionary review may *only* be accepted if a petitioner can show that the Court of Appeals' decision alters the status quo or limits the parties' freedom to act. Here, the Court of Appeals properly held that the trial court's decision could be remedied by protective orders or evidentiary limitations. Should the Court of Appeals deny Petitioners' Motion for Discretionary Review?

V. ARGUMENT

Petitioners are seeking discretionary review by the Washington Supreme Court. The Court of Appeals for Division III properly held that the trial court did not commit probable error. To succeed on the instant motion, Petitioners must show that the Court of Appeals committed probable error in finding that the trial court did not commit probable error. Such a finding is rare and disfavored. Petitioners cannot meet this high standard.

"Interlocutory review is disfavored." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, 593 (2010). "Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business." *Maybury v.*

City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). "Pretrial review of rulings confuses the functions of trial and appellate courts." *Minehart*, 156 Wn. App. at 462. "A trial court finds facts and applies rules and statutes to the issues that arise in the course of a trial." *Id.* "An appellate court reviews those rulings for legal error and considers the harm of the alleged error in the context of its impact on the entire trial." *Id.* Therefore, "[i]nterlocutory review is available in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart*, 156 Wn. App. at 462 (emphasis added).

Because discretionary review is disfavored, it is appropriate "only" if "[t]he Court of Appeals has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act." RAP 13.5(b)(2). "[T]here is an inverse relationship between the certainty of error and its impact on the trial. Where there is a weaker argument for error, there must be a stronger showing of harm." *Minehart*, 156 Wn. App. at 462.

A. THE COURT OF APPEALS DID NOT COMMIT PROBABLE ERROR.

1. The Court of Appeals' decision to accept interlocutory review is reviewed for abuse of discretion. A superior court's discovery order is reviewed for an abuse of discretion. Only the waiver issue is reviewed de novo.

"An appellate court reviews a trial court's discovery order for an abuse of discretion." *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053, 1056 (2006). "Judicial discretion means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." *T.S.*, 157 Wn.2d at 423 (internal quotations omitted). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *Minehart*, 156 Wn. App. at 463. "Thus, even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable." *Id.* "A court's exercise of discretion is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." *T.S.*, 157 Wn.2d at 423 (internal quotations omitted). While trial court's discovery orders are reviewed for abuse of discretion, whether a party waived a privilege is a question of law we review de novo. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 854, 292 P.3d 779, 790 (2013).

Therefore, based on these "well-settled principles," whether the records are reasonably calculated to lead to the discovery of admissible evidence is reviewed on an abuse of discretion standard. Only the privilege waiver issue is reviewed de novo. *See id.*

2. Court Rule 26 permits discovery of any, nonprivileged matter reasonably calculated to lead to the discovery of admissible evidence.

Court Rule 26 "authorizes discovery of any matter, not privileged, which may be admissible in evidence or which 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Cook v. King Cty.*, 9 Wn. App. 50, 51–52, 510 P.2d 659, 661 (1973) (quoting CR 26). "It is well settled that these rules are to be given a broad and liberal construction". *McGugart v. Brumback*, 77 Wn.2d 441, 444, 463 P.2d 140, 142 (1969). No showing of good cause is required to obtain information in discovery. *Cook*, 9 Wn. App. at 51 (quoting *Verrazzano Trading Corp. v. United States*, 349 F.Supp. 1401 (Cust.Ct.1972)).

Here, the superior court properly held, relying on *Lodis*, that "when you put mental health at issue" the documents become discoverable. VRP A-136; *Lodis*, 172 Wn. App. at 854. Petitioners disagree and argue that the records are not relevant. They argue that they are not claiming loss of consortium between each other and, therefore, the marriage counseling records are not relevant. This argument is both factually and legally

incorrect. In the underlying case, the Petitioners have pled that the Respondents' alleged negligence "directly and proximately caused Plaintiffs to suffer severe and permanent injuries, both mental and physical, pain and suffering and mental anguish as well as loss of consortium." *Complaint*, ¶ 8.1; A-5. Their claim is for generic emotional damages and, therefore, all potential sources of emotional distress become highly relevant to the dispute. The legal problem with Petitioners' argument is that it is nearly identical, in logic, to the argument that failed in *Lodis*. There, the petitioner argued that just because he made a general claim for emotional distress, it did not mean his psychologist's counseling records were relevant or admissible. The Court of Appeals disagreed.

The defendant is entitled to discover any records relevant to the plaintiff's emotional distress. . . . CR 26(b)(1) provides, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." When a plaintiff claims emotional distress, mental health records and provider testimony are relevant, because the plaintiff's mental health is at issue. . . . For example, such records and testimony are relevant in showing causation or the degree of the alleged emotional distress. *Id.* Even if the plaintiff stipulates that he will not introduce any psychologist or expert testimony, the records may still be relevant to show causation and magnitude.

Lodis, 172 Wn. App. at 856.

The superior court in this matter correctly applied *Lodis* and other precedent to determine that the marital counseling records became

relevant and discoverable when Petitioners filed a lawsuit against the Respondents and claimed emotional distress and mental anguish. As discussed above, whether or not the superior court erred in finding relevance is reviewed for an abuse of discretion. Given that the court in *Lodis* held that similar documents were discoverable, it cannot be said that "no reasonable person would take" such a position here. *T.S.*, 157 Wn.2d at 423. Rather, because reasonable minds could differ as to the discoverability of the records, the superior court did not commit "probable error" as to the discoverability of the records. *See Minehart*, 156 Wn. App. at 457. The next question is whether Petitioners waived any privilege in the relevant documents.

3. Petitioners waived any privilege when they sued the Respondents and claimed generic emotional distress and mental anguish.

Washington protects certain confidential communications from discovery in a civil proceeding or disclosure generally. *See Lodis*, 172 Wn. App. at 854; *Petersen v. State*, 100 Wn.2d 421, 429, 671 P.2d 230 (1983). For example, "Washington protects confidential physician-patient (RCW 5.60.060(4)) and psychologist-patient (RCW 18.83.110) communications." *Lodis*, 172 Wn. App. at 854. These statutory privileges, however, were "enacted in derogation of the common law." *Id.* These privileges are not absolute and they can be waived under certain

circumstances. "Plaintiffs waive their physician-patient privilege when they voluntarily put their physical or mental health at issue in a judicial proceeding." *Id.* Similarly, a psychologist-patient privilege is waived "when a plaintiff puts his mental health at issue by alleging emotional distress." *Id.* at 855.

The superior court in this case took *Lodis's* application of the waiver principle to the psychologist-client privilege and then applied the same analysis to the marriage counselor privilege. The court correctly held that when a party puts at issue their mental health by claiming emotional damages, mental anguish, stress, etc., they impliedly waive the privilege of their physicians, psychologists and counselors, and, if the documents comport with the scope of discovery in CR 26, they are discoverable.

Petitioners argue the superior court was incorrect and that the *Lodis* decision is objectively incorrect. Petitioners argue that a strict interpretation of the statute does not permit such waiver. Petitioners are incorrect on both claims. As explained below: (a) *Lodis* was correctly decided and should guide the court's decision in this matter; and (b) Petitioners' interpretation of the statute would lead to untenable results where the marital counselor privilege would be granted unparalleled levels of protection.

a. *Lodis was correctly decided and should guide the court's decision in this matter*

First, *Lodis* was correctly decided and is controlling precedent in the superior court. As a threshold matter, discretionary review is only appropriate if the superior court made "probable error" and it is the Petitioners' burden to prove probable error. Discretionary review is not warranted just because a different decision could have been made or reasonable minds could come to different conclusions. Petitioners must show that the superior court was probably wrong.

With this standard in mind, the superior court was not probably wrong when it applied the Court of Appeals decision in *Lodis* to the marriage counseling privilege. *Lodis* reviewed the physician-patient privilege and the psychologist-patient privilege, as well as Washington case law that held the two privileges to be similar. *Lodis* then held: "When a plaintiff puts his mental health at issue by alleging emotional distress, he waives his psychologist-patient privilege for relevant mental health records." *Lodis*, 172 Wn. App. at 855. (emphasis added). As a result, a defendant is "entitled to discover any records relevant to the plaintiff's emotional distress." *Id.* (emphasis added).

The *Lodis* case makes it clear that when a plaintiff puts at issue his emotional distress, the defendant is "entitled to discover any records

relevant to the plaintiff's emotional distress." *Id.* (emphasis added). The superior court relied on this case and held that the marriage counseling records should be treated the same and afforded the same protections.

Importantly, Petitioners in this case have cited no case law that contradicts or rejects *Lodis*. Petitioners do not cite any case law where a plaintiff claims emotional distress and maintains the privilege. Petitioners' argument is that the superior court committed probable error in applying *Lodis* because *Lodis* was objectively incorrectly decided. To succeed on this argument then, Petitioners must prove that the Court in *Lodis* was also wrong. Petitioners cannot meet this burden. *Lodis* was and is controlling, persuasive, and analogous. The superior court was correct when it made its ruling.

The posture of Petitioners' present motion is *not* whether *Lodis* was objectively correctly decided. Petitioners' motion can only succeed if they can show that the Court of Appeals committed probable error in finding that the superior court did not "abuse its discretion" in entering its discovery order. The superior court, however, faithfully applied a controlling appellate court decision when no other contradicting decisions were made known to the court. Therefore, the Court of Appeals did not commit probable error in determining that interlocutory review was inappropriate.

From a logical standpoint, the limitations of both RAP 2.3(b) and RAP 13.5(b) would be nullified or effectively useless if a party could simply claim that the only case on point was "incorrect" and, therefore, they were entitled to discretionary review. Such an application would violate the purpose of the rule and effectively result in every decision being reviewable at any time. Therefore, the Court of Appeals' decision was not "probable error" as it was in line with the only controlling appellate decision.

b. Petitioners' interpretation of the statute would lead to untenable results, elevating the privilege to unparalleled levels of protection.

Second, strict interpretation of the marriage counselor privilege statute is inappropriate given the broader statutory scheme and related case law. Washington courts have held that, even though a privilege statute does not specifically authorize waiver, implied waiver can be found in the litigation context. *See In re JF*, 109 Wn. App. 718, 729, 37 P.3d 1227, 1233 (2001). To hold otherwise would "elevate" certain privileges to an untenable level of protection.

In *In re JF*, a parent attempted to exclude counseling records from a dependency hearing. 109 Wn. App. at 729. The parent argued, just as in this case, that a strict interpretation of the counselor-patient privilege statute would not permit such evidence because nothing in the text of the

statute "explicitly creates an exception for dependency proceedings and ... the court may not read into the statute an exception to the privilege having no basis in the plain language." *Id.* at 730. Comparing the counselor-patient privilege to the physician-patient, psychologist-patient, and clergy-patient privileges, the court held such a strict interpretation of the statute to be unreasonable as it would elevate its protections above all of the other protections:

[Petitioner]'s proposed construction of the statutory privilege would raise the counselor-patient privilege to a higher level than the physician-patient privilege, the psychologist-patient privilege, and the clergy-penitent privilege. . . . If any hierarchical categorization of statutory privileges was intended, the blanket exception for subpoenaed information seemingly places the counselor-patient privilege among the weaker of such privileges, and not among the stronger.

Id. at 733-34.

Here, just as in *JF*, accepting Petitioners' interpretation of the marriage counseling privilege statute would create a nearly impenetrable privilege and would elevate the privilege to a level of protection not even afforded physicians, psychologists, or clergy. This cannot have been the statute's intent. If anything, as stated in *JF*, the marital counseling privilege is weaker than the physician or psychiatrists' privilege, and should be treated as such.

B. THE SUPERIOR COURT'S DECISION DOES NOT ALTER THE STATUS QUO OR LIMIT THE PETITIONERS' FREEDOM TO ACT.

In addition to proving the Court of Appeals committed probable error, Petitioners must also prove that the decision "substantially alter[ed] the status quo or substantially limit[ed] the freedom of a party to act." RAP 13.5(b)(2). "This standard typically requires a party to show that the party's substantive rights will be impaired in some fundamental manner outside the pending litigation." WASHINGTON APPELLATE PRACTICE DESKBOOK, §4.4(2)(b). "RAP 2.3(b)(2) [a similar rule] was originally intended to apply primarily to equitable order, such as injunctions, attachments, and receivers that were formerly appealable as a matter of right." *Id.* (quoting Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541 (1986)).

Petitioners here have failed to offer *any* evidence that the superior court's decision would limit their freedom to act in any manner outside of the litigation context. In fact, the disclosure of information would not affect the Petitioners' day-to-day freedom to act in any way. As the Petitioners themselves describe this controversy:

During the course of discovery, Defendants learned that the Magneys had undergone marital counseling *prior* to the misdiagnosis of their son and the requested copies of the

marital counseling records. The Magneys have *not* had any marriage counseling *after* the misdiagnosis of their son.

Petitioners' Motion for Discretionary Review, p. 2 (quoting VRP 3:14-19) (emphasis in original). Despite this assertion, Petitioners argue that releasing their records would somehow limit their ability to act outside of the litigation. For instance, the Petitioners argue: "Disclosure of this information threatens to jeopardize the relationship between the Magneys and their counselor." *Petitioners' Motion for Discretionary Review*, p. 23. If the Magneys have not seen their counselor in years, how can disclosure threaten their relationship? The Magneys themselves assert that they have not, are not, and will not treat with that counselor again. How can it be that disclosure will disrupt that relationship?

Petitioners' case law does not support the proposition that disclosure of privileged materials is categorically subject to discretionary review. The cases cited predominately deal with privilege that would disclose attorney-client privileged materials or work product related to litigation in that same lawsuit. For instance, the issue in *Newman v. Highland High Sch. Dist. No. 203*, 186 Wn. 2d. 769 (2016), was whether attorney-client privilege extended to postemployment communications between corporate counsel and former employees. The communications sought related to the merits and legal strategy of that same litigation. In

Estate of Dempsey v. Spokane Washington Hosp. Co. LLC, 1 Wn. App. 2d. 628 (2017), the issue was whether confidential communications from the attorney to the retained expert were discoverable. Those communications related to the same subject as the underlying litigation.

The matter at hand is categorically different than the issues raised by *Newman* and *Dempsey*. While those cases related to attorney-client privilege concerning the same litigation, the asserted privilege here relates to counseling that occurred *before* the facts of the case and has not continued since. Releasing the records would not alter the status quo of the parties' relationships or limit their freedom to act. The counseling at issue ceased years ago with no indication that it would restart.¹ Consequently, the freedom of the parties to act has not been limited. The Court should find that Petitioners have failed to meet their burden of discretionary review and deny their motion.

Additionally, "Interlocutory review . . . is available in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart*, 156 Wn. App. 457. Here, the Court of

¹ Petitioners are likely to argue that the temporal disconnect between the date of counseling and the claimed injuries in this case make the marital counseling records less relevant. For the reasons previously stated and understood by the trial court, this argument is simply incorrect. Separate and apart from whether any privilege that may attach to the records has been waived, which Respondents assert it has, the fact that the Magneys are claiming mental anguish and distress, yet there could well be an alternative cause for the anguish or the records could provide information about the magnitude of the current distress as compared with historical, unrelated stressors.

Appeals' order and the trial court's order have *no* impact on the trial. The underlying issue is purely a discovery ruling. No information has been admitted or considered for substantive purposes. The Petitioners retain the ability to argue that all of the records are irrelevant and inadmissible. Therefore, there is no impact on the trial.

Finally, Petitioners seek discretionary review by the Supreme Court in lieu of protective orders by the Superior Court. As the Court of Appeals stated: "While the records may contain material that is of a personal nature, the Magneys can move to seal the records and to limit their use in court." *Commissioner's Ruling*, 3 – 4. Petitioners can seek a standard protective order and pursue motions in limine. Such procedures, if appropriate, could limit the alleged prejudice of which Petitioners now complain. Such procedure, if appropriate, is more favorable than the "disfavored" process of Supreme Court review of a trial court's discovery order.

VI. CONCLUSION

In order for discretionary review to be granted, Petitioners must prove (1) that the Court of Appeals committed "probable error" **and** that the error (2) altered the "status quo" of the parties or limited the Petitioners' freedom to act. Petitioners cannot show that the Court of Appeals committed probable error as the only appellate court decision on

point supported the trial court's decision. As a result, the Court of Appeal's ruling was correct. The superior court's decision was directly in accordance with controlling, persuasive, and analogous precedent and the parties are free to act as they have for the past several years. The court should deny Petitioners' Motion for Discretionary Review and allow the superior court to continue through trial before reviewing the discovery order.

DATED this 24th day of January, 2019.



STEVEN J. DIXSON, WSBA No. 38101
CASEY M. BRUNER, WSBA No. 50168
WITHERSPOON · KELLEY
Attorneys for Respondents Corn and Yin

PROOF OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 24th day of January, 2019, the foregoing was filed with the Court of Appeals, Division III, and delivered to the following persons in the manner indicated:

George M. Ahrend
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
gahrend@ahrendlaw.com

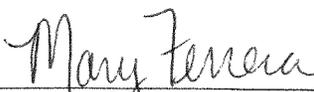
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- Facsimile Transmission
- Via Electronic Mail

Mark D. Kamitomo
Collin M. Harper
421 W. Riverside Ave., Suite 1060
Spokane, WA 99201
mark@markhamgrp.com
collin@markamgrp.com
Attorneys for Appellant

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

Stephen M. Lamberson
Jeffrey R. Galloway
Etter, McMahon, Lamberson,
VanWert & Oreskovich, P.C.
618 W. Riverside Ave., Suite 210
Spokane, WA 99201
jgalloway@ettermcmahon.com
slamberson@ettermcmahon.com
***Attorneys for Respondents Pham
and Incyte Diagnostics Corp.***

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



Mary Ferrera

WITHERSPOON KELLEY

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- lambo74@ettermcmahon.com
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