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COA No. 345734-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ESTATE OF MICHAEL DEMPSEY, by and through its Personal Representative, ELLEN SMITH, and ELLEN SMITH,

Respondents/Appellants,

v.

SPOKANE WASHINGTON HOSPITAL COMPANY d/b/a DEACONESS MEDICAL CENTER,

and

ROCKWOOD CLINIC and Michael Wukelic, M.D.,

Petitioners/Respondents.

ANSWER TO PETITION FOR REVIEW

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I. **IDENTITY OF RESPONDENT.**

The Respondent to this petition is the Estate of Michael Dempsey through its Personal Representative, Ellen Smith, and Ellen Smith, (hereafter collectively known as "Estate.") The Estate is the Plaintiff in the trial court, and the Appellant before the Division III Court of Appeals, in *Estate of Dempsey v. Spokane Washington Company, LLC d/b/a Deaconess Medical Center, et al*, 406 P.3d 1162 (2017).

II. **COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW.**

A CR 45 subpoena to an outside *witness* ordering that witness, under threat of contempt, to produce the Estate party attorney's privileged work product materially differs from a CR 34 request for production to the Estate *party*. A CR 45 subpoena ordering the production of privileged material from a witness must be quashed, and sanctions applied against the issuing party.

III. **SUMMARY**.

Attorney and expert work product privileges have always existed with testifying experts both by rule and by precedent under CR 26(b)(4) and (b)(5) respectively. The *Dempsey* court so affirms. *See Dempsey at 1166 (Section B Attorney work product) and 1168 (Section D Testifying expert work product).* But what the *Dempsey* decision fails to do is to distinguish

between a party's use of a CR 45 subpoena to a *witness*, versus the issuance of a CR 34 request for production to a *party*. Using a CR 45 subpoena in ordering a witness to produce a party attorney's privileged work product material in the hands of that witness creates conflict between the witness and their retaining attorney. Were the order followed by the witness to avoid personal contempt, then that witness would have to divulge their retaining attorney's mental impressions and theories of the case directly to the party issuing the subpoena. Here, Defendant Petitioners Wukelic and Rockwood Clinic issued a subpoena duces tecum directly to the Estate's testifying medical expert, explicitly ordering the expert to produce direct to the Defendants all of the retaining Estate's attorney's correspondence and communications with the expert, including the expert's handwritten notes concerning conversations had with the Plaintiffs' counsel. *Dempsey, 406 P.3d at 1164.* Defendants ordered this direct production from the witness under threat of the witness being "deemed guilty of contempt of court." *CP 78:25-26.* If the witness did not produce directly to the Defendant what was ordered, he would be found in contempt. *Id.* The use of a subpoena in this fashion thereby excludes the party Estate from the order. It circumvents the party attorney, and therefore that attorney's work product protections. This is why CR 45(c)(3)(A)(iii) directs the trial to quash or modify such a subpoena. A party is not allowed to gain access to an attorney's work

product by directly subpoenaing an expert witness for it. *CR 45*.

In contrast, when a CR 34 request for production issues to an Estate *party,* then the Estate is the party required to produce, not the witness. The privilege log process, and the "waiver" analysis the *Dempsey* court applies,[1] is now triggered to allow the party to protect its attorney's work product. Because a request for production goes to the Estate *party*, then the Estate collects the information from the expert as a retained expert for the Estate, discloses the proper information, and may move for a protective order and assert any claim of privilege via a privilege log over attorney work product that may exist within its expert's work product. These substantial differences in protection and process between CR 45 and CR 34 discovery mechanisms are missed in the *Dempsey* ruling. The result is confusion over the use of the two forms of discovery, and the *Dempsey* court incorrectly denying the Estate the remedies to which it was entitled in the form of an order quashing that subpoena and fees. The *Dempsey* court accepts that Defendants' subpoena was subject to CR 45, *see Dempsey at 1168-1169 discussing CR 45's fee provision,* but it then fails to properly apply that rule's mandatory sanctions for the improper use of a court order against a witness. This distinction between CR 45 and CR 34 is not well defined in

[1] see *Dempsey at 1167, section C*.

other precedent dealing with these privileges, and goes awry in *Dempsey*, but it is error.

The second critical distinction between a CR 45 subpoena to a witness verses a CR 34 request for production to a party is the "burden of proof" and the concept of privilege logs. When a party issues a CR 45 subpoena to a witness ordering privileged material, it is the *issuing* party who must assert some waiver or exception to the rule's preclusion from them doing this with a witness. *CR 45(c)(3)(A)(iii)*. Absent such, the subpoena to that witness must be quashed. *Id*. *Dempsey* reaffirms the privileges, but it then applies a "waiver" and "privilege log" process to the *Estate* that could only arise with a properly issued CR 34 request for production to the Estate itself. When a CR 45 subpoena is used, the party's attorney never gets their hands on the privileged material, because the order demands production directly from the witness. No privilege log is prepared by the party attorney, because the party attorney is circumvented. Again, this distinction is not made in *Dempsey*. Again, the remedy for such an improper subpoena duces tecum issued directly to a witness, not a party, is an order quashing that court order and awarding the mandatory sanctions under *CR 45(c)(1)*, not a discussion of waiver, as detailed in Section C of the decision. *Dempsey at 1167.*

Finally, the *Dempsey* court addresses, e.g., whether "waiver" of the

now reaffirmed privileges may have existed, and concludes it can't yet tell, because the *Estate* hasn't produced anything. Again, this fails to appreciate the difference between a CR 45 subpoena to a witness and a CR 34 request for production to a party. The *Estate* has no burden of production, because the subpoena directive *is not to the Estate*—it is to the witness.

Plaintiffs thus submit that *Dempsey's* affirming the continued existence of attorney and expert work product privileges should be affirmed; but this Supreme Court should review and reverse the *Dempsey* court's failure to apply the difference between an improper CR 45 order to a witness, versus those protective order/privilege log remedies that apply with CR 34 discovery to a party. The Estate should be entitled to all of its fees and costs, and the Defendants' subpoena quashed.

IV. RESPONSE STATEMENT OF THE CASE.

Defendant Petitioners Rockwood and Dr. Wukelic issued a subpoena duces tecum to the Estate's expert medical witness, ordering that the witness produce "[a]ny and all notes, memos, either written or electronic which you have made while performing work on this case. This is meant to include handwritten notes concerning conversations with … Plaintiffs' counsel …" 406 P.3d at 1164, *citing CP 78.* Absent production, the witness would be "deemed guilty of contempt of court." *CP 78: 25-26.* This document thus ordered the witness to produce the Estate attorney's mental

impressions and opinions held by the expert. CR 45 mandates that a court quash or modify any such subpoena, because the subpoena demands production of "disclosure of privileged or other protected matter" from a witness, and the Defendants failed to identify any requisite CR 45 exception or waiver that might apply to allow their use of a subpoena in this fashion. *CR 45(c)(3)(A)(iii).*

At both discovery master and trial court levels, the Estate moved for an order quashing this improper subpoena duces tecum, and requesting fees. Both the discovery master and trial court denied CR 45 remedies to the Estate by concluding that no privileges *exist* with a testifying expert witness. Moreover, the Discovery Master and the trial court ordered the Estate's counsel to submit a privilege log—even after concluding that no privileges existed to invoke. *See CP 189, Estate of Dempsey at 165.*

Contrary to Defendants' petition, the Estate did not "refuse both orders to provide a privilege log." Instead, the Estate was forced to appeal to Division III to (re)establish a work product privilege before it could even *begin* a privilege log, or, more accurately, enforce CR 45 against this improper subpoena. Until the privileges were "reinstated," there would be no privilege to claim on a privilege log, and no CR 45 relief. *See CP 189,*

Estate of Dempsey at 165.[2] Because it was the *witness* who was under court order to produce directly to the issuing party, the Estate counsel moved to protect its counsel's work product in that expert's hands, essentially placing counsel and their expert in conflict.

The Estate's appeal to Division III was successful in confirming the continued existence of attorney and expert work product privileges with a testifying expert. The trial court was reversed on its ruling that no privilege existed between an attorney and their retained testifying expert. *Dempsey at 1164*. But it did not direct an order quashing the Defendants' subpoena to the witness, and denied fees to the Estate. The Defendants now petition for review claiming that no such privileges exist. In response, the Estate asks that this Court hold that the Estate is entitled to all CR 45 remedies, direct an order quashing the subpoena, and award all fees to the Estate.

V. REPLY TO ARGUMENT.

The decision of the Court of Appeals is not in conflict with decisions of this Supreme Court, nor with other published decisions of the Court of Appeals, in its holding that both attorney and expert work product privileges apply to testifying experts. But having made that ruling, the *Dempsey* ruling

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[2] Even Judge Fearing, in dissent, concedes this "anomaly in the ruling," whereby the discovery master rejected the application of the attorney work product doctrine entirely but then required the presentation of a privilege log. *Dempsey at 1170*.

does err in failing to enforce the plain language of CR 45, which mandates an order quashing the subpoena, and an award of fees to the Estate. The distinction between a party using a CR 45 subpoena against an expert witness, versus its sending a CR 34 request for production to the opposing party, should be recognized and enforced.

A. The Appellate Court correctly reaffirms that attorney and expert work product privileges remain where each's work is in the hands of the other.

An attorney's work product privilege protects that attorney's work product in the hands of any retained expert. CR 26(b)(4), *and see Soter v. Cowels Pub. Co.,* 162 Wn.2d 716 (2007) (attorney work product protections remain under the public disclosure act per civil rules, applying this principle to a district's investigation notes); *Matter of Firestorm 1991,* 129 Wn.2d 130 (1996) (attorney work product protections remain with a retained expert who offered his information to the other side); *Harris v. Drake*, 152 Wn.2d 480, 48-486, 491, 99 P.3d 872 (2004). Both a party and the party's representative, i.e., those retained or employed by the party's insurer, may assert the protection of the work product rule, and documents prepared in anticipation of litigation are discoverable only upon a showing of substantial need); *In re Det. Of West,* 171 Wn.2d 383, 407 (2011)(work product protections attach to both a consulting and an expert witness, and

remain in place with a testifying expert whose materials are otherwise discoverable within the limits of CR 26(b)(5)). The *Dempsey* court correctly affirms CR 26(b)'s attorney and expert work product privileges, and correctly reversed the trial court's improper abrogation of both.

Defendants argue that all such privileges are waived with a testifying expert given *In re Det. of West*, 171 Wn.2d at 383; but *West* does not stand for that proposition. When the *West* court states: "Accordingly, where the liberal discovery rule in CR 26(b)(5)(A*) lacks protections for testifying expert work product before trial,* …," the lack of protection being referenced is the distinction made by CR 26(b)(4) and (5) themselves.[3] With a CR 26(b)(5)(B) consulting expert, nothing can be accessed. With a testifying expert, CR 26(b)(5)(A), "facts known and opinions held by experts," otherwise discoverable under the provisions of subsection (b)(1), and "acquired or developed in anticipation of litigation or for trial," can be accessed, subject to attorney work product protections. Neither an attorney nor an expert waive privileges or civil rules limitations because of testifying expert status. *West* goes out of its way to reiterate *Firestorm* as protecting attorney work product:

> "Finally, we clarify any confusion from our decision in *In re Firestorm 1991*…. CR 26(b)(5) pertains only to the 'facts known and opinions held by *experts*.' (Emphasis added). We

[3] *See* 171 Wn.2d at 407, *emphasis added.*

> do not say that 'the mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the litigation,' CR 26(b)(4), are subject to discovery under CR 26(b)(5)."

West, 171 Wn.2d at 407.[4]

Defendants argue that *Dempsey* is contrary to *Limstrom v. Ladenburg*, 10 Wn. App. 133, 145 (2002). This is incorrect. *Limstrom* addresses the concept of waiver in the context of an attorney who had disclosed their work product protected documents to their *adversary*, not to a testifying expert. But the court held that even where disclosure is mandatory, such as in criminal cases, then the disclosure does not constitute a waiver. *See Petition for Review, p. 13, "Analysis."*

The *Dempsey* ruling is in accord with Washington state law and its Civil Rules as it relates to the existence of these privileges between

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[4] The Defendants reference Justice Madsen's concurring opinion in *In re Firestorm 1991*. Justice Madsen noted that federal rules have been looked to for guidance in construing state rules. 129 Wn.2d 130 (1996). Were that to be done here, then it must be noted that the federal rules were specifically changed in 2010 to prevent the very outcome that the Defendants urge here. *See Fed. R. Proc. 26, 2010 Federal Rules Advisory Committee Note; and see PacifCorp v. Nw. Pipeline GP*, 879 F,Supp.2d 1171, 1212 (D. Or. 2012)(stating, "Importantly, the amended Rule 26 now explicitly protects communications between a party's attorney and reporting experts"; *and see Republic of Ecuador v. McKay*, 742 F.3d 860, 870 (9th Cir. 2014)(noting that "historical evolution of the rule, its current structure, and the Committee's explanatory notes" all make clear that the 2010 amendments were "to protect opinion—i.e., attorney mental impressions, conclusions, opinions, or legal theories—from discovery," and that attorney-expect communications were targeted by the Committee because they were considered "the areas most vulnerable to the disclosure of opinion work product.")

testifying experts and their retaining counsel. Each's work product remains protected in the hands of the other.

B. <u>Privileges protect both consulting and testifying experts</u>.

Defendants argue that the Appellate Court erred by allegedly failing to recognize the "distinction" between consulting experts and testifying experts, but they fail to explain exactly what they think that distinction is. As explained above in Section A, "full disclosure" certainly applies to testifying experts, versus no disclosure at all with consulting experts, but "full disclosure" with testifying experts means that disclosure allowed by existing privileges and civil rule limitations. *CR 26(b)(5)(A)*. Discovery within the limits of the rule may be obtained from a testifying expert. *CR 26(b)(5)(A)*. No discovery at all may be obtained from a consulting expert, absent a showing of exceptional circumstances. *CR 26(b)(5)(B)*.

C. <u>No basis for review exists where an appellate court ruling is "contrary to pre-2010 federal law."</u>

Defendants argue that the *Dempsey* ruling on the continued existence of privileges is contrary to "pre-2010 federal law." That is not a basis for review under *RAP 13.4(b)*.

RAP 13.5(b)(2).

D. **The party *issuing* a CR 45 subpoena to an outside witness has the burden of asserting waiver or an exception to avoid the rule's sanctions. The Appellate Court failed to hold the Defendants to their burden as the *issuer* of a CR 45 subpoena, and this error is cause for review under RAP 13.5(b)(2).**

An issue regarding "burdens of proof" raised in the Defendants' petition for review leads to the probable error in *Dempsey* that the Estate asserts is subject to review under RAP 13.5 (b)(2). *Dempsey* determines an interlocutory appeal, subject to RAP 13.5, and it errs by failing to direct the trial court to quash the Defendants' subpoena, and by failing to award all attorney fees to the Estate. Its ruling substantially alters the status quo by redirecting a defense subpoena directed at a witness to the Estate itself, subjecting the Estate attorney to contempt, as opposed to the witness. The error arises from the critical distinction between a CR 45 subpoena to a witness of the opposing party, versus a CR 34 request for production to the opposing party itself. This ruling should be reviewed as probable error under RAP 13.5(b)(2).

Defendants argue that the *Dempsey* court failed to hold the Estate to *its* evidentiary burden in responding to a discovery inquiry. Defendants fail to distinguish between a CR 45 subpoena duces tecum to an outside witness

demanding privileged information from that witness, versus a CR 34 request for production to the party Estate.

Dempsey also fails to apply this distinction, but when a party uses a CR 45 subpoena to directly order a *witness* to produce privileged material, then CR 45(c)(3)(A)(iii) makes it the *issuing* party's duty to assert the exception to the preclusion. Otherwise, the subpoena is not in conformity with CR 45, and it is a nullity. *State v. Adamski*, 111 Wn.2d 574, 578, 761 P.2d 621 (1988) (addressing nullity in the context of service of the subpoenas).

In this way, CR 45's subpoena rule differs substantially from CR 34's request for production. Under CR 45, a subpoena may not target privileged information from an outside witness without the issuer identifying some exception to the preclusion, or asserting that the preclusion is waived as to this subpoena. *CR 45(c)(3)(A)(iii)*. Absent this exception or waiver, a court "*shall* quash or modify the subpoena where it "requires disclosure of privileged or other protected matter and no exception or waiver applies." *Id.*, *emphasis added*. Here, once the *Dempsey* court confirmed that the Defendants' SDT explicitly required the disclosure of privileged matter—attorney and expert work product—from this outside witness, then because the Defendants referenced neither any exception to CR 45's preclusion against such use of a subpoena, nor any waiver of the

preclusion, then the subpoena failed to conform to CR 45, and Plaintiffs were entitled to an immediate order quashing it, with sanctions. *CR 45(c)(3)(A)(iii)*.

The *Dempsey* court did not make this distinction, leading to an erroneous outcome. *Dempsey* erred in changing the status of the Estate from a "bystander" to the direct target of the Defendants' subpoena. The trial court should be directed to quash the subpoena, and the Estate awarded its attorney fees. This "redirection" error should be reviewed under RAP 13.5 (b)(2).

E. <u>The Appellate Court did not apply waiver contrary to state law. Waiver is not reached under this CR 45 subpoena.</u>

Defendants argue that the Appellate court erred in its assessment of waiver. But the argument that waiver occurs simply by retaining a testifying expert is without merit. *See CR 26(b)(4) and (b)(5), and Section A supra.* But the *Dempsey* court did err in discussing waiver as a duty that the *Estate* will have to defeat on remand, because the Estate has never been presented with a discovery demand.

F. The Estate should not be ordered to produce a privilege log—such a log would be responsive to a CR 34 discovery demand upon the Estate, which has never issued, but not with a CR 45 subpoena to a witness. It is error to require that log, warranting review under RAP 13.5(b)(2).

Defendants assert that Plaintiffs failed to properly provide a privilege log. But under their own theory, no privilege exists to invoke. More importantly, the Estate would not have to prepare a "privilege log," when it has never been presented with a discovery demand. The Estate was not the entity subpoenaed. The Estate did not receive a CR 34 request for production. The subpoena order is to the witness. This is why CR 45 requires the quashing of that subpoena. *CR 45(c)(3)(A)(iii).* This is the difference between CR 45 and CR 34.

The *Dempsey* court errs by failing to quash the subpoena, and instead returning the matter to the discovery master to address whether the attorney or expert waived work product protections, and discussing privilege logs. *Dempsey at, e.g., 1167, 1168.* Discussing even "partial waiver" at this point is error. *Dempsey at 1167.* A privilege log arises in the context of a valid CR 34 request for production *to the Estate,* and there is no such request here. Had the Estate received a CR 34 request for production, then, as the receiving party, the Estate would have certainly

gathered all of its expert's materials from the expert and then disclosed those materials within the limitations of CR 34 and CR 26(b)(5). If discovery was requested as to "facts known and opinions held by experts" otherwise discoverable under the provisions of subsection (b)(1) and "acquired or developed in anticipation of litigation or for trial," then production may be required from the Estate. And if it turns out that certain of those facts known and opinions held by experts are in part facts or opinions given to the expert by the attorney, then the Estate may have been required to disclose those facts or opinions discoverable under the limitations of CR 26(b)(5). But because the Estate attorney has now collected the expert's materials for production under CR 26(b)(5), the attorney may now invoke a CR 26(b)(4) attorney work product privilege over certain of those otherwise discoverable disclosures via a privilege log, and move for a protective order per CR 26(c). The expert's facially discoverable facts and opinions may now be placed on a privilege log, and the attorney's work product privilege asserted via the log. Even where facts known and opinions held by experts are disclosed, CR 26(b)(4) still protects attorney work product. *Soter v Cowles,* 131 Wn. App at 901. The court would then apply CR 26(b)(4)'s review process of the privilege log to ensure that the *Estate's* disclosure of the attorney's facts or opinions used by their expert in forming opinions, balanced against the protection of true

work product privilege, requires disclosure or redaction as appropriate. *CR 26(b)(4)*. Even then, "in ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney …" This process is properly addressed by *Dempsey* at 1168, but it is assessed as if the Defendant issued a *request for production to the Estate,* which it did not. Until there is a proper CR 34 discovery demand issued to the Estate via a request for production, this privilege log process is never properly triggered, and it is error to remand this matter to the trial court for a privilege log balance. To this date, the Estate has never received a discovery demand. Review is warranted to apply the distinctions between CR 45 and CR 34, per RAP 13.5 (b)(2), as the *Dempsey* court did not.

G. Even if construed as an interrogatory, Defendants' demand would violate CR 26(b)(1), (4) and (5), and a protective order would necessarily issue.

Even with the *Dempsey* court's error in analogizing Defendants' subpoena to a witness as a request for production to the Estate, *Dempsey* does correctly hold that Defendants' demand also exceeds the limitations of "discoverable" matters under CR 26(b)(1), (4) and (5). *Dempsey at 1168 (detailing what is and is not discoverable, citing West*, 171 Wn.2d at 404).

This analysis is correct.[5] Thus, even if Defendants' subpoena to a witness were to be reissued as a request for production to the Estate, it is overbroad under both CR 26(b)(4) and (b)(5). But with a reissued proper discovery demand to the Estate, the protective order/privilege log process may be triggered, because the Estate now has control over the disclosure. But no CR 34 request to the Estate has ever issued. There is no responsibility on the part of the Estate to respond to the witness's subpoena. This distinction is lost in *Dempsey*, and should be reviewed.

H. **The Estate was, and remains, entitled to attorney fees under RAP 18.1 and CR 45, and it is error not to award those fees, and cause for review under RAP 13(5)(b)(2).**

The *Dempsey* court commits probable error in failing to grant the Estate its order to quash and in failing to grant the Estate all of its fees

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[5] CR 26(b)(1) limits the scope of discovery to any matter "not privileged, …." Attorney and expert work product are privileged. Beyond those privileges, CR 26(b)(4) and (b)(5) limits discovery into even *non*-privileged material with both a testifying and consulting expert. CR 26(b)(4) contains the attorney work product privilege, requiring a showing of substantial need to overcome, and CR 26(b)(5) limits expert discovery to the "discovery of facts known and opinions held by experts otherwise discoverable under the provisions of subsection (b)(1) of this rule, or acquired in anticipation of litigation or for trial,…." Such discovery may be obtained *only as follows*: …" *Id.* A party may therefore certainly use a request for production for inquiry of an expert under CR 26(b)(5)(A)(i). It may also depose the expert, 26(b)(5)(A)(ii), subject to Rules 30 and 31. The latter CR 30(b)(5) allows a CR 34 request for production to a deponent, but CR 34 also limits the production of documents to documents "which constitute or contain matters within the scope of Rule 26(b)." *CR 34(a)(1).*

reaffirming and "reestablishing" the attorney and expert work product privileges. Once the *Dempsey* court affirmed the continued vitality of the work product privilege between attorneys and their testifying experts, and noted the application of CR 45 to Defendants' subpoena,[6] then the Estate was entitled to an explicit order quashing the Defendants' subpoena to an outside witness, and to an award of CR 45's sanctions for all stages of this proceeding. *Dempsey* recognizes that this is indeed a CR 45 subpoena to the witness, not to the Estate, because it erroneously limits CR 45 to allow only for fees to only an outside counsel that *the expert* might retain. *Dempsey at 1168-69* (holding "Dr. Simons did not incur any attorney fees of lost wages in responding to the subpoena.") But such outside fees incurred by an expert in protecting his own work product are only one of CR 45's examples of a proper sanction—a sanction that *may* be included, but not an exclusive one. *CR 45(c)(1).* Attorney fees are also incurred by the Estate in moving to quash the improper SDT to a witness to protect its *own* counsel's work product. The work product protection "belongs to the attorney as well as to the client." *Soter v Cowles,* 131 Wn. App. 882, 885 (2006). The Estate remains entitled to its reasonable fees as an appropriate sanction under CR 45(c)(1). Failing to grant these fees is probable error,

[6] *See Dempsey at 1168-1169 discussing CR 45's fee provision.*

and should be reviewed and reversed under RAP 13.5(b)(2). Fees should be awarded to the Estate on appeal, with a directive to grant such awards as well at the appellate, trial court and discovery master levels.

VI. CONCLUSION.

The Court of Appeals' reiteration of attorney and expert work product privilege should be affirmed, but the use of CR 45 subpoena duces tecum with an expert witness should be distinguished from the use of a CR 34 request production to a party. The Estate should be entitled to an explicit order quashing Defendants' improper subpoena duces tecum to its expert witness, and an order for its recovery of all fees and sanctions from the date of that subpoena's improper issuance.

DATED this **12th** day of **February, 2018**.

Respectfully submitted,

MARY SCHULTZ LAW, P.S.

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<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that on the **12th** day of **February, 2018**, I electronically filed the foregoing document with the Clerk of the Supreme Court, which delivers copies to the following attorneys for Petitioners in the manner indicated below:

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DATED this **12th** day of **February, 2018.**

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