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Spokane Co. Superior Court No. 17-2-00266-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs - Petitioners,

v.

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

Defendants - Respondents.

BRIEF OF RESPONDENTS

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I. STATEMENT OF THE ISSUES

1. Does a plaintiff waive the marital counselor privilege under RCW 5.60.060 when they allege emotional distress damages in the complaint and place their mental health at issue in the litigation?
2. Is it proper for the Superior Court to decline *in-camera* review when the plaintiffs have waived the privilege protecting the records and the court reasoned that at the discovery stage *in-camera* review was not practical given the posture of the case?

II. STATEMENT OF THE CASE

Petitioners Emily and Brian Magney (hereinafter referred to as the “Magneys” and/or “Petitioners”) filed a medical negligence action against Defendants/Respondents Dr. Truc Pham, M.D. and Incyte Diagnostics (hereinafter collectively referred to as “Respondents” and/or “Defendants”). Clerk’s Papers “CP” at 1. The action alleges a misdiagnosis of Plaintiff Logan Magney. CP at 3. The Magneys allege in their Complaint:

severe and permanent injuries, both mental and physical, pain and suffering and mental anguish as well as loss of consortium.

CP at 5. Through discovery, Respondents learned the Magneys had undergone marital counseling. CP at 8. The Magneys saw a marriage counselor together and Brian Magney saw a marital counselor for individual counseling. CP at 13. On January 23, 2018, Defendants served the Plaintiffs with Second Interrogatories and Requests for Production requesting Plaintiffs’ marital counseling records. CP at 44. On April 13, 2018, the Magneys filed a Motion for Protective Order regarding the

marriage counseling records of Plaintiffs Emily and Brian Magney. CP at 7.

On May 4, 2018, the Superior Court denied the Magneys' Motion for Protective Order and ordered them to produce their marital counseling records within thirty (30) days of entry to the Order. CP at 102. Following the Court's ruling, the Magneys sought discretionary review by the Court of Appeals, Division III on May 25, 2018. CP at 99. The appellate court denied review, however, the Commissioner granted review from this Court.

III. ARGUMENT

Whether the marital counselor privilege out of RCW 5.60.060(9) is waived when a plaintiff makes a claim for mental anguish is an issue of first impression in Washington. While Petitioners seek to establish a privilege unique to marriage and family counselors, this Court should hold any extension of privilege to marriage and family counselors is subsumed by the psychotherapist-patient privilege. The psychotherapist-patient privilege and the marital counselor privilege are subject to the same implied waiver when a patient's communications about mental health are at issue in litigation. Whether the Magneys waived the marital counselor privilege is a question of law this Court reviews de novo. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 854, 292 P.3d 779 (2013).

The Petitioners seek to frame the Superior Court's decision on waiver as an error because the Magneys have not made a "claim for injury

to their marital relationship.” *See Brief of Petitioners* at pg. 1. Petitioners ignore the fact that they have alleged “mental anguish” in their Complaint which directly places their mental health at issue in the instant matter. *See Lodis*, 172 Wn. App. at 856, 292 P.3d 779; CP at 5. As shown by RCW 18.225.010(8), marriage and family counseling involves the “diagnosis and treatment of mental and emotional disorders, whether cognitive, affective, or behavioral, within the context of relationships.” RCW 18.225.010(8). The Magneys have sought treatment by a marriage counselor and in doing so have communicated about their mental health. *See id.* The Magneys have not protected their marital counseling records by not alleging injury to their marital relationship. *See LeVien v. LaCorte*, 168 Misc. 2d 952, 958-59, 640 N.Y.S.2d 728 (Sup. Ct. 1996). The Magneys have alleged they suffer “mental anguish” which affirmatively places their mental health at issue in the present matter. CP at 5.

A. *Lodis* was Correctly Decided Because the Court Relied on the Broad Approach from Federal Law Which Resulted In A Waiver of the Psychotherapist-Patient Privilege.

As identified in their Complaint, the Magneys seek damages for the “mental anguish” caused by the Defendants’ alleged negligence. CP at 5. Consequently, the Magneys have put their mental health at issue in this litigation. *See id.* In order to provide a baseline for the Magneys’ mental state, and to explore other possible sources of mental anguish other than as alleged by the Magneys, Respondents are entitled to disclosure of the Magneys’ marital counseling (mental health) records; the records are

clearly discoverable. *See Lodis*, 172 Wn. App. at 856, 292 P.3d 779. The trial court, as well as the Court of Appeals, correctly relied upon *Lodis* to make this determination.

In *Lodis v. Corbis Holdings, Inc.*, Lodis was hired as vice president of human resources for Corbis Corporation. 172 Wn. App. at 842, 292 P.3d 779. Lodis was terminated by Corbis and alleged age discrimination and retaliation along with claiming emotional harm resulting from the discrimination and retaliation. *Id.* at 844, 292 P.3d 779. Corbis requested discovery related to Lodis's treatment for emotional distress and Lodis asserted the physician-patient and psychologist-patient privileges. *Id.* Corbis filed a motion in limine to preclude Lodis from introducing evidence of emotional distress, the trial court granted Corbis's motion finding a waiver of the psychologist-patient privilege. *Id.* On Lodis's motion for reconsideration, the trial court gave Lodis the option to waive the privilege and produce the records or strike the emotional damage claim. *Id.* Lodis refused to provide discovery and was precluded from introducing evidence of any emotional harm he suffered. *Id.* The Supreme Court denied Lodis's motion for discretionary review. *Id.*

The analysis of *Lodis* is applicable to the present case, and 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. *Lodis*, 172 Wn. App. at 855-56, 292 P.3d 779. Although the court in *Lodis* reviewed a claim for psychotherapist-patient privilege and waiver

under RCW 18.83.110, the same analysis can be applied to RCW 5.60.060(9) because they provide substantially the same protections. *See id.* at 854, 292 P.3d 779. The analysis the court used was correct because it found waiver of the psychotherapist-privilege could occur under the broad federal law approach when a plaintiff puts mental health at issue by alleging emotional distress. *Id.* at 855, 292 P.3d 779.

The *Lodis* court started its analysis of Lodis's claims by recognizing a plaintiff waives physician-patient privilege when "they voluntarily put their physical or mental health at issue in a judicial proceeding." *Id.* at 854, 292 P.3d 779 (citing RCW 5.60.060(4)(b) and *Carson v. Fine*, 123 Wn.2d 206, 213-24, 867 P.2d 610 (1994)). RCW 5.60.060(4)(b) codified "existing Washington case law which holds that waiver occurs even without plaintiff's express consent." *Carson*, 123 Wn.2d at 213, 867 P.2d 610.

The *Lodis* court then cited *Peterson v. State*, 100 Wn.2d 421, 429, 671 P.2d 230 (1983), for the proposition the physician-patient privilege and the psychotherapist-patient privilege provide essentially the same protection. *Id.* The *Peterson* court identified that RCW 18.83.110 provides the same protections to psychologist-patient communications as RCW 5.60.060(4) provides for communications between physician and patient. *Peterson*, 100 Wn.2d at 429, 671 P.2d 230. Moreover, the *Lodis* court did not err in comparing the physician-patient privilege and the psychotherapist-patient privilege because other courts have held the

privileges are closely related in what they protect. *See Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) (“Although there is a psychotherapist-patient privilege in federal cases . . . intended like the closely related doctor-patient privilege to avoid deterring people from seeking treatment by fear that doing so they will incur a disadvantage in litigation, the privilege is not absolute”). Both privileges seek to encourage people to seek treatment by quelling any fear they will incur a disadvantage in litigation and protect communications between the patient and the provider. *Id.* However, the privilege is not absolute. *Id.*

The *Lodis* court, while acknowledging that both the physician-patient privilege and the psychotherapist-patient privilege protect communications between practitioner and patient, ruled that plaintiffs waive their physician-patient when they put their “physical or mental health” at issue. *Lodis*, 172 Wn. App. at 854-55, 292 P.3d 779.

Similar to the Magneys, *Lodis* also contended he could bring a claim for emotional harm that would not require him to waive his psychotherapist-patient privilege; the *Lodis* court disagreed. *Id.* at 854, 292 P.3d 779. Because mental health was directly at issue the *Lodis* court turned to *Jaffee*. *Id.* at 855, 292 P.3d 779. The United State Supreme Court in *Jaffee v. Redmond*, held the psychotherapist privilege existed under Federal Rule of Evidence 501. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). The Supreme Court noted that “like other testimonial privileges, the patient may of course waive the protection.” *Id.* at fn. 14. While the

United States Supreme Court did not elaborate on what would waive the protection, it was reasonable and appropriate for the *Lodis* court to rely upon authority from federal and state law to determine what actions would waive the privilege. *Lodis*, 172 Wn. App. at 855, 292 P.3d 779; *Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 580, 828 P.2d 1175 (1992) (“In the absence of state authority it is appropriate to look to the federal interpretation of the equivalent rule.”)

The federal approaches to waiver of mental health records were identified in *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. Cal. 2003) and are referenced by the *Lodis* court. *Lodis*, 172 Wn. App. at 855, 292 P.3d 779.

The court examined the different waivers under federal law as follows:

Three different approaches have emerged in federal law for determining when a plaintiff waives the psychologist-patient privilege: a broad approach (privilege is waived upon allegation of emotional distress in the complaint); a middle ground approach (privilege waived when plaintiff alleges more than “ ‘garden variety’ ” emotional distress, like a specific psychiatric disorder); and a narrow approach (privilege is waived only when there is affirmative reliance on psychotherapist-patient communications).

Id. (citing *Fitzgerald*, 216 F.R.D. at 636-637). The *Lodis* court, stated “[*Jaffee*] does not dictate this court break new ground and adopt the narrow or middle approach.” *Id.*

By refusing to “adopt the narrow or middle approach,” the *Lodis* court adopted the broad approach from federal law in which a plaintiff waives the psychotherapist-patient privilege when the plaintiff alleges emotional distress in the complaint. *See id.*; *see also Fitzgerald*, 216

F.R.D. at 636. Because the court in *Lodis* was unable to cite to any case law that required it treat the physician-patient privilege and the psychotherapist-patient privilege differently, the court reasonably adopted the broad approach under federal law because a plaintiff similarly waives the psychotherapist-patient privilege when a plaintiff puts his or her mental health “at issue” by alleging emotional distress, similar to the physician-patient privilege. *See Lodis*, 172 Wn. App. at 855-56, 292 P.3d 779.

Relying on the broad federal approach to waiver, the court 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. The defendant is entitled to discover any records relevant to the plaintiff’s emotional distress.” *Id.* at 855, 292 P.3d 779 (emphasis added). Because the Magneys have put their mental health at issue by alleging mental anguish, they have waived the protection for their marital counseling records. *See id.*; CP at 5.

The *Lodis* court’s opinion should be persuasive to this Court; as the broad approach provides a clear, bright line rule and is consistent under federal and state law. Illustrative of the broad approach is *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997), wherein the court examined waiver of the psychotherapist-patient privilege and found the broad approach was consistent under federal law and state law; it listed three reasons for waiver of the privilege. *Id.* The *Sarko* court

recognized a qualified federal common law psychotherapist-privilege prior to *Jaffee* and found implied waiver of the privilege existed prior to *Jaffee*. *Id.* Also, prior to *Jaffee*, courts held a litigant may waive the privilege by placing a mental condition at issue. *Id.* Additionally, the *Sarko* court found the Supreme Court analogized the psychotherapist-privilege to the attorney-client privilege which is waived when the advice of counsel is placed at issue in litigation. *Id.* Similarly, the psychotherapist-patient privilege can be waived when communications with a psychotherapist are placed at issue. *Id.*

Finally, the court found that Pennsylvania's statutory psychotherapist-patient privilege is waived by placing communications with the psychotherapist at issue. *Id.* The *Sarko* court held that "allowing a plaintiff to hide behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice." *Id.* (emphasis added) (quoting *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140, 144-45 (E.D. Pa. 1993)) (internal quotations omitted). For the above reasons, the *Sarko* court found waiver of the psychotherapist-patient privilege and adopted the broad approach to waiver. *Id.*

Similarly, in *Doe v. City of Chula Vista*, 196 F.R.D. 562, 569 (S.D. Cal. 1999) the court adopted the broad waiver of the psychotherapist-patient privilege to:

[e]nsure a fair trial, particularly on the element of causation, the court concludes that defendants should have

access to evidence that Doe's emotional state was caused by something else. Defendants must be free to test the truth of Doe's contention that she is emotionally upset because of the defendants' conduct. Once Doe has elected to seek such damages, she cannot fairly prevent discovery into evidence relating to the element of her claim.

Id. (emphasis added). The *Doe* court was primarily concerned the discovery process must be fair to both parties. *Id.* The court found it is the plaintiff's choice whether to put their mental condition at issue in litigation by seeking mental anguish damages. *Id.* Plaintiffs can choose whether to seek emotional distress damages, thereby putting their mental health at issue; it follows that the defendant must be allowed to "test the truth" of the plaintiff's claims. *Id.* Where mental health has been placed "at issue" any communications about mental health, whether made to a marital counselor or a psychotherapist, are relevant and can no longer be held privileged in the interest of fairness in the discovery process to both parties. *See id.*

The holdings in the above referenced cases are directly related to the Magneys' claims for emotional distress/mental anguish. Respondents must be given access to the Magneys' marital counseling records to determine the causation and magnitude of the alleged emotional damages, if any. *See Lodis*, 172 Wn. App. at 856, 292 P.3d 779; *Doe*, 196 F.R.D. at 569. The Magneys' alleged mental anguish undeniably places their mental state and any causation of that mental state at issue. CP at 5. Although the Magneys state the counseling occurred before the alleged incident, it is in fact more relevant to the nature and magnitude of their alleged injuries

because these records will help to establish a baseline for their mental state before the alleged conduct by Dr. Pham and Incyte. CP at 14-15. Discovery of the marital counseling records must be allowed in order for Dr. Pham and Incyte to adequately “test the truth” of the Magneys’ contention that they suffered mental anguish as a result of the Respondents’ conduct. *See Doe*, 196 F.R.D. at 569.

Finally, the *Lodis* holding is persuasive to this Court because it directly addresses several statements made by the Magneys. While the Magneys contend they do not intend to offer testimony regarding their marital relationship, this is immaterial because the marital counseling records are anticipated to speak broadly about the Magneys’ mental health. *See Lodis*, 172 Wn. App. at 855, 292 P.3d 779. Relatedly, the *Lodis* court held “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.” *Id.* at 856, 292 P.3d 779. Specifically, the court said when there is a claim for emotional harm damages the records related to mental health became discoverable. *Id.* *Lodis* is consistent with other cases in that it provides the mental health records are discoverable and acknowledges a “judge is still authorized to conduct in *in camera* review, seal the records, or limit their use at trial as necessary to protect the plaintiff’s privacy.” *Id.* at 855, 292 P.3d 779.

Lodis was correctly decided and remains persuasive authority because it addresses waiver and discoverability of mental health records

by adopting the federal broad approach to waiver. *See id.* Moreover, because the Magneys have communicated about their mental health to their marital counselors and they have alleged “mental anguish” in their complaint these communications are at issue, relevant to this litigation, and discoverable. *See id.* at 855-56, 292 P.3d 779.

B. The Marital Counseling Privilege Contained in RCW 5.60.060(9) is Subsumed by the Psychotherapist-Patient Privilege and is Thereby Subject to the Same Waivers.

The privileges and exceptions in RCW 5.60.060(9) apply to the following professionals: “mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW.” RCW § 5.60.060(9).¹ The plain language of the statute includes protections for mental health counselors and independent clinical social workers; prior to codification of this statute, both of these professions already enjoyed protections under the psychotherapist-patient privilege found in *Jaffee* as well as state law. *See Jaffee*, 518 U.S. at 15 (“confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence”); RCW 18.83.110; RCW 5.60.060(9). The *Jaffee* court also extended the testimonial privilege to “licensed social workers in the course of

¹ RCW 5.60.060(9)(b), as an exception, may only apply to a “mental health counselor.” Although, mental health counselors, social workers, and marital and family health counselors licensed under RCW 18.225 are also subject to disclosure of information exceptions under RCW 18.225.105 and specifically 18.225.105(2) that the privilege is waived by “bringing charges against the person licensed under this chapter.” RCW 18.225.105(2).

psychotherapy.” *Jaffee*, 518 U.S. at 15. The court had “no hesitation” in extending the privilege to social workers because “social workers provide a significant amount of mental health treatment.” *Id.* at 15-16. In doing so, the court acknowledged that “drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.” *Id.* at 17.

Here, as in *Jaffee*, it serves no discernible public purpose to make a distinction between marriage and family therapists and mental health counselors and social workers, also protected by RCW 5.60.060(9). As shown by the definitions of “marriage and family therapy” and “mental health counseling,” both are professions in the “course of psychotherapy” deserving the same protections and waivers. *See id.* at 15; RCW 18.225.010(9); RCW 18.225.010(8).

RCW 5.60.060(9) applies to the listed professionals licensed under RCW 18.225. RCW 18.225 *et seq.* defines the counseling functions of the professionals licensed in the chapter. By definition “mental health counseling” is:

the application of principles of human development, learning theory, psychotherapy, group dynamics, and etiology of mental illness and dysfunctional behavior to individuals, couples, families, groups, and organizations, for the purpose of treatment of mental disorders and promoting optimal mental health and functionality. Mental health counseling also includes, but is not limited to, the assessment, diagnosis, and treatment of mental and emotional disorders, as well as the application of a wellness model of mental health.

RCW 18.225.010(9) (emphasis added). Additionally, in relevant part,

RCW 18.225.010(8) defines “marriage and family therapy” as:

the diagnosis and treatment of mental and emotional disorders, whether cognitive, affective, or behavioral, within the context of relationships, including marriage and family systems. Marriage and family therapy involves the professional application of psychotherapeutic and family systems theories and techniques in the delivery of services to individuals, couples, and families for the purpose of treating such diagnosed nervous and mental disorders.

RCW 18.225.010(8) (emphasis added). Mental health counselors and marriage and family therapists are clearly, by definition, both engaging in psychotherapy to diagnose and treat mental and emotional disorders. *See* RCW 18.225.010(8) & (9). To afford marriage and family therapists greater protection is in error.

Professionals licensed under RCW 18.225, and given testimonial privilege by RCW 5.60.060(9), are practicing under the course of psychotherapy. *See id.*; *see also Jaffee*, 518 U.S. at 15. Because these professionals are practicing in the course of psychotherapy it would serve “no discernable public purpose” to separate the privileges and waivers regarding each of the three professionals listed in RCW 5.60.060(9). *Jaffee*, 518 U.S. at 17. The Magneys characterize RCW 5.60.060(9) as the “marriage counseling privilege statute” and seek to establish the “marriage counseling privilege” as unique from other testimonial privileges based on the text of the statute. *See Brief of Petitioners*, at pg. 7. However, trying to differentiate the marriage counselor privilege from the psychotherapist-

patient privilege is a distinction without a difference. *See Jaffee*, 518 U.S. at 17.

The marital counseling privilege and the psychotherapist-patient privilege should be treated the same. As shown in *Ziemann v. Burlington Cty. Bridge Comm'n*, 155 F.R.D. 497, 506 (D.N.J. 1994), federal courts treat the marital counseling privilege as an “outgrowth” of the psychotherapist-patient privilege. *See id.* In *Ziemann*, the plaintiff, Ziemann, sought damages for embarrassment as well as mental distress and suffering in a case involving sexual harassment and gender discrimination. *Id.* at 499. Ziemann’s psychiatric expert characterized her depression as attributable to marital difficulties from her first marriage and issues with her workplace. *Id.* The defendant filed a motion to compel the release of the Ziemann’s records related to counseling sessions with her current husband, as well as records from the counselor who counseled her and her first husband. *Id.* at 500. Ziemann opposed the release of the records and sought a protective order. *Id.*

The *Ziemann* court noted “no case has been cited or found that has recognized a marriage counselor privilege as a matter of federal common law.” *Id.* at 504. As a pre-*Jaffee* case, the *Ziemann* court had to determine whether a privilege existed for the marriage counseling records. *See id.* It was clear the federal courts had not recognized a marriage counselor privilege and the *Ziemann* court was “not prepared to recognize the marriage counselor privilege as a matter of federal common law.” *Id.* at

506. It did, however, determine the marriage counselor privilege should “receive protection as an outgrowth of the psychotherapist-patient privilege.” *Id.*

In making its determination, the *Ziemann* court looked at New Jersey’s statute granting the marriage counselor privilege. *Id.* at 505. The New Jersey statutory marriage counselor privilege provides:

[a]ny communication between a marriage counselor and the person or persons counseled shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except where the marriage counselor is a party defendant to a civil, criminal or disciplinary action arising from such counseling, in which case, the waiver shall be limited to that action.

Id. (quoting N.J.S. § 45:8B-29). The *Ziemann* court stated “[i]n allowing some protection to communications resulting from the marriage counselor relationship, the court will not, however, permit the breadth of protections offered by N.J.S. § 45:8B-29.” *Id.* at 506. The court limited application of the privilege to instances where “the counselor is licensed and [the privilege] will stand on no higher footing than the psychotherapist-patient privilege” *Id.* Moreover, the court held the privilege “can be overcome when the need for the communications is compelling.” *Id.*

The *Ziemann* court decided the marriage counselor privilege “will be recognized as subsumed by the psychotherapist-patient privilege.” *Id.* The *Ziemann* case and its holding is persuasive to this court in light of the definitions of “marriage and family therapy” and “mental health counseling” out of RCW 18.225.010. This Court should treat the marriage

counselor privilege under RCW 5.60.060(9) as subsumed by the psychotherapist-patient privilege because marriage and family therapists are counselors in the course of psychotherapy. *See Jaffee*, 518 U.S. at 15. While the Petitioners in this matter seek to establish the marital counseling privilege as its own unique privilege, case law and the statute itself indicate otherwise. Like the court in *Ziemann*, this Court should view the marital counselor privilege as subsumed by the psychotherapist-patient privilege and hold it is subject to the same waivers. *See Ziemann*, 155 F.R.D. at 506.

As the Court in *Ziemann* articulated, the marital counseling privilege should not stand on a higher footing than the psychotherapist-patient privilege. *Id.* If the marital counseling privilege was interpreted as the Petitioners suggest, this Court would be giving the marital counseling privilege much greater protections than other testimonial privileges. The physician-patient privilege, the psychotherapist-patient privilege, and the attorney-client privilege are subject to waiver when the communications between the patient/client and the professional become “at issue.” *See Carson*, 123 Wn.2d at 213, 867 P.2d 610; *Lodis*, 172 Wn. App. at 854, 292 P.3d 779; *Pappas v. Holloway*, 114 Wn.2d 198, 208–09, 787 P.2d 30 (1990) (attorney-client privilege found waived under the *Hearn* test, where attorney’s advice was “at issue” in litigation). It would be an error to not interpret an implied waiver into RCW 5.60.060(9) because in effect it would give more protection to marriage and family therapists than

physicians, psychotherapists, and attorneys, especially when marriage therapists and psychotherapists perform similar therapy as defined by statute. *See* RCW 18.225.010(8)-(9).

i. The Text of the Marital Counseling Privilege Statute Does Not Preclude Waiver of the Privilege in this Case Because Privileges are not Absolute.

On its face, RCW 5.60.060(9) does not preclude a waiver of the psychotherapist-patient privilege or marital counselor privilege. The Magneys have argued to limit waiver only to the exceptions in the statute and rely on cases that use principles of statutory interpretation namely “expression unius est exclusion alterius” to preclude this Court from applying an exception to RCW 5.60.060(9). *See Brief of Petitioners* at pg. 7. The cases cited by the Magneys are distinguishable; while the cases address statutory exemptions, none address statutory privileges and are not persuasive to this analysis.

Plaintiffs rely on *Nat’l Elec. Contractors Ass’n., Cascade Chapter v. Riveland*, however, that case is distinguishable from the facts of this case. In *Riveland*, 138 Wn.2d 9, 978 P.2d 481 (1999) the court examined a claim made against the Department of Corrections (“DOC”) for utilizing inmate labor to perform electrical work without complying with state laws related to licensing, workplace safety, prevailing wage, and competitive bidding. *Id.* at 13, 978 P.2d 481. The DOC argued they were exempt from complying with RCW 19.28 because they fit within the exception in RCW 19.28.610. *Id.* at 17-18, 978 P.2d 481. The court rejected the DOC’s

arguments because they did not fall under the statutory language of RCW 19.28.610. *Id.* The court held the DOC must comply with RCW 19.28 because the specific requirements therein prevail over the general statutes relating to inmate labor. *Id.* at 24, 978 P.2d 481. Whereas the DOC did not fit the exceptions enumerated in RCW 19.28.610, the present matter is distinguishable because statutory privileges are not absolute like the labor law requirements of RCW 19.28. *See id.* at 18, 978 P.2d 481 (“Clearly, DOC’s practice does not constitute any of the exemptions contemplated by the statute, since inmates are not performing work on their own property, they are not employees working on an employer’s premises, and DOC is not a utility”); RCW 19.28.610 (recodified as RCW 19.28.261 by Laws 2000, Ch. 238 § 102).

Principles of statutory interpretation are not necessary for this analysis because case law interpreting the privilege indicates the marital counseling privilege can be waived. *See Lodis*, 172 Wn. App. at 855, 292 P.3d 779. In the instant matter, the marital counseling privilege, like the psychotherapist-patient privilege, is waived because the Magneys have placed their mental condition at issue. *See Ziemann*, 155 F.R.D. at 506 (“while the marriage counselor privilege will be recognized as subsumed by the psychotherapist-patient privilege, it has been overcome by the facts of this case”); *Lodis*, 172 Wn. App. at 855, 292 P.3d 779.

Plaintiffs also rely upon *State v. Sommerville*, which is inapplicable to this matter. In *Sommerville*, 111 Wn.2d 524, 760 P.2d 932

(1988), the court interpreted RCW 10.77.220 and RCW 9.9A.110 to determine the controlling statute for sentencing a man who murdered his wife and then raped his stepdaughter. *Id.* at 535, 760 P.2d 932. The mandatory language of both statutes conflicted. *Id.* In resolving the conflict, the court held RCW 10.77.220 was controlling because the statute enumerated specific exceptions that superseded the general language of RCW 9.9A.120 and the order granted by the trial court did not comply with RCW 10.77.220. *Id.* at 536, 760 P.2d 932. The present matter is distinguishable. Unlike *Sommerville*, there is no conflict as to which statute controls, and this court does not need to rely on statutory interpretation to determine a controlling statute. This Court should rely upon case law that dictates when a plaintiff places their mental health at issue, they waive the privilege to that information. *Carson*, 123 Wn.2d at 213, 867 P.2d 610 (waiver of the physician patient privilege when placing physical or mental condition at issue); *Lodis*, 172 Wn. App. at 855, 292 P.3d 779 (psychotherapist-patient privilege waived when mental health at issue).

Jepson v. Dep't of Labor & Indus. is yet another case which is not applicable to this matter, but which is relied upon by Plaintiffs. In *Jepson*, 89 Wn.2d 394, 573 P.2d 10 (1977), the court reviewed a judgment on a worker's compensation claim where the Department of Labor and Industries was ordered to pay Jepson's industrial insurance claim and the claim of Western Clinic for medical services rendered to Jepson. *Id.* at

396, 573 P.2d 10. Jepson was injured on the job and the Department rejected his claim claiming he was an officer at the time of the injury and had not elected to be insured under RCW 51.32.030. *Id.* at 397, 573 P.2d 10. The court rejected the Department’s argument because a 1917 amendment to the statute that did not include “member or officer of any corporate employer” in the provision. *Id.* at 403, 573 P.2d 10. The court then determined they could not read into provisions language the legislature may have left out. *Id.* at 403, 573 P.2d 10.

Here, RCW 5.60.060(9) has not been amended to include or exclude an exception, as the full text of RCW 5.60.060(9) was adopted in full at the same time. *See EVIDENCE—COUNSELORS AND COUNSELING—PRIVILEGES AND IMMUNITIES*, 2009 Wash. Legis. Serv. Ch. 424 (S.S.B. 5931). The court is not precluded from implying an exception like the court in *Jepson* because privileges are not absolute and can be waived. *See Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490, 496 (1968) (“the [attorney-client] privilege cannot be treated as absolute”). Additionally, without implying an exception, this Court would be offering greater protections to marriage and family therapists – which is contrary to the case law providing for waiver of other testimonial privileges. *See Carson*, 123 Wn.2d at 213, 867 P.2d 610; *Lodis*, 172 Wn. App. at 854, 292 P.3d 779; *Pappas*, 114 Wn.2d at 208–09, 787 P.2d 30.

In *Bradley v. Dep’t of Labor & Indus.*, 52 Wn.2d 780, 329 P.2d 196 (1958), the court interpreted RCW 51.24.010 and RCW 51.24.020 to

determine whether a workman who recovered damages for personal injuries from a third-party, in excess of the compensation from workmen's compensation, is entitled to receive payment of his medical and hospital expenses from the medical aid fund. *Id.* However, the court concluded because there is a separate provision, RCW 51.36.020, that clarified the meaning of the expression "entitled to compensation" as used in RCW 51.36.010 it was no other exception was intended to be applied. *Id.* at 784, 329 P.2d 196. The statutes construed in that matter were workers compensation statutes that clarified the requirements for each other and is not persuasive to this issue. *See id.*

This court is not limited by statutory language when case law provides instances of implied waiver. *See Lodis*, 172 Wn. App. at 854, 292 P.3d 779. Statutory privileges that have origins in common law, like the attorney-client privilege and the psychotherapist-patient privilege, judicially can be waived. *See Pappas*, 114 Wn.2d at 208, 787 P.2d 30 (attorney-client privilege waived as to third-party defendants when counterclaim brought for the same cause of action).

Additionally, Petitioners' use of the dissent in *State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 966 P.2d 1252 (1998) is not persuasive as the dissenting justices analyzed the eminent domain provision of the Washington Constitution. *Id.* at 830, 966 P.2d 1252. The majority held the expansion of the Convention Center was for "public use" and any development by a private developer was "merely

incidental” which was not a violation of the Washington Constitution’s absolute prohibition of takings for private use. *Id.* at 822-23, 966 P.2d 1252. The judicially created “incidental use” exception was applied by the majority even though the dissent sought to rely on “Expressio unius est exclusion alterius.” *Id.* at 830, 966 P.2d 1252. While the Magneys would have this Court adhere to the dissent’s argument, the majority opinion emphasizes judicially created exceptions can and have been applied to statutory language absent a specific exception that allows it. *See id.* at 822-23, 966 P.2d 1252.

The aforementioned cases are not persuasive in the present matter because they do not address privileges and judicial waiver thereof. Although RCW 5.60.060(9) does enumerate a list of exceptions, the Court need not rely on principles of statutory construction like “expression unius est exclusion alterius” and instead should rely upon relevant case law interpreting when statutory privileges may be waived. *See Lodis*, 172 Wn. App. at 855, 292 P.3d 779; *see also Pappas*, 114 Wn.2d at 208, 787 P.2d 30.

ii. Cases Relied Upon by the Magneys do not Limit Waiver of the Psychotherapist-Patient Privilege, Rather, They Define the Scope of Admissibility.

The Magneys rely on *Bond v. Indep. Order of Foresters*, 69 Wn.2d 879, 421 P.2d 351 (1966), and *Phipps v. Sasser*, 74 Wn.2d 439, 443, 445 P.2d 624 (1968), for the proposition that the marital counseling privilege statute is not waived by the filing of a claim for mental health damages. At

issue in both cases was whether the physician-patient privilege from RCW 5.60.060(4) was waived by filing an action for personal injuries. *See Bond*, 69 Wn.2d at 880, 421 P.2d 351; *Phipps*, 74 Wn.2d at 440, 445 P.2d 624. Both addressed whether testimony can be elicited from a plaintiff's physician at the time of trial or deposition. *See Bond*, 69 Wn.2d at 880; *Phipps*, 74 Wn.2d at 441.

The Magneys give significant weight to the court's deference to the legislative process in *Bond* and *Phipps*. In both *Bond* and *Phipps*, the courts found filing a personal injury claim did not waive the physician-patient privilege and left an exception for the legislature to decide. *Bond*, 69 Wn.2d at 882; *Phipps*, 74 Wn.2d at 448. However, in the present matter this analysis is not persuasive because the psychotherapist-patient privilege has common law origins as opposed to the physician-patient's statutory origins. *See Phipps*, 74 Wn.2d at 444. As discussed above the marital counseling privilege as an "outgrowth" of the psychotherapist-patient privilege should not be subject to the strict legislative limits of *Bond* and *Phipps*. *See Ziemann*, 155 F.R.D. at 506.

While the Magneys seek to limit implied waiver to instances where plaintiffs introduce testimony of a medical condition, case law supports a broader application of implied waiver than the Petitioners contend. The scope of the waiver was not limited by the case law cited by Petitioners, rather, the scope of admissibility was determined by the waiver of the physician-patient privilege. *See Carson*, 123 Wn.2d at 216-17, 867 P.2d

610 (physician-patient privilege waived for one physician constitutes a waiver as to other physicians who attended to the plaintiff with regard to the disability or ailment at issue making adverse testimony admissible); *Randa v. Bear*, 50 Wn.2d 415, 423–24, 312 P.2d 640 (1957) (by filing a cross-complaint, the respondent knew medical services were in question and she “undoubtedly intended to waive the physician-patient privilege . . . ” allowing “a full presentation of the material facts by both parties instead of upon one-sided, self-serving testimony of respondent”); *McUne v. Fuqua*, 42 Wn.2d 65, 76, 253 P.2d 632 (1953) (“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”); *In re Quick's Estate*, 161 Wash. 537, 546, 297 P. 198 (1931) (privileged testimony was admissible when defendants introduced testimony of other doctors of the same privileged character in their own behalf in regard to a testator’s state of mind); *State v. Tradewell*, 9 Wn. App. 821, 824, 515 P.2d 172 (1973) (“defendant abandoned his right of medical privacy and waived the statutory physician-patient privilege as to any medical testimony which tends to contradict or impeach his medical evidence”) (emphasis added).

In each case, the scope of the waiver was not at issue but rather the issue was the admissibility of medical testimony. *See Carson*, 123 Wn.2d at 216-17, 867 P.2d 610; *Randa*, 50 Wn.2d at 423–24, 312 P.2d 640; *McUne*, 42 Wn.2d at 76, 253 P.2d 632; *In re Quick's Estate*, 161 Wash. at

546, 297 P. 198; *Tradewell*, 9 Wn. App. at 824, 515 P.2d 172. The limitations on admissibility from the above cases is appropriate for waivers of the psychologist-patient privilege as factually analogous cases could arise. However, these cases do not dictate this court limit waiver to a specific condition and instead are instructive as to the scope of admissibility of medical testimony once a privilege has been waived. *See Carson*, 123 Wn.2d at 216-17, 867 P.2d 610; *Randa*, 50 Wn.2d at 423-24, 312 P.2d 640; *McUne*, 42 Wn.2d at 76, 253 P.2d 632; *In re Quick's Estate*, 161 Wash. at 546, 297 P. 198; *Tradewell*, 9 Wn. App. at 824, 515 P.2d 172.

Waiver of the marital counseling privilege is consistent with Washington law “inasmuch as privileges frustrate the search for truth, they are limited in scope so as to accomplish their intended purpose and no more.” *Lowy v. PeaceHealth*, 174 Wn.2d 769, 785, 280 P.3d 1078 (2012). Under Washington law, discovery of privileged records is allowed when the physical or mental health of the plaintiff is “at issue” in the litigation. *Carson*, 123 Wn.2d at 213-24, 867 P.2d 610.

C. The Magneys’ Claim for Loss of Consortium Also Makes Their Marital Records Discoverable Because it Places Their Mental Conditions at Issue.

The Magneys confuse the issues by stating that their “Complaint does not include claims for injury to the Magneys’ marital relationship.” *See Brief of Petitioners*, pg. 2. In order to provide a baseline for the Magneys’ mental state, to understand any causation, and to test the

magnitude of mental anguish alleged by the Magneys, the Respondents must be allowed to test the truth of such allegations. *See Doe*, 196 F.R.D. at 569. The marital counseling records could speak to the mental health of the Magneys, their relationship with their children, or any potential causes resulting in mental anguish. Without discovery of the marital counseling records the Respondents are being denied vital discoverable information to preparation of a defense when the Magneys have directly placed their mental health at issue in this litigation.

Claims for loss of consortium under RCW 4.24.010 allow for damages to be recovered for the “loss of love and companionship of the child and for injury to or destruction of the parent-child relationship.” RCW 4.24.010. This provision of RCW 4.24.020 has been interpreted by the Washington Supreme court to include the “grief, mental anguish, or suffering of the parents.” *See Wilson v. Lund*, 80 Wn.2d 91, 105, 491 P.2d 1287 (1971) (Wright concurrence).

The Washington Pattern Jury instructions for noneconomic damages provide in relevant part:

[(a)] [[The loss of love and the destruction of the parent-child relationship between (name of child) and (name of parents), including the grief, mental anguish, and suffering of (name of parents) as a result of (name of child's) injury.]

WPI 32.06.01 Measure of Damages—Injury to Child—Action Brought by Parent (RCW 4.24.010), 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 32.06.01 (7th ed.). RCW 4.24.010 and the pattern jury instructions both

account for the mental anguish of the individual making the claim for loss of consortium.

Because mental anguish is an element to prove damages for loss of consortium under RCW 4.24.010 which was alleged in the Magneys' Complaint – mental health or mental anguish is at issue in the litigation and waives the marital counselor privilege, under the broad federal approach adopted in *Lodis* or under the *Hearn v. Rhay* test as analyzed below. See *Lodis*, 172 Wn. App. at 855-56, 292 P.3d 779; *Hearn v. Rhay*, 68 F.R.D. 574, 580 (E.D. Wash. 1975). The Court of Appeals and Superior Court correctly applied *Lodis* to compel disclosure of the Magneys' marital counseling records because mental anguish is an essential element of proving damages for loss of consortium.

D. If this Court Does Not Adopt the Broad Approach to Waiver From *Lodis*, The *Hearn* Test is Instructive for Waiver of the Marital Counseling Privilege Because of the Analogous Protection Between the Attorney-Client Privilege and the Psychotherapist-Patient Privilege.

In the alternative, if this court does not adopt the broad approach to waiver from *Lodis* for implied waiver, the *Hearn* test should be adopted for waiver of the psychotherapist-patient and marital counseling privilege.

The *Hearn* test from *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), has been adopted to determine whether filing a lawsuit implicitly waives the attorney-client privilege. *Pappas*, 114 Wn.2d at 208, 787 P.2d 30. The *Hearn* court reviewed whether defendants should be compelled to answer questions and produce documents concerning legal advice they

received from the attorney general. *Hearn*, 68 F.R.D. at 580. The plaintiff argued by asserting the “good faith immunity defense, defendants waived the attorney-client privilege to the extent the privilege would protect information relevant to that defense from disclosure.” *Id.* The court listed three factors that summarize the commonality between each exception to the attorney client privilege as:

- (1) assertion of the privilege was a 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.

Id. at 581. Where these three conditions exist, a court should find the party asserting a privilege has impliedly waived it through its own affirmative conduct. *Id.*

When applied to the Magneys’ claim of mental anguish the *Hearn* test results in waiver of the marital counselor privilege. First, the Magneys have asserted the privilege as a result of filing a suit and alleging mental anguish. CP at 5. Because mental anguish is an essential element of a claim for damages under loss of consortium, it is an affirmative act. *Cf. Bellevue Farm Owners Ass'n v. Stevens*, 198 Wn. App. 464, 482, 394 P.3d 1018 (2017). Second, through this affirmative act the Magneys put their mental health at issue and made it relevant to the case. *Id.* Third, application of the privilege denies Dr. Pham and Incyte access to discoverable information vital to their defense, because the marital

counseling records directly speak to the mental health of the Magneys and are necessary for Respondents to determine the causation and magnitude, if any, of the Magneys' mental anguish. *See Doe*, 196 F.R.D. at 569.

The *Hearn* test should be applied to issues of marital counselor privilege to determine whether a plaintiff has waived the privilege. The Washington Supreme Court applied the *Hearn* test in *Pappas*, which led to a waiver of attorney-client privilege to third-party defendants. *Pappas*, 114 Wn.2d at 208, 787 P.2d 30. The court found waiver of the attorney-client privilege because the defendant counterclaimed for malpractice, the counterclaim caused malpractice to be an issue in litigation, and the attorney's claims against third-party defendants did not add new issues of malpractice to the suit. *Id.* at 208, 787 P.2d 30. Because the inquiry in litigation required examination of decisions made at various stages of litigation the conditions of the *Hearn* test were met and the attorney-client privilege was waived. *Id.* at 209, 787 P.2d 30.

The *Pappas* court noted the criticism of *Hearn* from other courts, namely, the test undermines the legislatively established attorney-client privilege but disagreed with the criticism in the context of the case. *Id.* at 208, 787 P.2d 30. The court acknowledged "while it is true that the attorney-client privilege is statutory in nature, it is also true that this court has held that the privilege itself should be strictly limited for the purpose for which it exists." *Id.* (citing *Dike*, 75 Wn.2d at 11, 448 P.2d 490). The court specified to allow the client to counterclaim against the attorney for

malpractice and at the same time conceal communications related to the issue of malpractice based on attorney client privilege would allow the client to use attorney-client privilege as a sword rather than a shield as the legislature intended. *Pappas*, 114 Wn.2d at 208, 787 P.2d 30 Because the litigation will require examination of the Magneys mental state before and after the alleged incident, the assertion of privilege denies the Respondents information vital to their defense. The marital counseling records are highly relevant and the Magneys have waived the privilege under the *Hearn* test. *Hearn*, 68 F.R.D. at 580.

While criticism of the *Hearn* test has been noted in other circuits, the Eastern District of Washington carefully articulated the policy reasons for imposing the test and how it should be implemented. *Id.* at 582. The court noted when:

the content of defendant's communications with their attorney is inextricably merged with the elements of plaintiff's case and defendants' affirmative defense. These communications are not incidental to the case; they inhere in the controversy itself, and to deny access to them would preclude the court from a fair and just determination of the issues.

Id. (emphasis added). The same issues arise with the marital counseling privilege and psychotherapist-patient privilege. Where communications between the plaintiff and a therapist, marriage counselor or other, are part of the controversy itself those records must be discoverable. *See id.* To deny access to the records would preclude the court from a fair and just determination of the issues. *Id.* The *Hearn* court also noted that “[a]

substantial showing of merit to Plaintiff's case must be made before the court should apply the exception to the attorney-client privilege defined herein." *Id.* This creates a threshold for use of the *Hearn* test and alleviates the criticism from other courts use of the *Hearn* test. The Magneys mental health is part of this controversy. CP 5. The Magneys have likely communicated about their mental health to their marriage counselors. These communications are what was at issue before the Superior Court. To deny access to the marital counseling records to the Respondents would preclude the court from a fair and just determination of the issue of damages in the present litigation. *See id.*

Additionally, in *Dana v. Piper*, 173 Wn. App. 761, 295 P.3d 305 (2013) the court applied the *Hearn* test while noting the criticism from other circuits. Petitioner cites *Dana*, noting the criticism of the *Hearn* test. *See Brief of Petitioners*, pg. 18. However, other courts concern that the *Hearn* test may make the attorney-client privilege "illusory" has been expressly disagreed with by the Washington Supreme Court. *See Pappas*, 114 Wn.2d at 208, 787 P.2d 30 ("We disagree with this criticism of *Hearn* in the context of the present case"). Moreover, the *Dana* court itself shows the *Hearn* test does not make the attorney-client privilege "illusory" because application of the *Hearn* test did not result in waiver of the attorney-client privilege. *See Dana*, 173 Wn. App. at 775, 295 P.3d 305. The court in *Dana* held the defendant failed to meet the second and third conditions of the test because the defendant failed to make a showing of

the second and third conditions of the *Hearn* test based on the record. *Id.* at 775, 295 P.3d 305. As shown in *Dana*, use of the *Hearn* test does not result in an automatic waiver the attorney-client privilege, but rather, waiver is found in those circumstances when the three-factor test is met. *See id.*

Moreover, application of the *Hearn* test has led to waiver of the attorney client privilege in relation to claims for attorney's fees. *Bellevue Farm Owners Ass'n*, 198 Wn. App. at 482, 394 P.3d 1018. A defendant under *Hearn* impliedly waives the attorney client privilege and work product privilege by claiming attorney's fees as the plaintiff's only damages in an abuse of process claim. *Id.* The court held "because discovery is necessary to determine the proximate cause of his alleged harm, [the defendant] waived the right to assert attorney client privilege and work product for attorney fees and cost billing records." *Id.* Similarly, by alleging mental anguish and loss of consortium the Magneys waive the marital counselor privilege under the *Hearn* test because discovery is necessary to determine the "proximate cause" of their alleged harm. *See id.*

The *Hearn* test should be applied to the psychotherapist-patient privilege because other courts have held the attorney-client privilege and the psychotherapist-patient privilege are waived under a similar analysis. *See Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) ("similar to attorney-client privilege that can be waived when the client places the

attorney's representation at issue, a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue”); *Oberweis Dairy*, 456 F.3d at 718 (“If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state”); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 529 (N.D. Ill. 1999) (“[o]ther courts agree that “the principles governing implied waiver of the attorney-client privilege should apply in determining what is sufficient to constitute an implied waiver of the psychotherapist-patient privilege”); *Lodis*, 172 Wn. App. at 855, 292 P.3d 779 (“when a plaintiff puts his mental health at issue by alleging emotional distress, he waives his psychologist-patient privilege for relevant mental health records”); *LeVien*, 168 Misc. 2d at 957, 640 N.Y.S.2d 728 (“[t]o determine whether there is a waiver of the psychologist-client privilege, therefore, the Court must look to the standard to be applied to a waiver of the attorney-client privilege”). These cases are appropriate to consider and are persuasive because they note the origins of the psychotherapist-patient privilege and the analogous protections in the attorney-client privilege. Because the attorney-client privilege and the psychotherapist-privilege are linked in their analysis of waiver, the *Hearn* test should also be applied to the present matter, resulting in waiver of the privilege protecting the Magneys’ marital counseling records.

Factually similar to the present matter, in *LeVien*, 168 Misc. 2d 952, 640 N.Y.S. 2d 728, the plaintiff claimed he had suffered psychological and emotional harm as a result of defendant's defamatory conduct. Two years prior to the incident the plaintiff, his wife, and his son went to a family counselor. *Id.* The plaintiff did not want to disclose the family counseling records to the defendant and argued the records were privileged, were not relevant, and disclosure of the records would invade the confidentiality of the plaintiff's son and wife. *Id.* at 953, 640 N.Y.S. 2d 728. The plaintiff also went to counseling after the incident and entered an agreement to disclose those records to the defendants. *Id.* at 958, 640 N.Y.S. 2d 728. The *LaVien* court found:

when the commencement of such an action is coupled with an acknowledgment by the plaintiff of pre-incident visits with a psychologist and a statement by the plaintiff that the emotional or psychological problems which caused him to visit a psychologist at the present time are not the same as those which caused him to visit a psychologist prior to the subject incident, a limited waiver of the privilege should be implied.

Id. at 959, 640 N.Y.S.2d 728. Additionally, the court found that "application of the privilege as to the family counselor would deprive the defendants of vital information. If such family counselling records ultimately reveal no other source of emotional stress or strain, the information is no less vital to the preparation of the defendants' case." *Id.*

The facts and analysis of *LaVien* are directly on point to the present matter. While the Magneys have not sought counseling after the alleged incident, their claims for mental anguish still necessitates review

of the pre-alleged-incident records for a comparison on their mental state then and now. The *LaVien* court found the records were vital to the preparation of the defendant's cases and it is the same in this matter. *See id.* Respondents require the information in the marital counseling records to properly prepare a defense.

Notably, the *LaVien* court cited *Hearn*, in making its decision. *Id.* at 958-59, 640 N.Y.S.2d 728. The court found “[t]he communications to the family counselor are integral to the defendants' preparation of a defense in this action and to deny access to these communications would preclude the court from a fair and just determination of the issues.” *Id.* Application of the *Hearn* test to a psychotherapist-patient privilege claim by the *LaVien* court shows the test is appropriate for analyzing waiver of privileges outside the attorney-client privilege. *See id.*

While the *Hearn* test has not been applied beyond the attorney-client privilege in Washington, the analogous policy of the attorney-client privilege and the psychotherapist-patient privilege is grounds for use of the *Hearn* test in the present matter. *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 825, 381 P.3d 111 (2016) (the *Hearn* test is not limited in application to legal malpractice claims and “implied waiver should be considered on a case-by-case basis”). Application of the *Hearn* test to the Magneys' marital counselor privilege claim would be appropriate, and would results in a waiver of the privilege and the disclosure of the records.

E. The Trial Court’s Decision Denying *In-Camera* Review was Proper Because the Court Reasonably Relied on *Lodis*.

It is within the discretion of a trial court to decide whether to conduct an *in-camera* review of records. *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993). Review of a trial court’s discovery order is for abuse of discretion. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The Magneys argued to the Superior Court that there is no relevant information within the marital counseling records. CP at 18. The Superior Court weighed the Magneys’ request for *in-camera* review of the records heavily and offered the following reasoning for denying *in-camera* review:

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

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

Report of Proceedings “RP” at 28: 2-18 (emphasis added). The records sought by Dr. Pham and Incyte are for discovery purposes, to determine

the causation and magnitude of any emotional damages the Magneys have incurred as a result of the alleged incident. Whether the same records are admissible at the time of trial is a separate inquiry. Thus, the Superior Court properly denied *in-camera* review by relying on the ruling in *Lodis*. Where a plaintiff puts their mental health at issue in the litigation then the privilege is waived, and the records become discoverable. *See Lodis*, 172 Wn. App. at 855–56, 292 P.3d 779. Accordingly, the Superior Court did not have to conduct *in-camera* review because it could determine without reviewing the documents that they were subject to a waiver of the privilege and were discoverable. *See Harris v. Pierce County*, 84 Wn. App. 222, 235-36, 928 P.2d 1111 (1996). The Superior Court exercised its discretion reasonably in denying *in-camera* review because the privilege was waived under *Lodis*.

Petitioners rely on *Cedell*, 176 Wn.2d 686, 295 P.3d 239, which involved a first-party bad faith homeowner’s insurance claim where the insured filed against the insurer for delayed coverage of a house fire as grounds for *in-camera* review. In *Cedell*, the court recognized bad faith claims by insureds against their insurer give rise to important public policy considerations – the insurance company’s quasi-fiduciary duty to its insured and that the insurance contracts, practices, and procedures are highly regulated and of substantial public interest. *Id.* at 698, 295 P.3d 239. The court started with a presumption that there is no attorney-client privilege or work product privilege relevant between the insured and the

insurer in the claims adjusting process. *Id.* at 698-99, 295 P.3d 239. However, the court noted the insurer could overcome the presumption by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim. *Id.* at 699, 295 P.3d 239. If the insurer overcomes the presumption, then the insurance company is entitled to an *in-camera* review of the claims file and redactions to communications from counsel. *Id.* The court concluded:

Cedell is entitled to broad discovery, including, presumptively the entire claims file. The insurer may overcome this presumption by showing in camera its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating the claim. Upon such a showing, the insurance company is entitled to the redaction of communications from counsel that reflected the mental impressions of the attorney to the insurance company, unless those mental impressions are directly at issue in their quasi-fiduciary responsibilities to their insured. The insured is then entitled to attempt to pierce the attorney-client privilege. If the insured asserts the civil fraud exception, the court must engage in a two step process to determine if the claimed privileged documents are discoverable.

Id. at 702, 295 P.3d 239 (emphasis added). While *Cedell* enumerated protections based on the attorney-client privilege specifically in the context of a bad faith claim against an insurance company, this case does not indicate that all privilege holders are entitled to *in-camera* review to ensure only relevant information is produced. *See Brief of Petitioners*, pg. 22-23.

Additionally, *Fellows v. Moynihan*, 175 Wn.2d 641, 648-49, 285 P.3d 864 (2012), does not mandate *in-camera* review in this case. In *Fellows*, the court ordered *in-camera* review to determine whether

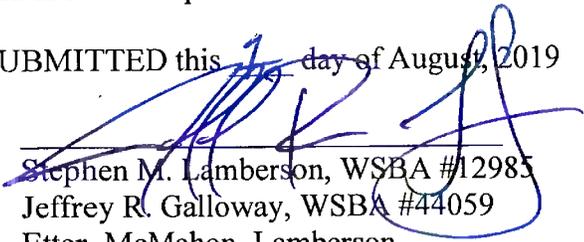
discovery sanctions should be imposed when the defendant did not comply with a discovery request. *Id.* It does not indicate *in-camera* review is mandated here or that the Superior Court abused its discretion.

The Superior Court reasonable relied on the decision in *Lodis*, that the privilege protecting the document had been waived and therefore, the court was not mandated to conduct *in-camera* review. The Magneys do not point to case law that indicates the Superior Court abused its discretion. Accordingly, the Superior Court properly denied the Magneys' request for *in-camera* review. The Superior Court did not abuse its discretion.

V. CONCLUSION

The Court of Appeals and Trial Court's determinations were in accordance with case law; and should be upheld.

RESPECTFULLY SUBMITTED this 7th day of August, 2019



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CERTIFICATE OF SERVICE

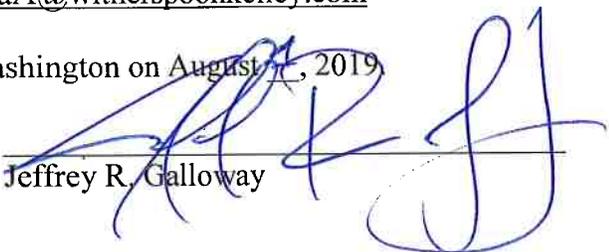
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Signed at Spokane Washington on August 1, 2019



Jeffrey R. Galloway

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

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