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No. 71611-5-I

WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

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FOSS MARITIME COMPANY,

*Respondent,*

v.

JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

*Petitioners,*

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof

Defendants.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Dean S. Lum

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# BRANDEWIEDE'S OPENING BRIEF

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## I. INTRODUCTION

This is discretionary review of the denial of discovery sanctions and disqualification, after discovery and on the eve of trial, of the trial counsel and law firm representing Petitioners Jeff Brandewiede and Brandewiede Construction, Inc. ("Brandewiede") in a suit arising out of a large ship refurbishment project Respondent Foss Maritime Company ("Foss") was doing for the ship owner.

Disqualification was for trial counsel's alleged improper review and intended use at trial of attorney-client privileged communications, primarily a short email exchange embedded in a 38-page letter from the project's manager Mr. Vorwerk to Foss asserting wrongful termination after he was fired about two weeks after the project ended; it also apparently refuted Foss' claims against Brandewiede. Foss never produced or identified the document. It only came to light late in discovery when Foss gave Brandewiede's counsel Mr. Vorwerk's contact information in lieu of a deposition. Mr. Vorwerk gave the document at an interview; Foss claimed that document tainted counsel, requiring disqualification.

Brandewiede was granted an emergency stay of the disqualification order, discretionary review under RAP 2.3(b)(2), and a stay of trial court proceedings pending appeal. Much of the facts and parts of the argument are quoted or paraphrased from the ruling granting discretionary review ("Ruling Granting Review," App. E hereto), with citations to the clerk's papers added.

## II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

### A. Assignments of Error.

1. The trial court erred by entering its order disqualifying Brandewiede's trial counsel and law firm.

2. The trial court erred in its wholesale exclusion of all evidence provided to defendant Brandewiede by Foss' former employee and manager of the project at issue, Mr. Vorwerk, including non-privileged, non-confidential material possessed by Foss and which had not been produced by Foss in discovery.

3. The trial court erred in denying Brandewiede's motion for discovery sanctions and for failing to impose discovery sanctions on Foss for its admitted and unexcused failure to disclose material documents during discovery, particularly the Vorwerk 38-page letter complaining to Foss that his termination was wrongful.

### B. Statement of Issues.

1. Must the order of disqualification and exclusion of evidence be vacated because the trial court failed to engage in any analysis, much less the required analysis under the discovery rules, *Fisons*, and the *Burnet* and *Jones v. City of Seattle* line of cases?[1]

2. Must the order of disqualification be vacated because the trial court failed to engage in any analysis, much less the analysis

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[1] *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) ("*Fisons*"); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) ("*Burnet*"); *Jones v. City of Seattle,* 179 Wn.2d 322, 338 - 344, 314 P.3d 3380 (2013) ("*Jones*").

used for disqualification under the Washington case Foss proffered on disqualification, *Firestorm*, or the federal case it proffered, *Jain*?[2]

3. Where the facts are undisputed that: 1) Brandewiede's trial counsel had no "inappropriate contact" with Foss's ex-employee project manager, for whom Foss' counsel provided direct contact information in lieu of deposition; and 2) Brandewiede's trial counsel did not review any attorney-client communications either clearly labeled as such or that disclosed a confidence material to this litigation; and where the court is applying court rules or the rules of professional conduct to undisputed facts, should the appellate court follow *Fisons* and *Firestorm* and determine if any violation of the discovery rules or RPC's occurred?

4. Should Foss be responsible for Brandewiede's attorney fees on appeal as part of the required discovery sanctions awarded to Brandewiede under *Fisons* and CR 37, which requires the miscreant party and/or counsel to pay the expenses "including attorney fees, caused by the failure," here Foss' failure to disclose the Vorwerk wrongful termination letter or to otherwise protect its allegedly privileged information in the possession of its ex-employee, which failures created Foss' claimed basis to obtain disqualification and imposed huge costs on Brandewiede?

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[2] *In re Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996) ("*Firestorm*"); *Richards v. Jain,* 168 F. Supp. 2d 1195 (W.D. Wash. 2001) ("*Jain*").

## III. STATEMENT OF THE CASE

### A. Litigation Overview.

The Ruling Granting Review gives a succinct case overview.

> The case involves a commercial contract dispute over the work and payment for the renovation of a vessel named Alucia. Plaintiff Foss contracted with defendant Core Logistic Services to work on Alucia. Foss claims Core Logistic Services is a partnership of defendants Lisa Long, Frank Gan, and Brandewiede. Brandewiede claims he was only a subcontractor. In July 2012, Foss filed a lawsuit against Core Logistic Services, Long, Gan, and Brandewiede for breach of contract, unjust enrichment, and fraud.
>
> In October 2012, during discovery, Foss identified its former employee and Alucia project manager Van Vorwerk as a person likely to have discoverable information. According to Vorwerk, he reported to Foss's shipyard manager and had no direct responsibility for the overall management of the shipyard or the company, which was handled by Foss's upper management.[3] Although Foss terminated Vorwerk's employment before the lawsuit was filed,[4] Foss did not indicate in its discovery response that Vorwerk was no longer employed by the company. Foss listed Vorwerk as its potential witness and identified his contact information as care of Foss's counsel.[5] Brandewiede claims Foss misrepresented its relationship with Vorwerk.
>
> In September 2013, Brandewiede's counsel contacted Foss's counsel about setting Vorwerk's deposition and learned then that Vorwerk no longer worked for Foss. Foss's counsel provided Brandewiede's counsel with Vorwerk's contact information. On September 24, 2013, Brandewiede's counsel

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[3] Brandewiede App. F (Vorwerk declaration) at 2 ¶2 **[CP 191]**.

[4] Brandewiede App. F (Vorwerk declaration) at 1 ¶2 **[CP 190]**.

[5] Brandewiede App. D at 8 (Foss's disclosure of primary witnesses) ¶ 5 **[CP 120]**.

met Vorwerk for an interview in lieu of a deposition. Foss agrees the interview itself was proper, and there is no claim of an improper ex parte contact. During the interview, Vorwerk provided Brandewiede's counsel with a copy of a 38-page document entitled "The Wrongful Termination of Van V. Vorwerk" that Vorwerk wrote and submitted to Foss after his termination. Vorwerk's "wrongful termination" letter contained Vorwerk's recitation of facts related to his work and the Alucia project as well as his email communications with other Foss employees. The letter included a couple of emails involving Vorwerk, Foss's in-house counsel (with title "VP Safety, Quality & General Counsel"), and several others. The emails were not designated as attorney-client privileged. Brandewiede complains that Foss did not produce or identify Vorwerk's "wrongful termination" letter in discovery.

During the September 2013 interview, Vorwerk offered to bring copies of his other emails about the Alucia project. On October 24, 2013, Brandewiede's counsel met with Vorwerk again to obtain his emails. Vorwerk told Brandewiede's counsel he was unable to separate the Alucia related emails and provided a thumb drive containing two folders of his emails about his work as an estimator and project manager for Foss.

About two weeks later, Brandewiede's counsel informed Foss's counsel of the documents he received from Vorwerk, stating he had only reviewed a portion of the documents. Brandewiede's counsel also complained that Foss did not fully comply with Brandewiede's discovery requests. Foss's counsel emailed Brandewiede's counsel, requesting the documents as responsive to its discovery requests.[6] Four days later, Brandewiede provided Foss with his proposed witness and exhibit lists, which included Vorwerk's "wrongful termination" letter as a proposed exhibit.

On November 12, 2014, Foss's counsel emailed Brandewiede's counsel, expressing a concern that Vorwerk had

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[6] Foss App. B at 2 ¶ 3 **[CP 82]**; Ex. 1 to Foss App. B **[CP 86].**

provided Brandewiede with Foss's proprietary information, attorney-client privileged communications, or attorney work product.[7] According to Brandewiede's counsel, at that time, he had reviewed only a portion of the emails received from Vorwerk, had reviewed no documents "that would even remotely indicate" attorney-client privileged communications or attorney work product, and stopped any further review.[8] On November 15, 2013, Brandewiede's counsel provided Foss with the thumb drive received from Vorwerk, requesting, however, that Foss return the thumb drive after downloading the file.

On November 22, 2013, Foss filed a motion to disqualify Brandewiede's counsel and his firm and for discovery sanctions. Foss argued that Vorwerk's "wrongful termination" letter and emails on the thumb drive contained its proprietary and privileged information and that Brandewiede's counsel's possession and use of the documents prejudiced its ability to receive a fair trial. Foss argued that Brandewiede's counsel violated rules of professional conduct (RPC) 4.2 and 4.4(a) by obtaining, reviewing, and using privileged information.[9] It appears the "use" of the documents refers to Brandewiede's counsel's submission to Foss of the "wrongful termination" letter as a proposed exhibit. Foss also sought as discovery sanctions under CR 26(b) exclusion of evidence "tainted" by Vorwerk's and Brandewiede's counsel's "wrongful conduct," including Vorwerk's letter and all the information on the thumb drive.[10]

Brandewiede countered that Foss's motion lacked a legal or factual basis. Brandewiede's counsel submitted his declaration stating that he did not notice any attorney-client communication in Vorwerk's 38-page "wrongful termination" letter until it was brought to his attention by Foss's counsel and

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[7] Foss App. B at 2 ¶ 4 **[CP 82]**; Ex. 2 to Foss App. B **[CP 88]**.

[8] Brandewiede App. K at 2 ¶ 3 **[CP 313]**; S at 3 ¶¶ 8, 10 **[CP 200]**.

[9] Brandewiede App. K at 2 ¶ 3 **[CP 313]**; S at 3 ¶¶ 8, 10 **[CP 200]**.

[10] Brandewiede App. B at 13-14 **[CP 44-45]**.

offered to redact the communication, to which Foss did not respond.[11] Brandewiede's counsel also stated that he only reviewed a portion of the emails on the thumb drive, did not notice any attorney-client communications, and stopped his review when notified by Foss's counsel that the file might contain attorney-client communications.[12] Both Brandewiede and Foss filed separate motions for discovery sanctions, which are not at issue in this ruling.[13]

On January 17, 2014, the trial court heard the parties' argument on Foss's motion to disqualify counsel and for sanctions as well as the parties' separate motions for discovery sanctions. The court took the matter under advisement and ordered Foss to file allegedly privileged documents under seal with a privilege log, which Foss did.

On February 14, 2014, the trial court issued an order disqualifying Brandewiede's counsel and his firm, finding "Brandewiede's counsel did not address case law cited in plaintiff's brief" and "some (but not all) documents he reviewed were clearly attorney-client communications." The court also excluded evidence "tainted" by Vorwerk's and Brandewiede's counsel's "wrongful conduct," including Vorwerk's "wrongful

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[11] Brandewiede App. D at 4 ¶¶ 11, 12 **[CP 116].**

[12] Brandewiede App. D at 3-4 ¶¶ 8, 10, 13 **[CP 115-116];** S at 3 ¶¶ 8, 10 **[CP 200]**.

[13] In his motion for discovery sanctions, Brandewiede argued Foss (1) misrepresented Vorwerk's involvement in providing discovery responses, (2) improperly identified its counsel as contact for Vorwerk when Foss had terminated Vorwerk for more than a year, and (2) withheld emails from Vorwerk to its management regarding the relationship between Brandewiede and Core Logistic Services at issue in the lawsuit. Brandewiede App. O **[CP 177-189]**.

In its separate discovery sanctions motion, Foss argued Brandewiede supplemented his production with nearly 600 pages of documents on the eve of the scheduled trial, and Foss was thus entitled to a default judgment, dismissal of Brandewiede's counterclaims, exclusion of the newly discovered documents, and fees and costs related to the issue. Brandewiede App. P **[CP 163-168]**.

termination" letter, information contained on the thumb drive, and any further information containing or derived from privileged or confidential information belonging to Foss that might be in Brandewiede's, his counsel's, or Vorwerk's possession, unless defendants obtained the information from a source "untainted by the wrongful conduct." The trial court did not identify what conduct was "wrongful." The court made no findings or conclusions as to what, if any, discovery or ethical rules were violated. The court denied Foss's and Brandewiede's separate motions for discovery sanctions without prejudice.[14]

Ruling Granting Review, pp. 2-6.

## B. Discovery Sanctions and Disqualification Motions, Details.

Both parties filed motions seeking sanctions for discovery violations. Brandewiede sought sanctions for the improper withholding of discovery by Foss, particularly documents related to its ex-employee who held a critical role during the project, Mr. Vorwerk. CP 177-189. In particular, Brandewiede invoked the *Burnet-Blair-Jones* line of cases which requires on-the-record findings and balancing of lesser sanctions *before* imposing severe sanctions for discovery violations.[15] Foss cited the same line of cases in its discovery sanctions motion. *See* CP 165-166.

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[14] Brandewiede App. H **[CP 276-277].**

[15] *See* CP 185-188, Brandewiede's discovery sanctions brief, citing *Magana v. Hyundai Motor America,* 167 Wn.2d 570, 584, 220 P.3d 191 (2009), which follows and ties into *Burnet, Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 696, 41 P.3d 1175 (2002); *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006); *Blair v. TA–Seattle E. No. 176*, 171 Wn.2d 342, 351, 254 P.3d 797 (2011); *Teter v. Deck*, 174 Wn.2d 207, 219, 274 P.3d 336 (2012); and *Jones* , 179 Wn.2d at 338 – 344.

Foss filed its disqualification motion ("DQ Motion") based on what it deemed the "improper" acquisition of documents from Mr. Vorwerk, its former employee and project manager of the Alucia project at issue in the suit; he was fired by Foss two weeks after the project was completed and two months before Foss filed suit against Brandewiede and others on the project.[16] Foss' discovery sanctions motion sought a default against Brandewiede for alleged late disclosure of 600 pages of documents. CP 163-168.

On January 17, 2014, Judge Lum heard together argument on both parties' discovery sanction motions and Foss' DQ Motion. *See* RP. During the argument, Judge Lum acknowledged the settled requirements to impose severe discovery sanctions under *Burnet* and its progeny up to the most recent decision in *Jones v. City of Seattle,* 179 Wn.2d 322, 314 P.3d 3380 (2013). RP 45-47.[17]

Foss' counsel argued first, seeking sanctions for late discovery and disqualification of Mr. Welch and his firm for what it contended was the improper acquisition and use of privileged and confidential documents. Foss sought to downplay that 1) those documents were obtained from a third party, Mr. Vorwerk, the ex-employee of Foss whose personal contact information was first

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[16] *See* CP 190-92, Vorwerk Dec. (¶ 2, termination date, May 14, 2012); CP 357-58, Foss trial brief (project finished in early May; CP 1 (complaint filed 7/16/12).

[17] *E.g.,* RP 45:4-7: " . . . The world has changed for anyone seeking discovery sanctions with the decision, *The City of Seattle v. Jones* [sic], which affirmed that the court needs to engage in a balancing of the *Burnet* factors. . ."

supplied to Mr. Welch by Foss' counsel September 19, 2013, late in the discovery period after Mr. Welch requested his deposition; and 2) that Foss took ***no*** precautions to safeguard any protectable company information that its former employee might have.[18]

Nevertheless, and despite the fact Foss argued that "Mr. Vorwerk was obliged to keep the information privileged and confidential" at pages 7 – 8 of its DQ Motion, CP 38-39, it then asserted that it was Mr. Welch, the innocent recipient of materials from Foss' ex-employee, who engaged in "misconduct" in obtaining the documents from Mr. Vorwerk; and, further, that Mr. Vorwerk's breach of ***his*** asserted duty somehow made Mr. Welch culpable and required his disqualification from the entire case for Mr. Vorwerk's transgression because Mr. Welch had acted "unethically" when he did not recognized the existence or extent of what Foss later claimed were privileged and confidential materials. *See* CP 37-44. Despite these accusations, Foss did not dispute Mr. Welch's representations that he had not viewed the allegedly privileged documents (RP 32, Foss). Foss also admitted that the central document, "Exhibit 80," Mr. Vorwerk's 38-page long narrative, was in the company's

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[18] Brandewiede argues that because Foss took no precautions to protect the information in the possession of its former employee Mr. Vorwerk when it gave his contact information to Mr. Welch, it necessarily ***waived*** any claim to protection it may have had. *See Sitterson v. Evergreen School Dist., No. 114,* 147 Wn. App. 576, 584-589, 196 P.3d 735 (2008) (setting out the analysis for waiver of inadvertent disclosures of privileged or confidential materials, focusing on the need of the proponent of the privilege to take proper precautions).

possession long before Mr. Vorwerk gave it to Mr. Welch, but that the attorneys had not been aware of it because it was a hard copy document, not an electronic document reviewed for purposes of discovery. *See* RP 33-35.[19] Even though Foss argued the privileged portions should not have been reviewed, and even though Mr. Welch stated he did not review privileged materials in the letter which the Foss counsel did not dispute, Foss successfully argued for disqualification based on mere possession of the document.

## IV. ARGUMENT

### A. Standard of Review.

The basis for disqualification proffered by Foss's DQ Motion was violation of the rules of professional conduct (RPC's 4.4 and 4.2., DQ Motion, CP pp. 39-40) and the civil rules (CR 26(b), DQ Motion, CP 44-45). Review is therefore *de novo. Firestorm*, 129 Wn.2d at 135 ("Since this case involves the application of a court rule to a set of particular facts, this is a question of law."). *Accord, Eriks v. Denver*, 118 Wn. 2d 451, 457-58, 824 P.2d 1207 (1992) ("the question of whether an attorney's conduct violates the relevant rules of professional conduct is a question of law" for purposes of reviewing a disqualification order on appeal); *State v. Pierce*, 169

[19] "Mr. Vorwerk had met with I believe a vice president at Foss who he had worked with before, and that was the only person who had seen the letter. It went to a hard file and was not even on the radar for collection. . . . I mean, granted it's in a file, a hard file somewhere with Foss. It did not come up in our search, our initial search for documents that were relevant to the project. " RP 34.

Wn. App. 533, 559, 280 P.3d 1158, 1172, *review denied*, 175 Wn. 2d 1025, 291 P.3d 253 (2012) (review of disqualification is *de novo*, affirming rejection of disqualification motion based in part on the alleged possession of confidential information by the attorney sought to be disqualified). Review of discovery sanctions is for an abuse of discretion. *Fisons,* 122 Wn.2d at 338-339.

**B. The trial court abused its discretion by disqualifying Brandewiede's counsel and excluding evidence without a proper analysis on the record of the factors required in the *Fisons*, *Burnet*, and *Jones* line of cases.**

**1. Foss' assertion that the alleged violation of discovery rules warranted the severe sanctions of disqualification and exclusion of evidence required the trial court to analyze and apply the *Burnet* factors prior to imposing a severe sanction.**

Before imposing a severe sanction, "the trial court must explicitly consider whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial." *Jones*, 179 Wn.2d at 338-39 (citing *Burnet*, 131 Wn.2d at 494). Violation of a rule, by itself, does not necessarily equate to a willful violation; "[s]omething more [than a violation of a discovery order] is needed." *Farrow v. Alfa Laval, Inc.*, 179 Wn. App. 652, 663-64 & fn.8, 319 P.3d 861 (2014) (quoting *Jones*).

In its motion to disqualify Mr. Welch ("DQ Motion"), Foss argued that disqualification and exclusion of evidence were

necessary sanctions because Mr. Welch violated CR 26(b) by obtaining privileged materials and by allegedly failing to take appropriate steps upon receiving those privileged materials. CP 44-45 (DQ Motion, pp. 13-14). The principles governing sanctions issued under CR 37 "apply with equal force to sanctions decisions for CR 26(b) violations." *Firestorm*, 129 Wn.2d at 139. The Court also expressly extended the guidelines from *Fisons* requiring imposition of "the least severe sanction adequate to serve the purpose of the particular sanction" to the sanction of disqualification. *Firestorm*, 129 Wn.2d at 142-43. Finally, findings of fact and conclusions of law have been required when the trial court makes a determination as to whether to disqualify an attorney. *See, e.g., Firestorm*; *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007) (no abuse of discretion in disqualifying counsel where trial court entered lengthy findings regarding its consideration of lesser sanctions, prejudice to the opposing party, and flagrancy of the violation).

It follows that the current test for imposing severe sanctions – "sanctions that affect a party's ability to present its case"[20] – first prescribed in *Burnet* and most recently confirmed in *Jones*, applies where disqualification and exclusion of evidence are imposed based on a discovery violation; this requires on the record consideration of

[20] *Blair*, 171 Wn.2d at 348 (quoting *Mayer*, 156 Wn.2d at 690).

lesser sanctions, willfulness and prejudice. Given that Foss argued for sanctions under CR 26(b) and the court ***both*** disqualified Mr. Welch ***and*** excluded all the Vorwick evidence presumably to punish Mr. Welch for the alleged "wrongful conduct," the determination was subject to the discovery violation sanctions requirements of *Burnet* which were not applied, much less met.

**2. Reversal is required because the trial court failed to make the required findings of fact and conclusions of law analyzing the *Burnet* factors.**

The failure to make explicit findings of fact and conclusions of law analyzing the *Burnet* factors is an abuse of discretion when imposing severe sanctions. *Burnet; Jones.* Here, as the Commissioner recognized, "[t]he trial court made no findings or conclusions as to whether any discovery or ethical rule was violated," let alone any finding or conclusion regarding intent, prejudice or availability of a lesser sanction. Ruling Granting Review, p. 8. *See* CP 276-77 (App. D.) Reversal and vacation of the disqualification order is necessary on this ground alone.

**3. Even if Mr. Welch violated discovery rules, disqualification and exclusion of evidence are improper sanctions under *Burnet*, and *Jones*.**

Under *Burnet* and *Jones* the trial court must balance the *Burnet* factors before imposing a severe sanction. Here, there is no evidence in the record that Mr. Welch willfully violated any rule, which by itself does not equate to a willful violation. *Farrow v. Alfa*

*Laval, Inc.*, 179 Wn. App. at 663-64 & fn.8. There is also no evidence Foss is prejudiced by Mr. Welch's receipt of the alleged privileged information. Any genuinely privileged part can be redacted from any exhibits. Further, appellate counsel (who have not reviewed the document) have no information that the alleged privileged email trail is significant to the case such that Mr. Welch could have gained a tactical advantage much less a disqualifying advantage, assuming he actually reviewed it, which the record does not support. The record simply will not support severe sanctions under a *Burnet* analysis, even assuming violations by Mr. Welch.

**C. Even if consideration of the *Burnet* factors was not required prior to disqualification and exclusion of evidence, the trial court abused its discretion by disqualifying counsel and excluding evidence without analysis of or regard for the strict legal standard of *Firestorm* for the "severe sanction" of disqualification, and by relying on findings not supported in the record.**

**1. The trial court based its decision on untenable grounds to the extent it relied on Foss's argument that the law "requires" disqualification if any privileged information is seen by opposing counsel, because that standard is not controlling law in Washington for inadvertent or unauthorized disclosure cases.**

In its motion to disqualify Mr. Welch, Foss asserted that Washington law holds that "disqualification is not only appropriate, but *required* 'when counsel has access to privileged information of an opposing party,'" citing *Firestorm*, 129 Wn.2d at 140. CP 42 (DQ Motion, p. 11) (emphasis in motion). Based on the trial court's

pithy order, it appears the court relied on 1) Foss' argument that disqualification is "required" if counsel sees any of an opposing party's privileged information; and 2) Brandewiede's alleged failure to respond to Foss' case law. *See* RP 276-77.

First, whether Brandewiede responded to Foss' case law is irrelevant as the trial court had the duty to determine and apply the correct law to the facts presented, and it did neither. It is well established that the trial court has the duty to apply the correct law regardless of the arguments presented by counsel. *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 962, 214 P.3d 954 (2009), *aff'd*, 170 Wn.2d 768 (2011): "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it."[21] The trial court erred in relying on law asserted by Foss without determining whether that law was actually applicable to the case at hand. Moreover and inexplicably, the court

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[21] *Accord State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008). The Supreme Court reversed the trial court where the defendant requested the wrong remedy and the trial court failed to dismiss the charges for an insufficient charging document. Under the controlling cases, the trial court was precluded from allowing a midtrial amendment of the charges and was required to dismiss the charges without prejudice. *Id.* Similarly, the trial court here was precluded under controlling law from disqualifying trial counsel where the only evidence was that the very limited privileged materials did not disclose material confidences as to the litigation in process and were waived by the means in which they were made available to Brandewiede's trial counsel by Foss' counsel. The Supreme Court held that "The abuse of discretion standard does not allow us to excuse an order based on an erroneous view of the law because the trial court considered and rejected an equally erroneous argument," reversing because "the trial court abused its discretion when it ordered a remedy that departed from clear precedent of this court." *Id.*

expressly recognized it had to do *Burnet* balancing after the recent decision in *Jones,* RP 45:4-10, but then failed to do it.

Second, the facts of *Firestorm* and the cases cited therein make clear that the rule assesrted by Foss -- that disqualification is automatically required when counsel has mere access to privileged information of the opposing party -- applies only where a conflict of interest issue is present, *i.e.,* from the attorney's prior representation of the opposing party. The Commissioner explained Foss's error:

> In In re Firestorm 1991, a case involving an ex parte interview of an expert hired by opposing counsel, the Supreme Court explained the "limited applicability" of the sanction of disqualification, while noting, "One situation requiring the drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party." The court cited Kurbitz [v. Kurbitz, 77 Wn.2d 943, 468 P.2d 973 (1970)], a conflict of interest case, and stated that the "issue of access to privileged information frequently arises in conflict of interest cases." ...
>
> Kurbitz is a conflict of interest case, where the Supreme Court held an attorney was disqualified to represent a wife in a divorce case where his law firm partner had represented the husband and wife on probate and family business matters with access to and possession of the estate file. The court adopted, from federal cases, a 2-factor analysis in determining whether to disqualify an attorney "for conflict of interest": (1) whether the matters in the present suit involving the former client are substantially related to matters on which the attorney or someone in his or her association previously represented the former client and (2), if not, whether the attorney had access to confidential information material to the present suit. Applying the two factors, the court concluded both factors were present and raised an "appearance of

> conflicting interests" necessitating the attorney's disqualification. ***Unlike Kurbitz, this case does not involve a violation of an attorney's ethical duty not to represent conflicting interests.***

Ruling Granting Review, pp. 9-11 (emphasis added).

The other Washington cases cited by *Firestorm* for the principle that disqualification of counsel is required if counsel has access to privileged information of the opposing party are also conflict of interest cases.[22] It makes sense that there is a lower standard for disqualification in conflict of interest cases involving *former clients'* information because attorneys are fiduciaries of their clients and must maintain strict duties of confidentiality. Conflicts of interest put that duty in jeopardy; by requiring disqualification, the court is avoiding any appearance of impropriety which may arise *in conflict of interest cases*. There is no similar concern in inadvertent or unauthorized disclosure cases, as the attorney has no conflict of interest with and owes no duty of confidentiality to an opposing party who is not a former client.

In fact, the interpretation Foss calls for is completely unworkable and is clearly unintended by courts and the legislature. Under Foss' interpretation, every time an attorney comes into

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[22] *See First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987); *Teja v. Saran*, 68 Wn. App. 793, 798-99, 846 P.2d 1375, *review denied*, 122 Wn.2d 1008, 859 P.2d 604 (1993), *Intercapital Corp. v. Intercapital Corp.*, 41 Wn. App. 9, 16, 700 P.2d 1213, *review denied*, 104 Wn.2d 1015 (1985).

possession of another party's privileged document, that attorney must be disqualified.[23] But inadvertent disclosure happens all the time; disqualification is, properly, exceedingly rare. Claw back agreements and rules would be unnecessary if disqualification was required in each such a situation. Yet, that is the untenable effect for which Foss in fact argues.

The existence of CR 26(b)(6), which requires specific steps to be taken by parties who receive an opposing party's privileged information, also demonstrates that counsel are not to be disqualified simply because they possess or see some privileged information of an opposing party. Otherwise, under Foss' interpretation, a party could engage in a tactical strategy of purposely sending privileged

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[23] *See, e.g.,* RP 34:24 – 35:16, Foss' counsel discussing Ex. 80:

> Mr. Crosetto: . . . But the fact is, if it contains privileged communications, those parts should have been -- should not have been reviewed, should have been returned to Foss and are certainly a basis, in and of themselves, for disqualification, . . .
>
> THE COURT: He's saying he didn't look at those.
>
> Mr. Crosetto: Well, again, that's not the analysis that the Court does. In fact, the very same argument was made in *Richards v. Jain* where those documents were taken in by a paralegal, lead counsel got up and said, well, you know, we didn't really review those documents, it was done by a paralegal.
>
> It didn't matter. That was – the review by the paralegal was imputed to the law firm. Somebody deemed this email, this information relevant enough to include as a trial exhibit. So that's the issue.

In contrast to *Jain,* Mr. Welch was the only person at his firm to do any review of the Vorwerk documents, and his review was both limited in scope and then ceased immediately upon notice from Foss counsel the materials might contain privileged communications. *See* CP 115-116 ¶¶ 8 -13, App. A-3; CP 200 ¶ 10, App. B-3; CP 313 ¶ 3, App. C-2.

information, thereafter claiming inadvertence, and getting opposing counsel disqualified on the eve of trial. Allowing the potential for such manipulation was not intended by the rules or the law behind disqualification. Nor can it be condoned.

Despite *Firestorm*'s citation to the conflict of interest cases, *Firestorm* did not set a per se rule requiring disqualification regardless of the context of access to the privileged information. As the Commissioner explained:

> Firestorm involved plaintiff's counsel's ex parte interview with an expert hired by defendants' counsel in violation of CR 26(b)(5). The Supreme Court reversed the order of disqualification because the information disclosed by the expert was not privileged, and disqualification as a sanction did not adhere to the guidelines set forth in Fisons, where the trial court was to fashion and impose the least severe sanction adequate to serve the purpose of the particular sanction. Firestorm does not appear to support a per se rule, as claimed by Foss, that mere access to privileged information taints the judicial process and requires disqualification, regardless of the circumstances. Instead, as discussed in a federal district case Richards v. Jain relied on by Foss, Firestorm appears to require weighing of various factors in deciding whether to disqualify counsel for access to and review of an opposing party's attorney-client privilege.

Ruling Granting Review, pp. 9-11(internal footnotes deleted). Thus even where counsel gets privileged information from ex parte communication with expert witnesses, which is explicitly prohibited in Washington, disqualification is not necessarily required. Rather, *Fison*'s guidelines must be followed to determine what sanction, if

any, fits the circumstances. Disqualification cannot be required as a rigid rule in *every* instance where counsel has access to privileged information, especially, as here, through *permitted* ex parte communications with *fact witnesses*.[24]

While there is no bright-line rule in Washington for when disqualification is appropriate for inadvertent or unauthorized disclosure through a fact witness, some courts – including *Richards v. Jain*, the decision relied on by Foss – apply a six-factor test. Although the trial court was presented with this test, it failed to consider these factors or engage in any balancing. Rather, the order states only that Brandewiede's counsel failed to respond to case law and viewed some privileged documents. Even if the trial court was not required to apply the six-factor test in *Jain*, its failure to engage in any balancing was an abuse of discretion. As Commissioner Kanazawa found, "Review of Kurbitz, Firestorm, and other cases cited by Foss indicates the trial court probably abused its discretion in disqualifying Brandewiede's counsel and his firm without making findings as to the extent of counsel's review of privileged materials,

[24] Foss also argued that "[t]he court should resolve all doubts in favor of disqualification in order to prevent even the appearance of impropriety." CP 42 (DQ Motion, p. 11). But as the Commissioner recognized, "Foss cites no Washington case that presumes such impropriety that requires disqualification based on an attorney's access to privileged information belonging to an opposing party without further inquiry." Ruling Granting Review, p. 13.

significance of the materials, counsel's fault if any, or prejudice." Ruling Granting Review, pp. 9-10.

The trial court's reliance on Foss' misinterpretation of *Firestorm* was error. Making the decision to disqualify on that basis was contrary to the law and policy behind disqualification for inadvertent or unauthorized disclosure of privileged information, and constitutes a manifest abuse of discretion.

**2. The trial court relied on untenable grounds in basing its decision on its finding that "some (but not all) documents [Mr. Welch] reviewed were clearly attorney-client communications" because the allegedly privileged evidence was not "clearly" privileged and most of it was not even arguably privileged.**

A court abuses its discretion if it bases its decision on facts unsupported in the record, an incorrect legal standard, or facts that do not meet the requirements of the correct standard. *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 120-21, 325 P.3d 327 (2014). The trial court's disqualification order found that "some (but not all) documents [Mr. Welch] reviewed were clearly attorney-client communications." CP 277. Even if an attorney could be disqualified based on his mere review of any document that is clearly privileged, the facts do not support disqualification here.

**(a) The evidence reviewed by Mr. Welch was not "clearly" privileged.**

Mr. Welch testified by declaration that he did not see any privileged communications in the few e-mails he reviewed:

> At the time of receipt of [Foss's counsel's] November 12, 2013 e-mail, I had only reviewed a portion of the e-mail communications provided by Van Vorwerk and **had not reviewed any e-mail communication that would even remotely indicate to me that the e-mail documents contained attorney-client communications or attorney work product.**

CP 313, App. C-2 (emphasis added). This was not disputed by Foss. The trial court did not expressly find that Mr. Welch reviewed any privileged communications in the electronic files received. As Commissioner Kanazawa determined:

> Some of the emails on the thumb drive appear to contain attorney-client communications. But Brandewiede's counsel stated in his declaration that he only reviewed a portion of the emails on the thumb drive, had not noticed any attorney-client communications, and stopped his review once Foss's counsel notified him of a concern about privileged information. No contrary evidence was presented, and the trial court made no findings as to the extent, if any, of the counsel's review of any privileged communications.

Ruling Granting Review, p. 8.

This leaves only the 38-page wrongful termination letter written by Mr. Vorwerk as the trial court's basis for disqualification because Mr. Welch only briefly reviewed it and saw no indication of privileged material in what he looked at; then stopped reviewing it at all as soon as Foss' counsel raised the possibility it contained privileged material. *See* CP 115-116, ¶¶ 6-7, App. A (Welch Dec.). Copied into that letter are, apparently, a short email trail between Foss's general counsel and several others at Foss, including Mr.

Vorwerk. The trial court presumably concluded that this small email portion of the 38-page document was a privileged attorney-client communication. However, it appears that the excerpt included in the document is not privileged because 1) it is not a confidential communication between protected persons made for the purpose of giving or receiving legal advice, since Mr. Vorwerk had it in the first place and he was not in a position to be receiving legal advice for the company; and 2) even if the communication was initially privileged, Foss waived that privilege by failing to reasonably protect it from disclosure to third parties.

**(i) The e-mail incorporated into the document is not protected by the attorney-client privilege.**

Counsel for Brandewiede on appeal have not yet reviewed Mr. Vorwerk's 38-page letter or the alleged privileged communications contained therein, as it remains under seal, and a specific request of this Court by the undersigned to review it while review was being sought was denied. Nevertheless, under the Commissioner's description and principles of attorney-client privilege which would apply to the email, it appears the trial court erred in finding the communication privileged.

The attorney-client privilege is narrowly construed to limit the exclusion of relevant evidence, and it must likewise be narrowly construed when it may otherwise result in the drastic sanction of disqualification: "As the privilege may result in the exclusion of

evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purposes for which it exists." *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968). Following the reasoning in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), Washington recently recognized that the corporate attorney-client privilege may extend to lower-level employees in some cases, if certain factors are met. *Youngs v. PeaceHealth*, 179 Wn. 2d 645, 662, 316 P.3d 1035 (2014). Though the *Upjohn* court did not establish a bright-line rule to determine the limits of the corporate privilege, the *Youngs* court relied on eight factors in holding when corporate counsel-employee communications are privileged:

> (1) they were made at the direction of corporate superiors, (2) they were made by corporate employees, (3) they were made to corporate counsel acting as such, (4) they concerned matters within the scope of the employee's duties, (5) they revealed factual information "not available from upper-echelon management," (6) they revealed factual information necessary "to supply a basis for legal advice," (7) the communicating employee was sufficiently aware that he was being interviewed for legal purposes, and (8) the communicating employee was sufficiently aware that the information would be kept confidential.

*Youngs v. PeaceHealth,* 179 Wn.2d at 665, n.7.

Considering those factors in this case, it is not clear that the communication at issue deals with legal advice, that Mr. Vorwerk was directed to speak with counsel by his superiors, or that he understood the communication was for the purpose of providing Foss with legal advice. It also is not clear that Mr. Vorwerk was communicating with Foss's corporate counsel in his legal capacity as opposed to his other role related to security, since he filled dual roles. Finally, it is not clear that the communication dealt with information within the scope of Mr. Vorwerk's duties, to the extent it addressed legal strategies. While sharing ***factual*** information about the dispute would have been within the scope of his employment duties as project manager, to the extent the communication discusses ***legal*** strategy or analysis, there is no reason it had to be shared with Mr. Vorwerk,; nor is there any evidence he helped determine or implement Foss's legal strategy.

**(ii) Even if the communication was privileged, that privilege was waived due to Foss' failure to protect the document from disclosure to third parties.**

The attorney-client privilege can be waived by disclosures to third parties unless proper protections are taken. ER 502(b), adopted in 2010, protects inadvertent disclosures from waiver only where "the holder of the privilege or protection took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error." While this rule has not been construed by our appellate

courts to date in this context, Division II addressed the same basic issue in *Sitterson v. Evergreen School Dist., No. 114,* 147 Wn. App. 576, 584-589, 196 P.3d 735 (2008) (adopting a "balanced approach" to waiver of privilege for inadvertently disclosed documents). Judge Armstrong set out the analysis for waiver of inadvertent disclosures of privileged or confidential materials and focusing on the need of the proponent of the privilege to take proper precautions. *Id.* His analysis is consistent with the later-adopted ER 502 and the provisions of CR 26(b)(6). The factors to be considered in determining waiver for an allegedly inadvertent disclosure are:

> "(1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness."

*Sitterson,* 147 Wn. App. at 588.[25]

Here, Foss waived any privilege that may have existed because it failed to take any reasonable steps to prevent disclosure. It was aware that Mr. Vorwerk was a disgruntled former employee, and yet it still invited Mr. Welch to contact him for an ex parte interview in lieu of a deposition at which both parties would have access to any documents produced by Mr. Vorwerk at the same time and Foss could immediately assert any claims of privilege, if in fact it did not meet with Mr. Vorwerk ahead of the deposition to review

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[25] Even Foss recognized in the trial court it was required to take proper precautions to protect its privileged information. *See* RP 29-30.

any documents he planned to provide. But oddly, Foss' counsel did not even request to be present at any interview of Mr. Vorwerk.

Foss should have anticipated Mr. Vorwerk might present Mr. Welch with documents during the ex parte interview. Foss thus did not act reasonably in letting Mr. Welch to interview Vorwerk ex parte without first assuring itself that Mr. Vorwerk did not have, or would not provide, privileged information. It expressed no interest in being involved or overseeing that process and any information or documents that might be shared through the interview. Whatever protections Foss may have been entitled to in the materials in Mr. Vorwerk's possession were waived by Foss' failure to protect its own interests and police its own ex-employee.

**(b) The evidence was not *clearly* privileged.**

The trial court noted that even under Foss's interpretation of the law, disqualification would only be appropriate if opposing counsel reviewed evidence that was *clearly* privileged on its face:

> THE COURT: I guess the question is, once you -- okay. So if somebody inadvertently receives -- okay, so for example, somebody gets a document where it's not readily apparent that it's attorney-client privileged, it's Person A to Person B and it doesn't have a title, but I understand some of these do have titles. But it if a document doesn't have a title and he doesn't know who Person A is and doesn't realize it's attorney-client privilege until you arguably get down into the body of the document and then you kind of go, oh, gee, this looks like advice or something, but you need to read it first in order to get there, that doesn't call for automatic disqualification, does it? I mean, if it's not readily apparent that it's attorney-client

> privilege until somebody actually points out that, hey, this guy is general counsel, this is legal advice and this -- case law doesn't require disqualification, does it, at that point?
>
> MR. CROSETTO: Well, what the facts here are, is that the face of --
>
> THE COURT: Which is a different issue, right? Which is a different issue. If it's obvious that it's general -- this person is Person A, general counsel, and it's marked, it's stamped "attorney-client privileged," that's a different situation, right? And so you're saying that there -- I guess my question is, there are both kind of documents in this production, right? There are some that you say are clearly attorney-client privileged and there are some that you would actually have to know who the players are in order to figure out that's it attorney-client privileged work product, right? Isn't that the scenario?

RP 40-41. The trial court apparently followed Foss' arguments as it disqualified Mr. Welch based on its finding that some of the documents he reviewed which "were *clearly* attorney-client communications," CP 277 (trial court order) (emphasis added).

However, Mr. Welch stated in his declaration in response to the DQ Motion that it was ***not*** obvious on the face of the "wrongful termination" letter that the communication was subject to attorney-client privilege: "I did not notice any attorney-client communications in the [wrongful termination letter] and was unaware of the existence of potential attorney-client communications until it was brought to my attention by Foss' counsel." CP 116. There is no contrary evidence in the record. The Commissioner, who was able to review the Vorwerk documents including the

wrongful termination letter and emails, notes that the emails in the wrongful termination letter "were not designated as attorney-client privileged," Ruling Granting Review, p. 3, and while some of the thumb-drive emails "appear to contain attorney-client communications," there is no evidence contrary to Mr. Welch's declaration that he had not noticed any attorney-client communications in those emails before he stopped his review. Ruling Granting Review, pp. 8-9, App. E-8 to E-9.

Further, the Commissioner noted that Mr. Williamson's title showed he served dual roles at Foss, as legal counsel and as vice president of security. *Id.* When corporate counsel serve dual roles, their communications are not privileged if they are not acting in their capacity as legal advisor. *See State v. Dorman*, 30 Wn. App. 351, 359, 633 P.2d 1340 (1981) (communications between attorney and client for business purposes, as opposed to legal purposes, are not protected by the attorney-client privilege); *Mechling*, 152 Wn. App. at 853; *see also Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981) (memo between corporate employees transmitting business advice not privileged).

Here, it was not readily apparent from emails in the wrongful termination letter that the communication with Foss's vice president and general counsel was for the purposes of giving or receiving legal advice as they were not clearly labeled as privileged. It thus would have been reasonable for Mr. Welch to review them to make that

determination. The trial court abused its discretion in basing its decision to disqualify on the unsupported determination that the short email trail embedded in the middle of the 38-page "wrongful termination" letter was "clearly privileged."

### 3. The trial court abused its discretion in basing its decision to exclude "tainted" evidence on Mr. Vorwerk's and Mr. Welch's alleged "wrongful conduct."

Foss moved to exclude evidence only as a sanction for alleged violation of the discovery rules. The order does not say what law it relied on in excluding the evidence. But after finding Mr. Welch reviewed some privileged communications, it stated that evidence "tainted by Mr. Vorwerk's and Mr. Welch's wrongful conduct" was excluded, and excluded it all. The trial court appears to have decided that, as it believed Mr. Welch must be disqualified, all related evidence received from Mr. Vorwerk had to be thrown out. This is obvious, manifest error in light of *Jones* and *Burnet.*

#### (a) Disqualification of counsel does not provide legal grounds for excluding all of Vorwerk's relevant, non-privileged, non-protected communications from the case.

No law was presented to or by the trial court – outside the discovery rules – which would have allowed it to exclude all the Vorwerk evidence -- an exclusion that consisted almost entirely of relevant and non-privileged evidence -- simply because Mr. Welch was disqualified. ***Even if*** the allegedly privileged (and tiny) portion

of the long document should have been excluded, which it should not; and ***even if*** Mr. Welch was properly disqualified, which he was not; Brandewiede was still entitled to receipt and use of all of the relevant, non-privileged, or non-protected documents from Mr. Vorwerk as his case continued without Mr. Welch's presence. The trial court's exclusion of all this relevant and probative evidence without a proper basis was a manifest abuse of discretion, whatever the propriety of the disqualification.

The evidence rules begin from the express presumption that "all relevant evidence is admissible" unless it may be properly excluded by rule, statute, or case law. ER 402. Underlying this presumption of admissibility and its exceptions is the even more fundamental principle that the evidence rules "***shall*** be construed . . . to the end that the truth may be ascertained and proceedings justly determined." ER102 (emphasis added). After all, trials are supposed to be a search for the truth, not a jousting match.[26] The mechanism for exclusion of evidence for unfair prejudice to the opposing party under the rules is ER 403.

ER 403 provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of

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[26] *See, e.g., Curtis Lumber Co. v. Sortor,* 83 Wn.2d 764, 766-767, 522 P.2d 822 (1974) (civil rules' basic purpose was "to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as 'the sporting theory of justice'.").

***unfair*** prejudice." *Id*. (emphasis added). Thus, to exclude evidence under ER 403, the trial court must engage in a balancing test, weighing the probative value of the evidence against the probable prejudicial impact. *Lockwood v. A C & S, Inc.,* 109 Wn.2d 235, 257, 744 P.2d 605 (1987); *Carson v. Fine*, 123 Wn.2d 206, 222 - 225, 867 P.2d 610 (1994). *See* K. Tegland, 5 WASHINGTON PRACTICE, EVIDENCE LAW AND PRACTICE ER 403 (5th ed. 2007). Here, the trial court engaged in no such balancing test. Rather, it excluded the relevant, non-privileged evidence as a sanction based on Mr. Welch's "wrongful conduct," an exclusion which has no proper basis. Outside of discovery sanctions, the trial court was not presented with, nor did it cite any law which allows for the exclusion of evidence based solely on "wrongful conduct."

Further, even though the rule provides guidance for ***exclusion*** of otherwise relevant evidence, ER 403 analysis still begins from the presumption in favor of admitting relevant evidence unless the party seeking the exclusion (here Foss) has met its burden of proving that the inclusion will incite ***unfair*** prejudice. *Carson v. Fine*, 123 at 222 - 225.[27] This presumption in favor of admission of relevant evidence

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[27] The Supreme Court explained in *Carson*:

> Both [federal and state] rules are concerned with what is termed "unfair prejudice", which one court has termed as prejudice caused by evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.' "[Citations omitted.] Another authority states that evidence may be unfairly prejudicial under rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or

*(Footnote continued next page)*

means the non-privileged documents provided by Mr. Vorwerk should not have been excluded because Foss failed prove their use would produce unfair prejudice; and it is Foss who bears that burden of showing prejudice sufficient to exclude all the evidence it challenged. *Id.,* 123 Wn.2d at 225. The Court of Appeals was reversed precisely because its analysis would have permitted a reversal of this presumption of admissibility and removed the burden from the party seeking to exclude the evidence. *Id.*[28]

Mr. Welch's receipt of relevant, non-privileged evidence did not unfairly prejudice Foss, even if it included proprietary information. Opposing parties are entitled to proprietary or confidential corporate information during discovery, as long as it is not subject to attorney-client privilege or work product protection. *See Mechling v. City of Monroe*, 152 Wn. App. 830, 853, 222 P.3d 808 (2009). Even if one portion of a document is protected by

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"triggers other mainsprings of human action." 1 J. Weinstein & M. Berger, EVIDENCE § 403[03], at 403–36 (1985). Washington cases are in agreement, stating that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors.

*Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994), citing *Lockwood.*

[28] The Court noted at 123 Wn.2d at 225 (emphasis added):

> . . . under ER 403, the burden of showing prejudice is on the party seeking to exclude the evidence. [citation omitted]. Through its six prong proposed evaluation, ***the Court of Appeals would reverse the usual ER 403 burden and force the party seeking admission to bear the burden of justification.*** Moreover, there is a presumption favoring admissibility under ER 403. [citations omitted] ***The Court of Appeals' requirement of a 6–factor evaluation is inconsistent with this presumption.***

attorney-client privilege, that does not shield the entire document from disclosure. *Id.* The unprotected portion must be disclosed. *Id.*

If the producing party wishes to protect proprietary or corporate information during discovery, the burden is on them to obtain a protective order by showing there is good cause to treat the evidence as confidential and perhaps seal it in court files. *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412, 423, 204 P.3d 944 (2009). Foss alleged that it produced all the information in the e-mails not subject to attorney-client privilege prior to Mr. Welch receiving them through Mr. Vorwerk. Foss cannot claim prejudice from Mr. Welch's receipt of evidence that Foss previously had provided to Mr. Welch, or should have.

Since Foss did not prove that the inclusion of the relevant, non-privileged documents provided by Mr. Vorwerk presented unfair prejudice, the trial court needed an independent legal basis to exclude those documents. The only basis would be a sanction for "wrongful conduct" under the discovery rules which requires the *Burnet* analysis it did not employ and which, as the trial court recognized, was so recently reaffirmed in *Jones v. City of Seattle.*

**(b) The trial court relied on untenable grounds to the extent it based disqualification and exclusion of evidence on Mr. Welch's alleged "wrongful conduct" because the facts do not support a finding that his conduct was "wrongful."**

The trial court excluded evidence allegedly tainted by Mr. Welch's and Mr. Vorwerk's "wrongful conduct" without clarifying what conduct each engaged in that was "wrongful." The record does not support a finding Mr. Welch engaged in *any* wrongful conduct.

Although not disclosed to Mr. Welch by Foss until September, 2013, Mr. Vorwerk was a former employee with no ability to bind Foss, so Mr. Welch did not need Foss' permission to interview him ex parte.[29] Because Foss had listed Mr. Vorwerk's address as care of Foss' counsel, when Mr. Welch sought Mr. Vorwerk's deposition, Foss' counsel provided Mr. Vorwerk's contact information, encouraging Mr. Welch to contact Mr. Vorwerk directly. As Commissioner Kanazawa recognized, "Foss agrees the interview itself was proper, and there is no claim of an improper ex parte contact." Ruling Granting Review, p. 3.

Below, Foss argued that Mr. Welch violated RPC 4.2, comment [7] and RPC 4.4 prohibiting the use of "methods of obtaining evidence that violate the legal rights of a third party."

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[29] *See Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984) (permitting ex parte communications with former employees who cannot speak for the corporation); RPC 4.4, comment [7] ("...Consent of the organization's lawyer is not required for communication with a former constituent. ...").

While the RPCs prohibit the attorney from "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship," *see* RPC 4.4, comment [1], nothing here suggests that Mr. Welch acted improperly. Mr. Welch informed Mr. Vorwerk of his status as an attorney in this litigation, and did not elicit or induce Mr. Vorwerk to provide him with attorney-client privileged communications. No law prevents an attorney from receiving documents from a non-party fact witness, and Mr. Welch had no reason to believe that the documents he received would contain attorney-client privileged communications. Foss relied on a statement from *Jain* that "[i]t seems logical to conclude that a highly placed executive would be involved in legal matters." *Jain,* 168 F. Supp. 2d at 1205. Here, Mr. Vorwerk was not an executive at Foss. He was a project manager who would not necessarily have interactions with Foss's counsel.

Foss attempted to read additional obligations into the RPCs, beyond affirmatively seeking to penetrate the privilege and purposely acquire privileged information. Under Foss's view, Mr. Welch had a duty to ensure that the third-party fact witness did not disclose any privileged information it had from Foss. This would put an unreasonable burden on attorneys on the receiving end of evidence to prevent inadvertent disclosures, which is not in accord with the law or the RPCs. In fact, comment [2] to RPC 4.4 explicitly states that it does not govern the duties, other than requiring prompt

notice, of a lawyer who is aware that he received privileged information through inadvertent or unauthorized disclosure:

> [2] ... If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. ...
>
> [3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

RPC 4.4, comments [2], [3]. *See also* Karl B. Tegland, 5A WASHINGTON PRACTICE, EVIDENCE LAW AND PRACTICE § 502.2 (5th ed. 2007, 2014 supp.):

> If Attorney A inadvertently provides protected materials to Attorney B, RPC 4.4(b) gives Attorney B a duty to notify Attorney A. The rule does not require Attorney B to refrain from reading the protected material, nor does the rule require Attorney B to return the material to Attorney A. According to the official comment accompanying RPC 4.4, the issue of whether Attorney B should return the protected material without reading it is "a matter of professional judgment."

Under the RPCs, Mr. Welch was permitted to review and use the documents received. Mr. Welch did not intentionally seek to

invade Foss' attorney-client privilege. As explained *supra*, the communication at issue in the "wrongful termination" letter was not clearly privileged on its face, so Mr. Welch did not know or have reason to know he was improperly in possession of privileged materials; no duty to notify Foss's counsel was triggered. Even so, he gave prompt notice to Foss he had received documents from Mr. Vorwerk. There was no "wrongful conduct" under the RPCs.

Nor could the trial court's finding of "wrongful conduct" be based on a violation of CR 26(b)(6). That rule requires that, after being notified by the opposing party of its possession of privileged materials, the party must return the materials and not use or disclose the materials. Mr. Welch immediately stopped review of the Vorwerk evidence after Foss asserted that they contained privileged communications and he provided a copy of the entire file to Foss. Mr. Welch did not use the evidence in any way that prejudiced Foss. Though the "wrongful termination" letter was in his proposed trial exhibit list, it was not used in court or filed in public records. The proposed trial exhibit list was sent to Foss before it notified Mr. Welch of their concerns triggering the CR 26(b)(6) duties.

**(c) The trial court's decision to exclude evidence because of Mr. Welch's and Mr. Vorwerk's alleged "wrongful conduct" is manifestly unreasonable.**

"A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a

view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

It is unreasonable and against the purposes of disqualification to punish the client and hinder the client's entire case because of an alleged mistake by the client's attorney and the conduct by a third party over whom the client has no control. Even if Mr. Welch was properly disqualified, Washington case law demonstrates that courts are loath to punish clients for the sins of their attorneys. *E.g. Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) (court abused discretion in denying request for continuance where it would be unfair to punish client for former attorney's "apparently dilatory conduct"); *Firestorm*, 129 Wn.2d at 143 ("[t]o the extent possible, individual parties should not be penalized for their attorneys' misconduct in the discovery process").

Here, as Commissioner Kanazawa recognized, "disqualification of counsel is akin to an injunction and operates as a 'penalty' for Brandewiede as well as for his counsel." Ruling Granting Review, p. 7 (citing *Firestorm*, 129 Wn.2d at 140 ("Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary.")). Even assuming Mr. Vorwerk was prohibited by Foss from disclosing the evidence and -- perhaps -- is answerable to Foss for any "wrongful"

disclosure, consistent with basic principles Brandewiede cannot properly be punished for a third party's wrongdoing.[30] Because that is what the trial court did, it must be reversed. *See* fn. 30.

Nor should Brandewiede be punished because ***Foss*** failed to take adequate precautions to protect ***its*** privileged materials. This is especially true here. Foss asserted in discovery responses that Mr. Vorwerk assisted with its responses and could be contacted for discovery through Foss' lawyers, leading to the logical assumption that he was still employed by Foss and, in any event, could ***only*** be contacted through its lawyers. *See* CP 120. But when contacted by Mr. Welch to have his deposition taken as trial approached, Foss' counsel, for the first time, provided Mr. Vorwerk's personal contact information rather than set up a time and place for a deposition, indicating Mr. Welch was free to contact Mr. Vorwerk. *See* CP 114 ¶¶ 3 – 4. Since Foss had the chance to have Mr. Vorwerk's testimony taken at a deposition where he could have been defended

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[30] *See, e.g.,* RCW 26.09.190, which has been characterized as preventing a plaintiff injured by a married person "from recovering against the separate property of the nontortfeasor spouse" in *Keene v. Edie,* 131 Wn.2d 822, 830, 935 P.2d 588 (1997). The Supreme Court discussed an underlying 1980 decision that abolished "a concept of law that . . . imposed liability on innocent spouses." *Id.* at 830-32, discussing *deElche v. Jacobson*, 95 Wn.2d 237, 622 P.2d 835 (1980). In applying those principles in the context of providing for executable recovery for a tort victim against the separate property interests of the tortfeasor spouse whose only interests were his share of community real property, the Supreme Court overruled one of its first cases to insure that an innocent party did not have to pay for the wrongs of another for the injured party to be compensated for her injury and the tortfeasor held accountable. *See Keene v. Edie,* 131 Wn.2d at 831-35 & fn. 6, overruling *Brotton v. Langert,* 1 Wash. 73, 23 Pac. 688 (1890).

(and monitored) by Foss' counsel, but gave up that opportunity, Foss also gave up the opportunity to monitor an ex-employee it had fired two weeks after completion of the project and who had shortly thereafter written a 38-page manifesto on his wrongful termination; a long, detailed account of the conduct of the project at issue that was never produced by Foss in discovery in any form, redacted or otherwise. If ever there was an ex-employee whom the employer-litigant should monitor in giving information to its opposition before trial, it was Mr. Vorwerk. Foss' failure to do so cannot be turned into blame on Brandewiede's counsel when he obtained information directly from Mr. Vorwerk that Foss later asserted was otherwise privileged or protected.

### D. The Court of Appeals should rule on the undisputed facts that there was no violation of the discovery rules or ethics rules, or that any alleged violation does not warrant either the severe sanction of disqualification or wholesale exclusion of relevant, non-privileged evidence.

#### 1. The Court of Appeals has the authority to rule as a matter of law that disqualification and exclusion of evidence are inappropriate in these circumstances, and it should do so to promote judicial economy.

As in *Firestorm*, the appellate court can provide the ultimate decision when the record is appropriate and the issue does not involve an issue of discretion but can be decided as a matter of law, as here. *Firestorm,* 129 Wn.2d at 135. *Accord, Fisons,* 122 Wn.2d at 345-346 (determining at the appellate level that the discovery rules

had been violated so that sanctions were warranted, reversing the ruling of no violation requiring sanctions).

**2. Mr. Welch did not violate the discovery rules or the ethics rules as alleged by Foss.**

As discussed *supra*, Mr. Welch had permission from Foss and authority under the law to interview Mr. Vorwerk ex parte. Mr. Welch did not induce Mr. Vorwerk to provide him with attorney-client communications, Mr. Welch gave prompt notice of his receipt of the documents to Foss, and he immediately stopped reviewing them and turned them over to Foss upon Foss' request. This is in accord with CR 26(b)(6) requirements.

Foss also alleges violations of RPC 4.2 and 4.4, which prevent an attorney from using "methods of obtaining evidence that violate the legal rights of" an organization. Foss cites to these rules in an apparent attempt to shift its burden to protect its privileged documents from disclosure to Mr. Welch, requiring him to prevent himself from receiving any evidence that might have privileged information buried in it. While the RPCs place a duty on counsel not to use improper methods that would reveal privileged information, it does not shift to counsel the full burden of preventing access to such information. Mr. Welch had a right to interview Mr. Vorwerk and review the documents he received when he did not seek to invade Foss' attorney-client privilege and had no reason to

know that some allegedly privileged communications might be included within the otherwise relevant, non-privileged evidence.

Neither Mr. Welch's conduct in receiving, disclosing, or using the Vorwerk evidence; nor Mr. Welch's possible review of a single document that *may* have had privileged information buried within it but did not clearly indicate so on its face, was a violation of the discovery rules or the RPC's. With no violation, disqualification and exclusion of evidence were manifestly improper.

### 3. Even if Mr. Welch violated ethics rules, disqualification and exclusion of evidence were improper sanctions under *Jain* and other authorities given the circumstances.

If disqualification based on inadvertent or unauthorized disclosure of privileged communications is not subject to the *Burnet* analysis, this Court could adopt a standard for trial courts to use in the future. Many courts, including the Western District of Washington in *Jain*, have adopted the analysis from a Texas case which requires analysis of the following six factors:

1) whether the attorney knew or should have known that the material was privileged;
2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
3) the extent to which the attorney reviews and digests the privileged information;
4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the

movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;

5) the extent to which movant may be at fault for the unauthorized disclosure;

6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

*Jain*, *supra*, 168 F. Supp. 2d at 1205.

These factors weigh in favor of this Court holding that Mr. Welch is not disqualified, as the facts here are very different from those in *Jain.* Here, Mr. Welch reviewed only a small portion of *one document* that even *arguably* contains privileged information. In *Jain*, the paralegal reviewed hundreds of clearly privileged documents, and that firm had eleven months of access to thousands of privileged information, with review of hundreds of privileged documents.

### E. Brandewiede Should Be Awarded Sanctions For The Consequences of Foss' Discovery Violation of Failing to Produce the Vorwerk Wrongful Termination Letter, Which Include Brandewiede's Attorney's Fees on Appeal.

Brandewiede moved for sanctions for Foss' failure to produce the Vorwerk wrongful termination letter and other evidence. CP 177-189 (motion); CP 265-269 (reply). He argued Foss engaged in "intentional withholding of internal communications that directly contradict Foss' theory of the case and that exculpate Brandewiede and Brandewiede Construction from the claims asserted by Foss." CP 177-78. The relief sought included production of all Vorwerk-related materials and fees and costs incurred. CP 188. The order

denying the motion expressly tied it to the disqualification order allowing Brandewiede's "new counsel" to re-file it. CP 274-75.

Foss admitted it had the 38-page Vorwerk wrongful termination letter in its possession and failed to produce it in any form, whether whole or partly redacting the email portion it now claims is privileged.[31] Similar to *Fisons*, where "interrogatories and requests for productions should have led to the discovery of the 'smoking gun' documents [which were not produced so that] their existence was not revealed to the [requesting party] until one of them was anonymously delivered to his attorneys," 122 Wn.2d at 337, so here the long Vorwerk letter setting out the entire scenario of the project, including Foss' knowledge of Brandewiede's actual role as a subcontractor,[32] was not produced as it should have been pursuant to interrogatories and requests for production. And while the letter was not anonymously delivered to Brandewiede's attorney, like *Fisons,* it only came to his attention through third party disclosure, not by production from Foss. Further, it was after Mr. Welch's effort to designate that document for use in trial that Foss declared it privileged and poison to Mr. Welch's continued participation, getting him disqualified for finally obtaining possession and use of a

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[31] *See* RP 34:16 – 18: "granted it's in a file, a hard file somewhere with Foss. It did not come up in our search, our initial search for documents that were relevant to the project, . . . ."

[32] *See* CP 194 ¶¶ 8-10, Vorwerk Dec., summarizing this scenario.

critical document Foss should have produced early in the case, imposing huge costs on Brandewiede.

Under these circumstances of an admitted violation of the discovery rules which require production of all responsive documents in the possession of the party, sanctions are mandated. *Fisons,* 122 Wn.2d at 346.

Whatever other sanctions are imposed to cure the violation, the rules provide that "the court ***shall*** require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust," CR 37(d) (bold added). Brandewiede sought and was erroneously denied such minimum relief,[33] which does not require *Burnet* balancing because it does not exclude evidence or claims. The facts here cry out for a fee award as part of righting the wrong, including fees on appeal.

In *Fisons* the trial court had denied a violation ruling the nondisclosure of material evidence was not intentional and denied sanctions. The Supreme Court held that "intent need not be shown

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[33] Brandewiede's sanctions motion requested relief as follows, at CP 188:

> Brandewiede requests the issuance of an order that compels Foss to produce all communications between Van Vorwerk and Foss' management, a delay in the trial to allow for Brandewiede to properly prepare for trial and monetary sanctions against Foss equal to all of Brandewiede's fees and costs incurred to date and that will be incurred in reviewing the additional discovery produced by Foss. [Alternative relief request omitted.]

before sanctions are mandated" and then, itself determined there was a violation and that sanctions were required. *Fisons,* 122 Wn.2d at 345-46.[34] This court can and should do the same. Given CR 37(d), it also should direct that the fees include Brandewiede's fees on appeal and at trial, at least from when Foss objected to the use of the Vorwerk evidence.

## V. CONCLUSION

Brandewiede respectfully requests the Court to: 1) vacate the order of disqualification and excluding evidence and specifically provide that the Vorwerk evidence may be used at trial, subject to proper objections other than privilege; 2) determine, as in *Fisons,* that sanctions are required for Foss' discovery violation of failing to produce the Vorwerk wrongful termination letter and, further, that part of the required sanctions include Brandewiede's appeal fees and trial court fees from the time Foss objected to use of the Vorwerk evidence; and 3) if this Court does not determine additional fees or other remedies are required for Foss' discovery violations as to the Vorwerk evidence, remand to determine what additional sanctions or remedies are appropriate to remedy the violations, if any.

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[34] A remand for a determination as to whether sanctions are warranted would be appropriate but is not necessary. Where, as here, the trial judge has applied the wrong legal standard to evidence consisting entirely of written documents and argument of counsel, an appellate court may independently review the evidence to determine whether a violation of the certification rule occurred. **If a violation is found, as it is here, then sanctions are mandated** . . ."

*Fisons,* 122 Wn.2d at 345-346 (footnotes omitted) (emphasis added).

Dated this 29th day of September, 2014.

**CARNEY BADLEY SPELLMAN, P.S.**

By _____
Gregory M. Miller, WSBA No. 14459
*Attorneys for Petitioners Brandewiede*

## APPENDICES

# APPENDIX A

FILED
13 NOV 27 AM 9:15

KING COUNTY
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CASE NUMBER: 12-2-23895-2 SEA

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

| | |
|---|---|
| FOSS MARITIME COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof; JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,<br><br>Defendants. | NO. 12-2-23895-2 SEA<br><br>DECLARATION OF JOHN R. WELCH IN SUPPORT OF BRANDEWIEDE'S RESPONSE RE: FOSS' MOTION TO DISQUALIFY COUNSEL<br><br>Hearing Date: December 2, 2013 |

I, John R. Welch, hereby declare and state as follows:

1. I am an attorney with the law firm of Carney Badley Spellman, and the attorney for Defendants Jeff Brandewiede, Melanie O'Cain Brandewiede and Brandewiede Construction, Inc., (collectively referred to herein as "Brandewiede") in this matter. I am over 18 years of age, competent to testify and have personal knowledge of the statements provided in this declaration.



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2. Attached as **Exhibit A** is a true and correct copy of Foss' Answers to Brandewiede's First Interrogatories and Request for Production of Documents to Foss,.

3. Attached as **Exhibit B** is a true and correct copy of Foss' Disclosure of Primary Witnesses dated July 1, 2013, which includes Mr. Van Vorwerk as a potential primary witness and identifies his contact information as "c/o Garvey Schubert Barer, 1191 Second Avenue, Suite 1800, Seattle, Washington 98101", Foss' attorneys.

4. Attached as **Exhibit C** is a true and correct copy of my e-mail to Foss' counsel dated September 19, 2013. At the time I had heard that Mr. Vorwerk was no longer employed by Foss and wanted to know if Foss would make Mr. Vorwerk available for deposition or if Brandewiede would need to subpoena Mr. Vorwerk. In response, Foss' counsel provided Mr. Vorwerk's contact information.

5. I then contacted Mr. Vorwerk regarding his availability for a deposition. In this initial conversation Mr. Vorwerk agreed that in lieu of sitting for a deposition he would meet with Jeff Brandewiede myself on September 24, 2013 at a restaurant in Lake City to discuss his involvement with the Alucia project.

6. During the meeting with Mr. Vorwerk on September 24, 2013, Mr. Vorwerk stated that early on in the Alucia project he had sent an e-mail to his boss, Mark Houghton, and informed him that Brandewiede Construction did want to be in partnership with CLS but CLS's owners rejected this arrangement and hired Jeff as a subcontractor. I asked Mr. Vorwerk if he would have a copy of the e-mail he was referring to and he stated that he might and that he would check. He also noted that he had other e-mail communications regarding the Alucia project that he would make available to Brandewiede. Additionally, Mr. Van Vorwerk had brought with him a 38 page document

titled "The Wrongful Termination of Van V. Vorwerk", dated June 27, 2012, that he had drafted after his termination. Mr. Van Vorwerk offered to provide a copy of his June 27, 2012 letter.

7. On October 24, 2013, I again met with Mr. Vorwerk in Lake City for the purpose of obtaining Mr. Vorwerk's e-mail communications regarding his work on the Alucia. During this meeting, Mr. Vorwerk explained that he was unable to separate out just the Alucia related communications and, instead provided a hard drive that contained two folders of communications regarding his work as an estimator and project manager for Foss.

8. On Friday November 8, 2013, two weeks after receiving Van Vorwerk's e-mail communications, I informed Foss' counsel that we had received documents from Mr. Vorwerk. I also noted that we had information that Foss did not fully comply with Brandewiede's discovery requests and informed Foss' counsel that I had only reviewed a portion of Van Vorwerk's records.

9. On Friday November 15, 2013, I provided Foss with a thumb drive containing the entire file received from Van Vorwerk. Attached hereto as **Exhibit D** is a true and correct copy of my cover letter to Foss' counsel.

10. Given the recent receipt of Mr. Van Vorwerk's files, the pending trial date, and other professional commitments, I have been unable to review all the files provided by Van Vorwerk and compare them to the information provided by Foss in response to Brandewiede's discovery requests. Moreover, except for possible attorney client communications contained within the document titled "The Wrongful Termination of Van



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7. On October 24, 2013, I again met with Mr. Vorwerk in Bothell for the purpose of obtaining Mr. Vorwerk's e-mail communications regarding his work on the Alucia. During this meeting, Mr. Vorwerk explained that he was unable to separate out just the Alucia related communications and, instead provided a hard drive that contained two folders of communications regarding his work as an estimator and project manager for Foss.

8. On Friday November 8, 2013, two weeks after receiving Van Vorwerk's e-mail communications, I informed Foss' counsel that we had received documents from Mr. Vorwerk. I also noted that we had information that Foss did not fully comply with Brandewiede's discovery requests and informed Foss' counsel that I had only reviewed a portion of Van Vorwerk's records.

9. On November 12, 2013, Foss' counsel, without the benefit of having seen the documents provided by Mr. Vorwerk, sent an e-mail with his concerns that the documents I had received from Mr. Van Vorwerk contain proprietary and/or attorney-client communications. Attached as **Exhibit D** is a true and correct copy of my e-mail from Foss' counsel dated November 12, 2013.

10. Once Foss asserted that Mr. Van Vorwerk's e-mail communications contain attorney-client communications, I stopped reviewing them.

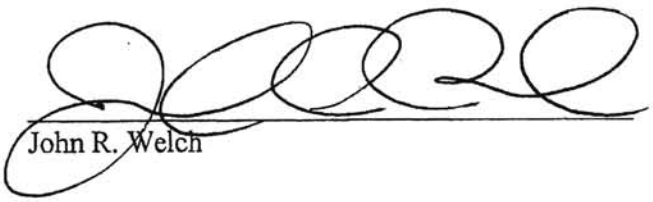
11. On Friday November 15, 2013, I provided Foss with a thumb drive containing the entire file received from Van Vorwerk. Attached hereto as **Exhibit E** is a true and correct copy of my cover letter to Foss' counsel.

12. In compliance with CR 26, I e-mailed Foss' counsel, John Crosetto, in the evening of December 5, 2013 and attached Mr. Van Vorwerk's declaration. I requested a CR 26(i) conference in the morning of December 6, 2013. Attached hereto as **Exhibit F** is a

true and correct copy of my e-mail to Foss' counsel dated December 5, 2013. In the morning of December 6, 2013, I spoke with Mr. Crosetto about Mr. Vorwerk's declaration and his claim that he had notified Foss' management of the relationship between Brandewiede Construction and CLS. The parties were unable to resolve the discovery dispute.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 6th day of December, 2013, at Seattle, Washington.



John R. Welch



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# APPENDIX C

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KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 12-2-23895-2 SEA

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof; JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

Defendants.

NO. 12-2-23895-2 SEA

SUPPLEMENTAL DECLARATION OF JOHN R. WELCH IN SUPPORT OF BRANDEWIEDE'S MOTION FOR RECONSIDERATION

I, John R. Welch, hereby declare and state as follows:

1. I am an attorney with the law firm of Carney Badley Spellman, and the attorney for Defendants Jeff Brandewiede, Melanie O'Cain Brandewiede and Brandewiede Construction, Inc., (collectively referred to herein as "Brandewiede") in this matter. I am over 18 years of age, competent to testify and have personal knowledge of the statements provided in this declaration.



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Seattle, WA 98104-7010
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F (206) 467-8215

2. Attached as **Exhibit A** is a true and correct copy of the November 8, 2013 e-mail from John Crosetto to John Welch.

3. Attached as **Exhibit B** is a true and correct copy the November 12, 2013 e-mail from John Crosetto to John Welch. At the time of receipt of Mr. Crosetto's November 12, 2013 e-mail, I had only reviewed a portion of the e-mail communications provided by Van Vorwerk and had not reviewed any e-mail communication that would even remotely indicate to me that the e-mail documents contained attorney-client communications or attorney work product. However, given Mr. Crosetto's expressed concerns, I immediately stopped reviewing the e-mail communications received from Mr. Van Vorwerk.

4. Attached as **Exhibit C** is a true and correct copy the February 10, 2014 e-mail from John Welch to John Crosetto in which I request a copy of the privilege log and declaration that are referenced in the Notice as documents filed under seal on February 5, 2014. Foss's counsel did not respond to the request.

5. Attached as **Exhibit D** is a true and correct copy the February 20, 2014 e-mail from John Welch to John Crosetto in which I let Mr. Crosetto know that Brandewiede was considering filing a Motion for Reconsideration and again requested copies of the privilege log and declaration that was filed under seal.

6. Attached as **Exhibit E** is a true and correct copy of the February 24, 2014 e-mail string by and between John Welch to John Crosetto in which Foss' counsel states that he believes he needs direction from the court before providing any sealed documents. In response, I questioned why documents not privileged would be submitted to the court under seal and asserted Brandewiede's right to see a privilege log of what has been filed under seal and under a claim of attorney-client privilege. Foss' attorney did not respond.



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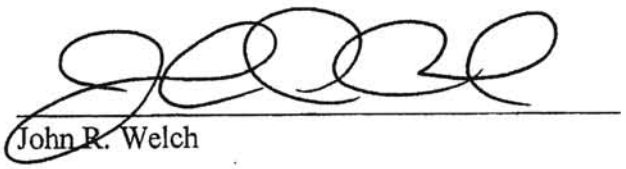
I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 28th day of February, 2014, at Seattle, Washington.



John R. Welch



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# APPENDIX D

Honorable Dean S. Lum
Dept. 12
Ex Parte

ORIGINAL

FILED
KING COUNTY WASHINGTON
FEB 18 2014
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BY ~~Sung Kim~~ KIRSTIN GRANT
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof; JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

Defendants.

NO. 12-2-23895-2 SEA

(DSC) ~~PROPOSED~~ ORDER TO DISQUALIFY COUNSEL FOR DEFENDANT JEFF BRANDEWIEDE AND SEEKING SANCTIONS

THIS MATTER came before the Court on Plaintiff's Motion to Disqualify Counsel for Defendant Jeff Brandewiede and Seeking Sanctions ("the Motion"). The Court reviewed the pleadings on file herein regarding the Motion, including the following. The Court considered the pleadings filed herein, and fully considered the following:

1. Plaintiff's Motion;

2. The Declaration of John Crosetto;



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206 464 3939

3. The Declaration of Lisa Sulock;

4. Documents filed and served in response to this Motion; and

5. Documents filed and served in reply to the response.

The Court hereby finds: that Brandewiede counsel did not address carelessly cited in plaintiff's brief and that some (but not all) documents he reviewed were clearly attorney-client communications

1. The Court excludes evidence tainted by Mr. Vorwerk's and Mr. Welch's wrongful conduct – specifically, Defendant Brandewiede's Trial Exhibit 80; all of the information contained on the Drive; and any additional information containing or derviced from privileged and/or confidential information belonging to Plaintiff that might be in Mr. Welch's, Mr. Brandewiede's, or Mr. Vorwerk's possession, unless dependants obtain that information from a source untainted by the wrongful conduct.

3. Grant to Plaintiffs attorneys fees to bring this motion and sanctions.

Based on the above findings, it is hereby ORDERED:

1. Plaintiff's motion is GRANTED. Counsel for defendant Brandewiede is disqualified. Pltf. counsel shall propose a new trial date and case schedule by separate motion.

DONE IN OPEN COURT this 14 day of February, 2014.

KING COUNTY SUPERIOR COURT
JUDGE

Presented By:

GARVEY SCHUBERT BARER

By: *s/ John Crosetto*
John Crosetto, WSBA # 36667
Tyler W. Arnold, WSBA #43129
Attorneys for Judgment Creditor-Plaintiff
Foss Maritime Company

~~PROPOSED~~ ORDER TO DISQUALIFY COUNSEL FOR DEFENDANT JEFF BRANDEWIEDE AND SEEKING SANCTIONS- 2

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# APPENDIX E

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

| | |
|---|---|
| FOSS MARITIME COMPANY,<br><br>Respondent,<br><br>v.<br><br>CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof;<br><br>Defendants,<br><br>JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.<br><br>Petitioners. | No. 71611-5-I<br><br>COMMISSIONER'S RULING GRANTING DISCRETIONARY REVIEW |

This case involves disqualification of counsel for access to and limited review of attorney-client privileged communications belonging to an opposing party. Defendants Jeff Brandewiede, his wife, and Brandewiede Construction (collectively Brandewiede) seek discretionary review of the trial court's order disqualifying their counsel and excluding evidence "tainted" by the counsel's "wrongful conduct." Brandewiede's counsel obtained documents containing some attorney-client communications belonging to plaintiff Foss Maritime Company (Foss) from Foss's former employee. Foss agrees the counsel's contact with its former employee was proper. Case law appears to require the trial court to weigh various factors before imposing the drastic sanction of

disqualification for access to and review of privileged communications. Here, the trial court made no findings or conclusions as to the extent of counsel's review, significance of reviewed documents, fault, or prejudice. Review is granted under RAP 2.3(b)(2).

**FACTS**[1]

The case involves a commercial contract dispute over the work and payment for the renovation of a vessel named Alucia. Plaintiff Foss contracted with defendant Core Logistic Services to work on Alucia. Foss claims Core Logistic Services is a partnership of defendants Lisa Long, Frank Gan, and Brandewiede. Brandewiede claims he was only a subcontractor. In July 2012, Foss filed a lawsuit against Core Logistic Services, Long, Gan, and Brandewiede for breach of contract, unjust enrichment, and fraud.

In October 2012, during discovery, Foss identified its former employee and Alucia project manager Van Vorwerk as a person likely to have discoverable information. According to Vorwerk, he reported to Foss's shipyard manager and had no direct responsibility for the overall management of the shipyard or the company, which was handled by Foss's upper management.[2] Although Foss terminated Vorwerk's employment before the lawsuit was filed,[3] Foss did not indicate in its discovery response that Vorwerk was no longer employed by the company. Foss listed Vorwerk as its potential witness and identified his contact information as care of Foss's counsel.[4] Brandewiede claims Foss misrepresented its relationship with Vorwerk.

In September 2013, Brandewiede's counsel contacted Foss's counsel about

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[1] This ruling refers to appendices to Brandewiede's motion for discretionary review as "Brandewiede App." and appendices to Foss's answer as "Foss App."

[2] Brandewiede App. F (Vorwerk declaration) at 2 ¶ 2.

[3] Brandewiede App. F (Vorwerk declaration) at 1 ¶ 2.

[4] Brandewiede App. D at 8 (Foss's disclosure of primary witnesses) ¶ 5.

setting Vorwerk's deposition and learned then that Vorwerk no longer worked for Foss. Foss's counsel provided Brandewiede's counsel with Vorwerk's contact information. On September 24, 2013, Brandewiede's counsel met Vorwerk for an interview in lieu of a deposition. Foss agrees the interview itself was proper, and there is no claim of an improper ex parte contact. During the interview, Vorwerk provided Brandewiede's counsel with a copy of a 38-page document entitled "The Wrongful Termination of Van V. Vorwerk" that Vorwerk wrote and submitted to Foss after his termination. Vorwerk's "wrongful termination" letter contained Vorwerk's recitation of facts related to his work and the Alucia project as well as his email communications with other Foss employees. The letter included a couple of emails involving Vorwerk, Foss's in-house counsel (with title "VP Safety, Quality & General Counsel"), and several others. The emails were not designated as attorney-client privileged. Brandewiede complains that Foss did not produce or identify Vorwerk's "wrongful termination" letter in discovery.

During the September 2013 interview, Vorwerk offered to bring copies of his other emails about the Alucia project. On October 24, 2013, Brandewiede's counsel met with Vorwerk again to obtain his emails. Vorwerk told Brandewiede's counsel he was unable to separate the Alucia related emails and provided a thumb drive containing two folders of his emails about his work as an estimator and project manager for Foss.

About two weeks later, Brandewiede's counsel informed Foss's counsel of the documents he received from Vorwerk, stating he had only reviewed a portion of the documents. Brandewiede's counsel also complained that Foss did not fully comply with Brandewiede's discovery requests. Foss's counsel emailed Brandewiede's counsel,

requesting the documents as responsive to its discovery requests.[5] Four days later, Brandewiede provided Foss with his proposed witness and exhibit lists, which included Vorwerk's "wrongful termination" letter as a proposed exhibit.

On November 12, 2014, Foss's counsel emailed Brandewiede's counsel, expressing a concern that Vorwerk had provided Brandewiede with Foss's proprietary information, attorney-client privileged communications, or attorney work product.[6] According to Brandewiede's counsel, at that time, he had reviewed only a portion of the emails received from Vorwerk, had reviewed no documents "that would even remotely indicate" attorney-client privileged communications or attorney work product, and stopped any further review.[7] On November 15, 2013, Brandewiede's counsel provided Foss with the thumb drive received from Vorwerk, requesting, however, that Foss return the thumb drive after downloading the file.

On November 22, 2013, Foss filed a motion to disqualify Brandewiede's counsel and his firm and for discovery sanctions. Foss argued that Vorwerk's "wrongful termination" letter and emails on the thumb drive contained its proprietary and privileged information and that Brandewiede's counsel's possession and use of the documents prejudiced its ability to receive a fair trial. Foss argued that Brandewiede's counsel violated rules of professional conduct (RPC) 4.2 and 4.4(a) by obtaining, reviewing, and using privileged information.[8] It appears the "use" of the documents refers to Brandewiede's counsel's submission to Foss of the "wrongful termination" letter as a proposed exhibit. Foss also sought as discovery sanctions under CR 26(b) exclusion of

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[5] Foss App. B at 2 ¶ 3; Ex. 1 to Foss App. B.
[6] Foss App. B at 2 ¶ 4; Ex. 2 to Foss App. B.
[7] Brandewiede App. K at 2 ¶ 3; S at 3 ¶¶ 8, 10.
[8] Brandewiede App. B at 8-10.

evidence "tainted" by Vorwerk's and Brandewiede's counsel's "wrongful conduct," including Vorwerk's letter and all the information on the thumb drive.[9]

Brandewiede countered that Foss's motion lacked a legal or factual basis. Brandewiede's counsel submitted his declaration stating that he did not notice any attorney-client communication in Vorwerk's 38-page "wrongful termination" letter until it was brought to his attention by Foss's counsel and offered to redact the communication, to which Foss did not respond.[10] Brandewiede's counsel also stated that he only reviewed a portion of the emails on the thumb drive, did not notice any attorney-client communications, and stopped his review when notified by Foss's counsel that the file might contain attorney-client communications.[11] Both Brandewiede and Foss filed separate motions for discovery sanctions, which are not at issue in this ruling.[12]

On January 17, 2014, the trial court heard the parties' argument on Foss's motion to disqualify counsel and for sanctions as well as the parties' separate motions for discovery sanctions. The court took the matter under advisement and ordered Foss to file allegedly privileged documents under seal with a privilege log, which Foss did.

On February 14, 2014, the trial court issued an order disqualifying Brandewiede's counsel and his firm, finding "Brandewiede's counsel did not address case law cited in

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[9] Brandewiede App. B at 13-14.

[10] Brandewiede App. D at 4 ¶¶ 11, 12.

[11] Brandewiede App. D at 3-4 ¶¶ 8, 10, 13; S at 3 ¶¶ 8, 10.

[12] In his motion for discovery sanctions, Brandewiede argued Foss (1) misrepresented Vorwerk's involvement in providing discovery responses, (2) improperly identified its counsel as contact for Vorwerk when Foss had terminated Vorwerk for more than a year, and (2) withheld emails from Vorwerk to its management regarding the relationship between Brandewiede and Core Logistic Services at issue in the lawsuit. Brandewiede App. O.

In its separate discovery sanctions motion, Foss argued Brandewiede supplemented his production with nearly 600 pages of documents on the eve of the scheduled trial, and Foss was thus entitled to a default judgment, dismissal of Brandewiede's counterclaims, exclusion of the newly discovered documents, and fees and costs related to the issue. Brandewiede App. P.

plaintiff's brief" and "some (but not all) documents he reviewed were clearly attorney-client communications." The court also excluded evidence "tainted" by Vorwerk's and Brandewiede's counsel's "wrongful conduct," including Vorwerk's "wrongful termination" letter, information contained on the thumb drive, and any further information containing or derived from privileged or confidential information belonging to Foss that might be in Brandewiede's, his counsel's, or Vorwerk's possession, unless defendants obtained the information from a source "untainted by the wrongful conduct." The trial court did not identify what conduct was "wrongful." The court made no findings or conclusions as to what, if any, discovery or ethical rules were violated. The court denied Foss's and Brandewiede's separate motions for discovery sanctions without prejudice.[13]

This Court granted a temporary stay of the trial court's order of disqualification pending a ruling on Brandewiede's motion for discretionary review.

**DECISION**

Discretionary review is available only on the narrow grounds set forth in RAP 2.3(b). Brandewiede seeks review under RAP 2.3(b)(1), (2), and (3), which provide:

> (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 . . . as to call for review by the appellate court[.]

"Under these criteria, there is an inverse relationship between the certainty of error and its impact on the trial. Where there is a weaker argument for error, there must

[13] Brandewiede App. H.

be a stronger showing of harm."[14] For example, a denial of summary judgment or exclusion of evidence is generally insufficient to satisfy the effect prong of RAP 2.3(b)(2) and requires a showing of an obvious error. However, disqualification of counsel is akin to an injunction and operates as a "penalty" for Brandewiede as well as for his counsel.[15] In addition, a disqualification decision presents a unique consideration where a party seeking to challenge it after a final judgment must show prejudice.[16] For the reasons discussed below, discretionary review is warranted under RAP 2.3(b)(2).

**A. Disqualification of Counsel**

Whether the trial court committed an error that merits discretionary review should be evaluated in light of the applicable standard of review. Generally, this Court reviews a disqualification order for an abuse of discretion.[17] However, if disqualification is based

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[14] Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462-63, 232 P.3d 591 (2010).

[15] See In re Firestorm 1991, 129 Wn.2d 130, 140, 916 P.2d 411 (1996) ("Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary.").

[16] See First Small Business Inv. Co. of Cal. v. Intercapital Corp. of Or., 108 Wn.2d 324, 331-32, 738 P.2d 263 (1987) (when denial of disqualification is challenged after a judgment, the judgment will not be reversed without a showing of prejudice); Teja v. Saran, 68 Wn. App. 793, 846 P.2d 1375 (1993) (same); RWR Mgmt., Inc. v. Citizens Realty Co., 133 Wn. App. 265, 280, 135 P.3d 955 (2006) ("The court's interlocutory decision [to disqualify counsel for a conflict of interest] was not presented for discretionary appellate review. Consequently, we question the viability of the issue now that the matter has been tried with able counsel.").

It appears there is a split among other states as to whether disqualification of counsel is immediately appealable. Compare Arkansas Valley State Bank v. Phillips, 171 P.3d 899, 903 (Ok. 2007) ("An order granting a motion to disqualify counsel is a final order subject to appellate review."); Great Lakes Constr., Inc. v. Burman, 114 Cal. Rptr.3d 301, 305 n.2 (App. 2010) (same); Slade v. Ormsby, 872 N.E.2d 223, 225 (Mass. App. 2007) (same); Robinson & Lawing, L.L.P. v. Sams, 587 S.E. 2d 923, 925 n.3 (N.C. App. 2003) (same); Ross v. Ross, 640 N.E. 2d 265, 267-69 (Ohio App. 1994) (same) with Flores Rentals, L.L.C. v. Flores, 153 P.3d 523, 532 (Kan. 2007) (order disqualifying counsel is not a final decision appealable as a matter of right); In re Estate of French, 651 N.E. 2d 1125, 1128 (Ill. 1995) (same). In the federal court, the United States Supreme Court has resolved a split among federal circuit courts to hold that an order disqualifying counsel is not an immediately appealable final decision. See Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430-40, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985).

[17] State v. Schmitt, 124 Wn. App. 662, 666, 102 P.3d 856 (2004) ("We review the

on application of discovery or ethical rules, application of such rules is a question of law subject to a de novo review.[18] The trial court made no findings or conclusions as to whether any discovery or ethical rule was violated. In the order of disqualification, the court interlineated that "some (but not all) documents [Brandewiede's counsel] reviewed were clearly attorney-client communications." Evaluating whether such review justified disqualification requires exercise of discretion, and, if review is granted, the trial court's decision in this respect will be reviewed for an abuse of discretion.[19]

As to the factual basis for the disqualification (counsel's access to and review of privileged communications), I have reviewed in camera copies of Vorwerk's 38-page "wrongful termination" letter and his emails on the thumb drive reviewed by the trial court.[20] Some of the emails on the thumb drive appear to contain attorney-client communications. But Brandewiede's counsel stated in his declaration that he only reviewed a portion of the emails on the thumb drive, had not noticed any attorney-client communications, and stopped his review once Foss's counsel notified him of a concern about privileged information. No contrary evidence was presented, and the trial court made no findings as to the extent, if any, of the counsel's review of any privileged communications. The only attorney-client communication reviewed by Brandewiede's counsel appears to be the email communication involving Vorwerk, Foss's in-house

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question of whether to disqualify an attorney under the abuse of discretion standard.").

[18] See Firestorm, 129 Wn.2d at 135 (application of CR 26 is a question of law subject to de novo review); Sanders v. Woods, 121 Wn. App. 593, 597, 89 P.3d 312 (2004) ("Review of a court's decision to grant or deny a motion to disqualify counsel [for conflict of interest under RPC 1.9] is a legal question that is reviewed de novo.").

[19] See RWR, 133 Wn. App. at 279 ("Determining the proper resolution of this alleged conflict requires the exercise of discretion, and we review the trial court's resolution for abuse of discretion.").

[20] By ruling of April 14, 2014, I ordered Foss to submit to this Court, in a sealed envelope, copies of the sealed documents Foss submitted to the trial court along with a copy of the privilege log Foss submitted to the trial court.

counsel, and several others contained in Vorwerk's "wrongful termination" letter.

Disqualification of counsel is a drastic remedy, and a "court should not disqualify an attorney absent compelling circumstances."[21] Brandewiede argues that none of the cases cited by Foss supports the drastic remedy of disqualification. He argues the trial court erred in not engaging in the Burnet[22] discovery sanction inquiry as to willfulness, prejudice, and lesser sanctions. Foss argues that "mere access" to any attorney-client privilege required disqualification to preserve the public confidence in the legal profession.[23] Foss also points out Brandewiede's counsel reviewed its attorney-client communications contained in Vorwerk's "wrongful termination" letter and used the letter by submitting it to Foss as a proposed exhibit in an exchange of proposed exhibits.

In In re Firestorm 1991, a case involving an ex parte interview of an expert hired by opposing counsel, the Supreme Court explained the "limited applicability" of the sanction of disqualification, while noting, "One situation requiring the drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party."[24] The court cited Kurbitz, a conflict of interest case, and stated that the "issue of access to privileged information frequently arises in conflict of interest cases."[25] Review of Kurbitz, Firestorm, and other cases cited by Foss indicates the trial court probably abused its discretion in disqualifying Brandewiede's counsel and his firm without making

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[21] Schmitt, 124 Wn. App. at 666.

[22] Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997). Under Burnet, when imposing one of the harsher remedies for a discovery violation such as dismissal, default, or exclusion of testimony, a trial court must make findings that show consideration of lesser sanctions, willfulness, and prejudice. Burnet, 131 Wn.2d at 494, 933 P.2d 1036 (1997); Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 687-88, 132 P.3d 115 (2006).

[23] Answer to Motion for Discretionary Review at 15.

[24] Firestorm, 129 Wn.2d at 140 (citing Kurbitz v. Kurbitz, 77 Wn.2d 943, 947, 468 P.2d 673 (1970)).

[25] Firestorm, 129 Wn.2d at 140.

findings as to the extent of counsel's review of privileged materials, significance of the materials, counsel's fault if any, or prejudice.

Kurbitz is a conflict of interest case, where the Supreme Court held an attorney was disqualified to represent a wife in a divorce case where his law firm partner had represented the husband and wife on probate and family business matters with access to and possession of the estate file.[26] The court adopted, from federal cases, a 2-factor analysis in determining whether to disqualify an attorney "for conflict of interest": (1) whether the matters in the present suit involving the former client are substantially related to matters on which the attorney or someone in his or her association previously represented the former client and (2), if not, whether the attorney had access to confidential information material to the present suit.[27] Applying the two factors, the court concluded both factors were present and raised an "appearance of conflicting interests" necessitating the attorney's disqualification.[28] Unlike Kurbitz, this case does not involve a violation of an attorney's ethical duty not to represent conflicting interests.

Firestorm involved plaintiff's counsel's ex parte interview with an expert hired by defendants' counsel in violation of CR 26(b)(5). The Supreme Court reversed the order of disqualification because the information disclosed by the expert was not privileged, and disqualification as a sanction did not adhere to the guidelines set forth in Fisons, where the trial court was to fashion and impose the least severe sanction adequate to serve the purpose of the particular sanction.[29] Firestorm does not appear to support a

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[26] Kurbitz v. Kurbitz, 77 Wn.2d 943, 947, 468 P.2d 673 (1970).
[27] Kurbitz, 77 Wn.2d at 947.
[28] Id.
[29] See Firestorm, 129 Wn.2d at 139-45; Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993).

per se rule, as claimed by Foss, that mere access to privileged information taints the judicial process and requires disqualification, regardless of the circumstances. Instead, as discussed in a federal district case Richards v. Jain[30] relied on by Foss, Firestorm appears to require weighing of various factors in deciding whether to disqualify counsel for access to and review of an opposing party's attorney-client privilege.

Richards involved a plaintiff's paralegal's extensive review of almost a thousand attorney-client privileged documents belonging to defendants, many of which contained a bold type warning on their face "PRIVILEGED AND CONFIDENTIAL" or a warning footer, while others stated "Attorney-Client Privileged Communication" in the body of the emails.[31] The plaintiff, who supplied the documents, was defendant's corporate vice president.[32] The paralegal "received privileged information, reviewed it, and neither ceased review upon notice of its privileged nature nor informed the privilege holder of its receipt."[33] The court concluded the firm's 11 months of access to privileged materials created an appearance of impropriety and so tainted the process that disqualification was justified.[34] The court also engaged in a 6-factor analysis "in evaluating whether disqualification is called for when an attorney receives privileged information outside the normal course of discovery."[35] The court stated the six factors "neatly incorporate the concepts of prejudice, bad faith, and knowledge elucidated by the Washington Supreme

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[30] 168 F. Supp. 2d 1195 (W.D. Wash. 2001).

[31] Richards, 168 F. Supp. 2d at 1198-99, 1201. The paralegal not only reviewed "thousands of documents" retrieved through his first search for case relevance but later conducted a second search. Id. at 1201. He "reviewed literally hundreds of documents that were on their face privileged and informed no one and did not stop reviewing the documents." Id. at 1202. The paralegal admitted "he simply ignored the privilege banners." Id.

[32] Id. at 1202.

[33] Id. at 1201.

[34] Id. at 1200.

[35] Id. at 1205.

Court as elements to be weighed in evaluating a motion to disqualify," citing, among other things, Firestorm.[36] The factors are as follows:

> (1) Whether the attorney knew or should have known that the material was privileged;
>
> (2) The promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
>
> (3) The extent to which the attorney reviews and digests the privileged information;
>
> (4) The significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> (5) The extent to which movant may be at fault for the unauthorized disclosure;
>
> (6) The extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.[37]

Here, the trial court found "some (but not all) documents [Brandewiede's counsel] reviewed were clearly attorney-client communications." It appears the court based this finding in part on its review of the emails on the thumb drive. However, as discussed above, Brandewiede's counsel stated he reviewed only a portion of the emails and did not notice any attorney-client communications. Brandewiede's counsel stated:

> At the time of receipt of [Foss's counsel's] November 12, 2013 e-mail, I had only reviewed a portion of the e-mail communications provided by Van Vorwerk and had not reviewed any e-mail communication that would even remotely indicate to me that the e-mail documents contained attorney-client communications or attorney work product.[38]

Brandewiede's counsel reviewed Vorwerk's 38-page "wrongful termination" letter and submitted it to Foss as a proposed exhibit, and the letter contained a couple of

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[36] Richards, 168 F. Supp. 2d at 1205.
[37] Id. (quoting In re Meador, 968 S.W.2d 346, 351-52 (Tex. 1998)).
[38] Brandewiede App. K at 2 (emphasis added).

emails that appear to be attorney-client communications. But the trial court made no findings or conclusions about the extent of the counsel's review of those emails, their significance, fault, or prejudice. While referring to "wrongful" conduct of Vorwerk and Brandewiede's counsel, the trial court did not state what conduct was wrongful and whether the conduct violated any ethical or discovery rule. I conclude the absence of findings on the circumstances of Brandewiede's counsel's access to and limited review of privileged communications is a probable error that merits discretionary review.[39]

**B. Exclusion of Evidence**

The trial court excluded evidence "tainted" by Vorwerk's and Brandewiede's counsel's "wrongful conduct," including Vorwerk's "wrongful termination" letter, unless the information is obtained from an "untainted" source. Because the exclusion of the evidence is intertwined with the court's disqualification decision, review is granted as part of the overall issue as to the proper remedy for Brandewiede's counsel's access to and limited review of privileged communications.[40]

**CONCLUSION**

Discretionary review is warranted under RAP 2.3(b)(2) on the trial court's

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[39] Foss argues "all doubt must be resolved in favor of disqualification in order to prevent even the appearance of impropriety," citing other jurisdiction cases involving conflicts of interest. Answer to Motion for Discretionary Review at 15. But Foss cites no Washington case that presumes such impropriety that requires disqualification based on an attorney's access to privileged information belonging to an opposing party without further inquiry.

[40] In my ruling granting a temporary stay, I rejected Foss's argument that Carney Bradley Spellman was in contempt of the trial court's order of disqualification by representing Brandewiede in seeking review of the order in this Court. In its answer to Brandewiede's motion for discretionary review, Foss now argues Carney Bradley Spellman lacks standing to challenge the order of disqualification under Article III, section 2 of the United States Constitution and the prudential constraints, citing only federal cases. But Carney Bradley Spellman represents Brandewiede (not the firm itself) in this case. Foss does not argue Brandewiede lacks standing to challenge the disqualification order. Further, Foss presents no authority that Article III, section 2 of the United States Constitution applies to the Washington court and presents no argument under RAP 3.1 about an aggrieved party who may seek review by the appellate court.

February 18, 2014 order disqualifying counsel and excluding evidence. Therefore, it is

ORDERED that discretionary review is granted, and the clerk shall issue a perfection schedule. It is further

ORDERED that the stay ordered by ruling of April 14, 2014 will remain in effect until further order of this Court.

Done this 13th day of May, 2014.

Court Commissioner

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