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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.; AUMI I. CORN, M.D.; LIQUN YIN, M.D; and INCYTE DIAGNOSTICS, a Washington Corporation,

Defendants - Respondents.

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF THE RESPONDING PARTIES

This Opposition is submitted on behalf of Defendants-Respondents Truc Pham M.D. and Incyte Diagnostics.

II. INTRODUCTION

Respondents Truc Pham, M.D. and Incyte Diagnostics (collectively "Respondents") oppose Petitioners Brian Magney and Emily Magney's (collectively "the Magneys") Motion for Discretionary Review. Underlying this matter is an alleged misdiagnosis by the Respondents, which the Magneys claim caused them to suffer physical and mental harm, including mental anguish and other emotional distress. Respondents are entitled to, and did, request relevant medical records from the Magneys, particularly their marital counseling records, in an effort to determine what, if any, emotional and/or mental damages the Magneys suffered. Upon hearing the Magneys' Motion for Protective Order, Spokane County Superior Court Judge, Hon. Julie M. McKay, denied the Magneys' Motion and required the Magneys to produce their martial counseling records. As the Magneys have specifically placed their mental health at issue through their Complaint, this determination was proper under applicable law. *See Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 856, 292 P.3d 779 (2013) (citing *Fitzgerald v. Cassil*, 216 F.R.D. 632, 634 (N.D. Cal. 2003)).

The Magneys' Motion for Discretionary Review mischaracterizes Judge McKay's ruling and the record. As Magneys have not, and cannot, establish that they meet the strict requirements of RAP 2.3(b) or RAP

13.5(b), the instant Motion must be denied. *See Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010).

III. ISSUES PRESENTED FOR REVIEW

A. The Trial Court correctly denied the Magneys' Motion for a Protective Order for marital counseling records because the Magneys asserted a claim for damages for mental anguish and/or emotional distress.

B. The Trial Court correctly declined to conduct an *in-camera* review of the Magneys' marital counseling records because the Magneys asserted a claim for damages for mental anguish and/or emotional distress.

IV. STATEMENT OF THE CASE

This is an action based in medical negligence arising out of Defendants' alleged misdiagnosis of Logan Magney, the Magneys' son. The action includes claims for mental injuries and mental anguish brought by Logan Magney's parents, Brian Magney and Emily Magney. *See* Record Appendix re: Motion for Discretionary Review ("Appx."), submitted by Plaintiffs-Petitioners on December 19, 2018, at A-1; A-119:8-22. During discovery, Defendants learned that the Magneys had undergone marital counseling and requested copies of their marital counseling records. Appx. at A-112:14-16. Brian and Emily Magney's marital counseling records are admittedly privileged under RCW 5.60.060(9) absent litigation. *See* RCW 5.60.060(9). However,

Respondents assert the Magneys waived the marital counseling privilege by asserting claims for mental injury and mental anguish.

The Magneys filed a Motion for a Protective Order to prevent the disclosure of Emily and Brian Magneys' marital counseling records. Appx. at A-8. Respondents opposed this Motion. Appx. at A-85. On April 30, 2018, the Trial Court heard oral argument and denied the Magneys' Motion. Appx. at A-145. The Court further declined to conduct an *in-camera* review of the records as requested by the Magneys. *Id.*

On May 4, 2018, the Trial Court entered a written order requiring the Magneys to produce their marital counseling records within thirty days. Appx. at A-155. The Magneys filed a Notice of Motion for Discretionary Review of the May 4, 2018 Order. Appx. at A-141. On June 29, 2018, the Trial Court issued a limited stay of proceedings pending a decision by the Court of Appeals. *See* Appx. at A-148. On September 5, 2018, the Commissioner of the Court of Appeals denied the Magneys' Motion for Discretionary Review. Appx. at A-154. The Magneys then filed a Motion for Reconsideration of the Commissioner's Ruling which was denied on November 20, 2018, by a panel of the Court of Appeals. Appx. at A-154. December 19, 2018, the Magneys sought review in this Court by filing the instant Motion for Discretionary Review.

V. ARGUMENT

A. The Rulings Compelling Disclosure of the Magneys' Marital Counseling Records Should be Upheld.

The Magneys' Motion fails to establish the requirements for discretionary review under RAP 13.5(b)(2). RAP 13.5(b)(2) permits discretionary review of an interlocutory decision: "If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act ..." RAP 13.5(b)(2).

A party seeking discretionary review "bears a heavy burden." *See In re Grove*, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995). "Interlocutory review is disfavored." *Minehart*, 156 Wn. App. at 462. "Interlocutory review is available in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Id.* Under RAP 13.5(b)(2), "there 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 462–463.

It is well established under Washington law that when a plaintiff brings a claim for emotional distress and/or mental anguish, their mental health records become discoverable. *See Lodis*, 172 Wn. App. at 856. "When a plaintiff claims emotional distress, mental health records and provider testimony are relevant, because the plaintiff's mental health is at issue." *Lodis*, 172 Wn. App. at 856 (referencing *Fitzgerald*, 216 F.R.D. at

634). Through their claims, the Magneys have put their mental health at issue by claiming damages for "severe and permanent injuries, both mental and physical, pain and suffering and mental anguish as well as loss of consortium." Appx. at A-5, § 8.1. Requiring production of their marital counseling records is proper; the Trial Court's ruling should be upheld.

i. Disclosure of the Magneys' Marital Counseling Records does not Alter the Status Quo and does not Limit Their Freedom To Act.

In *State v. Howland*, 180 Wn. App. 196, 206, 321 P.3d 303 (2014), the Court discussed this prong of RAP 13.5(b)(2), stating:

> ... [W]hen a party is compelled by court order to remove a structure, the order, if given effect, quite literally alters the status quo. Or if a court restrains a party from disposing of his or her private property, the party's freedom to act to conduct his or her affairs, is at least arguably, substantially limited. In each example, the court's action has effects beyond the parties' ability to conduct the immediate litigation. When this occurs in combination with the trial court's probable error, discretionary review is appropriate. But where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2).

Id. (internal citations omitted) (emphasis added). Here, the Trial Court's Order does not alter the status quo or limit the freedom of the Magneys to act outside the scope of this lawsuit. The Trial Court's ruling specifically relates to the *discoverability* of specific mental health records, but not the *admissibility* of the same. Appx. at A-136:22-137:1, 9-14. These are separate and distinct issues.

The Magneys primarily rely upon *Nw. Gas Ass'n v. Washington Utilities and Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007) and *Dana v. Piper*, 173 Wn. App. 761, 295 P.3d 305 (2013) in support of their contention that the status quo will be altered and/or their freedom to act is substantially limited. These cases are distinguishable from this situation. In *Dana*, the court considered attorney-client privileged documents in the context of a malpractice lawsuit. The court recognized that the "attorney client privilege can be waived [by a client] ... by suing his attorney for malpractice ..." *Dana*, 173 Wn. App. at 770. "A client impliedly waives the privilege with respect to the defendant attorney and with respect to all other attorneys who represented the client in the underlying matter of the malpractice suit." *Id.* The *Dana* court found that, because the communications at issue were not had until after the underlying matter had concluded, "any communications ... could have no effect on [the] alleged malpractice [claim]." *Id.* at 772. This case is inapposite. There is clear authority under *Lodis* and its progeny that once a claim for emotional distress and similar mental-health related damages are asserted, the discovery of mental health records is proper. *Nw. Gas Ass'n* is similarly unpersuasive. In this matter, the Court considered whether a party would suffer "actual and substantial injury" under a preliminary injunction standard if certain confidential information was released, potentially in violation of the Washington Public Records Act. *Nw. Gas Ass'n*, 141 Wn.

App. at 120-21. This standard is entirely separate from determining a party's freedom to act under RAP 13.5.

The Magneys' core argument is that once the records are disclosed there is no mechanism to retract the privileged information. However, the Magneys must have understood that their mental health records would be subject to – at the very minimum – discovery upon their claim for mental-health related damages and that certain privileges which protect these records would be waived. The Magneys seek to prevent Respondents from obtaining relevant information related to specific damages claims; this does not affect the Magneys' freedom to act, but rather, the Respondents'. Clearly claims for mental health damages have been alleged. Appx. at A-5; § 8.1. These claims invoke *Lodis* and the waiver of privileges associated with these records and make the same ripe for discovery. The rulings on this matter should be upheld.

ii. The Text of the Marital Counseling Privilege Statute Does Not Preclude Waiver of the Privilege in this Case and The Magneys' Interpretation is in Error.

As a policy matter, because some relationships are deemed so important and cannot be effective without candid communication, courts and legislatures have granted them privilege. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 785, 280 P.3d 1078 (2012). "But inasmuch as privileges frustrate the search for truth, they are limited in scope so as to accomplish their intended purpose and no more." *Id.* An example of this is how Washington Courts have historically treated the physician-patient

privilege. "As a statute in derogation of common law, RCW 5.60.060(4) is to be construed strictly and limited to its purposes." *Carson v. Fine*, 123 Wn.2d 206, 213, 867 P.2d 610 (1994) (citing *State, Dep't of Soc. & Health Servs. v. Latta*, 92 Wn.2d 812, 820, 601 P.2d 520 (1979)); *see also Randa v. Bear*, 50 Wn.2d 415, 420, 312 P.2d 640 (1957)). Indeed, the statutory privilege is now expressly limited by legislative amendment.

In *Carson*, the Court found:

> In 1986, the Legislature amended RCW 5.60.060(4) to provide that the privilege is deemed to have been waived 90 days after the filing of a personal injury or wrongful death action. The amendment is a codification of existing Washington case law which holds that waiver occurs even without plaintiff's express consent. Other courts and authorities agree that a patient voluntarily placing his or her physical or mental condition in issue in a judicial proceeding waives the privilege with respect to information relative to that condition. 1 J. Strong, McCormick on Evidence 384 (4th ed. 1992)); 8 J. Wigmore Evidence § 2389, at 855 (1961). The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist.

Carson, 123 Wn.2d at 213-14 (emphasis added). "A waiver of this privilege as to one of plaintiff's physicians also constitutes a waiver as to other physicians who attended the plaintiff with regard to the disability or ailment at issue." *Id.*. (referencing *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953), *adhered to on reh'g,* 257 P.2d 636 (Wn. 1953); *State v. Tradewell*, 9 Wn. App. 821, 824, 515 P.2d 172 (1973)). "A patient who could select among various physicians' opinions, and claim privilege as to

the remainder, would make a mockery of justice." *Id.* (referencing *Tradewell*, 9 Wn. App. at 824; *see also State v. Brewton*, 49 Wn. App. 589, 591, 744 P.2d 646 (1987)).

As discussed, *Lodis* also clearly holds that the psychologist-patient privilege is waived for relevant mental health issues when a plaintiff puts their mental health at issue by alleging emotional distress, and discovery of these records is permitted. *See Lodis*, 172 Wn. App. at 854-856. The *Lodis* court further found that even if a plaintiff stipulates that they will not introduce any psychologist or expert testimony, records may still be relevant to show causation and magnitude. *See id.* By placing their mental health at issues, the Magneys either expressly or impliedly waived this privilege. *See Lodis*, 172 Wn. App. at 856.

The Magneys rely on *Bond v. Independent 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. These cases are distinguishable. Notably, neither *Bond* nor *Phillips* discuss the marital counseling privilege statute. Both determine whether testimony can be elicited from a plaintiff's physician at the time of trial or deposition. *See Bond*, 69 Wn.2d at 352-53; *Phipps*, 74 Wn.2d at 441. The case at hand is more limited to whether these particular mental health records are discoverable. Importantly, and as the Magneys recognize, both *Bond* and *Phipps* were decided prior to the statute's

amendments, as discussed above, as well as both *Carson* and *Lodis*. In both *Carson* and *Lodis*, discussed in detail herein, the waiver of the physician-patient privilege is addressed for claims specifically related to mental health damages, as have been asserted here. Simply because the legislature has not included a specific, narrow exemption as the Magneys suggest, does not render *Carson* and *Lodis* inapplicable.

Because asserting a privilege may "sometimes results in the exclusion of evidence that is otherwise relevant material and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists." *See Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968); *see also State v. Maxon*, 110 Wn.2d 564, 567, 756 P.2d 1297 (1988) (refusing to recognize parent-child testimonial privilege). As the United States Supreme Court has said:

> The common-law principles underlying the recognition of testimonial privileges can be stated simply. 'For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.' *United States v. Bryan*, 339 U.S. 323, 331, 70 S. Ct. 724, 730, 94 L. Ed. 884 (1950) (quoting 8 J. Wigmore, Evidence § 2192, p. 64 (3d ed. 1940)).

Dietz v. Doe, 131 Wn.2d 835, 843, 935 P.2d 611 (1997) (citing *Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S. Ct. 1923 (1996)).

The Magneys' argument fails under established precedent. In *Loudon v. Mhyre*, 110 Wn.2d 675, 678, 756 P.2d 138 (1988), the Court referenced RCW 5.60.060(4) in part, stating:

> Subject to the limitations under RCW 71.05.250, a physician or surgeon or osteopathic physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient...

Id. *Louden* reaffirmed that a patient may waive this privilege by putting his or her physical condition in issue. *Id.* at 677–78.

The Court in *Randa v. Bear*, 50 Wn.2d 415, 312 P.2d 640 (1957) also held the plaintiff waived the physician-patient privilege when she put her physical condition at issue. The Court reasoned "access to all material facts relating to the mental or physical condition of any party in any case where such condition is in controversy" was vital. *See id.*

Quite simply, the Magneys have placed their mental health at issue by alleging damages for mental anguish and other mental damages. Appx. at A-5, § 8.1.

iii. The Magneys Have Impliedly Waived the Marital Counseling Privilege and the Courts have Correctly Relied upon *Lodis*.

The Magneys' attempt to confuse the issues by stating that their "marital relationship is not at issue" and ignore the fact that they have placed their mental health at issue. *See* Appx. at A-5, § 8.1. 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 records (mental health); the records are clearly discoverable. *See Lodis*, 172 Wn. App. at 856. The Court of Appeals and Trial Court correctly applied *Lodis* to compel disclosure of the Magneys' marital counseling records.

In *Lodis*, the plaintiff waived his psychologist-patient privilege when he put his mental health at issue. *Lodis*, 172 Wn. App. at 856. The court went on to state that "simply because he did not intend to introduce medical records, billings, or testimony, does not mean those records are irrelevant and undiscoverable." *Id.* (underling added). This is precisely what occurred in this matter. Privileges exist to promote full disclosure to a treating provider or to prevent embarrassment. *See Carson*, 123 Wn.2d at 213–14. The court in *Lodis* properly analogized the psychologist-patient and physician-patient privilege. *Lodis*, 172 Wn. App. at 835. The Washington Supreme Court recognizes that both the physician-patient and psychologist-patient privileges provide essentially the same protection. *Petersen v. State*, 100 Wn.2d 421, 429, 671 P.2d 230 (1983). Similar to the plaintiff in *Lodis*, the Magneys point to no Washington case law that requires this Court to treat these two privileges differently.

Similar to the plaintiff in *Lodis*, the Magneys have placed their mental health at issue by claiming "mental injuries" and "mental anguish" *Id.* By placing their mental health at issue, the Magneys have waived privilege in their martial counseling records which are relevant to establish

their mental health prior to the alleged misdiagnosis and to establish a baseline from which to calculate potential damages. Even if the Magneys stipulate that they will not introduce any psychologist or expert testimony, the records are discoverable at this stage in the litigation. *See Lodis*, 172 Wn. App. at 856.

Similarly, the *Lodis* Court did not state that the psychologist-patient privilege was waived for all cases, it simply stated that plaintiffs waive their psychologist-patient privilege when they voluntarily put their physical or mental health at issue in a judicial proceeding. *Lodis,* 172 Wn. App. 835; *see also* RCW 5.60.060(4)(b) ("Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege."); *Carson*, 123 Wn.2d at 213–14 ("[A] patient voluntarily placing his or her physical or mental condition in issue in a judicial proceeding waives the privilege with respect to information relative to that condition.").

B. The Trial Court's Decision Denying *In-Camera* Review Was Proper.

The decision whether to conduct an *in-camera* review of privileged records is reviewed for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993). 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 cannot satisfy this standard.

In *Lodis*, the court concluded that a judge is authorized to conduct an in-camera review, seal the records, or limit their use at trial as necessary to protect the plaintiff's privacy. *Lodis*, 172 Wn. App. at 855–56; *see also Jane Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006). The trial court reasoned that it was not currently in a position to make a decision as to what was relevant, combined with the fact the disclosure during the discovery phase did not mean that the evidence would be admissible at trial, is well within the trial court's discretion under Washington case law. In this case, the Trial Court acted with appropriate discretion by denying *in-camera* review, and this decision should be upheld.

VI. CONCLUSION

The Court of Appeals and Trial Court's determinations were proper and should be upheld. The Magneys' Motion for Discretionary Review must be denied.

RESPECTFULLY SUBMITTED this 24th day of January 2019

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington: On the date set forth below, I served the document to which this is annexed by email pursuant to electronic service agreement, as follows:

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Margie Blaine

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