

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

No. 36624-0-II

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

COLLEEN McCALLUM,

Respondent,

vs.

**ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,
a foreign insurer,**

Appellant.

**APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Lisa Worswick, Judge**

REPLY BRIEF OF APPELLANT

RM 5/2/08

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I. INTRODUCTION

As the superior court initially recognized by granting a protective order, Allstate established, through the Christine Sullivan and Robert Bjorback declarations, good cause for use and dissemination limits on the McKinsey Documents, claim manuals, and claim bulletins that Allstate produced in discovery in this case. Nothing changed after the court issued that protective order to justify its later vacatur of that order. Since filing its opening brief, Allstate has publicly released the McKinsey Documents, and Allstate's appeal is now moot as to those documents. (*See* Notice Regarding Certain Discovery Documents (filed Apr. 7, 2008).) Because the McKinsey Documents are no longer at issue, the disputes over Bjorback's changes to his deposition testimony and the striking of his second declaration – which solely concerned the McKinsey Documents – are no longer material to this appeal.

Still at issue, however, are four documents or portions of documents that are independent of the McKinsey Documents and reflect Allstate's trade secrets and other confidential and proprietary business information:

- portions of the October 2000 edition of Allstate's Claim Core Process Redesign ("CCPR") Manual relating to the evaluation of claims and the early recognition process for UM/UIM claims;

- portions of five chapters from the October 2003, edition of Allstate's P-CCSO Claim Policy Practices Procedures ("CPPP") Manual; and
- two 1986 Allstate claim bulletins advising certain claims personnel as to an amendatory endorsement concerning procedures for arbitration of disputed UM/UIM claims and Claim Bulletins.

Both the Sullivan and Bjorback declarations established good cause for these four documents. Plaintiff's subsequent deposition of Ms. Sullivan could not possibly undermine her declaration as to these documents because plaintiff's counsel *did not depose her as to them*.

Moreover, these four documents are not part of the McKinsey Documents, and their protectability is not altered by Allstate's release of the McKinsey Documents. The first two were created years after the implementation of CCPR, and the latter two predated Allstate's work with McKinsey.

In addition, plaintiff has these four documents and can proceed to use them in preparing her case for trial. Use and dissemination limits would not affect that or prejudice her in any way, while they will preserve Allstate's trade secrets and other confidential business information. Though plaintiff is familiar with the contents of the documents, she does not address them specifically or explain why they should be available for unfettered use and dissemination outside this case. Instead, plaintiff advocates a legal standard under CR 26(c) that Washington courts have

never adopted and that would make use and dissemination limits nearly impossible to obtain. The result would be *more* discovery battles over sheer production of contested documents and loss of a key counterbalance to prevailing principles of liberal discovery. This Court should reject that “specific harm” standard, reverse the superior court’s July 20, 2007, vacatur order, and reinstate the April 20, 2007, protective order.

II. ARGUMENT

A. ALLSTATE’S RELEASE OF THE MCKINSEY DOCUMENTS DOES NOT AFFECT THE PROTECTABILITY OF THE REMAINING DOCUMENTS.

While Allstate has publicly released the McKinsey Documents, that decision does not undermine the protectability of the manuals and bulletins that remain at issue. Plaintiff argues that the public disclosure of the McKinsey Documents eviscerates Allstate’s credibility and shows that Christine Sullivan’s declaration was either false or exaggerated. (Resp. Br. 2, 14) This argument is baseless in fact and law. As to the facts, Allstate’s Notice reaffirmed that “Allstate *continues* to believe that the ‘McKinsey Documents’ contain trade secrets and other valuable confidential and proprietary business information,” and it explained how “the circumstances have changed in a way that requires it to reevaluate its continuing efforts” to protect those specific documents *despite* their trade-secret value. (Notice 2 (emphasis added).)

Moreover, plaintiff does not attempt to link the McKinsey Documents substantively to the other four documents or show that their contents have been disclosed through the release of the McKinsey Documents. Certainly the superior court made no finding on this point, which suggests the need for remand for further factual proof if this Court does not reinstate the protective order. For example, the 2000 CCPR Manual was developed and issued by Allstate through the expenditure of considerable time, manpower, and resources five years after the implementation of CCPR. It is not the same document as the 1995 manual produced in the *Tastad* case after the denial of a protective order. (CP 898) And though plaintiff's counsel has both documents, plaintiff offers no evidence on this point. The 2000 CCPR Manual has *never* been produced in litigation without a protective order.

Similarly, the CPPP Manual at issue was created years after the implementation of CCPR. (CP 898) It describes Allstate's internal policies governing the handling of property, automobile, and casualty claims, as well as standardized practices and procedures for the handling of such claims. Allstate has *never* produced that CPPP Manual in litigation without a protective order. (CP (898)

The Allstate claim bulletins constituted Allstate's confidential and proprietary advice to certain personnel concerning implementation and

consequences of an amendatory endorsement that required both parties to agree to arbitrate UM/UIM claims before that approach could be used, and that deleted the “trial de novo” feature when the arbitration award exceeded certain limits. (CP 97-98, 319-31) Allstate has treated its advisory bulletins as confidential and proprietary, and plaintiffs have not suggested the slightest need to disseminate them broadly.

As to the law, that Allstate made a business decision to waive prospectively its trade secret protection or other confidentiality claims for the McKinsey Documents does not suggest in any way that the documents previously were not protected trade secrets or otherwise confidential. *See, e.g., Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1256 & n.20 (11th Cir. 2008) (party’s “changing its mind” and subsequently producing documents “that could have been withheld as privileged” did not mean that documents “should have been produced with [its] initial disclosure”). Indeed, intrinsic to the concept of waiver is the fact that there was a right to be waived. *See Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980) (waiver is intentional relinquishment of known right).

In the trade secret context, parties often make business decisions to waive protections for confidential information in order to address what may have become more pressing business or legal concerns. Indeed, as

one court noted, a party who sues for trade secret misappropriation and attaches the alleged trade secret to its complaint does not “destroy[] any claim that it may have had at some moment in time for trade secret misappropriation.” *Curcio Webb LLC v. Nat’l Benefit Progs. Agency*, 367 F. Supp. 2d 1191, 1206 (S.D. Ohio 2005). The court explained, “Defendant ignores Plaintiff’s *temporal* argument, the basis of which is that even if Plaintiff’s Proposal Document is no longer entitled to trade secret protection, it was entitled to such protection before Defendant allegedly misappropriated it.” *Id.* (emphasis added). That Allstate has later, for the reasons stated in its notice, decide to waive protections for the McKinsey Documents does not impugn the validity of its pre-disclosure position or undermine protections for other documents.

B. WASHINGTON’S PROVISIONS FOR OPEN-COURT PROCEEDINGS DO NOT EXTEND TO UNFILED DISCOVERY.

Plaintiff contends that Washington public policy affords the public access to discovery. (Resp. Br. 19) To the contrary, however, Washington public policy both recognizes the importance of protecting trade secrets and other confidential business information *and* distinguishes between unfiled discovery and the decision making of a judge or jury. As to the first point, CR 26(c) acknowledges the protection to be afforded in discovery to trade secrets and *other* confidential research, development,

and commercial information. Moreover, the Washington legislature has declared as a matter of public policy:

The legislature . . . recognizes that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, *the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.*

RCW 4.24.601 (emphasis added). Thus, RCW 4.24.611 acknowledges that the court has the power to issue protective orders and discovery orders during litigation.

Plaintiff argues that protective orders prevent the public from knowing about dangerous products. (Resp. Br. 19) But this is not a case involving hazardous products, and the Washington Legislature has treated cases involving such products differently. Under Washington statutes, a court cannot enter a confidentiality provision in a settlement agreement or other order that limits the disclosure of information about an alleged hazard to the public. RCW 4.24.611(1)(b), (4)(b). The statutes acknowledge the public's right to information "necessary for a lay member of the public to understand the nature, source, and extent of the risk from alleged hazards to the public," but the legislature has not provided for similar public access in other cases, including insurance bad faith cases, and it has specifically recognized the right to the "protection of

trade secrets . . . , other confidential research, development, or commercial information.” RCW 4.24.611(2)-(3).

Plaintiff attempts to analogize insurance to hazardous products, arguing that RCW 48.01.030 states that insurance affects the public interest. (Resp. Br. 19) That statute merely relieves a party pursuing a Consumer Protection Act claim from having to establish the public interest element of such a claim, *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 791, 719 P.2d 531 (1986), but it does not mean that insurers cannot have trade secrets or are subject to any higher standards in seeking use and dissemination limits on documents produced in discovery. For example, courts have recognized that even a regulated utility’s interest in its business trade secrets was in the nature of a property right and that, despite constitutional requirements that public utilities’ hearings be public, disclosure of those trade secrets would not be compelled unless the regulatory agency provided adequate protective procedures to assure nonuse and nondisclosure by recipients. *Great Falls Tribune v. Montana Pub. Serv. Comm’n*, 319 Mont 38, 56, 82 P.3d 867 (2003); *N.Y. Tel. Co. v. Pub. Serv. Comm’n*, 436 N.E. 2d 1281, 1283-4 (N.Y. 1982). Neither the Washington Legislature, the state’s insurance regulators, nor its courts have adopted any rule requiring insurance companies to make public any of their claim manuals or bulletins. Absent

such requirements, insurers are subject to the same rules—and the same protections—as other litigants.

As to the second point, the Washington Supreme Court has recognized that unfiled discovery materials are different from judicial decision making, and it has emphasized the privacy interests of litigants over the purported right to disseminate freely materials produced in discovery:

[A]s to other information which [a party] is forced to give under the liberal rules of discovery, *the effective administration of justice does not require dissemination beyond that which is needed for litigation of the case.* It was the needs of litigation and only those needs for which the courts adopted this rule and demanded of the litigant a duty which would not otherwise be his. *For this reason, it is proper that the courts be slow to subject a civil litigant to any exposure which he deems offensive, beyond that which serves the purpose of the rule.*

Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 236, 654 P.2d 673 (1982) (emphasis added). The United States Supreme Court upheld this ruling, repeatedly emphasizing that discovery is meant for limited purposes and that a protective order is a necessary instrument to protect information obtained through discovery while allowing for the free flow of information within a lawsuit. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-34, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). The Washington Supreme Court later distinguished discovery materials from dispositive motions with respect to

the CR 26(c) “good cause” standard and the applicability of Washington’s constitutional “open courts” provision. *Dreiling v. Jain*, 151 Wn.2d 900, 909-10, 93 P.3d 861 (2004) (citing WASH. CONST. art. I, § 10). Discovery is simply not a public activity, and plaintiff’s contention that protective orders are disfavored is not supported by any Washington law.

Plaintiff repeatedly contends that a party should not be entitled to a protective order which prevents sharing documents with litigants and attorneys in other matters. (Resp. Br. 1, 20-24) But that argument erroneously presupposes an irreconcilable conflict between use and dissemination limits and legitimate discovery sharing. Courts have long recognized that the proper approach to accommodating other litigation is to enter the protective order upon a showing of “good cause” and then allow actual litigants in other cases who need the information either to request it in their own cases or to appear and seek a modification of the protective order that allows them access under confidentiality provisions. *See, e.g., Olympic Ref. Co. v. Carter*, 332 F.2d 260, 265-66 (9th Cir. 1964) (second litigant may “have the orders ... modified in such form as to permit access to the documents subject to reasonable restrictions as to

disclosure”).¹ Indeed, in *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992), cited by plaintiff, the Ninth Circuit noted that “legitimate interests in privacy can be protected by putting the intervenors under the same restrictions as those contained in the original protective order.” This approach retains the vital role of the *courts* in determining whether documents are even discoverable, and protects the producing party’s legitimate interests in preserving the confidentiality of its proprietary business information.

Plaintiff laments the expense involved in obtaining discovery and opposing motions for protective orders (Resp. Br. 1, 20-22), but the expense in this case and others was caused solely by the plaintiffs’ own failure to agree to use and dissemination limits and insistence on the right to disseminate Allstate’s confidential documents freely. As this Court’s Commissioner noted in this case, plaintiff has “obtained much of what she argues she needs, and the protective order will not impede the discovery process.” (Ruling Granting Review 7)

¹ See also *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987) (affirming trial court’s modification of a previously-issued protective order to allow a later litigant to have access to the materials produced in the prior litigation); *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295, 1299-301 (7th Cir. 1980) (vacating and remanding trial court’s refusal to modify a protective order to allow a later litigant, in matter involving “virtually identical allegations,” to have access to materials produced in prior litigation).

Plaintiff also misplaces reliance on *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003). (Resp. Br. 19) *Foltz* involved a “blanket protective order” to which the parties stipulated for all confidential materials produced in discovery. After the parties settled, intervenors sought access to discovery materials produced subject to the protective order but not filed with the court. The district court denied the intervenors’ motion, but the Ninth Circuit reversed and remanded because the record did not contain an analysis of whether the district court engaged in a CR 26(c) “good cause” determination, and there was nothing to demonstrate State Farm had shown good cause. *Id.* at 1130-31. *Foltz* merely stands for the proposition that a blanket protective order is not sufficient grounds for refusing to modify the order.

Plaintiff urges a degree of public access to discovery that is unprecedented and unwarranted in Washington. While some federal courts have interpreted Rule 26 as implicitly stating that discovery should be open and public, *see Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 481 n.20 (S.D.N.Y. 1982) (pre-*Rhinehart*), and *Avirgan v. Hull*, 118 F.R.D. 252, 255 (D.D.C. 1987), Washington courts have never endorsed the concept for CR 26, and CR 5(i) specifically provides that discovery materials “shall **not** be filed with the court unless for use in a proceeding or trial or on order of the court.” CR 5(i) (emphasis added). Washington

should follow the guidance from the New Jersey Supreme Court, which more recently recognized “The universal understanding in the legal community is that unfiled documents in discovery are not subject to public access.” *Estate of Frankl v. Goodyear Tire and Rubber Company*, 853 A.2d 880, 886, 181 N.J. 1 (2004) (citations omitted). As the *Frankl* court explained: “Despite the academic debate and state-by-state efforts by the Association of Trial Lawyers of America to obliterate the distinction between filed and unfiled documents in discovery, the distinction remains intact across the nation.” *Id.* at 886 (footnotes omitted). Similarly, here this Court should reject plaintiff’s unfounded argument for “open” discovery.

C. THE SUPERIOR COURT ERRED BY IMPOSING A SPECIFIC HARM TEST AFTER FINDING GOOD CAUSE FOR A PROTECTIVE ORDER.

Contrary to plaintiff’s argument, no Washington court has read the words “specific harm” into the language of CR 26(c). *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991), does not impose a requirement of “specific harm” or its functional equivalent as the test for a protective order, but instead requires only good cause. In *Doe*, where, notably, the plaintiffs were proceeding anonymously, the plaintiff’s estate sued the blood bank after the plaintiff died as result of AIDS, and it sought the identity of the blood donor, who also had died from AIDS

complications. The trial court ordered the blood bank to disclose the information to the plaintiff, who was required to keep the information confidential until the donor was named as a defendant. The Washington Supreme Court affirmed the trial court's order, recited the language of CR 26(c), and conducted a balancing test; it did not adopt any heightened standard of proof.

Lacking any Washington authority, plaintiff looks to various federal court decisions. Instead of providing meaningful analyses of these cases, plaintiff lifts pithy soundbites without providing the context of the case or its holding. These federal court decisions do not provide authority for the "specific harm" test that plaintiff wishes to read into the rule. Almost every decision holds that certain discovery materials are entitled to confidentiality or limitation on use and dissemination. Moreover, the cases can largely be distinguished based on the three dimensions for protective orders identified in Allstate's opening brief. (Appellant's Br. 12)

1. Nature of Restrictions. Some of the protective orders at issue were more restrictive than the use and dissemination limits Allstate seeks here. In *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 175 (E.D. Pa. 2004), the insurer had sought an order that prohibited plaintiff from *obtaining discovery* of a broad range of materials. The district court permitted much of the requested discovery but notably modified the

magistrate judge's order to limit the use and extent of the discovery to address concerns about trade secrets and confidentiality. *Id.* at 178 (“[r]ecognizing that the requested information is about Defendants’ business practices and almost always involves information that is proprietary in nature...”).

Similarly, in *Pearson v. Miller*, 211 F.3d 57, 72 (3d Cir. 2000), the protective order limited access to the discovery to counsel. Nevertheless, the Third Circuit acknowledged that the restriction seemed “entirely sensible” because the restrictions furthered the legitimate interest of confidentiality and would not interfere with the plaintiff’s needs. *Id.* at 73. It remanded the issue to the district court to consider a protective order and conduct a “thorough and conscientious assessment of the various considerations for and against confidentiality.” *Id.* at 72.

2. Phase of Case. *Tinman v. Blue Cross & Blue Shield of Michigan*, 176 F. Supp. 2d 743, 745 (E.D. Mich. 2001), like *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 154 P.3d 236 (2007), dealt with materials in the *court record*, not unfiled discovery. Exhibits to a motion were filed under seal pursuant to a protective order that required the defendant to file a motion to maintain the documents under seal. Believing that the motion was too conclusory, the *Tinman* court held an in camera hearing – which the superior court did not conduct in this case.

The court ultimately determined that some of the documents could be unsealed and others were subject to limited access.

3. Impact on Producing Party. *Avirgan v. Hull*, 118 F.R.D. 252, 253-54 (D.D.C. 1987), involved a motion for a “blanket” protective order prohibiting the press and other members of the public from attending the deposition of a third-party deponent. The court found no good cause where the deponent argued that *adverse publicity* had harmed his business, but the court nevertheless recognized that the deponent would be permitted to move to seal the transcript under Rule 26(c) if good cause could be shown. In contrast to *Avirgan* and plaintiff’s insinuations, Allstate’s reasons for maintaining the confidentiality of its manuals and bulletins revolve around the protection of trade secrets and other valuable confidential and proprietary information, not mere injury to “reputation” or avoidance of being “embarrassed.” (Resp. Br. 25-26)

Other cases involved *stipulated* protective orders where *no* showing of good cause had been required or made, and intervenors subsequently sought access. *See Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002) (vacating order granting newspaper access to confidential settlement information produced under protective order and remanding where district court failed to analyze good cause); *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 471-72, 476 (9th Cir. 1992)

(affirming modification of protective order to allow intervenors to use deposition transcripts “in accordance with protective orders in the pending state actions”); *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 571 (E.D.N.Y. 1985) (modifying stipulated blanket protective order and requiring defendants to show good cause to preserve confidentiality of certain documents).²

A meaningful analysis of these federal cases shows that courts issue protective orders upon a showing of good cause based on showings akin to that which Allstate made in this case.³ The most similar case is *Gohler v. Wood*, 162 F.R.D. 691 (D. Utah 1995), in which Deloitte & Touche was sued for allegedly false and misleading audits, and the plaintiffs sought production of Deloitte’s audit practice manuals. Deloitte offered to produce the portions of manuals referenced in the specific

² *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573, 583 (D.N.J. 1985), involved the burden of proof. The magistrate entered a protective order prohibiting the plaintiffs from disseminating any of the information and materials obtained in discovery. The district court reversed in part and affirmed in part because the existing order placed the burden on the *plaintiff* to overcome the claim of confidentiality. Allstate has never argued for that shifting of the burden of proof.

³ See, e.g., *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255, 259 (M.D.N.C. 2001) (granting protective order to keep discovery materials confidential); *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 204 F.R.D. 420, 424 (S.D. Ind. 2001) (granting protective order limiting the dissemination of claims manuals to the parties and the attorneys); *Wauchop v. Domino’s Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991) (limiting dissemination of defendant’s materials concerning 30-minute delivery guarantee that qualified as proprietary commercial information).

audits under a protective order, arguing that the manuals, which were created through the substantial investment of time and money, contained distinctive accounting and auditing procedures and methodologies that amounted to trade secrets. Deloitte averred that it would be placed at a great competitive disadvantage if competitors were able to copy or adapt the manuals for their business. *Id.* at 693. The court concluded that Deloitte's manuals constituted trade secrets and limited their use and dissemination to that case.

Numerous courts have granted protective orders limiting the use and dissemination of insurers' claim manuals and other company documents like Allstate's manuals and bulletins at issue here. (*See* Appellant's Br. 34-36 & n. 4 (collecting cases).) Moreover, the courts have done so based on the same kind and extent of showing that Allstate made in this case, recognizing that "[t]hese concerns about future use by a competitor are not always easy to demonstrate." *Tinman*, 176 F. Supp. 2d at 746. Plaintiff has not challenged this body of case law with respect to the documents at issue or the showings that the courts accepted as establishing "good cause" for use and dissemination limits. Allstate made a proper showing of "good cause" in this case as to its claim manuals and bulletins, and the superior court erred by vacating the protective order under which Allstate had produced the documents.

D. THE DECLARATIONS OF MS. SULLIVAN AND MR. BJORBACK ESTABLISHED GOOD CAUSE FOR THE PROTECTIVE ORDER.

The declarations of Christine Sullivan and Robert Bjorback established good cause for a protective order limiting the use and dissemination of Allstate's claim manuals and bulletins. Ms. Sullivan's personal knowledge and credibility regarding the manuals and bulletins have never been in dispute. Indeed, after the superior court granted the protective order, plaintiff took Ms. Sullivan's deposition but did not ask her about the manuals or bulletins. The record is therefore void of any challenge to Ms. Sullivan's declaration about these documents, and that declaration alone is sufficient to support the protective order for the manuals and bulletins.

In addition, as established in Allstate's opening brief (Appellant's Br. 37-40), Mr. Bjorback also had the requisite knowledge for the statements in his declaration offered in support of the protective order. Plaintiff erroneously contends that knowledge is inadequate because Mr. Bjorback did not know the claims practices of Allstate's competitors. (Resp. Br. 6) Plaintiff cites no authority for the proposition that a witness must know the practices of its competitors to have the knowledge to testify about the confidentiality and value of his employer's procedures. Indeed, if the competitors each maintained their procedures as trade secrets, such

knowledge would be impossible to gather. Again, without citing any legal authority, plaintiff contends that Mr. Bjorback lacked personal knowledge because he did not specifically quantify the time and money spent to prepare the claims manuals, or provide certainty on the dilution of Allstate's competitive advantage. (Resp. Br. 7) Plaintiff offers no authority to contradict the rule that Washington courts apply a common sense approach in assessing personal knowledge. *See, e.g., Citoli v. City of Seattle*, 115 Wn. App. 459, 475, 61 P.3d 1165 (2002), *rev. denied*, 149 Wn.2d 1033 (2003).

Buffets, Inc. v. Klinke, 73 F.3d 965 (9th Cir. 1996), cited by plaintiff, is not instructive here. After a bench trial, the district court concluded that neither the restaurant recipes nor the employee manuals constituted trade secrets. The recipes were in the public domain, served at buffet restaurants across the United States, and were readily ascertainable, basic American dishes. The recipes could be obtained from other public sources. The court also found that the recipes did not have economic value because there was no proof that they resulted in better food quality and that the other buffet restaurants had less business because of inferior quality food. The court held there was no demonstrated relationship between the lack of success of competitors and the unavailability of the recipes.

The employee manuals also were not trade secrets because they were not the subject of reasonable efforts to maintain secrecy. The employees were allowed to take the manuals home. Most notably, the employees were not advised that the manuals were confidential and secret. Nor were the employees advised of any measures to keep the manuals secret. *Id.* at 969. The manuals also failed the trade secret test because they did not contain any information which was not generally known or readily ascertainable.

The *Buffets* case is not remotely analogous to the present case. Allstate has taken reasonable efforts to maintain the secrecy of the claim manuals and bulletins. Employees are advised that these materials are confidential. (CP 341-42) Most notably, in both *Buffets* and *Woo*, the trial courts and the appellate courts had reviewed the actual documents which were the subject of the lawsuit. In *Buffets*, the recipes and employee manuals were part of the record. In *Woo*, the claim manuals were exhibits at the trial and were provided to the appellate court for review. Here, however, the manuals and bulletins at issue are not in the record. The record here establishes that these documents should be subject to protection. Should this Court be inclined to conclude otherwise, the appropriate remedy would be to reverse and remand for the superior court to conduct in camera review of the documents.

E. PLAINTIFF IS NOT ENTITLED TO ATTORNEY FEES.

Plaintiff's request for fees on appeal under RAP 18.1 and RCW 19.86.090 should be denied. Plaintiff has not established any Consumer Protection Act violation, nor has plaintiff prevailed on any claim. There is no basis to award attorney fees.

III. CONCLUSION

This Court should reverse the superior court's order vacating the April 20, 2007, protective order and reinstate the use and dissemination limits on Allstate's manuals and bulletins.

DATED this 27th day of May, 2008.

REED McCLURE

By 

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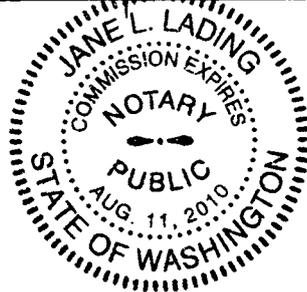
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DATED this 27th day of May, 2008.


SARA LEMING

SIGNED AND SWORN to (or affirmed) before me on
May 27, 2008 by SARA LEMING.




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