

No. 36624-0-II

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

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COLLEEN MCCALLUM,

Respondent,

vs.

ALLSTATE INSURANCE COMPANY, a foreign insurer,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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**APPEAL FROM PIERCE COUNTY SUPERIOR COURT**

Honorable Lisa Worswick, Judge

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This appeal started out as another chapter in Allstate's efforts to prevent discovery-sharing by attorneys handling bad faith cases against Allstate and to keep documentary evidence of Allstate's institutionalized bad faith policies from the public. Allstate's strategy for defending bad faith lawsuits has been to divide and conquer by insisting on protective orders in every case (and then refusing to produce documents if protective orders are denied) to prevent plaintiff's attorneys from sharing the fruits of discovery in one case with attorneys in other cases. Forcing plaintiff's attorneys to go through multiple rounds of motions and then lengthy appeals regarding discovery issues greatly increases the costs and resources necessary to prosecute bad faith cases against Allstate, and therefore deters plaintiff's attorneys from filing such cases. It also burdens all levels of the court system throughout the country with repetitive litigation over the same discovery issues and makes resolution of bad faith cases against Allstate cumbersome and inefficient because the fruits of discovery in one case cannot be used in another case when restrictive protective orders are imposed.

Consistent with the vast majority of courts that have addressed the standard of proof necessary to establish "good cause" for a protective order, Judge Worswick required that Allstate make a showing of "specific

harm” that would result from production of the McKinsey Documents, claims manual, claims bulletins, and CCPR training manuals without a protective order. Judge Worswick was well within her discretion in finding that Allstate failed to make the necessary showing.

The factual underpinnings of Allstate’s appeal have changed dramatically since the time the appeal was filed. Allstate has withdrawn any claims of confidentiality as to the “McKinsey Documents” and made them publicly available on Allstate’s website.<sup>1</sup> See Appendices A, B, and C. Allstate’s public disclosure of the McKinsey Documents completely eviscerates the credibility of the claims that Allstate made in the trial court in support of its request for a protective order. Judge Worswick’s orders should be affirmed.

## **II. RESTATEMENT OF ISSUES**

Did Judge Worswick apply the correct legal standard for establishing “good cause” for a protective order in requiring that Allstate demonstrate that it would suffer specific harm as a result of production of the subject documents without a protective order?

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<sup>1</sup> However, Allstate requires people seeking access to the McKinsey Documents to agree to “Terms of Service” that state that the person accessing the documents will only use them for “information and news media purposes.” Appendix A. What Allstate means by “information” purposes is unclear. Counsel for Plaintiff/Respondent McCallum have not accepted Allstate’s “Terms of Service.”

Did Judge Worswick act within her broad discretion in finding that Allstate failed to show any specific harm that would result from production of the subject documents without a protective order and that Allstate therefore failed to show good cause for a protective order?

Did Judge Worswick act within her broad discretion in striking the second Robert Bjorback Declaration?

### **III. STATEMENT OF FACTS**

#### **A. The underlying claim**

Colleen McCallum was injured in a motor vehicle collision caused by a phantom vehicle in May of 2004. CP 2. She incurred over \$23,000 in medical expenses. CP 4. Only \$25,000 in uninsured motorist (UIM) benefits was available to Ms. McCallum under her Allstate insurance policy. Because Allstate failed to make a reasonable settlement evaluation of Ms. McCallum's claim, she was forced to file a lawsuit (the Allstate policy required that she file a lawsuit to pursue her UIM claim) and litigate her UIM claim through mandatory arbitration in order to obtain the \$25,000 UIM policy limits. CP 3-4. The arbitrator, Karen Bertram, awarded Ms. McCallum the jurisdictional maximum of \$50,000. CP 5, 126, 270-271. Ms. McCallum then filed this lawsuit against Allstate for its bad faith handling of her claim.

**B. The credibility of the declarations submitted by Allstate in support of a protective order was later eroded by deposition testimony.**

Ms. McCallum issued discovery requests for the “McKinsey Documents” and other claims handling materials. Allstate submitted declarations from an Allstate vice president, Christine Sullivan, and a local claims representative, Robert Bjorback, in support of its motion for a protective order. Their declarations were the sole evidentiary basis for Allstate’s motion for a protective order. After the protective order was entered, Plaintiff deposed Ms. Sullivan and Mr. Bjorback to explore the factual bases for the conclusory statements in their declarations. Those depositions revealed significant credibility issues and raised significant concerns as to whether they had adequate personal knowledge regarding the content of their declarations.

Allstate claims that nothing changed between April 20, when the protective order was entered, and July 20, when the protective order was vacated. Allstate ignores the fact that the depositions of Ms. Sullivan and Mr. Bjorback were taken during that time. By the time of the July 20 order vacating the protective order, Judge Worswick had their depositions, which probed the credibility of the statements in their declarations and revealed significant concerns. The evidentiary record before Judge Worswick changed dramatically between April 20 and July 20.

Allstate suggests that Judge Worswick somehow confused the erroneous deposition testimony of Mr. Bjorback regarding the McKinsey documents with other issues (*Brief of Appellant* at 7), but the record is clear that Judge Worswick understood that Mr. Bjorback's declaration did not address the McKinsey documents. CP 695 (7/20/07 *Transcript* at 11) (Judge Worswick: "His declaration doesn't necessarily mention the McKinsey documents."). Judge Worswick's concern was with the credibility of the Bjorback and Sullivan declarations in light of their deposition testimony, and not whether Mr. Bjorback's declaration purported to address the McKinsey Documents.

Mr. Bjorback's declaration contained exaggerated, self-serving language, such as the following:

The procedures described in [Allstate's] manuals, and all related documents, give Allstate an advantage over its competitors in attracting and keeping policyholders. Allowing anyone unfettered access to these confidential documents and information would give Allstate's competitors the unfair advantage of obtaining, at no cost, Allstate's valuable and innovative business techniques, programs, processes, and information that were developed as a result of Allstate's significant investment of time, manpower, and financial resources. Such access would dilute the effectiveness of Allstate's investment and cause irreparable harm to Allstate's competitive position.

CP 341. This exaggerated language was clearly written by attorneys using language from case law. Mr. Bjorback admitted that his declaration was prepared by counsel. CP 894 (*Bjorback Dep.* at 11). The declarations of

Mr. Bjorback and Ms. Sullivan consist of boilerplate phrases taken from case law rather than the specific facts that the law requires. As Allstate acknowledges, legal argument, conclusory statements, and opinions are improper in declarations. CP 378, 495.

Mr. Bjorback admitted that a court ordered Allstate's claims manual to be produced without a protective order in *Tastad v. Allstate*, a Washington case in which he submitted a declaration containing statements similar to the declaration he submitted in this case. CP 899 (*Bjorback Dep.* at 31-32). Although Mr. Bjorback's declaration in *Tastad* claimed that irreparable harm would occur if the claims manual was produced without a protective order (CP 899, *Bjorback Dep.* at 32), Allstate failed to produce any evidence that the claimed "irreparable harm" ever occurred when the claims manual was produced in *Tastad* without a protective order. CP 899 (*Bjorback Dep.* at 33).

Like balloons, the exaggerated claims in Mr. Bjorback's declaration popped when probed at his deposition:

- While Mr. Bjorback stated in his declaration that the CCPR training manual and claims bulletins contain "information *unique* to Allstate's insurance policies and claims handling," (CP 342 (emphasis added)), he testified in his deposition that he did not know what Allstate's competitors' claims practices are. CP 894, 897 (*Bjorback Dep.* at 10, 22-24, 44). He did not know whether other insurance companies have hired the same consulting firm (McKinsey) that Allstate hired or whether other insurance

companies' claims manuals are substantially similar to Allstate's claims manuals. CP 898 (*Bjorback Dep.* at 28).

- Mr. Bjorback lacked knowledge of how much time or money Allstate invested in developing its claims manuals, despite statements in his declarations implying such knowledge. CP 896-897 (*Bjorback Dep.* at 19-22).

- While Mr. Bjorback stated in his declaration that producing the claims manual and related documents without a protective order would result in irreparable harm to Allstate, in his deposition he merely speculated that producing the documents without a protective order "could" dilute Allstate's competitive advantage or "could" benefit Allstate's competitors. CP 898-899 (*Bjorback Dep.* at 28-31).

- When pressed to give examples of a specific claims handling policy that would result in harm to Allstate if disclosed to a competitor, Mr. Bjorback was at a loss and identified only two policies – Allstate's policy of attempting to identify underinsured motorist claims as quickly as possible and Allstate's "fast track settlements" policy, which attempts to settle small cases expediently. CP 810-813 (*Bjorback Dep.* at 39-44). He admitted that there was no top secret formula in the claims documents. CP 811 (*Bjorback Dep.* at 40).

The trial court, Judge Worswick, vacated the protective order because, in light of Ms. Sullivan's and Mr. Bjorback's deposition testimony, she did not find their conclusory declarations to be credible:

The declarations of Mr. Bjorback and Ms. Sullivan seem in some substantial part, if not to contradict their testimony at the depositions, but 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.

Then on a date that the responsive materials are due, Mr. Bjorback substantially changes an answer in his deposition, changing a yes to a no. It wasn't just a yes. It was a yes with several follow-up

questions, as I recall when I read the deposition. And then he decided to change that to a no. I don't think the errata sheet covered the follow-ups.

That just causes me great concern. It's not only late, but substantially changing testimony directly relating to a motion the defendants have received . . . .

CP 713 (7/20/07 Transcript at 29).

### **C. The McKinsey Documents**

In the mid-1990s, Allstate hired McKinsey & Company, a business consulting firm, to analyze Allstate's automobile bodily injury claims handling procedures. CP 357 (*Allstate's Motion for Protective Order* at p.15). McKinsey recommended changes to increase Allstate's profitability for the benefit of its executives and shareholders, not to improve Allstate's claims handling for the benefit of its policy holders. *Allstate Ins. Co. v. Scrogan*, 851 N.E.2d 317, 324 (Ind. Ct. App. 2006) (noting that McKinsey's work resulted in revised claims handling policies that "included various cost control measures aimed at reducing the amount paid out on claims"). These changes and the motivations and concepts underlying them are summarized in a series of Power Point slides prepared by McKinsey, which have become known as the "McKinsey Documents." The changes implemented by Allstate are referred to as Claim Core Process Redesign ("CCPR"). The relevance of the McKinsey Documents in this case is similar to the relevance of design plans/memos for a

building or machine in a construction defect or product liability case, because they document the origins of CCPR and Allstate's claims manual.

The McKinsey Documents were generated 10+ years ago, in the "mid-1990s." *Brief of Appellant* at p.1; *Affidavit of Christine Sullivan (Pincheira v. Allstate)* at ¶ 2 (the redesigned claims handling processes developed as part of McKinsey's work were implemented in 1995) (reproduced in *Pincheira v. Allstate*, 164 P.3d 982, 1007 (N.M. Ct. App. 2007)). Regardless of whether these documents described cutting edge or state of the art insurance claims handling practices at the time they were produced, that claim no longer withstands scrutiny now that more than a decade has passed. The primary evidence relied upon by Allstate to support its claim that the McKinsey Documents warrant court-ordered secrecy through a protective order was the Declaration of Christine Sullivan, an Allstate executive who has testified that the value of the McKinsey Documents to Allstate is "historical":

Q. What about the McKinsey report? Have you testified that, too, now is considered a historical document at Allstate?

[colloquy of counsel omitted]

A. My understanding is and my personal knowledge is it's a report that was done way back when, so it's historical.

Q. Okay. And that would be its value to Allstate at this time, true?

A. Yes.

CP 802 (*Deposition of Christine Sullivan, pp.41-42, Simonsen v. Allstate, U.S. District Court, Montana*).

In her deposition in this case, Ms. Sullivan denied that testimony:

Q. Am I correct that you consider the McKinsey documents to be a historical document?

Mr. Neumann: Object to the form.

A. I don't think I have ever said that about the McKinsey documents. They're clearly historical because they occurred some time ago. I don't think I have ever labeled them historical.

Q. Have you stated and testified that the value to Allstate of the McKinsey documents is that they are, in fact, historical?

A. I believe my testimony was that the CCPR implementation and training manual was an historical document. I don't believe I have ever characterized the McKinsey documents as historical. . . .

CP 950-951 (*Deposition of Christine Sullivan at pp.27-28*).

With regard to the claimed "uniqueness" and "trade secret" status of the McKinsey Documents, Ms. Sullivan admitted that McKinsey has done consulting work for many other major insurance companies for many years and that some of the McKinsey Documents relate to the insurance industry in general, and not Allstate in particular. CP 953-955, 957 (*Sullivan Dep. at 30-32, 34*).

Plaintiff requested that Allstate produce the McKinsey Documents because of their relevance to a bad faith case such as this: they demonstrate the profit motive behind Allstate's claims handling procedures.<sup>2</sup> They provide useful evidence for establishing a Consumer Protection Act claim – that Allstate's claim handling procedures are designed to injure Allstate's own insureds on a large scale basis. They explain *why* Allstate handled Colleen McCallum's claim in bad faith. CP 395-403 (description of contents of McKinsey Documents).

The McKinsey Documents, claims manuals, training manuals, and claims bulletins, are also important to consumers and lawyers around the country who are involved in bad faith litigation against Allstate, and they are also of interest to the media and the general public. Allstate's reasons for its improper handling of Colleen McCallum's claim extend beyond her individual claim. They are part of a national strategy to increase profits by reducing payments on legitimate claims. Likewise, Ms. McCallum's reasons for bringing this lawsuit extend beyond her individual claim. Insurance bad faith lawsuits like this one are not only about compensation in individual cases. They also serve to deter future misconduct by insurance companies, thereby protecting other consumers; to expose

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<sup>2</sup> As Allstate acknowledges, the McKinsey Documents “show the development, design, testing, and implementation of Allstate's claim-handling reforms.” *Brief of Appellant* at p. 21.

wrongful conduct; and to educate the public about how certain insurance companies handle claims. The concept of private attorneys general is well-established in the civil justice system and is specifically encouraged by the Consumer Protection Act, which is one of the bases for Plaintiff's claim. CP 7. Allstate ignores the public interest and the interest of the civil justice system in having discovery materials in one case available to parties in other similar cases. This public interest is recognized by the law review article cited by Allstate: "Discovery confidentiality does not primarily pit one party against the other, but rather pits the parties against a possible public interest in disclosure." Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 372 (2006).

The McKinsey Documents have been the subject of litigation throughout the country. New Mexico lawyer David Berardinelli temporarily obtained copies of them from Allstate and made notes regarding their content. He has published articles<sup>3</sup> and a book, *From*

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<sup>3</sup> Berardinelli, *False Promises – Allstate, McKinsey and the Zero Sum Game*, 35-4 NMTLJ 93, 96-103 (Aug. 2005); *An insurer in the grip of greed*, TRIAL, Vol. 43, No. 7, pp. 33-37 (July 2007). CP 757-761. Other news sources have also discussed the McKinsey Documents. See, e.g., Tampa Tribune, Michael Sasso, *Secretive Allstate File Could Show "Bad Faith"* (January 23, 2008); King 5 TV, Chris Ingalls, *Investigators: Secret documents reveal insurance strategy* (October 5, 2007); Houston Chronicle, Loren Steffy, *The "good hands" people make a fist* (September

*Good Hands to Boxing Gloves* (CP 405-444; 518-557), based on his notes regarding the contents of the documents. His summary of the McKinsey Documents has been published in *Litigating Minor Impact Soft Tissue Cases* (ThompsonWest 2001). CP 394 (*Declaration of Karen Koehler* at p.2).

#### **D. Post-appeal developments**

The factual context of this appeal has changed dramatically during the time the appeal has been pending. The McKinsey Documents are now in the public domain:

. . . Allstate has decided to end its efforts to preserve the confidentiality of the “McKinsey Documents” produced in this case . . . .

. . . Allstate has decided to make the documents public.

. . . Allstate has decided that the “McKinsey Documents” produced in this case no longer need to be subject to the Protective Order entered in this case.

Appendix B (April 7, 2008 letter from Marilee Erickson to Karen Koehler and Michael Fisher).

. . . Allstate Property and Casualty Insurance Company (“Allstate”), hereby voluntarily removes the confidentiality designation for the “McKinsey Documents” produced in this case . . . .

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28, 2007); Bloomberg Markets, David Dietz & Darrell Breston, *Property insurers use secret tactics to cheat customers out of payments—as profits break records* (September 12, 2007) (CP 773-784); Business Week, *In Tough Hands at Allstate* (May 1, 2006).

Appendix C (Notice Regarding Certain Discovery Documents).

The Declaration of Allstate Vice President Christine Sullivan made the following claims – under penalty of perjury -- regarding the McKinsey Documents:

- “The McKinsey documents are a compilation of materials which derive independent economic value from not being generally known to other companies and competitors who can obtain economic value from the disclosure of the McKinsey documents.” (¶ 6)
- “Allowing anyone access to the McKinsey documents would give Allstate’s competitors the unfair advantage of obtaining, at no cost, Allstate’s valuable and innovative business techniques, programs, processes and information that were developed as a result of Allstate’s significant investment of time, manpower, and financial resources. This would dilute the effectiveness of Allstate’s investment and *cause irreparable harm to Allstate’s competitive position.*” (¶ 9) (emphasis added)
- “Allowing unlimited access to the McKinsey documents would harm Allstate. . . . Such access would dilute the effectiveness of Allstate’s investment and *cause irreparable harm to Allstate’s competitive position.*” (¶ 11) (emphasis added)
- “Allowing unlimited access to the McKinsey documents would also harm Allstate by giving others valuable and proprietary information about Allstate’s strategies for resolving contested claims and litigation pertaining to contested claims. Such access would undermine Allstate’s ability to handle, negotiate, and resolve contested claims.” (¶ 12)

CP 366-368.

That Ms. Sullivan’s claims were exaggerated at best, and false at worst, is now apparent. Allstate has made 150,000 pages of the McKinsey

Documents available on its website. Appendix A. Allstate's claim in the trial court that significant economic harm would befall Allstate if the McKinsey Documents were ordered produced without a protective order has now been shown to be false. Judge Worswick was correct in finding that Allstate's claims lacked credibility. Judge Worswick properly found that Allstate failed to meet its burden to keep the subject documents secret through a court-imposed protective order. These recent developments strongly support Judge Worswick's rulings.

#### IV. AUTHORITY

##### A. Standard of review

While the question of whether the trial court applied the correct legal standard in ruling on Allstate's motion for a protective order would be reviewed de novo, the trial court's factual findings as to the adequacy of Allstate's evidentiary showing to establish "good cause" under CR 26(c), as to whether the documents at issue constitute "trade secrets," and as to the adequacy of Allstate's showing that it would suffer any specific financial, commercial, or competitive harm as a result of production of the subject documents without a protective order, are reviewed for abuse of discretion. A ruling on a motion to strike is also reviewed for abuse of discretion. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998).

Allstate acknowledges that trial courts have “broad discretion to decide when protection from discovery is appropriate and what degree of protection is warranted. *Rhinehart*, 467 U.S. at 36. ‘The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.’ *Id.*” CP 351. *See also Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991) (“Within the generalities of the rule [CR 26(c)], it is the proper function of the trial court to exercise its discretion in the control of litigation before it.”); *Lang v. Washington State Dept. of Health*, 138 Wn. App. 235, 254, 156 P.3d 919 (2007) (“A court has wide discretion when ordering pretrial discovery, and this court will not disturb this type of decision absent an abuse of discretion.”); *King v. Olympic Pipeline*, 104 Wn. App. 338, 348, 371, 16 P.3d 45 (2000) (“A court's determination on a motion to ... grant a protective order is discretionary, and is reviewed only for abuse of discretion,” thus “a trial court has substantial latitude to decide when a protective order is appropriate . . . given the unique character of the discovery process.”).

Abuse of discretion is more than disagreement with the trial court's decision or an honest difference of opinion:

Admittedly, the balancing and weighing of interests and values are difficult. There is apparent merit on both sides. However, given this record and considering the limitations and restrictions imposed

by the trial court, we conclude that there has not been a clear showing of an abuse of discretion. In the words of *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971), the exercise of discretion was not manifestly unreasonable, it was not exercised on untenable grounds, or for untenable reasons.

*Doe v. Puget Sound Blood Center*, 117 Wn.2d at 789; *see also Thoren v. Thoren*, 73 Wn.2d 671, 672, 440 P.2d 182 (1968).

A trial court's findings of fact will not be disturbed on appeal if the findings are supported by substantial evidence:

As we have consistently stated, where the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978); *Moran v. Prudential Ins. Co. of America*, 86 Wn.2d 432, 545 P.2d 1193 (1976). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Holland*, 90 Wn.2d at 390-91, 583 P.2d 621; *In re Snyder*, 85 Wn.2d 182, 532 P.2d 278 (1975).

*Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982); *see also Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987); *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 343 P.2d 183 (1959).

Moreover, on appeal, findings of fact are presumed correct. *Fisher Properties Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990); *Thor v. McDearmid*, 63 Wn. App. 193, 205, 817 P.2d 1380

(1991); *Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App. 833, 842, 911 P.2d 1358 (1996). Thus, there is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing they are not supported by substantial evidence. *Fisher Properties, Inc.* at 369; *Thor* at 205; *Professionals 100* at 842. Based on this presumption, the appellate court does not substitute its judgment for that of the trial court in reviewing findings of fact. *Fisher Properties* at 369-370; *Thor* at 205.

As discussed below, Judge Worswick applied the correct legal standard in ruling on Allstate's request for a protective order. Because she applied the correct legal standard, the relevant standard of review for review of her factual determinations and balancing of the competing factors is abuse of discretion.

That Judge Worswick properly exercised her discretion is supported by the fact that the McKinsey Documents have now been made public by Allstate. This development completely undermines the credibility of Allstate's claims in the trial court that great economic harm would occur to Allstate if the documents were publicly released. Judge Worswick saw through Allstate's scorched earth litigation tactics, trumped up claims, and conclusory declarations. She did not commit error.

**B. There is a strong presumption that the civil justice system will be administered openly, not secretly.**

There is a strong presumption of public access to discovery materials in civil cases. *Foltz v. State Farm Ins. Co.*, 331 F.3d 1122, 1137 (9<sup>th</sup> Cir. 2003); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9<sup>th</sup> Cir. 2002) (“Generally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows ‘good cause’ why a protective order is necessary.”); *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 571 (E.D.N.Y. 1985) (citing “the presumption set forth in the Federal Rules that discovery should be conducted in public”).

The Legislature has specifically found that the insurance industry in particular is “affected by the public interest.” RCW 48.01.030. Protective orders are disfavored because they prevent the public from knowing about dangerous products and conditions and unfair business practices, thus allowing a defendant to continue to make profits while innocent persons are unnecessarily placed in harm’s way and injured, whether physically or financially. Discovery must take place in public unless there are compelling reasons to deny public access. *Turick v. Yamaha Corp.*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988).

Many courts have recognized that the interests of other litigants in accessing the fruits of discovery in other cases is an important factor weighing against protective orders:

This court strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation. *Beckman*, 966 F.2d at 475. Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery. *Id.*; *United Nuclear*, 905 F.2d at 1428 . . . .

*Foltz v. State Farm Ins. Co.*, 331 F.3d at 1131; *see also Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546-547 (N.D. Ind. 1991) (“[T]he sharing of discovery materials ultimately may further the goals of Rule 1 by eliminating the time and expense involved in ‘re-discovery.’ . . . The efficient administration of justice should encourage such practices. . . . Maintaining a suitably high cost of litigation for future adversaries is not a proper purpose under Rules 1 or 26.”); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986) (“[R]equiring each plaintiff in every similar action to run the same gauntlet over and over again serves no useful purpose other than to create barriers and discourage litigation against the defendants. Good cause as contemplated under Rule 26 was

never intended to make other litigation more difficult, costly and less efficient.”).<sup>4</sup>

Attorneys have shared the fruits of discovery in many types of cases, allowing other attorneys access to the evidence necessary to hold powerful corporations accountable for their wrongdoing. The sharing of discovery materials keeps the discovery process honest because it prevents defendants from hiding documents obtained in one case from being discovered in other cases, and it reduces the effectiveness of stonewalling as a defensive discovery tactic in litigation by making discovery materials available from other sources. The Ford Pinto gas tank and Firestone tire/Ford Explorer rollover cases are two examples. It should not be necessary for plaintiffs to re-litigate the same discovery disputes over and over, in courts throughout the country, in cases involving similar allegations against the same defendant.

The law review article cited by Allstate also acknowledges the importance of discovery sharing to the civil justice system:

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<sup>4</sup> See also *Krahling v. Executive Life Ins. Co.*, 959 P.2d 562, 568 (N.M. Ct. App. 1998); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D.C. Colo. 1982) (“Each plaintiff should not have to undertake to discover anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel. Efficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved.”).

Even if a party has articulated a legitimate need for confidentiality, and the case involves no public interest that justifies outright denial of the protective order, a court may consider modifying the order rather than granting it in the form to which the parties stipulated. ***In particular, if the protective order prohibits the parties from sharing information with other lawyers handling related cases, the court should consider modifying the order to permit such sharing. Coordination among counsel in related cases not only promotes litigation efficiency, but also enhances the quality of legal work and tends to level the field in asymmetrical multiparty litigation.***

Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 369 (2006) (emphasis added).

Allstate's claim that the McKinsey Documents are trade secrets that could be used by its competitors has been proven to be a smoke screen because Allstate has now made those documents public. Allstate used its confidentiality claims as a cover for its scorched earth litigation tactics directed at preventing plaintiff's counsel in bad faith cases against Allstate from sharing their discovery and work product.

This Court, like the court in *Koval v. General Motors Corp.*, 610 N.E.2d 1199 (Ohio Com. Pl. 1990), should see through that smoke screen. In *Koval*, the plaintiff claimed that his 1981 Buick Century was defectively designed in that it burst into flames after being struck from behind, causing the gas tank to rupture. General Motors sought a protective order, claiming that 2,200 documents related to its evaluations of the 1981 Buick Century contained confidential commercial information

and trade secrets. The court rejected General Motor's position, finding that the documents were not trade secrets and that General Motor's true motive for seeking a protective order was to prevent the sharing of discovery with plaintiff's attorneys in other cases, which does not establish good cause for a protective order:

General Motors has not given any specific examples of competitive harm. It simply argues that the information was costly to develop and that if the materials were to fall into the hands of its competitors, it *might* or *could* result in its competitors obtaining information concerning how they might improve the quality and performance of their products. Such vague conclusions regarding the value of those documents and their possible use by General Motors' competitors are insufficient grounds for a protective order, and fall short of the good cause requirement of the rule. . . .

...

[I]t is apparent to the court that one of General Motors' primary concerns and reasons for its motion for a protective order is that it fears these documents might fall into the hands of a similarly situated plaintiff suing General Motors in a different forum. Based on the case law and articles written on this subject, the court is of the opinion that this is the driving force not only behind the present motion, but also behind General Motors' request that the documents be returned to it at the close of the litigation. The fact that similarly situated plaintiffs may see and even use the documents at issue in other lawsuits does not justify the issuance of a protective order. Even assuming General Motors had demonstrated that these documents were competitively valuable, which the court finds it has not, for the reasons that follow it would not be entitled to a protective order that would preclude such information sharing or require the return of these documents.

There exists much case law supporting the sharing of discovery which General Motors so obviously abhors. [citing cases] . . . These and other courts have noted the efficiencies, in terms of time

and cost, that are created when two similarly situated litigants share discovery, and have further noted that such sharing imposes on the producing party, such as General Motors, the duty to provide full, fair and consistent disclosure of documents to each similarly situated plaintiff.

More important than any efficiency created, however, is that the public will derive an indirect benefit from a practice permitting sharing. The court notes that products have been modified and even taken off the market as a whole following the public outcry that the products are dangerous. Such revelations of a product's dangerous propensity occur mainly through litigation. . . .

The court concludes that this motion for a protective order has more to do with other litigation and bad publicity than with what the court finds to be but vague and conclusory allegations of competitively sensitive documents. The court "must consider the need for public dissemination, in order to alert other consumers to potential dangers posed by the product." *See Hendricks and United States v. Hooker Chemical Corp., supra*. If the sharing of discovery can possibly save lives and stop injuries such as occurred here by forcing this defendant to act, then no protective order should prohibit it. . . .

The court finds that the sharing of documents is beneficial, that requiring the return of these documents would hamper such practice, and, of utmost importance, that the decisions as to these matters and the denial of this motion comport with the spirit of our Civil Rules. As Civ. R. 1(B) states: "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." The court can think of nothing more violative of this rule than the protective order that General Motors has proposed and argued for in this case and, thus, its motion must be denied.

*Koval*, 610 N.E.2d at 698-700 (emphasis in original). There is no competitive disadvantage to Allstate to having the documents at issue in this case shared with attorneys handling other cases against Allstate.

The mere fact that Allstate might be embarrassed by having its profit-seeking motives publicly exposed is not a recognized basis for a protective order:

[I]f the basis for defendants' motion is to prevent information from being disseminated to other potential litigants, then defendants' application must fail. . . . The courts have emphatically held that a protective order cannot be issued simply because it may be detrimental to the movant in other lawsuits. *United States v. Hooker Chemicals & Plastic Corp.*, 90 F.R.D. at 426; *Kamp Implement Co., v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153 (W.D. Tex. 1980). Using fruits of discovery from one lawsuit in another litigation, and even in collaboration among various plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure. *United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. at 426. The harm possibly emanating therefrom does not form a basis for a protective order.

*Nestle Foods Corp. v. Aetna Cas. and Surety Co.*, 129 F.R.D. 483, 486 (D.N.J. 1990); *see also Tinman v. Blue Cross & Blue Shield of Michigan*, 176 F. Supp.2d 743, 746 fn. 4 (E.D. Mich. 2001) ("While Defendant might be embarrassed if competitors published BCBSM's 'candid evaluations' of aspects of its business, mere embarrassment is not enough to satisfy the requirements of . . . FRCP 26(c)."); *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. at 545-546 ("The general risk of public disclosure or collaborative sharing of information . . . does not constitute good cause for a protective order under Rule 26(c). . . . A claim . . . that public

disclosure would be harmful to the defendant's reputation is not sufficient.”).<sup>5</sup>

**C. Allstate's burden of showing good cause to keep the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins secret requires evidence of specific harm that would result without a protective order.**

If a party seeking a protective order fails to show good cause, no protective order should be issued to restrict the use of discovery materials. *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990).

Allstate complains that the trial court erred in requiring it to show specific harm that would result without a protective order in order to establish “good cause” for a protective order. *Brief of Appellant* at p.3. Allstate wants to avoid this burden because it did not and cannot demonstrate any significant harm that would result from production of the

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<sup>5</sup> *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), involved the privacy interests of an individual plaintiff who was being threatened with public disclosure, through the media, of humiliating information obtained during discovery. The Supreme Court noted in *Rhinehart* that cases involving consumer protection issues – such as antitrust cases – have much greater public interest in discovery materials, which favors denying a protective order in such cases. *Rhinehart*, 98 Wn.2d at 255 (“Of course, there are cases which involve matters which do concern the public generally (antitrust litigation being an example), and where privacy interests are not involved, there may be good reason to deny a protective order.”). This case is a clear example of a consumer protection case in which the public has a strong interest. The party seeking the protective order in this case is not an individual facing public humiliation as in *Rhinehart*, but a huge corporation that is used to adverse publicity.

McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins without a protective order.

Demonstrating specific harm is an element of showing good cause. Simply alleging that information is somehow “confidential” is not enough. As a party seeking a protective order, it was Allstate’s burden to show that disclosure of the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins would cause an identifiable and significant harm:

“Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.” *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,” do not support a good cause showing. *Cippolone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487, 98 L.Ed.2d 485 (1987).

*Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3<sup>rd</sup> Cir. 1994).

While Washington’s appellate courts have not expressly used the words “specific harm” in describing the showing required under CR 26(c), they have required the functional equivalent of “specific harm.” In *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991), the Supreme Court described the required showing for a protective order as follows:

[T]he 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.

*Doe*, 117 Wn.2d at 777.

Applying the standard set forth in *Doe v. Blood Center* to this case, justice clearly supports Judge Worswick's decision to vacate the protective order. Justice certainly does not *require* a protective order that prohibits the sharing of the fruits of discovery in this case with attorneys handling other insurance bad faith cases against Allstate. The administration of justice *favours* discovery sharing among attorneys in other cases. *See, e.g., Wauchop*, 138 F.R.D. at 546 ("The efficient administration of justice should encourage such practices [the sharing of discovery materials].") Justice does not favor allowing Allstate to play a game of "hide and seek" in responding to discovery requests in bad faith cases around the country, requiring that litigants file motions to compel and expend significant resources in litigating discovery disputes to obtain requested documents. The open administration of justice favors sharing of discovery among attorneys handling other cases against Allstate. CR 26(c) should be interpreted and applied with that in mind. *See* CR 1 ("[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."). The trial court

in this case properly refused to limit the use of the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins to this case.

Further, the Washington Supreme Court in *Doe v. Blood Center* held that the reasons supporting a protective order “must be found to exist and be stated as such.” This is the functional equivalent of a showing of “specific harm.” Self-serving, conclusory allegations are not sufficient. Here, the trial court found that Allstate’s alleged reasons to support a protective were not credible. Judge Worswick properly applied the rule of law set forth in *Doe v. Blood Center* and was well within her discretion in vacating the protective order.<sup>6</sup>

Consistent with *Doe v. Blood Center*, both *Washington Practice* and the *WSBA Civil Procedure Deskbook* state that a specific factual showing is necessary to establish good cause for a protective order. *See* 3A *Washington Practice, Rules Practice*, CR 26, § 43, p.608 (2006)

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<sup>6</sup> Allstate’s discussion of the standard to obtain an injunction under the Uniform Trade Secrets Act is inapposite. No one is asserting that Allstate must show evidence of “irreparable harm” in order to obtain a protective order. Allstate must, however, produce evidence demonstrating some specific harm that would occur from disclosure of the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins without a protective order, and it failed to do so. It is not at all surprising that Judge Worswick found the declarations of Christine Sullivan and Robert Bjorback to be too conclusory to establish any specific harm. The Sullivan and Bjorback Declarations are lacking in specific facts, and it is now clear that the claims made by Ms. Sullivan were either exaggerated or false.

(“Good cause must be demonstrated by a specific factual showing. Stock, boilerplate conclusions are not sufficient.”); *WSBA Civil Procedure Deskbook*, § 26.6(3)(b), p.26-74 (to show good cause, the moving party must articulate specific facts showing “clearly defined and serious injury”).

Although *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004), involved documents that had become part of the court file and distinguished between unfiled discovery materials and documents that become part of the court file, our Supreme Court in *Dreiling* (at pp.916-917) approved the reasoning in *Foltz v. State Farm*, 331 F.3d 1122 (9<sup>th</sup> Cir. 2003), which held that trial courts should generally not approve blanket protective orders and that a party seeking a protective order “bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. . . . Unsubstantiated allegations will not satisfy the rule. The requesting party must support, where possible, its request by affidavits and concrete examples.” *Dreiling*, 151 Wn.2d at 916-917 (citing *Foltz*, 331 F.3d at 1130).

In addition to the fact that federal case law concerning protective orders was approved in *Dreiling*, the language of CR 26(c)(7) is identical to the language of F.R.C.P. 26(c)(7), and federal case law is therefore

persuasive in interpreting CR 26(c)(7), particularly given the relatively small number of Washington cases addressing protective orders. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004) (where a Washington civil rule is identical to its federal counterpart, federal cases are highly persuasive).

Washington case law regarding protective orders is sparse, but numerous federal cases and cases from other states – including several cases cited by Allstate -- hold that a showing of specific harm is required:

- “To make a showing of good cause, the party seeking confidentiality has the burden of showing the injury ‘with specificity.’” *Pearson v. Miller*, 211 F.3d 57, 72 (3<sup>rd</sup> Cir. 2000).
- “Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. . . . Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.” *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 175 (E.D. Pa. 2004) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)) (cited by Allstate).
- “[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) [good cause] test.” *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 476 (9<sup>th</sup> Cir. 1992).
- “[T]he party seeking a protective order must show that disclosure will result in a clearly defined and serious injury to [the] moving party.” *Klesch & Co. Ltd. v. Liberty Media Corp.*, 217 F.R.D. 517, 524 (D. Colo. 2003).
- “The party seeking protection has the burden of coming forward with evidence demonstrating that the information is confidential

and that disclosure will result in a clearly defined and serious injury to its business.” *Cohen v. Metropolitan Life Ins. Co.*, 2003 WL 1563349, \*1 (S.D.N.Y. 2003) (cited by Allstate).

- “In order to obtain a protective order, defendants are required to demonstrate good cause. Furthermore, defendants are required to ‘make a particular request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one.’” *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255, 259 (M.D. N.C. 2001) (quoting *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D. N.C. 1991)) (cited by Allstate).

- In order to show “good cause,” “[t]he moving party must show ‘that disclosure will work a clearly defined and serious injury.’” *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 204 F.R.D. 420, 424 (S.D. Ind. 2001) (quoting *Pansy, supra*, at 786) (cited by Allstate).

- “FRCP allows the sealing of court papers only for ‘good cause shown’ . . . . To meet this burden, courts traditionally require that the party wishing to have confidential information in the court record kept under seal show that disclosure of the information would result in some sort of serious competitive or financial harm.” *Tinman v. Blue Cross & Blue Shield of Michigan*, 176 F. Supp.2d 743, 745 (E.D. Mich. 2001) (citing and quoting cases requiring a showing of specific examples of competitive harm, not broad, conclusory allegations of potential harm) (cited by Allstate).

- “As an initial matter, the court must make an independent determination of the existence of good cause for the protective order. . . . The movant bears the burden of showing good cause, and such burden must be satisfied with ‘a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause.’ . . . General injuries are insufficient. Rather, it must be shown that disclosure will cause a clearly defined and serious injury.” *Patt v. Family Health Systems, Inc.*, 189 F.R.D. 518, 522 (E.D. Wis. 1999).

- “To establish good cause, a party seeking the protective order must make ‘a particular and specific demonstration of fact, as distinguished from stereotyped and conclusionary statements.’” *Mediacom Iowa, LLC v. City of Spencer*, 682 N.W.2d 62, 67-68 (Iowa 2004).
- “There is a substantial body of federal law relating to the substantive showing necessary to obtain a protective order. The party seeking protection must show that the information is a trade secret or confidential commercial information. . . . The party must also establish good cause for the protective order by demonstrating that disclosure “will work a clearly defined and serious injury.” 529 F. Supp. at 890. Broad allegations of harm unsubstantiated by specific examples or articulated reasoning do not satisfy the good cause requirement. . . . The harm must be significant, not a mere trifle.” *Citizens’ Utility Board of Oregon v. Oregon Public Utility Commission*, 877 P.2d 116, 121-122 (Or. Ct. App. 1994).
- *Wauchop v. Domino’s Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991) (a defendant must clearly define the specific harm likely to result from public disclosure) (cited by Allstate).
- “The moving party must show a particular and specific need for the protective order, as opposed to making stereotyped or conclusory statements.” *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990).
- “. . . Bic argues, citing *Cipollone I*, that the Magistrate applied an improper standard by requiring it to show a ‘clearly defined and serious injury’ . . . . BIC USA’s interpretation of *Cipollone I* is clearly incorrect. . . . [S]ince the record created by BIC USA is devoid of *any* specific examples to support a conclusion that BIC USA would suffer any *significant harm* to its competitive and financial position, the Magistrate quite properly concluded that BIC USA had failed to sustain its burden on this point.” *Smith v. BIC Corp.*, 121 F.R.D. 235, 242 (E.D. Pa. 1988) (emphasis in original) (cited by Allstate).
- “[T]he party seeking a protective order clearly bears the burden of proving its necessity. . . . To show good cause, a movant for a protective order must articulate specific facts showing ‘clearly

defined and serious injury' resulting from the discovery sought, . . . and cannot rely on merely conclusory statements." *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987).

- "Courts have routinely required the party seeking protection to show a particular and specific need for that protection. . . . A showing of serious harm either to business or non-business interests is required." *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 571 (E.D.N.Y. 1985).

Rather than arguing for the application of Washington law and the overwhelming weight of authority from other jurisdictions, Allstate asks this Court to adopt a new "flexible standard" that takes into account "four critical dimensions." Allstate cites no authority to support the rule of law that it proposes. *Brief of Appellant* at p.12. The great weight of authority is contrary to Allstate's position:

The *Seattle Times* Court clearly assumed that this rule-based requirement of a showing of "good cause" has real meaning . . . . The proponent of the order must demonstrate that the order would reduce a real risk of significant harm to an interest that is entitled to protection under the law and that is independent of the proponent's (or the court's) desire simply to keep the discovered information out of public view or inaccessible to the authorities. . . .

The high Court's explicit limitation of its ruling to a protective order that "is entered on a showing of good cause as required by Rule 26(c)" should dispel another potential misreading of the *Seattle Times* opinion. Read hastily, Justice Powell's opinion for the Court might be misunderstood to suggest that when trial judges rule on a motion for a protective order they are simply to "weigh fairly the competing needs and interests of the parties affected by discovery." . . . Instead, before any judicial balancing begins, Rule 26(c) gives some precedence to one particular value: freedom to use discovered information in any lawful manner that

the discovering party chooses. That precedence is reflected in the Rule's demand that trial courts not issue protective orders unless the proponent of the order first makes a showing of good cause. Without such a showing, no such order can issue.

...

[T]he Rule creates a presumption in favor of freedom of dissemination. Placed by the law on the scales before the trial court begins any "balancing," this presumption *pre-weights the scales against restricting* a party's lawful use or dissemination of discovered information. . . . [This presumption] cannot be outweighed by merely speculative threats of harm to other interests. Instead, the proponent of a protective order must demonstrate that the risk of disclosure is real and that if the disclosure occurred it "would cause an identifiable, significant harm."

*Humboldt Baykeeper v. Union Pacific R. Co.*, 244 F.R.D. 560, 562-563

(N.D. Cal. 2007) (emphasis in original).

Judge Worswick applied the correct legal standard for establishing "good cause" in requiring that Allstate demonstrate that "specific harm" would result from production of the documents without a protective order.

**D. Judge Worswick's finding that Allstate failed to demonstrate any specific harm that would result from production of the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins without a protective order is amply supported.**

Judge Worswick found no evidence of any specific harm that would result from production of the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins without a protective

order. This issue was briefed at length. Judge Worswick specifically found as follows:

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

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

CP 740.<sup>7</sup>

This Court would have to substitute its judgment for Judge Worswick's judgment in order to find that there would be any specific

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<sup>7</sup> Judge Worswick is not the only trial judge to find Ms. Sullivan's declaration insufficient to establish good cause for a protective order. In *Pincheira v. Allstate*, 164 P.3d 982 (N. Mex. Ct. App.), *cert. granted*, 165 P.3d 327 (2007), the trial court found a similar declaration from Ms. Sullivan too conclusory to establish good cause for a protective order:

The formal order compelling production of the McKinsey documents without a protective order incorporates the trial court's reasoning. In pertinent part the order states:

. . . [T]he Affidavit of Christine Sullivan is too general and conclusory to support a protective order restricting production or dissemination of the [McKinsey documents] under the good cause standard for protective orders established in *Krahling*.

*Pincheira*, 164 P.3d at 1004 (dissent); *see also Pincheira* at 987 (same). Likewise, the Honorable Douglas McBroom (King County Superior Court) ordered the McKinsey Documents produced without a protective order in *Parks v. Allstate* (CP 446-447), and the Honorable Joan DuBuque (King County Superior Court) found Ms. Sullivan's Declaration insufficient to justify a protective order in *Erickson v. Allstate*. Allstate's appeal in *Erickson* is pending in Division I, No. 60216-1-I.

harm to Allstate as a result of production of the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins without a protective order. The evidence before this Court provides even more support for Judge Worswick's ruling than the evidence before Judge Worswick, because Allstate has now made the McKinsey Documents public, which completely eviscerates the credibility of Allstate's claims in the trial court that "irreparable harm" would occur if the documents became public.

There is no evidence that Allstate has suffered any specific harm as a result of the McKinsey Documents being made public, or that Allstate would suffer any specific harm as a result of the production of the claims manuals, CCPR training manual, or the claims bulletins without a protective order. As discussed above, a number of magazine articles, as well as a book, have been published that discuss the content of the McKinsey Documents, and 150,000 pages of the McKinsey Documents are now available on Allstate's website. Allstate has not presented any evidence of financial harm that it has suffered as a result of those disclosures. Allstate's claims in the trial court that it would suffer "irreparable harm to [its] competitive position" as a result of the disclosure of the McKinsey Documents rings hollow:

We find BIC USA's argument that it would suffer significant embarrassment and harm as a result of public disclosure of other incidents involving the BIC MOD II lighter particularly disingenuous given the extensive and detailed adverse publicity it claims to have already received.

*Smith v. BIC Corp.*, 121 F.R.D. 235, 243 (E.D. Pa. 1988).

There is no evidence that Allstate would suffer any serious harm as a result of the production of the remaining documents without a protective order. In *Tastad v. Allstate*, a Washington case, Robert Bjorback submitted a declaration similar to the one he submitted in this case, claiming that, if the claims manual were produced without a protective order, "Allstate would suffer irreparable harm." CP 899 (*Bjorback Dep.* at 32). A prior version of Allstate's claims manual was produced in *Tastad* without a protective order. CP 899 (*Bjorback Dep.* at 31, 33). Yet Allstate has not cited any specific harm – not to mention any irreparable harm -- that resulted from the production of the claims manual in *Tastad*. The fact that no harm of any kind resulted from the production of the claims manual in *Tastad* without a protective order, despite Mr. Bjorback's claim that irreparable harm would occur, severely undermines the credibility of the claims in Mr. Bjorback's and Ms. Sullivan's declarations in this case, and strongly supports Plaintiff's claim that their declarations contain exaggerated and conclusory statements that have no basis in fact.

Corporate defendants routinely bring motions for protective orders. They want plaintiff's attorneys to have to review tens or hundreds of thousands of pages of documents in each individual case, rather than allowing a few attorneys to review the documents and share a summary with other attorneys. They want to force each plaintiff's attorney to sort through thousands of documents to find the ones that are most significant. They want to make the discovery process as burdensome and time-consuming for plaintiffs as possible. Allstate's desire to prevent the public and plaintiff's attorneys in other cases from finding out about its abusive and unlawful practices is not a sufficient basis for a protective order.

**E. The McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins are not trade secrets.**

The "trade secret" prong of Fed. R. Civ. Pro. 26(c) has been narrowly construed:

*[C]ourts have required the moving party to show a particular and specific need for protection, especially when protection is sought pursuant to Fed. R. Civ. Pro. 26(c)(7).* That rule allows a court to order "that a trade secret or other confidential research, development, or commercial information not be disclosed . . . ." *Id.* In *United States v. International Business Machines Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975), the court held that "an applicant will have to demonstrate that disclosure of allegedly confidential information will work a clearly defined and very serious injury to his business." *Id.* at 46 (emphasis in original). In *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980), the court interpreted the rule as requiring "the party seeking the protective order . . . [to] demonstrate that the material sought to be protected

is confidential and that disclosure will create a competitive disadvantage for the party.” *Id.* at 726 (footnote omitted).

*In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 574 (E.D.N.Y. 1985) (emphasis added).

“(T)here is no absolute privilege for trade secrets and similar confidential information.” *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 362, 99 S. Ct. 2800, 2813, 61 L.Ed.2d 587 (1979) (quoting 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2043 at 300 (1970)) . . . . To resist discovery under Rule 26(c)(7), a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful. . . .

*Centurion Indus. Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10<sup>th</sup> Cir. 1981).

In *Buffets, Inc. v. Klinke*, 73 F.3d 965 (9<sup>th</sup> Cir. 1996), a case arising in Washington, the owners of the Old Country Buffet restaurant chain sued a former employee for making use of Old Country Buffet’s alleged trade secrets – recipes and employee training manuals. In analyzing whether the recipes and employee training manuals were trade secrets, the court cited RCW 19.108.010(4), the definitions section of the Uniform Trade Secrets Act, which defines a “trade secret” as follows:

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.

The court noted that, under Washington law, an idea must possess some  
novelty to qualify as a “trade secret.” *Buffets, Inc.*, 73 F.3d at 968.

The Ninth Circuit held that the employee training manual and  
recipes were not trade secrets because there was nothing novel about  
them:

The district court did *not* hold, as [Old Country Buffet] contends,  
that the recipes were not trade secrets merely because they had  
their origins in the public domain, but also because many of them  
were “basic American dishes that are served in buffets across the  
United States.” This finding was certainly not erroneous. The  
recipes were for such American staples as BBQ chicken and  
macaroni and cheese and the procedures, while detailed, are  
undeniably obvious. Thus, it is not a case where material from the  
public domain has been refashioned or recreated in such a way so  
as to be an original product, but rather an instance where the end-  
product is itself unoriginal.

. . . [T]he alleged secrets here at issue were found to be so obvious  
that very little effort would be required to “discover” them.

*Buffets, Inc.*, 73 F.3d at 968.<sup>8</sup>

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<sup>8</sup> The Ninth Circuit also agreed with the district court’s finding that the  
recipes had no independent economic value and that Old Country Buffet  
had not proven that the recipes gave it a competitive advantage over its  
rivals.

The Ninth Circuit affirmed the district court's finding that the employee training manuals, having been given to employees in an industry with high turnover, did not qualify as trade secrets because they were not the subject of reasonable efforts to maintain their secrecy.<sup>9</sup> *Buffets, Inc.*, 73 F.3d at 969. In addition, the Ninth Circuit found that the job manuals were not trade secrets because they contained little more than common sense truisms:

The [district] court made no findings concerning whether the manuals were generally known or readily ascertainable, but even a cursory review of them suggests that they fail this prong of the trade secret test as well. The manuals contain little more than such food service truisms as “[w]hen tasting foods, never use a cooking utensils [sic]” and “[f]ollow each recipe exactly.” Thus while it may have been reasonable to conclude that [Old Country Buffet] obtained value from the manuals, there is little to suggest that any value was obtained from the manuals being kept secret.

*Buffets, Inc.*, 73 F.3d at 969.

Likewise, in *Woo v. Fireman's Fund Ins. Co.*, 137 Wn. App. 480, 154 P.3d 236 (2007), the court held that an insurance company's claims manuals were not entitled to protection from public disclosure, despite the

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<sup>9</sup> Here, beginning in 1995, Allstate's redesigned claims processes (CCPR) were disclosed to “Allstate's employees responsible for handling claims and the management and supervision of claims,” a group of people that surely numbers in the thousands or tens of thousands. *Affidavit of Christine Sullivan (Pincheira v. Allstate)* at ¶ 2 (reproduced in *Pincheira v. Allstate*, 164 P.3d 982, 1007 (N.M. Ct. App. 2007)).

insurance company's claim that they were trade secrets.<sup>10</sup> The court held that the claims manuals were not novel, but merely set forth common sense claims practices:

The argument that smaller competitors will benefit from the opportunity to copy the Fireman's Fund claims manuals rather than having to write up their own is also too speculative and conclusory to support a finding that the manuals are unique. A trade secret must derive independent economic value from not being known to or generally ascertainable by others who can obtain economic value from their disclosure or use. . . .

Our own review of the sealed exhibits confirms what Woo alleges: the manuals simply set out good claims practices and philosophies that would be obvious to any insurance company setting out to prepare a claims manual. For example, a good coverage investigation begins with "a thorough investigation of the facts." Before deciding on coverage, the questions of "who did what, where, why, when and how" must be addressed. Sometimes "it will be necessary to turn down claims" and it is important to explain the reason to the policyholder, striving not to create animosity.

*Woo*, 137 Wn. App. at 489.

The Declaration of Christine Sullivan relied upon by Allstate is heavy on legal conclusions and light on specific facts:

- "The McKinsey documents are a compilation of materials which derive independent economic value from not being generally known to other companies and competitors who can obtain economic value from the disclosure of the McKinsey documents."

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<sup>10</sup> In *Woo*, the documents at issue had been used as exhibits at trial and then sealed by the trial court after the trial. The plaintiff appealed the post-trial order sealing the documents.

- “Allstate believes that the findings and procedures described in the McKinsey documents give Allstate an advantage over its competitors in attracting and retaining policyholders. . . . Allowing anyone access to the McKinsey documents would give Allstate’s competitors the unfair advantage of obtaining, at no cost, Allstate’s valuable and innovative business techniques, programs, processes and information that were developed as a result of Allstate’s significant investment of time, manpower, and financial resources. This would dilute the effectiveness of Allstate’s investment and cause irreparable harm to Allstate’s competitive position.”

- “Allowing unlimited access to the McKinsey documents would harm Allstate. Such access would give Allstate’s competitors the unfair advantage of obtaining, at no cost and with no expenditure of time and resources, Allstate’s valuable business techniques, programs, processes, and information that were deployed as a result of Allstate’s significant investment of time, manpower and financial resources. Such access would dilute the effectiveness of Allstate’s investment and cause irreparable harm to Allstate’s competitive position.”

CP 366-368.

Allstate’s sweeping allegations that the McKinsey Documents contain trade secrets that are unknown to its competitors and that “irreparable” competitive or financial harm would befall Allstate if the McKinsey Documents were disclosed have been shown to be, if not false, grossly exaggerated, by the fact that the McKinsey Documents have now been made public. Allstate’s cries of “Wolf!” now ring even more hollow than before. If the information contained in these documents were truly trade secrets and of significant independent economic value as claimed by Allstate, the public release of this information would have caused Allstate

to suffer economic harm. Yet Allstate has not presented any evidence of economic harm that it has suffered as a result of the public disclosure of these documents.

While there were serious questions about the credibility of the sweeping assertions in the Sullivan Declaration before this development, the credibility of the Sullivan Declaration is now completely eviscerated. It is difficult to see how Allstate would suffer any competitive harm, or how Allstate's competitors would obtain any competitive advantage, from the remaining documents being publicly available. It is not at all surprising that Judge Worswick found that Allstate failed to establish that these documents are trade secrets. They have no independent economic value from allegedly not being generally known, because most, if not all, of the concepts contained in the remaining documents have their origins in the McKinsey Documents, which are now public.<sup>11</sup>

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<sup>11</sup> See CP 836 (*Allstate's Reply in Support of Motion for Reconsideration*) ("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 . . . ."); *id.* ("[T]he McKinsey documents form the basis for claims practices that are still in use by Allstate."); CP 366 (*Declaration of Christine Sullivan*) ("The McKinsey documents describe, in great detail, . . . changes to Allstate's system of investigating, evaluating, handling, and resolving claims that were implemented as part of CCPR."); CP 358 (*Allstate's Motion for Protective Order*) (same); *Brief of Appellant* at p.30 ("[T]he 'McKinsey documents' remain valuable because they address claim-handling issues that continue to daunt insurers.");

Allstate's claim that the McKinsey Documents are unique because "[n]o other insurance company has this information and no other company has compiled this information in this particular way" is now clearly untrue. There is no evidence in the record that the remaining documents set forth claims handling procedures that are unique to Allstate as opposed to philosophies and procedures that are common to many other insurance companies. To the contrary, Plaintiff/Respondent presented evidence that the claims handling manuals of State Farm, Farmers, and Allstate are "vastly similar." CP 403 (*Declaration of Karen Koehler in Opposition to Allstate's Motion for Protective Order* at p. 11).

The same type of generalized allegations found in the Bjorback and Sullivan Declarations were found inadequate in *Buffets, Inc.* and *Woo* to justify a protective order. There is no evidence that production of the claims manuals, CCPR training manual, or claims bulletins without a protective order would cause Allstate any economic harm, let alone substantial economic harm. Mr. Bjorback and Ms. Sullivan make no attempt to explain how Allstate's claim handling documents are "novel" or "unique" as compared to other insurers. They fail to provide any

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[www.king5.com/video/index.html?nvid=180966](http://www.king5.com/video/index.html?nvid=180966) at 18:29-18:44 (video of oral argument on Allstate's motion for discretionary review in *Erickson v. Allstate* (Division I), wherein Allstate's counsel stated that the McKinsey Documents are even more clearly trade secrets or sensitive research and development documents than the claims manual).

examples of how Allstate's claims handling procedures differ materially from the procedures of other insurers. And their claim that Allstate's competitors would benefit from the opportunity to review Allstate's claims manuals rather than having to write up their own is too speculative and conclusory to support a finding that the manuals are unique or novel or that their disclosure would result in any specific or significant harm to Allstate, particularly when the McKinsey Documents – the source of CCPR – are now public. There is no evidence that production of the remaining documents without a protective order would cause Allstate any specific harm. Judge Worswick was well within her discretion in finding that Allstate failed to meet its burden of showing that the McKinsey Documents, claims manuals, CCPR training manual, and claims bulletins are trade secrets or confidential commercial information warranting a protective order.

**F. Judge Worswick acted well within her broad discretion in striking the second Bjorback declaration.**

CR 30(e) provides that a witness has 30 days after receiving a copy of his or her deposition transcript to submit changes to the court reporter. If a witness does not submit any changes within 30 days, CR 30(e) provides that the court reporter shall sign it and that the deposition may then be used as fully as if it had been signed by the witness. If a deponent

does not submit changes to a deposition transcript within 30 days, the deponent has waived his or her right to make changes.

Mr. Bjorback's second declaration relates entirely to his untimely attempt to change his deposition testimony. Allstate admits that Mr. Bjorback did not submit changes to his deposition within the 30-day period allowed by CR 30(e). CP 705 (7/20/07 Transcript at 21) (Allstate counsel Merilee Erickson: "I stand here as an officer of the court and must admit that, yes, the correction sheet was not submitted within 30 days."). Mr. Bjorback therefore waived his right to make changes to his deposition, and his attempt to make and explain changes to his deposition in his second declaration was therefore improper and untimely.

Mr. Bjorback could have, with reasonable diligence, submitted his deposition corrections in a timely manner. Judge Worswick acted well within her discretion in striking Mr. Bjorback's untimely declaration. *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) (trial court could not on reconsideration consider new evidence that could have been discovered prior to the trial court's ruling). Mr. Bjorback's declaration did not relate to newly discovered evidence. It related to deposition corrections that should have been submitted within 30 days of his receipt of the transcript of his deposition, as required by CR 30(e).

**G. Plaintiff requests attorney fees on appeal**

Plaintiff requests attorney fees on appeal pursuant to RAP 18.1 and RCW 19.86.090, which mandates a fee award as “costs of suit” to a party prevailing under the Consumer Protection Act. Plaintiff should prevail, and will comply with RAP 18.1. This Court should award fees on appeal to Plaintiff.

**V. CONCLUSION**

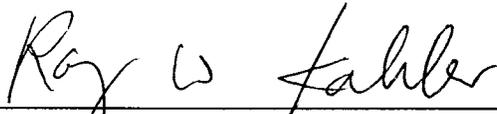
The resolution of this case will affect cases throughout the state and throughout the country. If the Court accepts Allstate’s position that vague, conclusory allegations are all that are required to obtain a protective order and that sharing of discovery materials in other similar cases should be prohibited, it will not only make it more difficult for plaintiffs in bad faith cases against Allstate to obtain accountability and justice, but it will also make it more difficult for plaintiffs litigating against any number of powerful corporations that have the resources to stonewall in discovery and litigate the same discovery disputes over and over.

Judge Worswick applied the correct legal standard for evaluating whether Allstate had shown “good cause” in requiring that Allstate demonstrate some specific harm that would result from disclosure of the McKinsey Documents, claims manuals, CCPR training manual, and

claims bulletins without a protective order. Requiring that the party seeking a protective order produce evidence showing some specific harm that would result without a protective order is consistent with Washington law (*Doe v. Puget Sound Blood Center, supra*), as well as with the overwhelming weight of authority from other jurisdictions.

Judge Worswick was well within her discretion in finding credibility concerns with the Bjorback and Sullivan Declarations, in light of their deposition testimony. Judge Worswick acted well within her broad discretion in finding that the Bjorback and Sullivan Declarations were too conclusory to establish good cause for a protective order, and in finding that Allstate failed to show any specific harm that would result from producing these documents without a protective order. Judge Worswick's decision was not even close to being manifestly unreasonable, based on untenable grounds, or arbitrarily exercised. Allstate has failed to demonstrate that Judge Worswick erred in any way. This Court should affirm Judge Worswick and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of April, 2008.



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Karen K. Koehler, WSBA #15325  
Ray W. Kahler, WSBA #26171  
STRITMATTER KESSLER WHELAN COLUCCIO  
Co-Counsel for Plaintiff/Respondent

Michael J. Fisher by RWK  
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If you accept the following terms and conditions you can link to approximately 150,000 pages of documents pertaining to a review of Allstate's claim practices conducted in the 1990s. Allstate was assisted in the review by business consulting firm McKinsey & Company. The documents are being posted for informational and news media purposes only. By clicking on "I accept" below, you acknowledge and agree that you will not alter any of the linked documents and will view them for informational and news media purposes only. Further, you acknowledge and agree that you have no ownership right or interest in the linked documents, will not represent that you have a right or interest and that you will not seek to use or transfer the documents in whole or in part in exchange for payment of any kind or use the linked documents for advertising, promotional or other commercial purposes. This is not intended to restrict the use of the documents for informational and news media purposes.

**APPENDIX A**

# REED M<sup>C</sup>CLURE

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## RECEIVED

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WRITER'S DIRECT LINE

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April 7, 2008

Via Facsimile & U.S. Mail

~~Ms. Karen K. Koehler  
Stritmatter Kessler Whelan Coluccio  
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Seattle, WA 98119-4204~~

~~Mr. Michael J. Fisher  
Rush, Hannula, Harkins & Kyler LLP  
4701 South 19th Street, Suite 300  
Tacoma, WA 98405-1199~~

Re: McCallum v. Allstate Ins. Co.  
Pierce County Superior Court No. 06-2-09493-5

Dear Ms. Koehler and Mr. Fisher:

I am writing to inform you that Allstate has decided to end its efforts to preserve the confidentiality of the "McKinsey Documents" produced in this case, Bates nos. 001 through 027 [inclusive], 029 through 039 [inclusive], 709, 710, 934, 952, 1426, 1427, 1428, 1429, 1456, 1608, 1658, 1861, 1862, 1863, 1864, 1866, 1867, 2927 through 2945 [inclusive], 2982, 3000, 3020, 3328, 3372, 3548, 4216, 4594, 4676, 4688, 4964, 5096, 5101, 5102, 5116, 5117, 5169, 5177, 51182, 5226, 5379, 5387, 5400, 5403, 5404, 5448, 5549, 5554, 5911, 6066, 6203, 6325, 6331, 6334, 6449, 6538, 6597, 7341, 7633, 7686, 7687, 8023, 8024, 8028, 8043, 8427, 8628, 9595, 9596, 9646, 9715, 10043, 10059, 10069, 10076, 10096, 10097, 10098, 10103, 10609, 10610, 10611, 10621, 10685, 10932, 10933, 10934, 10961, 11545, 12101, 12368, 12373 through 12386 [inclusive], 12466, 12492, 12504, 12506. Accordingly, I am informing you that these documents are no longer designated as Confidential pursuant to the Protective Order entered in this case.

Allstate continues to believe that these "McKinsey Documents" deserve protection as containing trade secrets and confidential proprietary and that Allstate's actions to protect them from general disclosure have been appropriate. However, because of the need to address misunderstandings resulting from the growing misplaced focus by Allstate's critics on very small pieces of the whole, Allstate has decided to make the documents public.

Accordingly, Allstate has decided that the "McKinsey Documents" produced in this case no longer need to be subject to the Protective Order entered in this case. We are filing the

April 7, 2008  
Page 2

enclosed notices with the Pierce County Superior Court and Division II of the Washington Court of Appeals to advise the courts of these developments.

Very truly yours,

REED McCLURE



Marilee C. Erickson

cc: / Mr. Ray W. Kahler, Stritmatter Kessler Whelan Coluccio (w/enc.)  
Mr. Bennett E. Cooper, Steptoe & Johnson LLP (w/enc.)

Enc.

HONORABLE LISA WORSWICK

**SUPERIOR COURT OF WASHINGTON 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

NOTICE REGARDING CERTAIN  
DISCOVERY DOCUMENTS

**TO: Plaintiff Colleen McCallum**

**AND TO: Karen Koehler and Michael Fisher, Attorneys for Plaintiff**

**NOTICE**

Please be advised that defendant, Allstate Property and Casualty Insurance Company ("Allstate"), hereby voluntarily removes the confidentiality designation for the "McKinsey Documents" produced in this case, Bates nos. 001 through 027 [inclusive], 029 through 039 [inclusive], 709, 710, 934, 952, 1426, 1427, 1428, 1429, 1456, 1608, 1658, 1861, 1862, 1863, 1864, 1866, 1867, 2927 through 2945 [inclusive], 2982, 3000, 3020, 3328, 3372, 3548, 4216, 4594, 4676, 4688, 4964, 5096, 5101, 5102, 5116, 5117, 5169, 5177, 51182, 5226, 5379, 5387, 5400, 5403, 5404, 5448, 5549, 5554, 5911, 6066, 6203, 6325, 6331, 6334, 6449, 6538, 6597, 7341, 7633, 7686, 7687, 8023, 8024, 8028, 8043, 8427, 8628, 9595, 9596, 9646,

NOTICE REGARDING CERTAIN DISCOVERY DOCUMENTS - 1

060349.099040#180270

**APPENDIX C**

**REED McCLURE**  
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1 9715, 10043, 10059, 10069, 10076, 10096, 10097, 10098, 10103, 10609, 10610, 10611,  
2 10621, 10685, 10932, 10933, 10934, 10961, 11545, 12101, 12368, 12373 through 12386  
3 [inclusive], 12466, 12492, 12504, 12506. Accordingly, these documents are no longer  
4 designated as Confidential.

5 Allstate has decided to end its efforts to preserve the confidentiality of these  
6 "McKinsey Documents" that have been produced in this case. Allstate continues to believe  
7 that the "McKinsey Documents" contain trade secrets and other valuable confidential and  
8 proprietary business information relating to the development and implementation of its  
9 Casualty CCPR claim-handling practices and procedures, and that its previous efforts to  
10 preserve the documents' confidentiality were warranted. Insurance companies commonly  
11 and legitimately seek to protect the confidentiality of materials relates to their claim-handling  
12 practices, and courts around the country routinely grant protection for such materials because  
13 of their value to competitors.  
14

15 Allstate has determined, however, that the circumstances have changed in a way that  
16 requires it to reevaluate its continuing efforts. Various individuals have made inaccurate,  
17 misleading, and disparaging public comments about the documents' contents and Allstate's  
18 claim-handling practices. This has resulted in negative press coverage that created a grossly  
19 inaccurate picture of the documents and Allstate's claim-handling practices. These  
20 misrepresentations can best be rebutted by disclosing the documents' full contents, as  
21 Allstate has demonstrated in recent cases by successfully defending itself against such  
22 unfounded charges. In addition, although courts have recognized the propriety of protective  
23 orders for insurers' claim materials, negative press coverage focusing on the mere "secrecy"  
24  
25

1 of the "McKinsey Documents" has implied that Allstate is hiding improprieties. Because of  
2 the need to address the increasing level of misunderstanding resulting from the growing  
3 misplaced focus on a small group of pages of the "McKinsey Documents" taken out of  
4 context, Allstate has decided to make the "McKinsey Documents" public.

5 Accordingly, Allstate has decided that the "McKinsey Documents" produced in this  
6 case no longer need to be subject to the confidentiality provisions.

7  
8 DATED this 7th day of April, 2008.

9 REED McCLURE

10  
11 By Marilee C. Erickson  
12 Marilee C. Erickson WSBA #16144  
13 Attorneys for Defendant Allstate  
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Certificate of Service

I declare under penalty of perjury under the laws of the State of Washington that on April 23, 2008, I served by first-class mail true and correct copies of the Brief of Respondent to the following:

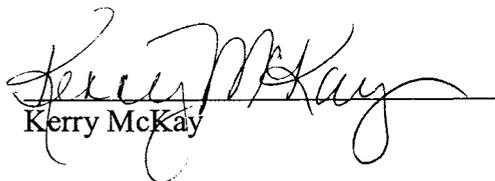
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FILED  
COURT OF APPEALS  
DIVISION II  
08 APR 24 PM 1:01  
STATE OF WASHINGTON  
BY DEPUTY

Dated this 23<sup>rd</sup> day of April 2008, at Hoquiam, Washington.

  
Kerry McKay