NO. 97279-6
(Court of Appeals No. 77507-3)

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

SAFE ACQUISITION, LLC, a Washington corporation; LUCIDY, LLC, a Washington corporation; and SCOTT FONTAINE, an individual,,

Plaintiffs – Appellants,

v.

GF PROTECTION INC., d/b/a Guardian Fall Protection, a Washington corporation,

Defendant – Respondent

PETITION FOR REVIEW

Daniel F. Johnson, WSBA No. 27848
Cynthia J. Heidelberg, WSBA No. 44121
BRESKIN JOHNSON & TOWNSEND, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Telephone (206) 652-8660
Counsel for Plaintiffs-Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

I. INTRODUCTION

Petitioners are Plaintiffs Scott Fontaine and his two companies, SAFE Acquisition, LLC, and Lucidy, LLC, the inventors and owners of a patented line of roofing and construction products. This is a dispute over two contracts in which Plaintiffs granted exclusive rights to market and sell 12 of their products to Defendant GF Protection, Inc. (GFP). Plaintiffs claim Defendant failed to market and sell Plaintiffs' products, in breach of the parties' contracts.

Plaintiffs ask this Court to review the decision of the Court of Appeals, filed March 25, 2019, under RAP 13.4 and RAP 13.5. Plaintiffs timely requested reconsideration, which the court denied on April 30, 2019. Both decisions are appended hereto.

The Court of Appeals' decision affirmed one order of the trial court and denied review of another:

1. The first order concerned whether GFP could bar the Plaintiffs from speaking to a central witness in the case, the former President of GFP, Ed Marquardt. Mr. Marquardt was President of GFP from 2005 to 2014 and was the driving force behind GFP's acquisition of Plaintiffs' products. GFP fired Mr. Marquardt in December 2014 and abruptly ceased most of its efforts to market and sell Plaintiffs' products, leading ultimately to this lawsuit.

After firing him, GFP sued Mr. Marquardt in an unrelated case. Meanwhile, Plaintiffs consulted with Mr. Marquardt about facts and evidence in this case. When GFP settled its lawsuit against Mr. Marquardt, it inserted a provision in the settlement agreement that specifically prohibits Mr. Marquardt from "assisting" Plaintiffs in this case, including prohibiting Marquardt from "providing advice, information, and serving as a witness" for Plaintiffs. *See* App'x at 3.

Plaintiffs asked the trial court for to strike this "non-cooperation" provision from the Marquardt settlement because it violates public policy as enunciated in *Wright v. Group Health* and confirmed in the Rules of Professional Conduct (RPCs). The trial court denied Plaintiffs' motion, and the Court of Appeals affirmed.

2. The second order of the trial court concerned new evidence that arose after the close of discovery. Four days after the discovery period ended, GFP sold all of its assets, including its licenses to Plaintiffs' patents which are the subject of this lawsuit. GFP did not tell Plaintiffs about this until weeks later, barely a month before trial. At that time, Plaintiffs asked for documents and information about the sale, but GFP refused. Plaintiffs moved to compel, which the trial court denied. The Court of Appeals denied review.

///

II. ISSUES PRESENTED FOR REVIEW

1. Do the decisions of the courts below, allowing a party to give valuable consideration to a key witness to stop him from cooperating with the other party in the case, conflict with *Wright v. Group Health* and Washington public policy?

2. Did the courts below commit probable error in allowing a party to conceal crucial information about the contracts in dispute because the information arose after the discovery cutoff, and do those decisions alter the status quo?

III. STATEMENT OF THE CASE

A. Plaintiffs licensed their patents to Defendant in 2013, and sued for breach of the license agreements in 2016.

Plaintiffs SAFE and Lucidy are companies created by Plaintiff Scott Fontaine in order to patent certain construction products he invented. Clerk's Papers (CP) 1-2. In August 2013, he entered contracts giving GFP the exclusive license to manufacture, market, and sell 12 of those products, in exchange for royalty payments on each product sold. CP 4. Among the products GFP licensed from Fontaine was the HitchClip, which is "the most revolutionary and versatile fall protection anchor ever made."[1] *See* CP 3 ¶ 4.4. Plaintiffs also developed several ancillary products that are used with HitchClips to enhance productivity in ways no other products on the market can. *See* CP 1-2.

[1] http://www.hitchclip.com/products/hitchclip.html. A roof anchor is a device that attaches to a residential or commercial roof to enable workers to attach a safety line and protect themselves in the event of a fall.

Ed Marquardt was President of GFP from 2005 to 2014. CP 91. He was GFP's chief advocate for Plaintiffs' products and possesses extensive knowledge about the issues in dispute. *See* CP 93-94. On December 4, 2014, GFP fired Mr. Marquardt, and immediately began rolling back his efforts to market and sell Plaintiffs' products. *See* CP 9-10. Nonetheless, GFP refused to relinquish its licenses to the products, leaving Plaintiffs with no ability to realize their potential. *Id.*

Plaintiffs filed this lawsuit in June 2016, claiming GFP failed to use reasonable commercial efforts to market and sell the products in breach of the license agreements. At that time, GFP was not marketing or selling 11 of the 12 products at all. *See* CP 6.

B. Defendant blocked Plaintiffs from speaking to a key witness.

After GFP terminated Mr. Marquardt's employment in 2014, it sued him for breach of a non-compete agreement. *See* CP 98. GFP insists Mr. Marquardt's termination and the subsequent lawsuit were totally unrelated to this lawsuit, and not even discoverable. *See* CP 99-100; 107.

Meanwhile, during the instant litigation, Mr. Marquardt had voluntarily spoken with Plaintiffs' counsel regarding the facts underlying their case. *See* CP 95-96. He is the author or recipient of scores of important exhibits that will be introduced at trial. CP 86. Plaintiffs plan to call him as a key witness in their case in chief. *See* CP 110. Because

Mr. Marquardt was a *former* employee of Defendant willing to speak to Plaintiffs and their counsel, they had no need to subpoena him for deposition.[2]

On June 30, 2017, GFP settled its lawsuit against Mr. Marquardt. Unbeknownst to Plaintiffs, GFP's counsel inserted into the settlement agreement the following provision:

> **Other Litigation.** Marquardt agrees that ***he shall not assist, directly or indirectly, SAFE, Lucidy, or Scott Fontaine in separate litigation or other proceeding adverse to GFP and/or its officers and directors***. For purposes of this agreement, assist includes, but is not limited to, ***providing advice, information, and serving as a witness***. Marquardt may respond to a properly served and noticed subpoena by making statements in a deposition pursuant to such subpoena or producing documents in direct response to such subpoena. Marquardt shall provide no assistance to this litigation voluntarily, or without notice to GFP consistent with the rules governing subpoenas….

CP 127-128 (emphasis added). GFP did not inform Plaintiffs of this agreement with Mr. Marquardt. Instead, GFP subpoenaed Mr. Marquardt for deposition for the last day of discovery, August 7, 2017. CP 89. During that deposition, it was revealed by Mr. Marquardt's lawyer late in the day that Mr. Marquardt had some restriction prohibiting him from speaking with Plaintiffs about this lawsuit, although the exact parameters of the restriction were not disclosed. *See* CP 98-100.

[2] *See Wright v. Group Health Hosp.*, 103 Wn.2d 192, 196, 691 P.2d 564 (1984).

At the deposition, Defense counsel used up almost all of the time Mr. Marquardt had that day, and insisted that no further deposition could be taken of Mr. Marquardt because the discovery period was over. *See* CP 90, 97-98. Plaintiffs' counsel was able to question Mr. Marquardt for only 40 minutes. *See* CP 97. After the deposition, Mr. Marquardt's counsel provided Plaintiffs' counsel with the language of GFP's settlement contract barring Mr. Marquardt from speaking to Plaintiffs. CP 127-128. GFP has refused to produce the settlement agreement itself. CP 107.

Plaintiffs moved to strike GFP's contract provision forbidding Marquardt from talking to them about this case. The trial court denied the motion without explanation. CP 217.

C. GFP sold its licenses to Plaintiffs' patents but refused to divulge evidence about the sale.

On August 11, 2017, four days after the discovery cutoff and unbeknownst to Plaintiffs, GFP *sold* the license agreements that are the subject of this lawsuit. A press release was issued by a company calling itself "Pure Safety Fall Protection," claiming to have "acquired" GFP. CP 47-48. GFP did not mention the transaction to Plaintiffs until two weeks later, a month before trial, when it remarked in a footnote to its mediation memorandum that "GFP was just acquired by The Smithfield Group." CP 27. It later told the trial court the same. CP 194. Plaintiffs immediately

requested all documents and communications that related to the sale or transfer of the license agreements. CP 61. The only document GFP provided Plaintiffs with was very limited, almost illegible, excerpts from the sale contract, omitting dozens of pages and redacting huge portions of the few pages it did produce. CP 32-45. It claimed that GFP had sold its assets but retained all rights and liabilities in this litigation. CP 130. GFP also said it had changed its name to GF Transition, Inc. *Id.*

Neither Pure Safety (the company that publicly announced it acquired GFP) nor The Smithfield Group (the company GFP told the trial court had acquired GFP) is named in the excerpts of the sale contract produced by GFP. Only one party is named other than GFP and its owner Darrin Erdahl, and that is Gemini Acquisition Corp. CP 32-45. However, the contract states that GFP would transfer its assets to yet another entity, Gemini Acquisition *Holdings LLC*. CP 33, 39. And it says that Gemini Acquisitions Holdings LLC is "a newly formed Delaware limited liability company that will be *a wholly owned subsidiary of Seller*," i.e., Defendant GFP. CP 33 (emphasis added). Thus, read literally, the excerpts suggest that GFP sold its assets (including its licenses to Plaintiffs' patents) to a subsidiary *of itself*. GFP refused to produce any additional information or documentation regarding the sale of Plaintiffs' licenses or answer any questions about the new management of those products or the necessary

parties to this lawsuit.

On September 7, 2017, Plaintiffs asked the trial court to order GFP to produce documents and information about the sale of the license agreements. They based their request on the fact that the sale had occurred after the discovery cutoff and has direct bearing on issues in this case, including (1) whether Plaintiffs would need to amend the pleadings to include any additional parties; (2) whether the only named Defendant, GFP, would be able to satisfy a judgment in Plaintiffs' favor; (3) who would be controlling the sales and marketing of Plaintiffs' products going forward, and what if anything they intended to do with them; and (4) how the parties to the sale valued the products. CP 17, 21-22. The value of the products is a central issue in this litigation. *See, e.g.*, CP 67.

GFP opposed the motion, contending the information Plaintiffs sought was "beyond the scope" of their previous discovery requests (issued long before the sale occurred) and "irrelevant." CP 68-69. The trial court denied the motion in a conclusory order supplied by GFP. CP 214.

This case had been set for trial on Sept. 25, 2017. The court struck that date *sua sponte*, and later granted Plaintiffs' motion to stay the trial altogether pending their appeal.

///

IV. ARGUMENT

A. The decision of the Court of Appeals allowing Defendant to block Plaintiffs' access to a witness is in conflict with *Wright v. Group Health* and violates public policy.

The Court of Appeals' decision allowing GFP to enforce its contract with Mr. Marquardt prohibiting him from speaking with Plaintiffs about this litigation is in direct conflict with the policy recognized and embraced by this Court 35 years ago in *Wright v. Group Health Hospital*, 103 Wn.2d 192, 200-01, 691 P.2d 564 (1984). In *Wright*, this Court held that an employer may not prevent its current or former employees from speaking to adverse counsel. *Id*. at 203. The defendant employer, Group Health Hospital, had a policy that when a medical malpractice case was filed against it, it notified all current and former employees involved in the patient's care that they should speak about the case only with Group Health's counsel. *Id.* at 194. The plaintiff moved for an order permitting him to speak to current non-managerial employees *ex parte*. *Id.* This Court ruled in his favor, based on the public policy "of keeping the testimony of employee witnesses freely accessible to both parties" in a lawsuit. *Id.* at 200.[3]

Washington's Rules of Professional Conduct embrace the

[3] The Court applied its ruling to all *current* non-managerial employees and *all* former employees. *Id.* at 201.

approach adopted in *Wright*. The drafters specifically rejected a rule that would allow a corporate lawyer to advise his client's employees not to speak to an adversary. The ABA's Model Rules of Professional Conduct expressly forbid an attorney to ask a witness not to cooperate with an adverse party, but contain exceptions, including if the witness is the client's employee. ABA Model Rule of Professional Conduct Rule 3.4(f) (2016). The Washington Rules Committee rejected Rule 3.4(f) because the exception for "employees" is contrary to *Wright*. *See* Wash. Rule Prof. Conduct 3.4, *comment* [5] (2006) (emphasis added):

> Washington did not adopt Model Rule 3.4(f), which delineates circumstances in which a lawyer may request that a person other than a client refrain from voluntarily giving information to another party, because the Model Rule is inconsistent with Washington law. *See Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984).

The WSBA's Special Rules Committee explained that it rejected Model Rule 3.4(f) because it "permits a lawyer to advise employees or relatives of a client to refrain from giving information to another party."[4] The committee felt that allowing attorneys to block their adversaries' access to their clients' employees "would have a chilling effect on legitimate access to information," and "increase the cost of litigation by forcing lawyers to

[4] App'x at 18, Wash. State Bar Ass'n, Report and Recommendation of the Special Committee for Evaluation of The Rules of Professional Conduct (Ethics 2003) to the Board of Governors (March 2004) at 182 ("Report and Recommendation"). *See* RAP 10.4(c).

conduct formal discovery." App'x at 18. Thus, the RPCs embrace the public policy enunciated in *Wright* against blocking access to employee witnesses.

GFP's settlement contract with Marquardt is directly at odds with that policy. It has the express purpose and effect of blocking Plaintiffs from speaking *ex parte* with a critical witness who is not a party to this suit. "Contract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy against enforcement of such terms." *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014).[5] GFP has never offered any legitimate interest in enforcing its non-cooperation agreement with Mr. Marquardt.[6] Its counsel admits it "insisted" on inserting the non-cooperation clause into its settlement agreement with Mr. Marquardt for the express purpose of preventing him from talking to the Plaintiffs about this case. CP 158, 167. The clause's sole purpose and effect is to block

[5] *See also General Steel Domestic Sales LLC v. Steelwise LLC*, 2009 U.S. Dist. Lexis 4872, *34 (D. Colo. Jan. 23, 209) (a party who uses a separate settlement agreement to bar adverse witnesses from speaking informally to its opponents in other litigation "would result in a needless and enormous financial burden with no ascertainable benefits" except to unfairly benefit that one party).

[6] GFP attempted to advance a "legitimate" reason: fear that Marquardt might share "confidential information" with Plaintiffs. CP 161. But GFP was *already* protected from that by a pre-existing confidentiality agreement with Marquardt entered into in 2015, and there is no evidence or suggestion that Marquardt violated that in speaking with Plaintiffs or their counsel. CP 208.

Plaintiffs' access to an important witness, and thereby gain an advantage in this case that *Wright* expressly prohibits. *See id.* at 200 (the purpose of ethical rules is not "to protect a corporate party from the revelation of prejudicial facts.").

The Court of Appeals sidestepped this analysis. Instead, it noted that under *Wright*, a witness remains "free to decline" to speak with his employer's adversary, so "[l]ogically," he "is also free to agree with the employer/former employer" to decline to speak with its adversary. App'x at 9. But that "logic" is not grounded in reality. An employee would never have any reason to "agree" with his employer, in advance, not to speak with a lawyer for the employer's adversary, unless there was either consideration for doing so, or threat for not doing so.[7] Those circumstances are categorically different from an employee who simply chooses, for his or her own reasons, not to speak with a plaintiff's lawyer

[7] Either is considered witness tampering under federal law. *See Synergetics, Inc. v. Hurst*, 2007 U.S. Dist. LEXIS 61286, at *2 (E.D. Mo. Aug. 21, 2007) (finding defendant "wrongfully conditioned the settlement of a separate lawsuit" against a witness on the witness's agreement not to testify for the opposing party. "Witness tampering is a serious interference with the justice system that the court must not ignore."); *id.* at *3 ("If a witness not under subpoena has voluntarily agreed to testify for one party, it is 'serious misconduct' for the other party to dissuade that witness from testifying." (citing *Ty v. Softbelly's, Inc.*, 353 F.3d 528, 537 (7th Cir. 2003))); *see also Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (affirming sanctions imposed for defense counsel's conversations with the plaintiff's doctor in which counsel "attempted to dissuade the doctor from giving testimony or otherwise cooperating with the Harlans.").

when asked.[8] A litigant who pays or coerces a witness not to speak to its adversary is no better (and arguably much worse) than one who, like Group Health, sends a letter "advising" employees not to speak with its adversary. If the latter violates public policy, surely the former does as well.

The Court of Appeals completely ignored the import of RPC 3.4, and misread *Wright*. It claimed that because Mr. Marquardt was still "free to testify pursuant to subpoena," GFP's contract clause "does not bar [his] participation" in the case, and therefore "does not offend public policy, or contravene the holding of *Wright*." App'x at 10. *Wright* expressly rejected this logic, noting that allowing only formal access through subpoena and deposition is not enough because "there is the need of the adverse attorney for information which may be in the exclusive possession of the corporation and may be too expensive and impractical to collect through formal discovery." 103 Wn.2d at 197; *see also* App'x at 18, Report and Recommendation at 182 (rejecting rule that would allow attorney interference with access to non-party employee witnesses because it would "increase the cost of litigation by forcing lawyers to conduct

[8] The Court of Appeals also asserted there was "no evidence" Marquardt did not "voluntarily" enter into the settlement agreement, but that is not pertinent, for the reasons stated, and false. GFP admits it "insisted" on adding the clause in the settlement. CP 158; CP 107, 99-100. Thus, Mr. Marquardt's only "choice" was to reject a settlement he wanted, solely to protect Plaintiffs' right to talk with him, or to accept.

formal discovery.").

Washington law has enunciated a clear public policy against litigants interfering with their opponents' access to non-party witnesses.[9] GFP's interference with Plaintiffs' access to Marquardt is against public policy and contrary to *Wright*, and this Court should accept review and order the non-cooperation clause stricken.

B. Denying discovery about Defendant's sale of the contracts in dispute is probable error and alters the status quo.

The Court of Appeals also let stand a discovery order that flies in the face of well-established, bedrock rules in civil litigation in Washington. Our adversarial system is built on the principle that litigation should not a game of "blindman's bluff"; a "fair, just, and efficient" system is only possible if "each side knows what the other side knows," subject to narrow limitations such as privilege. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 777, 280 P.3d 1078 (2012).

> The purpose of civil discovery is to disclose to the opposing party all information that is relevant, potentially relevant or reasonably calculated to lead to discovery of admissible evidence in the trial at hand. CR 26(b)(1). Counsel and parties may not unilaterally decide to withhold

[9] The only Washington case GFP cites that actually involved a non-cooperation agreement is *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 221 P.3d 913 (2009). But there was no legal issue raised or discussed regarding the validity of the clause in that case. *See id.* at 5. The case does not even imply that non-cooperation provisions are generally enforceable and in no way condones one like GFP's, which singles out a particular, ongoing case and bars a party's access to a witness.

> properly requested information on the ground it is not relevant or admissible.

In re Firestorm 1991, 129 Wn.2d 130, 152, 916 P.2d 411 (1996).

When Plaintiffs here learned, after the close of discovery, that GFP had sold all its rights to Plaintiffs' products, Plaintiffs naturally wanted to know more about the sale. CP 27-28, 61. It has obvious implications about the proper parties to the lawsuit and the enforceability of any judgment against GFP, and also raises relevant questions about who controlled the products going forward.[10] Moreover, to the extent GFP discussed Plaintiffs' products with the buyer, those communications could obviously be (or lead to) admissible evidence on the value of the products and/or the reasons for GFP's failure to market and sell them.[11] And, of course, the buyer's subsequent marketing decisions about the products could also be relevant and probative in Plaintiffs' suit against GFP.

When GFP refused to produce any information about the sale, Plaintiffs moved to compel production of specific evidence targeted to these needs. CP 17. The trial court denied the motion, stating that the discovery was "beyond the scope of [plaintiffs'] discovery requests, not

[10] As a result of this litigation, all normal business communications between the parties effectively ceased, leaving civil discovery the only realistic avenue to communicate.

[11] Notably, Plaintiffs' motion sought communications or other documents "relating to [the] acquisition *and* the Licensed Products and/or Plaintiffs." CP 17 (emphasis added).

relevant to the claims and issues in this case, and Plaintiffs have failed to establish good cause to conduct additional discovery after the discovery cutoff." CP 214.

The Court of Appeals denied review, finding no obvious or probable error. In doing so, it reviewed each of the three reasons quoted above from the trial court's order.[12] First, while it agreed with Plaintiffs that they could not have made a timely request for documents that did not even exist during the discovery period, the Court of Appeals concluded that the trial court did not err in denying the motion because it was not within the scope of Plaintiffs' requests. App'x at 11. In this respect, the Court of Appeals' decision makes no sense. In any event, the mere fact that the discovery deadline had passed "is an untenable reason to deny discovery" when the need for the discovery arose after the deadline. *Cook v. Tacoma Mall Partnership*, 2017 Wash. App. LEXIS 296, *9 (Feb. 7, 2017).

Second, the Court of Appeals found no error in the trial court's conclusion that the requested information was "not relevant." In doing so,

[12] The Court of Appeals began with a misstatement of the standard of review, stating that "abuse of discretion" exists "only when no reasonable person would have decided the way the judge did." App'x at 11, (citing *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 629, 818 P.2d 1056 (1991), which in turn cited *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), which applied that standard to a trial court's decision *not* to grant an "extraordinary remedy" of dismissing criminal charges against the accused on the grounds of governmental misconduct).

it could only have adopted an extraordinarily narrow construction of "relevance." As this Court has said many times, the scope of civil discovery is supposed to be the opposite: "very broad." *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn. 2d 686, 695, 295 P.3d 239 (2013). "[I]n our open civil justice system, parties may obtain discovery regarding any unprivileged matter that is relevant to the subject matter of the pending action." *Newman v. Highland Sch. Dist. No. 203*, 186 Wn. 2d 769, 777, 381 P.3d 1188 (2016).

Obviously, Defendant's sale of its licenses to Plaintiffs' products is "relevant to the subject matter" of this lawsuit over those licenses. And as explained above, the information Plaintiffs requested is relevant to establishing (1) the proper parties to this case, (2) enforceability of any judgment for Plaintiffs, (3) the current and ongoing marketing and sale of Plaintiffs' products, (4) the value of Plaintiffs' products, and (5) the ultimate question of the products' marketability.

It is not enough, as the Court of Appeals seemed to say, that GFP retained "all liability and assets with respect to this litigation," App'x at 13, because the lawsuit seeks termination of the license agreements, which GFP no longer possesses. CP 13. And Plaintiffs are not required to accept a *post facto*, self-serving statement by GFP's owner that Plaintiffs' products "were not separately valued" in the sale transaction, CP 130,

because Plaintiffs are entitled to see that for themselves, and because the owner pointedly did *not* say the parties to the transaction did not *discuss* the Plaintiffs' products, or their value or marketability.[13]

GFP unilaterally decided what information about its sale of the contracts in dispute the Plaintiffs should see, leaving them completely in the dark about who owns the license agreements at issue in this litigation, and who is and will be responsible for marketing and selling their products going forward, and depriving Plaintiffs of relevant and potentially highly probative information about the value and prospects of their products, which is hotly disputed. Plaintiffs' discovery is plainly "relevant, potentially relevant or reasonably calculated to lead to discovery of admissible evidence." *In re Firestorm 1991*, 129 Wn.2d at 152.

Finally, the Court of Appeals found no error in the trial court's

[13] The Court of Appeals suggested that if Plaintiffs believed the redacted contract *did* contain a separate valuation of their licenses, it should have sought *in camera* review. App'x at 13. This, again, betrays a backward view of civil discovery. A party cannot unilaterally redact an otherwise relevant, discoverable document based on its view of what *parts* of it are relevant. *See Bartholomew v. Avalon Capital Grp.*, 278 F.R.D. 441, 451–52 (D. Minn. 2011) (parties are entitled to discover "documents," not "words within those documents," and "if one part of a document is relevant, then the entire document is relevant."); *In re MI Windows & Doors Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 9468, at *7 (D.S.C. Jan. 24, 2013) ("The redaction of irrelevant information, even when sparingly done, deprives plaintiffs of context for the relevant information."). Any concern about confidentiality has been addressed through a blanket protective order, and is not a legal ground to redact or deny discovery. *See Bartholomew*, 278 F.R.D at 452; *Solidda Group, S.A. v. Sharp Elects*, 2013 U.S. Dist. Lexis 200188, *9 (S.D. Fla. 2013) ("There is abundant authority that a confidentiality agreement cannot be used as a shield against relevant discovery.") (citing cases).

denial of discovery because Plaintiffs "failed to establish good cause to conduct additional discovery after the discovery cutoff." App'x at 13; CP 214. There is no authority in Washington that requires, or explains, a showing of "good cause" to conduct discovery after the discovery cutoff. The federal courts do require such a two-step formality in this circumstance, and apply a multi-factor test:

> (1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.[14]

All of these (except number 2, GFP's opposition) support allowing the discovery. There was no trial date set; there would have been no prejudice to GFP; Plaintiffs had been diligent and could not possibly have foreseen the need for additional discovery earlier; and the information sought is plainly relevant.

The denial of this discovery is not supported by any law or policy, and is contrary to the spirit and purpose of the Civil Rules. It is obvious or probable error, and it substantially altered the status quo for the Defendant

[14] *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995), *vacated on other grounds sub nom. Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997).

to sell the Plaintiffs' products and conceal the facts about the sale from Plaintiffs. RAP 13.5(b)(2).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court accept review.

DATED: May 30, 2019

BRESKIN JOHNSON & TOWNSEND, PLLC

By: *s/Daniel F. Johnson*

Daniel F. Johnson, WSBA #27848
Cynthia J. Heidelberg, WSBA # 44121
1000 Second Avenue, Suite 3670
Seattle, WA 98104
(206) 652-8660 Fax (206) 652-8290
djohnson@bjtlegal.com
cheidelberg@bjtlegal.com
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that this date I electronically filed the attached document with the Clerk of the Court and caused service of the on all parties of record.

DATED: May 30, 2019

s/ Nerissa Tigner
Nerissa Tigner, Paralegal

APPENDIX

FILED
3/25/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SAFE ACQUISITION, LLC, a Washington corporation; LUCIDY, LLC, a Washington corporation; and SCOTT FONTAINE, an individual, Appellants, v. GF PROTECTION INC., d/b/a GUARDIAN FALL PROTECTION, a Washington corporation, Respondent.	No. 77507-3-I DIVISION ONE UNPUBLISHED OPINION FILED: March 25, 2019

APPELWICK, C.J. — SAFE sued GFP, alleging that GFP breached the parties' contracts in failing to market and sell SAFE's products. In the ongoing litigation, SAFE moved to strike a contractual provision between GFP and its former president, Marquardt, barring Marquardt from assisting SAFE in its lawsuit. The trial court denied the motion. After the discovery period ended, SAFE moved for an order to compel GFP to produce documents relating to the sale of its company and "to produce" GFP's alleged owner for a deposition. The trial court denied the motion. We affirm the order denying SAFE's motion to strike, and decline to grant discretionary review of the order denying SAFE's motion to compel GFP to produce documents.

FACTS

SAFE Acquisition LLC and Lucidy LLC (hereafter collectively called SAFE) are companies Scott Fontaine created to patent certain construction products he invented. In August 2013, SAFE signed contracts with GF Protection Inc. (GFP) for GFP to manufacture, market, and sell the products in exchange for royalty payments to SAFE.

SAFE sued GFP in June 2016, alleging that GFP breached the license agreements by failing to make reasonable efforts to market and sell the products. GFP discovered that its former president, Edward Marquardt, was actively sending e-mails to SAFE, leading GFP to subpoena Marquardt for a deposition. Due to scheduling conflicts, Marquardt chose the deposition date of August 7, 2017, the last day of discovery.

Near the end of the deposition on August 7, SAFE asked Marquardt to confirm that he had "signed some sort of agreement" with GFP. Marquardt acknowledged that he was bound by an agreement with GFP, restricting him from discussing confidential information that he was "exposed to during [his] tenure there as an employee." During the deposition, GFP's counsel stated,

> I'll allow you to ask . . . about terms of the settlement agreement with Mr. Marquardt which impact this litigation, but if you want to talk about, you know, the terms of, other terms of settlement of dispute between Guardian and Mr. Marquardt, that's off limits by the court's order.

After Marquardt stated that he was restricted from "talking about anything confidential," SAFE affirmed that GFP was going to provide the pertinent clauses and moved to a different subject.

Within three days following the deposition, GFP provided SAFE with the relevant provision from the settlement agreement with Marquardt. GFP did not provide the entire agreement, because it felt that the remainder was outside the scope of discovery.

The provision states,

> "Other Litigation. Marquardt agrees that he shall not assist, directly or indirectly, SAFE, Lucidy, or Scott Fontaine in separate litigation or other proceeding adverse to GFP and/or its officers and directors. For purposes of this agreement, assist includes, but is not limited to, providing advice, information, and serving as a witness. Marquardt may respond to a properly served and noticed subpoena by making statements in a deposition pursuant to such subpoena or producing documents in direct response to such subpoena. Marquardt shall provide no assistance to this litigation voluntarily, or without notice to GFP consistent with the rules governing subpoenas. This paragraph does not diminish or lessen Marquardt's ongoing obligations to not disclose Confidential Information to competitors such as SAFE, as further set forth in a paragraph II(D), above."

(Boldface omitted.)

On August 11, 2017, GFP executed an equity purchase agreement with buyer Gemini Acquisition Corporation (Gemini). Under the agreement, Gemini acquired the patent license agreements between SAFE and GFP. On August 25, 2017, SAFE asked GFP to produce documents and information about the sale of the license agreements. GFP agreed to provide a redacted version of the equity purchase agreement to confirm the transfer of the contracts and to show what rights and liabilities GFP retained regarding this litigation.

Unsatisfied with the redacted documents, on September 7, 2017, SAFE moved the trial court to compel GFP to produce (1) a complete, unredacted copy of the equity purchase agreement, (2) copies of all communications and other

documents relating to this acquisition and the licensed products and/or SAFE, and (3) Darrin Erdahl[1] for a two hour deposition regarding the details of the acquisition as it relates to SAFE and the licensed products. The trial court denied the motion, stating, "The documents and communications [SAFE] seek[s] are beyond the scope of their discovery requests, not relevant to the claims and issues in this case, and [SAFE has] failed to establish good cause to conduct additional discovery after the discovery cutoff."

On September 8, 2017, SAFE moved to strike GFP's contract provision prohibiting Marquardt from "assisting" SAFE in the lawsuit. In denying the motion, the trial court stated, "To the extent that someone might interpret the contractual prohibition as prohibiting Ed Marquardt from answering a subpoena to testify at trial, the court finds that it does not do so."

SAFE sought discretionary review of the order denying the motion to strike GFP's contract provision prohibiting Marquardt from assisting SAFE in this lawsuit. Review was granted. It also seeks review of the order denying its motion to compel GFP to produce the complete equity purchase agreement, related documents, and the Erdahl deposition.[2]

---

[1] SAFE alleges that Erdahl is the owner of GFP and replaced Marquardt as president, after Marquardt was fired. In its answer, GFP did not confirm that Erdahl was the owner or the president, but admitted that Marquardt was fired. In his declaration, Erdahl refers to himself as the "chairman of GF Transition Inc., formerly known as [GFP]."

[2] Commissioner Neel granted review of the order denying the motion to strike, but referred to the court to decide if it will grant discretionary review of the order denying SAFE's motion to compel production.

DISCUSSION

SAFE makes two arguments. First, it argues that the trial court erred in denying its motion to strike the "non-cooperation clause" in Marquardt's settlement agreement with GFP. Second, it argues that the trial court erred in denying its motion to compel GFP to produce relevant documents about the sale of GFP.

I. Motion to Strike Noncooperation Clause

SAFE argues first that the trial court erred in upholding a noncooperation clause in Marquardt's settlement agreement with GFP. It contends that the "restriction barring Mr. Marquardt from 'assisting' or 'serving as a witness' for [SAFE] contravenes public policy because it interferes with the free and fair administration of justice, and allows one party to restrict access of the other party to a key witness."

A. Standard of Review and Standing

The parties disagree over the proper standard of review. SAFE argues that, because it is "purely a question of law," this court should review de novo whether the noncooperation clause violates public policy. GFP argues that, because "the motion to strike sought discovery," this court should determine whether the trial court abused its discretion "[i]n declining to invalidate a contract in which [SAFE was] not a party."

Appellate courts determine legal issues de novo. Island County v. State, 135 Wn.2d 141, 160, 955 P.2d 377 (1998). And, this court reviews the trial court's conclusions of law pertaining to contract interpretation de novo. Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712, 334 P.3d 116 (2014).

An appellate court reviews a trial court's discovery order for an abuse of discretion. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). We will find an abuse of discretion only on a clear showing that the court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Id.

At the outset, GFP asserts, as it did below, that SAFE does not have standing to challenge Marquardt's settlement agreement with GFP.

The doctrine of standing prohibits a litigant from asserting another's legal right. Miller v. U.S. Bank of Wash., N.A., 72 Wn. App. 416, 424, 865 P.2d 536 (1994). A contract can be enforced only against those party to it. Gall v. McDonald Indus., 84 Wn. App. 194, 201, 926 P.2d 934 (1996). Dismissal of a contract action is proper when the litigant is not a party to the contract and thus lacks standing. West v. Thurston County, 144 Wn. App. 573, 576, 183 P.3d 346 (2008).

SAFE contends that it has standing under the Uniform Declaratory Judgment Act (UDJA), chapter 7.24 RCW. The UDJA permits a party to bring an action to determine the validity of a contract, among other instruments, as long as that party's rights, status, or other legal relations are affected by the instrument in question. RCW 7.24.020. In order to have standing to seek declaratory judgment under the Act, a person must present a justiciable controversy: (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or

academic, and (4) a judicial determination of which will be final and conclusive. Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004).

SAFE is not a party to the contract. Marquardt, who is the subject of the challenged provision in the contract, is not a party to this lawsuit. SAFE did not seek a declaratory judgment below. Instead, it moved "to strike" the provision of GFP's settlement agreement with Marquardt that "prohibits" Marquardt from assisting SAFE in the litigation. In its motion, SAFE asked the trial court to hold that, because it violated public policy, the provision "should be declared invalid" so that it could not be used to prevent Marquardt from participating in SAFE's litigation with GFP.

The trial court interpreted the agreement provision as allowing Marquardt to testify. As a result, the trial court did not need to, and did not address, the questions of whether the language had to be stricken and whether SAFE had standing to challenge it. The issue before this court is the correctness of the trial court's interpretation of the contractual language. The proper standard of review is de novo.

B. Public Policy

SAFE alleges that the contractual clause violates public policy and the fair administration of justice. It asserts that the provision "allows one party to restrict access of the other party to a key witness." SAFE further claims that the trial court "sanctioned witness tampering" in approving the clause. (Boldface omitted.)

As a matter of law, contract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy

against the enforcement of such terms. LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014). In general, a contract which is not prohibited by statute, condemned by judicial decision, or contrary to the public morals contravenes no principle of public policy. State Farm Gen. Ins. Co. v. Emerson, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984).

In denying SAFE's motion to strike, the trial court stated, "To the extent that someone might interpret the contractual prohibition as prohibiting Ed Marquardt from answering a subpoena to testify at trial, the court finds that it does not do so." SAFE argues that, in interpreting the clause in this matter, the trial court engaged in inappropriate "blue-lining" of the contract.

The original provision states,

> Marquardt agrees that he shall not assist, directly or indirectly, SAFE, Lucidy, or Scott Fontaine in separate litigation or other proceeding adverse to GFP and/or its officers and directors. For purposes of this agreement, assist includes, but is not limited to, providing advice, information, and serving as a witness. Marquardt may respond to a properly served and noticed subpoena by making statements in a deposition pursuant to such subpoena or producing documents in direct response to such subpoena. Marquardt shall provide no assistance to this litigation voluntarily.

Because the clause states that Marquardt is free to respond to a subpoena, the trial court did not improperly alter the provision in its interpretation.

Citing Wright v. Grp. Health Hosp., 103 Wn.2d 192, 691 P.2d 564 (1984), SAFE asserts that, "If a party cannot bar its current employees from cooperating in litigation against it, it cannot bar its former employees either."

In Wright, the issue before the court was whether a defendant hospital corporation may prohibit its current employees from conducting ex parte interviews

with plaintiffs' attorneys. Id. at 193. The court held that current employees authorized to speak for a corporation would be considered "parties" with whom opposing counsel could not speak ex parte. Id. at 196, 200-01. But, it held that opposing counsel could interview employees of the corporation ex parte so long as such employees were not authorized to speak for the corporation or in a management status. Id. at 202-03. And, it held that "[s]ince former employees cannot possibly speak for the corporation," opposing counsel could also interview them ex parte. See id. at 201. The court emphasized, "This opinion shall not be construed in any manner, however, so as to require an employee of a corporation to meet ex parte with adverse counsel. We hold only that a corporate party, or its counsel, may not prohibit its nonspeaking/managing agent employees from meeting with adverse counsel." Id. at 203 (emphasis in original).

Because an employee or former employee is not required to agree to speak with adverse counsel, the employee is free to decline to do so voluntarily. Logically, the employee is also free to agree with the employer/former employer that they will decline to engage in that communication voluntarily. There is no evidence in the record that Marquardt did not voluntarily enter into the settlement agreement in which he agreed not to communicate voluntarily with SAFE. GFP did not unilaterally block SAFE's access to Marquardt. This does not violate the policy articulated in Wright.

Here, the clause at issue explicitly states that "Marquardt may respond to a properly served and noticed subpoena by making statements in a deposition pursuant to such subpoena or producing documents in direct response to such

subpoena." GFP did not block SAFE's access to Marquardt, as it claims. He is free to testify pursuant to a subpoena, at which time counsel for GFP would be present to object to any disclosure of confidential information or information protected by the attorney-client privilege.

Because the provision at issue does not bar Marquardt's participation in the underlying proceeding, it does not offend public policy, or contravene the holding of Wright. There was no legal error, and the trial court did not err in denying the motion. We affirm the order denying SAFE's motion to strike.

II. Motion to Compel Production

SAFE argues second that the trial court erred in denying its motion to compel relevant documents about the sale of GFP and SAFE's licenses. It asserts that this court should grant review of this issue and reverse the trial court's decision. This court accepts discretionary review only in the following circumstances:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
>
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or that all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

A discovery order of the trial court is reviewable only for an abuse of discretion, which exists only when no reasonable person would have decided the way the judge did. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 629, 818 P.2d 1056 (1991).

SAFE makes three arguments for why the trial court abused its discretion in denying its motion. First, it argues that the trial court erred in concluding that the sale is "beyond the scope of [its] discovery requests," because the "discovery deadline is not a valid reason for the trial court to have permitted [GFP] to refuse basic discovery." But, in stating that the request was beyond the scope of SAFE's discovery requests, the trial court did not rely on the discovery deadline. It found that GFP's sale agreement was beyond the scope of information SAFE sought in its production requests. The sale occurred well after filing the lawsuit and became known to SAFE after the close of the discovery period. SAFE could not have knowingly included discovery requests about the sale within the deadline.

The trial court did not commit obvious or probable error necessitating discretionary review by denying the motion on the basis that the material was beyond the scope of the discovery requests made.

SAFE argues next that the trial court erred in concluding that the information sought was "not relevant to the claims and issues in this case." SAFE argues that it sought documents related to the sale of the licenses "that are at the center of this litigation and expressly mention either Plaintiffs or their licensed products."

In its motion, SAFE moved to compel GFP to produce (1) a "complete, unredacted copy of the Equity Purchase Agreement;" (2) "copies of all communications and other documents relating to this acquisition and the Licensed Products and/or Plaintiffs in this case;" and (3) "Darrin Erdahl for a two-hour deposition . . . regarding the details of this acquisition as it relates to the Plaintiffs and the Licensed Products." It did not ask the trial court for an in camera review of the documents.

But, SAFE alleged in its complaint that GFP—not Gemini—breached the contracts and owes damages. SAFE has not established that further information about the equity purchase agreement is relevant to determine whether breach of contract occurred nor any damages caused by the alleged breach.

The trial court did not commit obvious or probable error necessitating discretionary review by denying the motion on the basis of relevance.

SAFE argues third that the trial court erred in concluding that SAFE "'failed to establish good cause to conduct additional discovery.'" It contends, "There was (and is) no trial date set; there would have been no (and is no) prejudice to GFP; Plaintiffs had been diligent and could not possibly have foreseen the need for additional discovery earlier; and the information sought is plainly relevant."

The GFP sale was not made known to SAFE until August 23, too late to have been a specific focus of discovery. And, the trial court ruled the agreement was outside the scope of the discovery actually sought. So, permission from the court was required for additional discovery. See Buhr v. Steward Title of Spokane, LLC, 176 Wn. App. 28 34, 308 P.3d 712 (2013) ("[T]he rule contemplates a court

order establishing a plan and schedule for discovery. A schedule for discovery may be altered or amended 'whenever justice so requires'" (quoting CR 26(F))). However, a September trial date was in place when the motion for additional discovery was made. The trial date was stayed pending this appeal.

SAFE asserted that it needed to know the parties at issue and "whether GFP . . . will be able to satisfy any judgment against it, including a judgment terminating the licenses." It also raised the valuation of the licenses as an example of a document that was relevant, implying that it had a right to see the sale agreement on that premise. It is clear from the redacted equity purchase agreement that GFP retained all liability and assets with respect to this litigation. And, as for SAFE's concern about valuation, the Erdahl declaration states that SAFE's contracts were not separately valued as part of the transaction between GFP and Gemini, and had no independent impact on the purchase price. If the information in the declaration were in doubt, SAFE could have requested in camera review by the trial court. It did not. No other information in the record suggests the declaration is not true. In addition, SAFE does not show how this information would inform whether GFP breached its contract or the amount of any damages related to that breach. The court need not address whether production would prejudice GFP.

The trial court did not commit obvious or probable error necessitating discretionary review by denying the motion on the basis of lack of a showing of good cause.

We decline to grant discretionary review on the trial court's order denying SAFE's motion to compel GFP to produce documents.

III. Attorney Fees

GFP requests that this court award it attorney fees "under CR 37(b) and the fee provision in the contracts at issue." GFP does not cite to the record for the fee provision in the contracts. Because this provision does not appear to be in the record before this court, we cannot review it.

A trial court has broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order. Rhinehart v. KIRO, Inc., 44 Wn. App. 707, 710, 723 P.2d 22 (1986). But, this court has denied a party's fee request for defending an appeal, where the appeal is "without merit but not one that this court deem[s] frivolous or interposed to harass or for purposes of delay." Id. at 711. In line with the reasoning in Rhinehart, we decline to grant fees to GFP, as this appeal is not frivolous or designed to harass or to delay.

We affirm the order denying SAFE's motion to strike and decline to grant discretionary review of the order denying SAFE's motion to compel.

WE CONCUR:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SAFE ACQUISITION, LLC, a Washington corporation; LUCIDY, LLC, a Washington corporation; and SCOTT FONTAINE, an individual, Appellants, v. GF PROTECTION INC., d/b/a GUARDIAN FALL PROTECTION, a Washington corporation, Respondent.	No. 77507-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, SAFE Acquisition LLC, Lucidy LLC, and Scott Fontaine, have filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, C.J.
Judge

WASHINGTON STATE
BAR ASSOCIATION

Office of General Counsel
Nicole Gustine, Public Records Officer

January 12, 2018

Dan F. Johnson
Breskin Johnson & Townsend PLLC
1000 Second Ave. Suite 3670
Seattle, Washington 98104
Via email (djohnson@bjtlegal.com)

Re: Your records request dated January 12, 2018

Dear Dan Johnson,

I am writing in regard to your records request sent to the Washington State Bar Association (WSBA) dated January 12, 2017, in which you requested records regarding the regulatory history of RPC 3.4(f).

Attached please find the March 2004 Final Report and Recommendation of the Ethics 2003 Committee, as submitted to the WSBA Board of Governors, which contains the background information on RPC 3.4(f) and related comment 5 that you seek.

If you require anything in addition, please let us know.

This completes WSBA's response to your request.

Sincerely,

Nicole Gustine
Public Records Officer

1325 4th Avenue | Suite 600 | Seattle, WA 98101-2539
T: 206-727-8237 | nicoleg@wsba.org | www.wsba.org

Washington State Bar Association

WSBA

REPORT AND RECOMMENDATION OF THE SPECIAL COMMITTEE FOR EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT (ETHICS 2003) TO THE BOARD OF GOVERNORS

March 2004

Ellen Conedera Dial, Chairperson

Douglas J. Ende, Reporter

Washington State Bar Association
2101 Fourth Avenue – Suite 400
Seattle, Washington 98121-2330
(206) 443-9722

Rule 3.4: Fairness to Opposing Party and Counsel

Comparison with Model Rule

Proposed Rule 3.4 is identical to Model Rule 3.4, except that paragraph (f) and Comment [4] are deleted.

Washington Comment [5] explains the rationale for deletion of paragraph (f).

Comparison with RPC

Proposed Rule 3.4 is essentially identical to RPC 3.4. The substance of RPC 3.4(e) and (f) have been merged into a single paragraph (e) in conformity with the Model Rule. Also in conformity with the Model Rule, paragraph (e) of the proposed Rule omits the language "but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein" appearing in existing RPC 3.4(f).

Explanation of Committee Recommendation

Paragraph (f) of the Model Rule states, as a general rule, that a lawyer shall not request a person other than a client "refrain from voluntarily giving information to another party." Paragraph (f) permits a lawyer to advise employees or relatives of a client to refrain from giving information to another party, however, if "the lawyer reasonably believes that the person's interests will not be adversely affected." A minority of the Committee believed this approach represents an appropriate balance of interests and would provide useful guidance to lawyers who represent corporate or institutional employers. The Committee concluded that the Rule would have a chilling effect on legitimate access to information, would increase the cost of litigation by forcing lawyers to conduct formal discovery, would inappropriately authorize lawyers to give advice to nonclients, and would constitute a departure from existing Washington law as set forth in *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1994).

The exclusion of paragraph (f) from the proposed Rule was approved by the Committee by a vote of ten in favor, two opposed, and two abstentions. The deletion of paragraph (f) is explained in Washington Comment [5].

Rule 3.5: Impartiality and Decorum of the Tribunal

Comparison with Model Rule

Proposed Rule 3.5 is identical to Model Rule 3.5, except that Comment [1] is revised to refer to the Washington Code of Judicial Conduct in lieu of the ABA Model Code.

Comparison with RPC

Paragraph (a) of proposed Rule 3.5 is essentially identical to RPC 3.5(a).

APPENDIX D

ETHICS 2003 COMMITTEE
SUBCOMMITTEE REPORTS*

* Reporter's Note: The text of drafts prepared by subcommittees may vary from the text of the final rules and comments recommended by the Committee.

Title 3 Subcommittee Final Report

Our subcommittee reconvened since our prior report of January 30, 2004. We are supplementing our earlier memo with italicized text to give you our additional thinking.

RPC 3.4 Fairness to Opposing Party and Counsel

(f) (1) and (2) if adopted would be new to Washington. They were not modified by the ABA 2000 Ethics review. They state:

"A lawyer shall not

. . .

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interest will not be adversely affected by refraining from giving such information."

The comment provides: "[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client."

Subcommittee discussion: We wondered if the exceptions in subsections (1) and (2) swallowed the rule. In the criminal context, Tito suggested that this rule would be trumped by the criminal court rule that says don't obstruct. Jan also expressed concern about subsection (1) in employment cases, medical liability cases and negligence cases. If we keep (2), we are not sure what it means and think the comments should explain it.

Additional research done by my then extern Susan Carroll: The questions asked of the ABA: What are other states doing on ABA MRPC 3.4(f)(1) and (2) and if the ABA can shed some light on this. Our concerns: (1) is pretty broad, how would it work in employment cases, medical liability cases, and negligence cases. If keep (2), we think we need to make clearer in comments or re-write. So many negatives-we were having debates as to what it meant.

Susan Campbell from the ABA concedes that 3.4(f)(1) is very broad. However, 3.4(f)(2) is supposed to rein this in. Using the example of a doctor who is an independent contractor with a hospital for a negligence case, Ms. Campbell confirmed that the rule does not address this fact pattern and cases will have to be considered on a case-by-case basis, but that 3.4(f)(2) should cause the lawyer to act cautiously because of the potential conflict of interest between the client-hospital and witness-doctor.

Other states have, by a significant majority, adopted 3.4 (f) and its related comment without alteration. A few states have edited the language of the rule.

Rule Changes

State	Rule
ABA recommended	(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
Alabama	ABA 3.4(f) is AL 3.4(d): d) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless: (1) the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; (2) the person may be required by law to refrain from disclosing the information; or (3) the information pertains to covert law enforcement investigations in process, such as the use of undercover law enforcement agents
Georgia	(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; or (2) the information is subject to the assertion of a privilege by the client; and (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and the request is not otherwise prohibited by law;
Virginia	3.4(f) becomes 3.4(g): (g) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the information is relevant in a pending civil matter; (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Susan also checked the WSBA records to see why the WSBA chose not to include 3.4(f). The only thing specific to 3.4 (f), besides its deletion, is the following comment:

"Subsection (f), which requires that a lawyer shall not request a person other than his client to refrain from giving voluntary information, is designed to prevent the obstruction of justice. There is some concern within the Committee that this provision requires clarification."

RECOMMENDATION: Need further discussion and insight from committee as a whole

Supplemental discussion on RPC 3.4: We discussed whether we have a problem in Washington which RPC 3.4(f) including (1) and (2) would address. We thought this would really be a debate between Jan Eric Peterson and Pete Day as to the pros and cons of the exceptions. The criminal justice arena in which Tito and Tom work requires providing relevant information and does not have the exceptions. We thought there should be some justification for (f)(1) and (2), and we were unable to supply it. It is interesting to look at this issue using the Enron situation. Under the proposed rule, you could ask the employees not to talk. The proposed comment does not add any justification or clarification for (f)(1) and (2).

RPC 3.5 Impartiality and Decorum of the Tribunal

(b) and (c) are siginificantly different and divide ex parte communications into during the proceeding and following the proceeding.

Subcommittee discussion: Our discussion focused on subsection (c). Tito was concerned with (c)(2), for example when a juror withheld information during jury selection. Tom was not concerned with (c)(2). Prosecutors hear lots of complaints from jurors re: whether jurors have to talk to attorneys after the trials. Mary suggested that if necessary the attorney can get a court order. Jan felt that (c)(2) is unnecessary and that (c)(3) covers the problem.

RECOMMENDATION: Need further discussion and insight from committee as a whole

Supplemental discussion on RPC 3.5: Our focus continued to be on 3.5(c). Tito reminded us of a letter the Committee received from the Washington Defender Association (WDA), dated October 1, 2003. It argued that ABA Model Rule 3.5 would deter post-trial effective representation. How can the defense counsel determine if there was an inadvertent viewing of the defendant in handcuffs, or a juror doing an unauthorized site visit or a juror reenactment of testimony. WDA opined that the rule would discourage attorneys from talking to jurors after a mistrial. WDA believes that the rule applies disparately to prosecutors and criminal defense counsel. WDA wondered why it was needed as the judges always instructed the jurors about post-trial contact.

Our subcommittee discussion really focused on (c)(2). We were okay with (c)(1) and (c)(3). Tito commented that he did not necessarily agree with all of the WDA's points. He felt (c)(2) which states "the juror has made known to the lawyer a desire not to communicate" was unnecessary because (c)(3) includes in its list the communication involving "harassment". If a juror indicates s/he does not want to talk to the lawyer, the lawyer can't ask a week later if the juror has changed her/his mind. Sometimes a juror does change her/his mind.

APPENDIX E

ETHICS 2003 COMMITTEE
Meeting Minutes Organized by Rule

rules such as RPC 8.4(c)." Ms. Perluss said those situations are already covered by section (a)(1) and (d) of the existing rule.

Mr. Ripley said the second sentence of Comment [7] is not wholly accurate in Washington as *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997), is controlling on the issue of a lawyer's obligation when the lawyer knows that a criminal client intends to commit perjury. He suggested that case be cited and that the introductory phrase be amended to provide that there are jurisdictions where a lawyer can put a witness on the stand and let them tell their own story, but that Washington is not one of them. Mr. Ende inquired whether the text of Rule 3.3(a)(3) is problematic in light of the *Berrysmith* case. Mr. Ripley said that Berrysmith deals with the lawyer's response when the lawyer knows of the intended perjury, not with the "reasonable belief" issue. Ms. Perluss wondered if the signal for the cross-reference to *Berrysmith* should be "see" or "but see."

Mr. Sutton moved that Comment [7] be amended to add "other that Washington" after the word "jurisdictions." Mr. McBride seconded the motion. Professor Boerner offered a friendly amendment to add a "but see" citation to the Berrysmith case. *The amendments were accepted and the motion as amended passed unanimously.*

Mr. Howard moved for the adoption of the comments to proposed Rule 3.3, as amended. The motion was seconded by Mr. Ripley and passed on a vote of twelve in favor and one opposed. Ms. Seidel said she voted against the motion because she feels any statement a lawyer makes to the court should be true.

Rule 3.4 – Fairness to Opposing Party and Counsel

January 31, 2003

Justice Fairhurst said the subcommittee needed guidance with respect to Model Rule 3.4(f). The Model Rule has not changed since it was originally adopted in 1983. She reported that research into the history of the adoption of the Model Rule and its rejection in Washington in 1985 did not greatly clarify the intent of the rule or Washington's rejection of it. Ms. Seidel asked what Mr. Peterson's comments were on this rule as he had expressed to her that the exception was too broad in employment cases. Justice Fairhurst noted that Mr. Peterson desired that the rule include the language in paragraph (f) but eliminate the "unless" clause and the exceptions.

Mr. Day remarked that as a lawyer who has represented a corporate client, he was in favor of the exception. A corporate lawyer's greatest fear is that lawyers from the other side will go fishing among employees, hoping that one will say something incorrect or something about matters they have nothing to do with. Mr. Day said with Model Rule 3.4, the corporation's lawyer cannot instruct employees not to speak, but the lawyer can request that they refrain from speaking. According to Mr. Day, this is a reasonable rule because the plaintiffs can still seek information during discovery if employees choose not to speak voluntarily. Ms. Perluss disagreed: she fears that the moment an employer tells an employee not to speak about a matter, the employee will believe that he or she will be

fired for disclosing and will therefore resist legitimate efforts at inquiry. Ms. Perluss expressed the view that the rule is too vague and overbroad.

Mr. Kelly noted that there was a typographical error in the report; it should read "relative *or* employee." Mr. Kelly opined that the rule would permit lawyers appropriately to explain the rights of employees in this situation, and that a lawyer cannot unlawfully obstruct another party's access to evidence. Professor Boerner said that although it might not be perfect, the rule was an improvement over the current absence of any rule, though he prefers paragraph (f) without the additional provisos. Mr. Day said that plaintiffs lawyers have used police investigative tactics when approaching employees; in one instance lawyers showed up on a Sunday night, threatening to take action against the person as well as the company if the person failed to cooperate. Mr. Day said he has told employees that they have a right to talk to the adversary's lawyers, but he recommends to them that they do not. Mr. McBride said the Committee should focus only on civil ramifications of the rule because this issue is regulated by court rules in criminal matters. Mr. Rodriguez said there needs to be a comment stating that criminal discovery rules govern this issue in criminal matters. Mr. Ripley suggested the committee add the word "civil" as the State of Virginia did. Ms. Perluss and Mr. McBride stated that a rule change in that regard seems unnecessary.

February 11, 2004

Justice Fairhurst reported that the subcommittee had concerns about Model Rule 3.4(f); the Committee was concerned that the exceptions in paragraphs (1) and (2) might swallow the rule. Justice Fairhurst conveyed to the Committee that Mr. Rodriguez and Mr. McBride indicated that this rule would be superseded in criminal cases by court rules, which provide that access to witnesses cannot be obstructed. Mr. Peterson had also conveyed strong concerns about application of paragraph (f)(1) in employment, medical liability and negligence litigation.

Justice Fairhurst reported that Ms. Carroll had conducted additional research on this portion of the rule. According to Ms. Carroll, staff at the ABA Center for Professional Responsibility acknowledge that Model Rule 3.4(f)(1) is broad, but they had explained that paragraph (f)(2) is intended to limit that provision. Ms. Carroll determined that the majority of states have adopted Rule 3.4(f) and the comments without alteration.

Professor Boerner said the effect of this paragraph will be to discourage informal discovery and force the parties into the formal discovery process; he agrees with Mr. Peterson's concerns about the provision. Justice Fairhurst noted that Mr. Day has expressed approval of this rule owing to concerns from the employer's perspective.

Ms. Perluss expressed strong opposition to paragraph (e). According to Ms. Perluss, it eviscerates *Wright v. Group Health Hospital,* 103 Wn.2d 192, 691 P.2d 564 (1984); it will force the deposition of every potential witness in civil cases and inappropriately create quasi-attorney-client relationships between the lawyer and a

witness who is advised to refrain from giving information. Ms. Perluss believes it would be more prudent to have no rule on the subject at all.

Mr. Rodriguez indicated that he and Mr. McBride agree about the inapplicablity of this provision in criminal cases. Mr. Rodriguez thought it would be helpful to enact paragraph (f) without exceptions (1) and (2); if such conduct is impermissible in a criminal case, it should be impermissible in the civil context. Mr. Miller opined the provision clarifies existing law and would be of assistance in situations when a lawyer is involved in a dispute with opposing counsel about questions directed to a nonclient witness. Ms. Perluss disagreed, explaining that a lawyer has no right to instruct a witness not to answer if there is no lawyer-client relationship. Mr. Rushing said *Group Health* has served the state well for twenty years. According to Mr. Rushing, lawyers are familiar with it and have adapted to it; it should be retained as the applicable approach in Washington.

Mr. Rushing moved that paragraph (f) be reserved and Wright v. Group Health be referenced in a Washington comment. Mr. Howard seconded the motion.

Mr. Howard pointed out that contrary to the spirit of many rules, which strive to reduce cost and complexity to litigants, this provision will increase the cost and complexity of litigation, which would be counterproductive; he agrees with the motion to delete paragraph (f). Mr. Ripley said the provision creates conflict of interest problems by placing lawyers in the position of determining whether they reasonably believe a third party's interests will not be affected; he agrees with Mr. Rushing. Professor Boerner suggested deleting subparagraphs (1) and (2) but retaining paragraph (f). Justice Fairhurst, on behalf of Mr. Day, noted that the language says "request", not advise or direct; under *Group Health* the lawyer can request that current employees not speak to opposing counsel, so paragraph (f) itself is consistent with *Group Health*. Mr. Rushing noted that the suggested change would not be deemed a friendly amendment; he emphasized that in Washington lawyers have been operating successfully under *Group Health* for 20 years, and it would be imprudent to alter longstanding successful practices.

Mr. Rodriguez moved for the deletion of the word "unless" at the end of paragraph (f) and the deletion of subparagraphs (1) and (2). The motion failed for lack of a second.

Ms. McLean conveyed Ms. Seidel's comment that the Model Rule 3.4(f) does not represent a consensus among other states on this issue; laws vary widely in this area. A recommendation to omit paragraph (f) would not, therefore, make Washington an outlier. Mr. Rushing noted that *Group Health* is often cited and relied on outside of Washington; approximately 30 states have chosen to adopt the same approach.

Ms. Dial called for a vote on Mr. Rushing's motion, which passed on a vote of ten in favor, two opposed, and two abstentions.

Mr. Ripley moved for the adoption of Comments [1] through[3], with Comment [4] to be reserved and addition of a Washington comment referencing Wright v. Group Health. *The motion was seconded by Ms. Perluss and passed on a vote of eleven in favor, none opposed, and three abstentions.*

Mr. Howard moved to delete the cross-reference "compare Rule 3.4(f)" from Comment [7] to proposed Rule 4.2. The motion was seconded by Mr. Kelly and passed on a vote of eleven in favor, none opposed, and three abstentions.

March 10, 2004

Ms. Dial said proposed Rule 3.4 is the same as the Model Rule with section (f) reserved with the Washington Comment citing *Group Health v. Wright*. Professor Boerner noted that the comments say that 3.4(f) is taken out and that eliminates a key general prohibition. Ms. Seidel agreed and said the comment needs to be redrafted. She and Professor Boerner agreed to exchange emails to redraft the comment. *Mr. Day moved the adoption of proposed Rule 3.4. The motion was seconded by Mr. Ripley and passed on a vote of nine in favor and one abstaining.*

March 23, 2004

Turning to Rule 3.4, Ms. Dial reminded the Committee that it had recommended deletion of paragraph (f) of Model Rule 3.4. The Washington comment explains the reasons for this recommendation.

Mr. Kelly moved for the adoption of the comments to proposed Rule 3.4. The motion was seconded by Professor Boerner and passed on a vote of twelve in favor and one opposed.

Rule 3.5 – Impartiality and Decorum of the Tribunal

February 11, 2004

Justice Fairhurst turned to paragraph (c) of Model Rule 3.5, which covers post-proceeding juror contact, and which now has three subsections. She noted that the Washington Defender's Association submitted a letter to the Committee opining that the provision deters effective post-trial representation. Mr. Rodriguez noted that there are situations in which a juror says he or she does not want to talk to a lawyer, but that such jurors sometimes change their minds. He noted that the cases in which post-conviction contact with jurors is needed tend to be serious cases, for example, death penalty or 3-strikes cases. True juror harassment is covered in other rules, but this rule would prohibit an investigator from initiating even a second polite contact with a juror. Justice Fairhurst conveyed Mr. McBride's view that jurors should not be viewed as analogous to witnesses but rather as an extension of the court; he believes the gatekeeper's role is with the court.

BRESKIN JOHNSON TOWNSEND PLLC

May 30, 2019 - 4:05 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77507-3
Appellate Court Case Title:	SAFE Acquisition, LLC, Appellant v. GF Protection Inc., Respondent
Superior Court Case Number:	16-2-15102-7

The following documents have been uploaded:

- 775073_Petition_for_Review_20190530160423D1744647_8046.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review 77507-3 Marquardt.pdf

A copy of the uploaded files will be sent to:

- admin@bjtlegal.com
- arc@stokeslaw.com
- cheidelberg@bjtlegal.com
- jacob.a.zuniga@gmail.com
- krista.nelson@stokeslaw.com
- mlh@stokeslaw.com
- mpr@stokeslaw.com
- sja@stokeslaw.com
- smj@stokeslaw.com
- yss@stokeslaw.com

Comments:

Sender Name: Nerissa Tigner - Email: ntigner@bjtlegal.com
Filing on Behalf of: Daniel Foster Johnson - Email: djohnson@bjtlegal.com (Alternate Email:)

Address:
1000 Second Avenue
Suite 3670
Seattle, WA, 98104
Phone: (206) 652-8660

Note: The Filing Id is 20190530160423D1744647