

# SUPREME COURT OF THE STATE OF WASHINGTON

## Magney v. Pham

Magney v. Pham · No. 96669-9 · Decided July 2, 2020

### SUMMARY

The Washington Supreme Court held that parents did not automatically waive the statutory marital counseling privilege by filing a medical negligence action seeking damages including mental anguish and loss of consortium. The court rejected extending an automatic waiver rule from the physician-patient privilege to the marital counseling privilege because RCW 5.60.060(9) does not provide for such a waiver. It remanded for in camera review to determine whether the privilege had been impliedly waived and whether any counseling records were relevant and discoverable.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                              |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of the State of Washington                                                                                                                                                                                                                                     |
| WRITING FOR THE COURT | Charles Wiggins, J.                                                                                                                                                                                                                                                          |
| JURISDICTION          | Washington                                                                                                                                                                                                                                                                   |
| DECIDED               | July 2, 2020                                                                                                                                                                                                                                                                 |
| DOCKET                | 96669-9                                                                                                                                                                                                                                                                      |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                        |
| PROCEDURAL POSTURE    | The Magneys sought discretionary review of an order denying their motion for a protective order and requiring production of marital counseling records in a medical negligence action. The Washington Supreme Court granted review after the Court of Appeals denied review. |
| STANDARD OF REVIEW    | A trial court's scope-of-discovery ruling is reviewed for abuse of discretion; a ruling based on untenable grounds, untenable reasons, or an erroneous view of the law constitutes an abuse of discretion. Whether a privilege has been waived is reviewed de novo.          |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                               |
| PARTIES               | Logan Magney, Caleb Magney, Brian Magney, Emily Magney v. Truc Pham, MD, Ayumi I. Corn, MD, Liqun Yin, MD, Incyte Diagnostics                                                                                                                                                |

### TOPICS

discovery dispute

privilege

civil procedure

statutory interpretation

medical records privacy

## PRACTICE AREAS

civil procedure

evidence

health law

statutory interpretation

## QUESTIONS PRESENTED

1. Whether filing a medical negligence action seeking damages for mental anguish and loss of consortium automatically waives the marital counseling privilege under RCW 5.60.060(9).
2. Whether the record permitted the Supreme Court to determine whether the Magneys had impliedly waived the privilege.
3. Whether the superior court was required to conduct in camera review of the marital counseling records when the privilege holders requested it.

## HOLDINGS

1. Filing a medical negligence lawsuit seeking damages for mental anguish and loss of consortium does not automatically waive the marital counseling privilege because RCW 5.60.060(9) does not enumerate filing such an action as an exception or waiver event.
2. The absence of automatic waiver does not preclude implied waiver, and the record was insufficient for the Supreme Court to determine whether the Magneys had impliedly waived the privilege through their disclosures or litigation conduct.
3. When the holder of the marital counseling privilege requests it, the trial court must conduct in camera review of the counseling records to determine whether privilege was impliedly waived and, if so, which records or portions are relevant and discoverable.

## KEY QUOTATIONS

*“The plain language of the statute, the lack of ambiguity in the statute, the legislature’s clear choice of the different circumstances under which each privilege can be lost or waived, and the very structure of the statute lead us to the conclusion that there is no automatic waiver of the marital counseling privilege.” (11)*

*“We remand to the superior court for an in camera review of the Magneys’ marital counseling records to determine whether the Magneys impliedly waived the privilege and, if so, whether any privileged information is relevant to the present case.” (22)*

## FACTUAL BACKGROUND

In 2017, Brian and Emily Magney brought a medical negligence action on behalf of themselves and their sons, alleging that their infant son Logan had been misdiagnosed with acute myeloid leukemia and subjected to unnecessary chemotherapy. They sought damages including mental anguish and loss of consortium. The defendants learned that the Magneys had participated in separate marital counseling sessions in 2014, before Logan’s diagnosis, and sought discovery of the counseling records. The Magneys asserted the records were privileged under RCW 5.60.060(9) and moved for a protective order.

## PROCEDURAL HISTORY

The superior court denied the Magneys' motion for a protective order, denied in camera review, and ordered production of the marital counseling records, reasoning that the Magneys waived privilege by placing mental anguish at issue. The Court of Appeals denied review. The Supreme Court reversed the superior court, vacated the discovery order, and remanded for in camera review of implied waiver and relevance.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

The superior court must vacate the order denying the Magneys' motion for a protective order and conduct in camera review of the marital counseling records. It must determine whether the Magneys impliedly waived the privilege through their actions and, if waiver occurred, determine in camera which information is relevant and discoverable.

## CASES CITED

- Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 338-39, 858 P.2d 1054 (1993)
- Steel v. Olympia Early Learning Ctr., 195 Wash. App. 811, 822, 381 P.3d 111 (2016)
- Pappas v. Holloway, 114 Wash. 2d 198, 205, 787 P.2d 30 (1990)
- Lodis v. Corbis Holdings, Inc., 172 Wash. App. 835, 854-56, 292 P.3d 779 (2013)
- McUne v. Fuqua, 42 Wash. 2d 65, 74-76, 253 P.2d 632 (1953)
- State v. Emmanuel, 42 Wash. 2d 799, 815, 259 P.2d 845 (1953)
- Petersen v. State, 100 Wash. 2d 421, 429, 671 P.2d 230 (1983)
- Carson v. Fine, 123 Wash. 2d 206, 212-13, 867 P.2d 610 (1994)
- Dep't of Soc. & Health Servs. v. Latta, 92 Wash. 2d 812, 819, 601 P.2d 520 (1979)
- Swinomish Indian Tribal Cmty. v. Dep't of Ecology, 178 Wash. 2d 571, 581, 311 P.3d 6 (2013)
- TracFone Wireless, Inc. v. Dep't of Revenue, 170 Wash. 2d 273, 281, 242 P.3d 810 (2010)
- Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash. 2d 1, 9-12, 43 P.3d 4 (2002)
- Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County, 77 Wash. 2d 94, 98, 459 P.2d 633 (1969)
- Youngs v. PeaceHealth, 179 Wash. 2d 645, 650-51, 658, 316 P.3d 1035 (2014)
- Randa v. Bear, 50 Wash. 2d 415, 421, 312 P.2d 640 (1957)
- Bond v. Indep. Order of Foresters, 69 Wash. 2d 879, 880-82, 421 P.2d 351 (1966)
- Kime v. Niemann, 64 Wash. 2d 394, 396-97, 391 P.2d 955 (1964)
- Jaffe v. Redmond, 518 U.S. 1, 9-10, 14-18, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)
- State v. Kalakosky, 121 Wash. 2d 525, 550, 852 P.2d 1064 (1993)
- Dana v. Piper, 173 Wash. App. 761, 769, 295 P.3d 305 (2013)
- Cedell v. Farmers Ins. Co. of Wash., 176 Wash. 2d 686, 699, 295 P.3d 239 (2013)

- *Fellows v. Moynihan*, 175 Wash. 2d 641, 646, 285 P.3d 864 (2012)

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