

No. 36624-0-II

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

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STATE OF WASHINGTON
DEPUTY

COLLEEN McCALLUM,

Respondent,

vs.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,
a foreign insurer,

Appellant.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Lisa Worswick, Judge

BRIEF OF APPELLANT

Address:
Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

REED McCLURE
By Marilee C. Erickson
Attorneys for Appellant

Address:
201 E. Washington St., 16th Floor
Phoenix, AZ 85004-2382

STEPTOE & JOHNSON LLP
By Bennett Evan Cooper
Attorneys for Appellant

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I. INTRODUCTION

This appeal raises the legal standard for protective orders that limit the use and dissemination outside the case of raw unfiled discovery materials. The superior court at first granted, on Allstate's showing of good cause, a protective order limiting the use and dissemination of Allstate's claims manuals, claim bulletins, CCPR Implementation Training Manual, and the "McKinsey documents." The "McKinsey documents" are a compilation of materials relating to research-and-development work done by personnel from Allstate and McKinsey & Company, the internationally renowned consulting firm that Allstate retained in the mid-1990s to assist it in reviewing and improving its claims-handling processes and procedures.

The superior court then vacated the protective order and ordered production without any safeguards for the documents' confidentiality. In its later order, the superior court required a showing of "specific harm," though CR 26(c) requires only "good cause," which Allstate demonstrated in this case. Washington courts have never required a showing of "specific harm" or any other compelling interest in order to issue protective orders for mere unfiled discovery materials, much less for trade secrets. This Court should reverse the superior court and reinstate the protective order that limits the use and dissemination of Allstate's claims manuals, claim

bulletins, CCPR Implementation Training Manual, and “McKinsey documents” to this case, and thereby maintain the confidentiality of Allstate’s trade secrets and other valuable business information.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering the Order Granting Plaintiff’s Motion to Vacate Protective Order. (CP 662-63)

2. The superior court erred in entering the Order Denying Defendant’s Motion to Stay Order Vacating Protective Order. (CP 743-44)

3. The superior court erred in entering the Findings and Order Denying Defendant’s Motion for Reconsideration of Order Vacating Protective Order. (CP 984-87)¹

4. The superior court erred in entering Finding A. (CP 985)

5. The superior court erred in entering Finding B. (CP 985)

6. The superior court erred in entering Finding C. (CP 985)

7. The superior court erred in entering Finding D. (CP 985)

8. The superior court erred in entering Finding E. (CP 985)

9. The superior court erred in entering Finding F. (CP 985)

¹ A copy of the Findings and Order is attached as Appendix A.

10. The superior court erred in entering the Order Granting Plaintiff's Motion to Strike the Declaration of Bjorback re Changes in Deposition Testimony. (CP 988-89)

III. STATEMENT OF ISSUES

1. Did the superior court err in vacating the protective order where Allstate established that its claims manuals, claim bulletins, CCPR Implementation Training Manual, and "McKinsey documents" (1) contain trade secrets or other confidential and proprietary business information and (2) production of the documents without use and dissemination restrictions would cause significant commercial harm to Allstate? (Assignments of Error 1-9)

2. Did the superior court err by imposing a "specific harm" requirement for a protective order that merely limited the use and dissemination of unfiled discovery materials to this case? (Assignments of Error 1-9)

3. Did the superior court err by striking the second Bjorback Declaration where the declaration was properly submitted? (Assignment of Error 10)

IV. STATEMENT OF THE CASE

This case arises from a motor vehicle accident involving plaintiff Colleen McCallum; another motorist, Tuong Chung; and a phantom

vehicle. (CP 125) The accident was caused by the phantom vehicle. (CP 125) At the time of the accident, plaintiff was insured under an Allstate automobile policy which provided uninsured motorist (“UM”) benefits. (CP 125)

Plaintiff filed a UM claim. (CP 125) Allstate evaluated the claim and extended an offer of settlement which plaintiff declined. (CP 125-26) Plaintiff sued Allstate in King County Superior Court for the UM benefits and moved the case into mandatory arbitration. The arbitrator determined that plaintiff had damages in excess of policy limits, and Allstate paid the UM policy limits. (CP 125-26)

Plaintiff then filed suit in Pierce County Superior Court alleging, among other claims, bad faith and violations of the Consumer Protection Act based on Allstate’s handling of plaintiff’s UM claim. (CP 126) Plaintiff and Allstate engaged in extensive written discovery. Certain discovery issues were disputed. (CP 126) Plaintiff moved to compel and Allstate moved for a protective order seeking restrictions on distribution of documents that would be produced. (CP 343-64)

Allstate moved for an order providing that its “McKinsey documents,” claims manuals, claim bulletins, CCPR Implementation Training Manual, and training materials are confidential, commercial information, and/or trade secrets and should be produced only subject to

confidentiality protections. (CP 343-64) In support of the motion, Allstate submitted the declarations of Christine Sullivan, an Assistant Vice President from Allstate's home office in Northbrook, Illinois, and Robert Bjorback, Jr., an employee of Allstate's local market claim office. (CP 365-68, 340-42)

As to the "McKinsey documents," Allstate relied *solely* on the declaration of Ms. Sullivan. (CP 357) Ms. Sullivan's declaration also addressed the other documents: claims manuals, claim bulletins, and the CCPR Implementation Training Manual. (CP 356, 365-66) Mr. Bjorback's declaration only addressed *only* these latter documents and did *not* address the "McKinsey documents." (CP 340-42, Bjorback Dec. ¶¶ 5-17) Mr. Bjorback's declaration explicitly stated that he had "general familiarity with Allstate's claims manuals, claims handling procedures, and claim bulletins," as well as the "CCPR Implementation Training Manual." (CP 340)

On April 20, 2007, the superior court granted a protective order for Allstate's claims manuals, claim bulletins, the CCPR Implementation Training Manual, and "McKinsey documents." (CP 560-61) The protective order limited the use of the documents to this litigation and limited their distribution to plaintiff, her counsel, and her experts. (*Id.*)

Pursuant to, and in reliance on that order, Allstate timely produced the documents to plaintiff. (CP 620)

Plaintiff later deposed Mr. Bjorback and Ms. Sullivan as to their declarations. (CP 609) Plaintiff then moved to vacate the protective order under CR 60(b)(4) and 60(b)(11) on the grounds that Allstate had allegedly “engaged in misrepresentation or fraud and . . . the trial court entered the protective order in reliance upon mistaken information.” (CP 566-67, 568-75, 572) Plaintiff’s motion was primarily directed at the “McKinsey documents” and was predominantly based on her misperceptions as to the respective roles of the Sullivan and Bjorback declarations in laying the basis for Allstate’s protective order. (CP 566-67, 568-75)

On July 20, 2007, the superior court granted the motion to vacate but *not* on the ground that the Sullivan and Bjorback declarations were facially inadequate. (CP 712) Instead, the court said that it had “a number of concerns about the behavior of the defendant in this case.” (CP 711) The court stated that the declarations “seem in some substantial part, if not to contradict their testimony at the depositions” then to “lead the court to believe that Mr. Bjorback and Ms. Sullivan did not have the personal knowledge upon which to base the conclusions they came to in their declarations.” (CP 711) The court also expressed “great concern” that

Mr. Bjorback had belatedly changed his deposition answers about whether his declaration encompassed the “McKinsey documents.” (CP 711)

Allstate moved for reconsideration of the July 20 order because it appeared that superior court had misperceived the respective roles of the Sullivan and Bjorback declarations in establishing the basis for the protective order. (CP 668-78) In support of its motion, Allstate submitted a supplemental declaration from Mr. Bjorback (the “Second Bjorback Declaration”) regarding his misstatement during his deposition that his original declaration encompassed the “McKinsey documents” and his later correction of that testimony. (CP 679-80) Plaintiff belatedly moved to shorten time and to strike the Second Bjorback Declaration. (CP 745-49)

The court denied Allstate’s motion for reconsideration and struck the Second Bjorback Declaration. (CP 984-87, 988-89) The superior court entered the following findings:

A. That the declarations of Robert Bjorback and Christine Sullivan submitted by the defendant contain generalized and conclusory statements regarding possible harm and are insufficient to establish good cause for a protective order;

B. That the Declaration of Robert Bjorback contradict [sic] his sworn deposition testimony, contain [sic] representations that do not appear to have been made based upon personal knowledge and contain conclusory language that is insufficient to establish good cause for a protective order;

...

D. That the defendant has failed to show good cause or a showing of specific harm to support a protective order as to the McKinsey documents;

E. That the defendant has failed to show good cause or a showing of specific harm to support a protective order as to CCPR, CPPP, claims bulletins or training manuals[.]

(CP 985) This Court granted Allstate's motion for discretionary review and stayed the superior court's order vacating the protective order.

V. SUMMARY OF ARGUMENT

The superior court erred as a matter of law in requiring that Allstate establish "specific harm" under CR 26(c) to justify confidentiality protection for raw unfiled discovery, and not just the "good cause" required by the plain language of the rule. Washington courts have not required that a party establish specific harm for use and dissemination limits on any discovery materials, much less trade secrets. Allstate established good cause for a protective order, and nothing changed between the April 20 order and the July 20 motion to vacate to eliminate the good cause for the use and dissemination limits for Allstate's claims manuals, claim bulletins, CCPR Implementation Training Manual, and "McKinsey documents."

The superior court erred in finding that the declarations of Ms. Sullivan and Mr. Bjorback were general and conclusory and did not establish good cause. Ms. Sullivan's declaration established good cause

for limited use and dissemination of the “McKinsey documents.” The Bjorback and Sullivan declarations, together, or each considered separately, established good cause for the protective order for Allstate’s claims manuals, claim bulletins, and the CCPR Implementation Training Manual. The court erred in concluding that Mr. Bjorback’s declaration contradicted his deposition testimony and was without personal knowledge.

There is no justification for lifting the use and dissemination limits of Allstate’s documents which are already in plaintiff’s possession. Plaintiff has all of the documents which are the subject of this appeal, and she can proceed to prepare her case for trial. This Court should reverse the superior court’s July 20 order and reinstate the April 20 protective order.

VI. ARGUMENT

A. STANDARD OF REVIEW.

The superior court’s orders vacating the protective order and striking the Second Bjorback declaration were interpretations of court rules. This Court reviews de novo a trial court’s decision involving the interpretation of a court rule and application of the correct legal standard for protective orders. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997); *see also State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d

1255 (2001) (“The application of a court rule to the facts in a case is a question of law subject to de novo review on appeal.”); *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001) (same).

The court reviews findings of fact to determine whether substantial evidence exists to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

B. THE SUPERIOR COURT ERRED BY REQUIRING ALLSTATE TO ESTABLISH SPECIFIC HARM, INSTEAD OF GOOD CAUSE, FOR A PROTECTIVE ORDER.

The superior court correctly issued the protective order in the first instance because Allstate established “good cause” under CR 26(c) for protecting the confidentiality of the unfiled discovery materials. Yet, on the motion to vacate, the court rejected its own correct ruling and erroneously applied a higher threshold of “specific harm.” The court’s imposition of the heightened standard is not supported by Washington law and is reversible error.

CR 26(c) does not require that a party show “specific harm” in order to obtain a protective order for “the raw fruits of discovery.” *Dreiling v. Jain*, 151 Wn.2d 900, 910, 93 P.3d 861 (2004). Rather, CR 26(c) provides that, “*for good cause shown*,” the court “may make any order which justice requires to protect a party ... from annoyance,

embarrassment, oppression, or undue burden or expense, including ... (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.” CR 26(c) (emphasis added). When interpreting court rules, Washington courts employ principles of statutory construction, *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993), and among them are the canons that courts should apply the plain language of the rule, *Spokane County v. Speciality Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 244-46, 103 P.3d 792 (2004), and should not add words to an unambiguous provision, *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

No Washington court has engrafted a “specific harm” requirement onto CR 26(c)’s “good cause” standard for protective orders. In *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991), the Washington Supreme Court stated that “the limitations or restrictions contemplated by CR 26(c) are dependent upon (1) a showing of good cause, and (2) that justice requires the limitation or restriction. The reasons for protecting a party or person must be found to exist and be stated as such.” 117 Wn. 2d at 777. The Court did not require any additional showing.

Moreover, a general requirement of “specific harm” for the kind of protective order Allstate obtained does not fit CR 26(c)’s purpose or context. CR 26(c) provides for protective orders of different types, and “good cause” is by necessity a flexible standard that reflects the circumstances presented in the particular case. *Gill v. Gulfstream Park Racing Ass’n, Inc.*, 399 F.3d 391, 402 (1st Cir. 2005) (quoting *United States v. Microsoft Corp.*, 165 F.3d 952, 959-60 (D.C. Cir. 1999)). There are at least three critical dimensions that affect what constitutes good cause in any individual case: (1) the nature of the protective relief sought and impact on the opposing party, including whether the protective order bars the document production altogether or merely imposes confidentiality or other conditions, and the restrictiveness of those conditions; (2) the phase of the case and immediate anticipated use of the documents, including whether the documents are mere unfiled discovery materials; and (3) the impact of unfettered production on the producing party, including the irrevocable loss of confidentiality and competitive advantage. These three dimensions, each of which favors the protective order limiting the use and dissemination of Allstate’s claims manuals, claim bulletins, CCPR Implementation Training Manual, and “McKinsey documents,” are considered in turn.

1. Allstate Has Sought Only Use and Dissemination Limits that Will Not Hinder Plaintiff's Pursuit of Her Claims.

CR 26(c) authorizes the court to grant protective orders that either withhold or condition discovery. CR 26(c)(1)-(2). A greater showing of cause would be required to justify denying the documents to the requesting party altogether. In contrast, where the requesting party will be able to see the documents and use them in its case, the interests justifying the protective interest need not be of the same kind or magnitude. Here, Allstate invoked its proprietary interests in the claims manuals, claim bulletins, CCPR Implementation Training Manual, and the “McKinsey documents” only to obtain production with confidentiality protection.

Moreover, protective orders may have different levels of restrictiveness, allowing review only by counsel; by counsel and experts; or by counsel, experts, and the opposing party itself. *See, e.g., Jones v. Nationwide Ins. Co.*, 2000 WL 1231402 (M.D. Pa. July 20, 2000) (insurer ordered to produce information regarding its policies and claim manuals, under conditions of confidentiality “for the eyes of plaintiff’s counsel only”). The greater the limitations on who in the opposing camp may see the documents, the greater the showing of cause that logically should be required. In this case, Allstate sought, and the court granted, limitations on use and dissemination of Allstate’s claims manuals, claim bulletins, CCPR

Implementation Training Manual, and the “McKinsey documents” *outside* this case. Allstate has produced these documents to plaintiff, her counsel, or her experts for purposes of this case. As a result, the protective order does not limit plaintiff in any way from using the documents to pursue her claims in this case.

2. The Claims Manuals, Claim Bulletins, CCPR Implementation Training Manual, and the “McKinsey Documents” Are Merely Raw Unfiled Discovery.

The showing of good cause required also will turn on the state of the case and the use of the documents. Courts have recognized a continuum running from raw unfiled discovery of the kind at issue here to documents that were used in judicial decision making on the merits of the claim. “The caselaw, for the most part, recognizes a gradient. It is easiest to justify sealing discovery materials obtained via the authority of the court subject to a protective order, and never used at trial, filed with the court, or attached to any pleading or substantive motion.” *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, 340 F. Supp. 2d 1118, 1122 (D. Ore. 2003) (sealing some but not all exhibits introduced at jury trial) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed 2d 17 (1984)). In this case, all that is at issue is protection for raw unfiled discovery.

The Washington courts have recognized this distinction between unfiled discovery materials and documents used in dispositive motions or public trials. In *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004), the Washington Supreme Court addressed the sealing of a motion to terminate a derivative shareholder action and the supporting documents filed with the court. The court noted that “there are good reasons to distinguish between dispositive motions and discovery. Mere discovery may be sealed ‘for good cause shown.’” 151 Wn.2d at 909 (quoting CR 26(c)). As the court explained, “‘Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action.’” *Id.* (quoting *Seattle Times Co.*, 467 U.S. at 33). The court noted that unfiled discovery did not raise constitutional issues of the open administration of justice: “As this information does not become part of the court’s decision-making process, article I, section 10 [of the Washington Constitution] does not speak to its disclosure.” 151 Wn.2d at 909-10.

For this reason, plaintiff’s citation in the superior court to *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 154 P.3d 236 (2007), is misplaced. *Woo* *did* not concern discovery materials, but instead addressed whether documents which had been used as exhibits at trial without any limitation could later be sealed pursuant to GR 15. The *Woo*

court relied on *Dreiling* and *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005), both of which concerned whether documents filed with the court and considered as part of the court's decision-making process should be unsealed and available to the public. In light of the Supreme Court's distinction in *Dreiling* between mere discovery materials and exhibits, the *Woo* court's adoption of a "specific harm" standard for each exhibit to be sealed does not bear on the protection of unfiled discovery based on a showing of good cause.

Moreover, a heightened test for protective orders has been strongly criticized because it "imposes too great a burden on those seeking confidentiality protection. Such a strict requirement would make sense only if there were a strong presumption in favor of public access to discovery." Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 361 (2006). "The heightened requirement for showing good cause before a protective order can issue increases the costs of pretrial litigation and creates a quagmire of balancing factors for the district judge to consider, even in a case that will probably never reach the trial stage." Kurt Putnam, Note, *Your Trade Secret Is Safe With Us: How the Revision to Federal Rules of Civil Procedure Makes Discovery Presumptively Confidential*, 24 HASTINGS COMM. & ENT. L.J. 427, 441 (Spring 2002).

3. A Showing that Discovery Materials Are a Trade Secret or Other Confidential Business Information Justifies a Protective Order.

The final dimension to “good cause” is the nature of the documents sought and the impact on the party of producing them either at all or without confidentiality protection. If, as here, the documents constitute trade secrets, good cause for use and dissemination limits is satisfied per se. “A showing that a discovery request seeks trade secrets constitutes an adequate demonstration of good cause for a protective order under Rule 26(c).” *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991). “[B]y virtue of the very definition of a trade secret,” a party that succeeds “in demonstrating that the information encompasses trade secrets...would, by necessity, also have succeeded in demonstrating that it would suffer economic harm as a result of the unfettered public disclosure of the information for which it seeks protection, and hence, shown ‘good cause’ for the issuance of a protective order under Fed.R.Civ.P. 26(c).” *Smith v. BIC Corp.*, 121 F.R.D. 235, 240 (E.D. Pa. 1988), *aff'd*, 869 F.2d 194 (1989).

Moreover, requiring proof of “specific harm” is inconsistent with the Uniform Trade Secrets Act. As the Washington Supreme Court has recognized, under the Act, a trade secret owner may obtain injunctive relief against actual or threatened misappropriation by proving the

existence of a trade secret *without* independently proving that it will suffer irreparable injury. See *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 62, 738 P.2d 665, 681 (1987) (holding that “[n]either the Uniform Trade Secrets Act nor the civil rules about injunctions require such a finding” of irreparable harm “to support the trial court's injunction”); accord *Union Nat. Life Ins. Co. v. Tillman*, 143 F. Supp. 2d 638, 641-42 (N.D. Miss. 2000) (“[T]o be awarded an injunction under that [Uniform Trade Secrets] Act, Union National need not demonstrate irreparable injury; a violation of the Act itself constitutes irreparable injury.”). It would be incongruous to require a higher level of proof of injury for a mere protective order safeguarding the confidentiality of documents produced during liberal discovery than is required for a tort remedy.

Even if the documents do not constitute trade secrets within the meaning of the Uniform Trade Secrets Act, courts have recognized that use and dissemination limits may be appropriate to protect competitive advantages and other commercial interests in the documents. CR 26(c) does not limit protective orders to trade secrets, and specifically authorizes protective orders for “*other* confidential research, development, or commercial information.” CR 26(c)(7) (emphasis added). “Rule 26(c)(7) goes beyond trade secrets and covers other confidential business information.” *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*,

200 F.R.D. 255, 260 (M.D.N.C. 2001) (granting protective order); *see* 8 Charles Alan Wright & Arthur R. Miller et al., FEDERAL PRACTICE AND PROCEDURE § 2043, at 556 (2d ed. 1994).

Thus, courts have issued protective orders for confidential documents that the defendant “desires to keep confidential” even though they “are not ‘trade secrets’ in the traditional sense,” because “their potential to do commercial harm and the fact that the information...was quite arguably a part of [the party’s] efforts to gain competitive advantage are dispositive to the Court’s decision.” *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993); *see* Robert Unikel, *Bridging the “Trade Secret” Gap: Protecting “Confidential Information” Not Rising to the Level of Trade Secrets*, 29 LOY. U. CHI. L.J. 841, 843 (1998) (examining “the courts’ historical willingness to safeguard valuable commercial information that does not rise to the level of technical trade secrets”).

As explained in parts C and E, and as the superior court correctly ruled in entering the April 20 order, Allstate established good cause for protecting the “McKinsey documents” as well as Allstate’s claims manuals, claim bulletins, and CCPR Implementation Training Manual, whether they are trade secrets or otherwise protectable confidential

commercial information. The protective order should not have been vacated.

C. ALLSTATE ESTABLISHED GOOD CAUSE FOR THE PROTECTIVE ORDER FOR THE “MCKINSEY DOCUMENTS.”

The court properly entered the April 20 protective order because Allstate established good cause for such confidentiality protections. Between April 20 and July 20, nothing changed and good cause still existed yet the superior court vacated protective order for the “McKinsey documents.”

1. The “McKinsey Documents” Contain Trade Secrets or Other Confidential and Proprietary Business Information that Should Be Subject to Use and Dissemination Limits.

In its original motion, Allstate established “good cause” for a protective order by showing that the “McKinsey Documents” contain trade secrets protectable under the Uniform Trade Secrets Act, which Washington has adopted. *See Wauchop*, 138 F.R.D. at 546; *Smith*, 121 F.R.D. at 240. The Uniform Trade Secrets Act defines a trade secret broadly as

information, including a formula, pattern, *compilation*, program, device, *method*, technique, or *process*, that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4) (emphasis added). The Act “provides broad means for courts to preserve the secrecy of trade secrets.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994). The Sullivan declaration established that the “McKinsey documents” constitute a valuable compilation of information that has independent economic value and is the subject of reasonable secrecy efforts.

a. The “McKinsey Documents” Have Independent Economic Value.

Allstate presented proof that the “McKinsey documents” have considerable competitive value to Allstate because they document Allstate’s research-and-development efforts to improve its claim-handling processes. (CP 366-67, Sullivan Decl. ¶¶ 5-6, 9) The “McKinsey documents” were created by teams of Allstate and McKinsey employees, and they show the development, design, testing, and implementation of Allstate’s claims handling reforms based on, among other things, an intensive analysis of Allstate’s closed claim files. (CP 365-66, Sullivan Decl. ¶¶ 3-5)

The documents describe in great detail the findings of an internal fact-finding review, including reviews of closed files and results from

selected claim offices; they describe the extensive research and analysis performed in the development of CCPR, and a self-critical analysis of Allstate's methods of handling bodily injury claims and changes to Allstate's system of investigating, evaluating, handling and resolving claims that were implemented as part of CCPR. (CP 366, Sullivan Decl ¶ 5) All this information was developed through the expenditure of considerable money, time, manpower, and other resources, and would be of great value to other insurers who wish to compete with Allstate and improve their own claim processes. (CP 365-66 ¶ 3; CP 367 ¶ 9; CP 368 ¶ 11)

The "McKinsey documents" are protectable as a compilation of competitively valuable information. Under the Uniform Act, commonly available materials and information organized in an innovative way can qualify as a trade secret. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50, 738 P.2d 665 (1987). The proponent of a trade secret "need not prove that every element of an information compilation is unavailable elsewhere." *Id.* An innovative compilation qualifies for trade secret protection if the compilation has "novelty and uniqueness." *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 327, 828 P.2d 73, *rev. denied*, 120 Wn.2d 1007 (1992), *overruled on other grounds*, *Waterjet Technology, Inc. v. Flow Intern. Corp.*, 140 Wn.2d 313, 323, 996 P.2d 598 (2000). The

“McKinsey documents” are such a novel and unique compilation of research and analysis.

Moreover, the “McKinsey documents” are of value sufficient to constitute a trade secret. “A trade secret must be of sufficient value in the operation of a business or other enterprise to provide an actual or potential economic advantage over others who do not possess the information.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. e (1995). “The advantage, however, need not be great. It is sufficient if the secret provides an advantage that is *more than trivial*.” *Id.* (emphasis added). The “McKinsey documents” reveal the process by which Allstate’s procedures were developed and tested, as well as the other approaches that were considered and *rejected*. (CP 367, Sullivan Decl., ¶ 9) “The definition [of trade secret] includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will not work could be of great value to a competitor.” UNIF. TRADE SECRETS ACT § 1 cmt, 14 U.L.A. 529, 538 (amended 1985) (emphasis omitted).² A competitor that

² See also *Courtesy Temp. Serv., Inc. v. Camacho*, 272 Cal. Rptr. 352, 357-58 (Ct. App. 1990) (research about potential customers who were *not* valid leads constituted invaluable commercial information entitled to trade secret protection); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. e (1995) (following Uniform Act in recognizing protection “for so-called ‘negative’ information that teaches conduct to be

obtains the “McKinsey documents” would be able to avoid the expenditures Allstate incurred in learning which approaches should *not* be pursued. None of this information is publicly available.

b. The Documents Are the Subject of Reasonable Secrecy Efforts.

Ms. Sullivan’s declaration also established that Allstate has gone to considerable lengths to preserve the secrecy of these materials. The Uniform Trade Secrets Act requires only “efforts that are reasonable under the circumstances to maintain [the information’s] secrecy.” RCW 19.108.010(4)(b). Allstate limits access to the “McKinsey Documents” only to employees and others who have an obligation to maintain the confidentiality of these materials, and who are told that the materials are confidential and provided to them only with the understanding that they will not be revealed to any third parties. The materials also are kept in secure locations. (CP 366-67, Sullivan Decl. ¶¶ 7-8)

Contrary to plaintiff’s arguments at the superior court, the “McKinsey documents” are not part of the public record. David Berardinelli, a New Mexico attorney, has published his notes on the “McKinsey documents” in a book and articles, based on his review of the documents before he returned them to Allstate in the *Pincheira v. Allstate*

avoided, such as knowledge that a particular process or technique is unsuitable for commercial use”).

Insurance Company, 164 P.3d 982 (N.M. App. 2007), *cert. granted*, 165 P.3d 327 (N.M. 2007), case. (CP 829-30) Mr. Berardinelli published a series of sound bites and other brief passages from over 12,500 pages of “McKinsey documents” that he thought plaintiffs’ lawyers would like. Those sounds bites do not convey the knowledge of Allstate’s research, analysis, development, and implementation found in the “McKinsey documents,” which would be of competitive value to other insurers. Regardless of what Mr. Berardinelli has improperly revealed about the documents, the fact remains that the documents themselves have never been produced in any jurisdiction without a protective order. Unsubstantiated notes and commentary are not evidence, nor do they reflect the totality of the information contained in the documents. In fact, the fact that plaintiffs around the country continue to seek copies of the documents is more than ample evidence of the limited value and utility of information Mr. Berardinelli has “released.”³

³ Plaintiff also asked the Superior Court to take judicial notice that Christine Sullivan is a member of the Insurance Research Council (“IRC”). (CP 389) Plaintiff insinuated that because IRC involves other insurance companies, these companies share information and have no secrets. Assuming for sake of argument that such matters are the proper subject of judicial notice, Ms. Sullivan’s membership on the IRC proves nothing. At her deposition, Ms. Sullivan testified that the IRC board does not discuss individual company practices, pricing, or claim handling. (CP 939-40, Sullivan Deposition, 17:8-10; 18:2-4)

Moreover, on June 13, 2007, the New Mexico Court of Appeals reversed the denial of confidentiality protection, remanded for an evidentiary hearing as to the protectability of trade secrets. *Pincheira v. Allstate Insurance Company*, 164 P.3d 982 (N.M. App. 2007), *cert. granted*, 165 P.3d 327 (N.M. 2007). The court expressly rejected the contention that production of the documents under the interim protective order waived Allstate's trade secret claim. *Id.* ¶¶ 22-23, 61. The court did not suggest that Mr. Berardinelli's activities after returning the documents had in any way mooted Allstate's request for use and dissemination limits.

2. The "McKinsey Documents" Are Protectable Confidential and Proprietary Business Information Even if They Do Not Constitute Trade Secrets.

As other courts have recognized, based on the same showing that Allstate made through the Sullivan declaration, documents like the "McKinsey documents" that relate to insurer claim procedures should be produced under use and dissemination restrictions even if the insurer information did not rise to the level of an actual trade secret. Civil Rule 26(c) authorizes protective orders providing "that a trade secret *or other confidential research, development, or commercial information* not be disclosed or be disclosed only in a designated way." CR 26(c)(7) (emphasis supplied); *see Drexel Heritage*, 200 F.R.D. at 260; *Gelb*, 813 F. Supp. at 1035.

The Indiana Court of Appeals granted such protection for the “McKinsey documents” *without having to find that they contained trade secrets* when it reversed the trial court’s denial of use and dissemination limits. *Allstate Ins. Co. v. Scrogan*, 851 N.E. 2d 317, 324 (Ind. Ct. App. 2006). The court explained that “[t]he aim of discovery is to provide parties with evidence for use in their present case.” *Id.* The plaintiff “made no showing that discovery under a protective order would be detrimental to his case, but *discovery without a protective order could be detrimental to Allstate.*” *Id.* (emphasis supplied). The court remanded with instructions to enter a protective order that, among other things, precluded the plaintiff and his counsel from: copying the material except for use in the case, from using the material in any other action, distributing any materials to any other person, or disclosing to any other person or making public “any of the information contained in any of the materials...received or obtained from Defendant during the course of this action, except to use such materials or copies of materials during the litigation of this action.” *Id.* at 326. In this case, the superior court therefore properly granted the April 20 protective order for the “McKinsey documents,” and erred by vacating that protective order.

D. THE COURT ERRED IN VACATING THE PROTECTIVE ORDER AND DENYING ALLSTATE'S MOTION FOR RECONSIDERATION.

The superior court erred in vacating the protective order and adopting plaintiff's argument that Ms. Sullivan's deposition somehow changed the April 2007 showing of good cause for the protective order. Ms. Sullivan's deposition testimony provided additional proof that good cause existed for the protective order. Her deposition testimony established her personal knowledge about the "McKinsey documents" and their value as trade secrets and confidential business information. Ms. Sullivan testified that she first reviewed the "McKinsey documents" in 1997, when she took over responsibilities for the Liability and Casualty Division as part of her job, and that she has periodically reviewed them since then at the direction of counsel. (CP 944, 947-48, Sullivan Dep. at 22:18-23, 25:11-23, 26:18-24.)

In the superior court, plaintiff attempted to undermine Ms. Sullivan's declaration by suggesting that Ms. Sullivan viewed the "McKinsey documents" as having *solely* "historical" value, instead of continuing competitive significance. That misstates her deposition testimony. In response to a question about whether the "McKinsey documents" were historical, Ms. Sullivan testified that "[t]hey're clearly historical because they occurred some time ago" (*Id.* at 27:11-17), and that

“[i]t’s a document for a period of time in the 1990s, so I guess you could coin it as historical” (*id.* at 28:12-14.) She specifically noted, “*I don’t think that’s the only value to Allstate*, but it is a history of a body of work that was done in the 1990s.” (CP 951, *Id.* at 29:1-3 (emphasis added).) Plaintiff chose not to follow up by deposing Ms. Sullivan as to the other value of the “McKinsey documents,” as set forth in her declaration.

In any event, that the McKinsey documents are “historical” in documenting a process of research, analysis, development, and implementation does not mean that they do not have continuing value or constitute trade secrets. Courts have cognized that “historical” information may constitute trade secrets. *See, e.g., Byrd’s Lawn & Landscaping, Inc. v. Smith*, 542 S.E.2d 689, 692 (N.C. App. 2001) (affirming “finding that [plaintiff’s] historical cost information was a trade secret,” including records “maintained...over a period of seventeen years”).

More fundamentally, under the Uniform Trade Secret Act, the test is not the age of the information, but whether the information “[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.” RCW 19.108.010(4). Where the information has continuing economic value, it

remains subject to confidentiality protection notwithstanding its age. *E.g.*, *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 1981 Trade Reg. Rep. (CCH) ¶ 21,795 (Jan. 21, 1981) (holding that six-year-old financial data would remain subject to protection because it was not “too old to be of competitive concern,” and “the release of [the information] might enable DuPont’s competitors to construct an accurate financial model of DuPont’s business, to its detriment”). Courts have recognized, for example, that a corporation’s “sensitive internal economic records” may remain trade secrets despite the assertion that “this information is so stale as to preclude protection,” because “trade-secret status may continue indefinitely so long as there is no public disclosure,” and “secrecy may still attach to proprietary financial information.” *Enterprise Leasing Co. v. Ehmke*, 3 P.3d 1064, 1069-70 (Ariz. App. 1999 (citing *Kewanee Oil Co. v. Bicorn Corp.*, 416 U.S. 470, 476, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974))). In this case, the “McKinsey documents” remain valuable because they address claim-handling issues that continue to daunt insurers.

Ms. Sullivan’s declaration established good cause for the April 20 protective order, and her deposition provided further support for that order. Nothing changed between April and July 2007 to justify vacating that order. Instead, the superior court’s second ruling as to the “McKinsey documents” somehow became wrapped up in the dispute over Mr.

Bjorback's personal knowledge and testimony. But, Mr. Bjorback's declaration was not the basis for the protective order for the "McKinsey documents" in the first place and his declaration did not address the "McKinsey documents" at all. Indeed, Allstate did not cite his declaration in support of a protective order for those documents.

Given that Allstate had treated the distinct category of manuals and bulletins separately in its motion and had clearly identified which declarant was offered as to which category, there was no confusion before Mr. Bjorback's deposition or reason for plaintiff's counsel even to examine Mr. Bjorback about the "McKinsey documents." Nevertheless, out of the blue, plaintiff's counsel asked Mr. Bjorback whether his declaration "involve[d]" the "McKinsey documents." (CP 899, Bjorback Dep. at 34, l. 24) As Mr. Bjorback later explained, he was "confused" and stressed by the deposition and answered that series of questions incorrectly. (CP 679-80, Second Bjorback Decl. ¶¶ 4-5, 7) That was simply a mistake, because he could not possibly have submitted a declaration as to the "McKinsey documents": as he unambiguously testified at his deposition, he had never seen the documents and knew nothing about them. (CP 899, Bjorback Dep. at 36:18 -37:12; CP 680, Second Bjorback Decl. ¶ 6)

Plaintiff made much of Mr. Bjorback's belated correction of that mistake, but whether or not the correction is given any weight, the error is simply not material *even if left uncorrected*. Plaintiff established only that Mr. Bjorback admits that he has no personal knowledge about the "McKinsey documents" — a fact that Allstate readily admits. *Allstate never suggested anything to the contrary*. But for his error in giving a couple of yes-or-no answers, neither did Mr. Bjorback, who freely admitted that he knew nothing about those documents. The lateness of the correction and whether it changed substantive answers are ultimately immaterial because the answers themselves were always immaterial to the protective order for the "McKinsey documents."

E. ALLSTATE'S MANUALS AND CLAIM BULLETINS ARE TRADE SECRETS OR CONFIDENTIAL AND PROPRIETARY BUSINESS INFORMATION THAT WARRANT USE AND DISSEMINATION LIMITS.

The superior court properly entered the April 20 protective order because Allstate established good cause based on the declarations of *both* Robert Bjorback *and* Christine Sullivan for the CCPR Implementation Training Manual, claims manuals, and claim bulletins. Each declaration independently established the factual basis for the protective order. Between April 20 and July 20, nothing changed and good cause still

existed. The court erred in vacating the protective order for these documents.

1. Allstate Established Good Cause for the Protective Order for the CCPR Implementation Training Manual, Claims Manuals, and Claim Bulletins.

As detailed in the Sullivan and Bjorback declarations, Allstate's claim handling policies and procedures, manuals, and training materials were developed, created, and maintained by Allstate for use in business and are considered confidential, proprietary, and trade secret information. (CP 365-66; 340-342) The internal policies and procedures used by Allstate were developed with considerable time, effort and expense on the part of Allstate. (CP 365-66, Sullivan Decl. ¶ 3; CP 341, Bjorback Decl. ¶ 7) Access to any of these confidential internal documents requested would be of significant economic value to a competitor of Allstate. (CP 341-42, Bjorback Decl. ¶¶ 8, 14, 17) Broad production of documents, without limitation, of claims handling manuals, policies, procedures, and guidelines which reflect how Allstate services its policies or handles claims would enable a competitor to reconstruct and then adopt Allstate's procedures for satisfactorily handling claims. This information would be valuable to other insurance companies that could develop, calibrate, and refine their own standards and practices based on this information. Restricting the dissemination of confidential information and documents is

consistent with CR 26(c)(7), providing discovery while protecting confidential information and documents.

Other courts have granted use and dissemination limits for insurer claims manuals and other claim-handling materials based on precisely the same kind of showing that Allstate made in this case. For example, in *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 204 F.R.D. 420 (S.D. Ind. 2001), the court held that the insurer's claim manuals constituted trade secrets under the Uniform Trade Secrets Act because "[t]he discovery of [the insurer's] policy manuals by a competitor would permit them to appropriate [the insurer's] trade secrets by duplicating or reconstructing its claims handling procedures. This information is of particular value to small insurance companies, which lack the resources to adopt their own procedures." *Id.* at 424.

Similarly, in *Cohen v. Metropolitan Life Ins. Co.*, 2003 WL 1563349 (S.D.N.Y. Mar. 26, 2003), the court granted confidentiality restrictions for the insurer's claims management guidelines and best practices manual. *Id.* at *1. Like the Sullivan affidavit here, the insurer's affidavit in that case "show[ed] that the Manual consists of confidential commercial information, valuable to MetLife and potentially valuable to its competitors who could take unfair advantage of MetLife's substantial analytical and experiential investment by using the material to achieve

efficiencies in their claims handling operations.” *Id.* The court held that the insurer's affidavit was “sufficient to fulfill its burden of showing both the requisite confidential nature of the material and good cause for issuance of a protective order,” and “warrant[ed] appropriate protection under the principles normally applied in the discovery context.” *Id.*; see also *State ex rel. Johnson v. Tsapis*, 419 S.E.2d 1, 3-4 (W. Va. 1992) (affidavit averring, inter alia, that “the information is of great economic value both to Hitachi and its competitors” was sufficient to satisfy the “good cause” requirement of Rule 26(c)).

Moreover, courts have granted confidentiality protection for insurer claims manuals without requiring proof of trade secrets. For example, in *Tinman v. Blue Cross & Blue Shield of Michigan*, 176 F. Supp. 2d 743, 746, 747 (E.D. Mich. 2001), the court imposed use and dissemination limits on documents pertaining to the insurer's claim-processing procedures, even though the insurer had failed to make “any particularized showing with respect to any one document,” because “[t]hese concerns about future use by a competitor are not always easy to demonstrate.” And in *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 178 (E.D. Pa. 2004), though the court allowed broad-based discovery about the insurer's internal business practices and policies, the court applied the “good cause” standard and made such discovery subject to a

protective order, "[r]ecognizing that the requested information is about Defendants' business practices and almost always involves information that is proprietary in nature." *See also Auto Owners Ins. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 203-04 (M.D. Fla. 1990) (holding that though claim manuals were not entitled to trade secret protection, they were "sufficiently sensitive to warrant the issuance of a protective order under Rule 26(c)(7)"); *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331, 333 (E.D. Pa. 1999) (because "Allstate's claims manuals and company policies may include confidential information," ordering plaintiff "to keep confidential" all such information).⁴ Allstate made the same kind of showing of "good cause" in this case, and the superior should have maintained the protective order it initially issued for these documents.

2. The Court Erred in Vacating the Protective Order for the CCPR Implementation Training Manual, Claims Manuals, and Claim Bulletins.

On the motion to vacate, plaintiff did not suggest nor did the superior court conclude that Ms. Sullivan lacked sufficient personal

⁴ *Accord Newpark Environ. Ser. v. Admiral Ins. Co.*, 2000 WL 136006, at *4 (E.D. La. Feb. 3, 2000) (providing that insurer's claims procedures manual be produced subject to a protective order); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 14 (D. Md. 1980) (ordering that portions of insurer's claims manual describing the insurer's investigative procedures be produced, but only under a protective order); *Kaufman v. Nationwide Mut. Ins. Co.*, No. CIV. A. 97-1114, 1997 WL 703175 at *2 n.3 (E.D. Pa. Nov. 12, 1997) (inviting insurer to request issuance of a protective order to protect insurer's claims manuals from general disclosure).

knowledge to support her declaration. That alone should have disposed of plaintiff's attempt to undo the protective order. Nevertheless, the court vacated the protective order and denied reconsideration based solely on alleged deficiencies in Mr. Bjorback's knowledge.

ER 602 does not require personal knowledge in an absolute or literal sense. Wright & Gold, FEDERAL PRACTICE & PROCEDURE § 6023. Personal knowledge stems from perceiving and observing with one's senses. 5A WASHINGTON PRACTICE § 602.1. Thus, assessing personal knowledge involves a common sense approach. For example in *Citoli v. City of Seattle*, 115 Wn. App. 459, 61 P.3d 1165 (2002), *rev. denied*, 149 Wn.2d 1033 (2003), the court concluded that an owner had personal knowledge to testify that his building had separate meters for upper floors of the building, even though he did not explicitly state that he knew about the separate meter. Instead, common sense dictated that he had personal knowledge because he was the sole tenant on the first floor of a multi-story building and had paid electricity bills for five years.

Similarly, in *Dennis v. McArthur*, 23 Wn.2d 33, 36-37158 P.2d 644 (1945), the court concluded a woman had sufficient personal knowledge to testify that a surgical instrument had invaded her uterus. Though the woman obviously did not personally observe those facts, it was apparent from the circumstances that she had knowledge. *See also*

Herring v. Dept. of Social & Health Services, 81 Wn. App. 1, 914 P.2d 67 (1996) (coworkers had sufficient personal knowledge to testify about plaintiff's work performance in wrongful termination case though they did not know all the details about plaintiff's job performance).

Thus, courts do not impose a rigid standard for personal knowledge. If reasonable minds could differ on whether a witness has sufficient opportunity to observe to establish personal knowledge, the testimony should be admitted to allow the fact finder to weigh the evidence. 5A WASHINGTON PRACTICE, § 602.2. In addition, qualified statements from a witness do not defeat personal knowledge. *Id.* at § 602.6. Instead, phrases such as “to the best of my knowledge,” “I think,” or “I believe” are simply statements a court should expect from a truthful witness who wants to be careful to tell the whole truth and nothing but the truth. *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).

In his declaration, Mr. Bjorback set forth his knowledge and experience about Allstate's manuals, claims handling procedures, and bulletins gained through his nineteen years at Allstate. (CP 340-420) At his deposition, Mr. Bjorback explained the positions he has held at Allstate, including Claims Adjuster, Unit Claim Manager, Evaluation Consultant, Frontline Performance Leader, and Frontline Process Expert. (CP 892, Bjorback Dep. at 7:4-8:14) He testified about his training, which

has included at least ten management courses. (*Id.* at 8:15-9:21) He also testified about his knowledge of claims handling in other states, as he has worked on claims in up to twenty states other than Washington. (CP 894, *Id.* at 16:1-17:2, 17:9-18:2)

Mr. Bjorback also specifically testified that he knows about the manuals and bulletins. (CP 893, Bjorback Dep. at 12:1-13) These materials are used internally only. (*Id.* at 13:24-14:9) They are marked confidential. They are kept in a central location and are not distributed. (*Id.* at 12:25-13:6) He also testified about the personnel devoted to implementing claims manuals and claims handling procedures. (CP 895, *Id.* at 20:20-21:4, 21:20-22) He explained the harm to Allstate's business if other competitors had access to Allstate's confidential and proprietary claims manuals, claims-handling procedures, and claim bulletins:

[I]f [competitors] had — were handling claims based on what our policies or procedures were, that could be to their benefit in providing better customer service which could help them attain market share. . . . As far as to Allstate, we're a business and economic, that it could be detrimental to us.

(CP 898, *Id.* at 30:2-5, 30:18-19)

Though Mr. Bjorback was not able to testify as to the *number* of hours or *amount* of money that Allstate spent over several years in developing Allstate's manual (CP 895-96, *id.* at 19:21 to 20:12; 21:14 to

22:7), knowledge of such arithmetic details is not required. Nor can plaintiff establish that such arithmetic detail is material. Mr. Bjorback's declaration did not purport to provide such detail. (CP 340-342) Nor did his testimony contradict any aspect of his declaration or show a lack of personal knowledge of the facts stated in that declaration. Mr. Bjorback's declaration and deposition are not inconsistent and the superior court erred in vacating the protective order.

F. THE SECOND BJORBACK DECLARATION WAS PROPERLY SUBMITTED AND SHOULD NOT HAVE BEEN STRICKEN.

The superior court erred in striking the Second Bjorback Declaration, which explained the reasons for and timing of Mr. Bjorback's corrections to his deposition testimony. Declarations are permitted on reconsideration motions. *Jacob's Meadow Owners Assoc. v. Plateau 44 II, LLC*, 139 Wn. App. 743, 753, 162 P.3d 1153 (2007) (affidavits submitted on reconsideration motion considered by trial court). Nothing in the court rules precludes a party from submitting a declaration on a motion for reconsideration. *Sellsted v. Washington Mutual Sav. Bank*, 69 Wn. App. 852, 865, n. 19, 851 P.2d 1357, *rev. denied*, 122 Wn.2d 1018 (1993). In fact, CR 59(c) specifically provides for such declarations. The court erred in striking the second declaration. The court should have granted reconsideration and reinstated the April 20 protective order.

VII. CONCLUSION

Allstate established good cause for the protective order for Allstate's claims manuals, claim bulletins, and CCPR Implementation Training Manual. Plaintiff has these documents and can proceed to prepare her case for trial. This Court should reverse the order vacating and reinstate the April 20, 2007, protective order.

DATED this 21st day of March, 2008.

REED McCLURE

By Marilee C. Erickson

**Marilee C. Erickson WSBA #16144
Attorneys for Appellant Allstate**

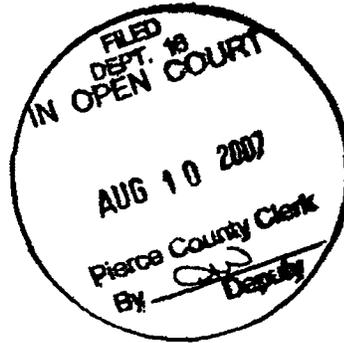
STEPTOE & JOHNSON

**Bennett Evan Cooper, Pro Hac Vice
Attorneys for Appellant Allstate**

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

COLLEEN MCCALLUM, a single person,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY, a foreign
insurer,

Defendant.

NO. 06-2-09493-5

FINDINGS AND ORDER DENYING
DEFENDANT'S MOTION FOR
RECONSIDERATION OF ORDER
VACATING PROTECTIVE ORDER

Honorable Lisa Worswick
Hearing Date: 8/10/07 @ 9:00 am

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court on defendant's motion requesting the Court to reconsider its order vacating the protective order previously issued in this matter, and the court having considered the files and records contained herein, including:

1. Defendant's Motion and Memorandum in Support;
2. Declaration of Marilee Erickson in Support;
3. Plaintiff's Memorandum in Opposition;
4. Declaration of Michael J. Fisher Attaching Exhibits in Opposition; *except*
5. Allstate's Reply in Support of the Motion;
6. *(u)* Second Declaration of Marilee Erickson in Support; *considered for purpose of noting Allstate filed an appeal, anything new was not considered substantively*

FINDINGS AND ORDER DENYING
DEFENDANT'S MOTION FOR
RECONSIDERATION OF ORDER
VACATING PROTECTIVE ORDER - 1

RUSH, HANNULA, HARKINS & KYLER, L.L.P.
4701 South 19th Street, Suite 300
TACOMA, WA 98405
TACOMA: (253) 383-5388
SEATTLE: (253) 838-4790

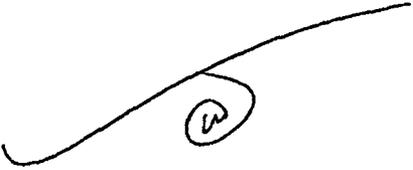
ORIGINAL

APPENDIX A

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and the court further having heard the argument of counsel, the Court hereby finds as follows:

A. That the declarations of Robert Bjorback and Christine Sullivan submitted by the defendant contain generalized and conclusory statements regarding possible harm and are insufficient to establish good cause for a protective order;

B. That the Declaration of Robert Bjorback contradict his sworn deposition testimony, contain representations that do not appear to have been made based upon personal knowledge and contain conclusory language that is insufficient to establish good cause for a protective order;

C. That the defendant has failed to show that it is entitled to reconsideration under CR 59(a);

D. That the defendant has failed to show good cause or a showing of specific harm to support a protective order as to the McKinsey documents;

E. That the defendant has failed to show good cause or a showing of specific harm to support a protective order as to CCPR, CPPP, claims bulletins or training manuals;

1 F. That the defendant has failed to comply with the Court's order requiring
2 the defendant to produce clean, legible and complete copies of the documents reflected
3 in the July 20, 2007 order, to the plaintiff by August 3, 2007; (Ct of Appeals granted stay on 8-9-07)

4 *6. The Court is reserving argument and reserving ruling on the issue of contempt.*

5 Now, therefore, it is hereby:

6 ORDERED, ADJUDGED AND DECREED that the defendant's motion for
7 reconsideration be, and the same hereby is, DENIED; and it is further

8 ~~ORDERED, ADJUDGED AND DECREED that defendant Allstate is in contempt~~
9 ~~of Court for failing to comply with the Court's order to produce clean, legible and~~
10 ~~complete copies of the documents reflected in the July 20, 2007, order by August 3,~~
11 ~~2007 as required in the order, and it is further~~

12 ~~ORDERED, ADJUDGED AND DECREED that the Court awards terms for the~~
13 ~~plaintiff and against the defendant in the amount of \$ _____ for the~~
14 ~~defendant's failure to comply with the Court's Order of July 20, 2007. Such terms and~~
15 ~~sanctions shall be paid not later than _____ business days after the entry of this order.~~

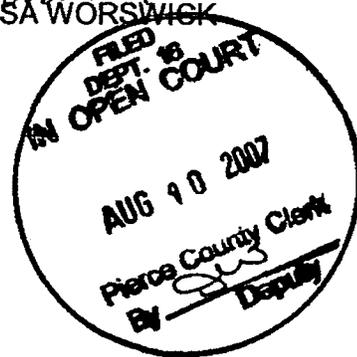
16 DONE IN OPEN COURT this 10th day of August, 2007.

17
18 *Lisa Worswick*
19 JUDGE LISA WORSWICK

20 Presented by:

21 RUSH, HANNULA, HARKINS & KYLER, L.L.P.
22 Attorneys for Plaintiffs

23 By: *Michael J. Fisher*
24 Michael J. Fisher, WSBA # 32778
25

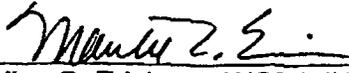


FINDINGS AND ORDER DENYING
DEFENDANT'S MOTION FOR
RECONSIDERATION OF ORDER
VACATING PROTECTIVE ORDER - 3

RUSH, HANNULA, HARKINS & KYLER, L.L.P.
4701 South 19th Street, Suite 300
TACOMA, WA 98405
TACOMA: (253) 383-5388
SEATTLE: (253) 838-4790

1 Approved as to form; Notice of Presentment Waived:

2 REED McCLURE
3 Attorneys for Defendant

4 By: 
5 Marilee C. Erickson, WSBA #16144

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addressed to the following parties:

Karen K. Koehler
Stritmatter Kessler Whelan Coluccio
200 Second Ave. W.
Seattle, WA 98119

Michael J. Fisher
Rush, Hannula, Harkins & Kyler LLP
4701 So. 19th St., Suite 300
Tacoma, WA 98405-1199

Ray W. Kahler
Stritmatter Kessler Whelan Coluccio
413 Eighth St.
Hoquiam, WA 98550-3607

Bennett E. Cooper
Jon T. Neumann
Steptoe & Johnson LLP
201 E. Washington St., 16th Floor
Phoenix, AZ 85004

DATED this 21st day of March, 2008.

Sara Leming
SARA LEMING

SIGNED AND SWORN to (or affirmed) before me on

Mar. 21, 2008 by SARA LEMING.



Jane L. Lading
Print Name: Jane Lading
Notary Public Residing at Seattle, WA.
My appointment expires Aug. 11, 2010