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COURT OF APPEALS, DIVISION II,
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STATE OF WASHINGTON
BY SW
DEPUTY

LISA STEEL, individually and as Guardian *ad litem* for J.T., a
minor; DOUGLAS THOMPSON and KRISTI BARBIERI, individually
and as Guardian *ad litem* for S.R.B., a minor,

Appellants/Plaintiffs,

vs.

OLYMPIA EARLY LEARNING CENTER, et al.,

Respondents/Defendants,

vs.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondents/Intervener

APPELLANTS' OPENING BRIEF

Darrell L. Cochran, WSBA No. 22851
Loren A. Cochran, WSBA No. 32773
Kevin M. Hastings, WSBA No. 42316
Christopher E. Love, WSBA No. 42832
Counsel for Appellants

PFAU COCHRAN VERTETIS
AMALA, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402
(253) 777-0799

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I. INTRODUCTION

This case originates out of horrific sexual abuse perpetrated by a day care worker on a group of children supervised at a daycare. Appellants reached a settlement with the defendants and moved for a hearing under RCW 4.22.060 to determine the reasonableness of the covenant judgment settlement between the parties. This appeal arises out of the efforts of Intervenor Philadelphia Indemnity Insurance Company's ("Philadelphia Indemnity" or "Philadelphia") to use the reasonableness proceeding as means to obtain massively invasive discovery of Appellants' attorney-client privileged materials and work product containing mental impressions to which it would not otherwise be entitled. The trial court, deriving its ruling from the "implied waiver" doctrine, ultimately ordered Appellants to produce nearly one hundred documents containing attorney-client communications or attorney opinions and mental impressions under a mere relevancy standard. Appellants have sought discretionary review to prevent this unprecedented and unjustified disclosure.

The practical effect of the trial court's ruling is that, by requesting a determination under RCW 4.22.060 of a covenant judgment settlement's reasonableness, a plaintiff automatically commits an implied waiver of attorney-client privilege regarding any relevant materials. But this violation of the near-absolute protection afforded under Washington law to attorney-client communications not only is unprecedented, but also contrary to existing precedent both in Washington and across the country.

First, Washington courts, recognizing the potential for the implied waiver doctrine to render the attorney-client privilege illusory, have carefully limited application of the doctrine to the specific facts and issues inherent in legal malpractice cases. Second, even if this Court were to extend the implied waiver doctrine beyond the legal malpractice context, well-reasoned opinions from numerous other jurisdictions make clear that such an extension should be limited to cases where a party's claim or defense puts such protected materials "at issue" by requiring the party to rely on such materials to prove an element of the claim or defense. Third, as both this Court and courts in other jurisdictions have determined, a trial court's determination of a settlement's reasonableness is an *objective* inquiry. Thus, the trial court's inquiry does not place attorney-client communications at issue because the inquiry does not depend on such *subjective* evidence. Fourth, even if the implied waiver doctrine applies to a trial court's determination of a covenant judgment settlement's reasonableness, Philadelphia Indemnity did not and cannot satisfy any of the portions of the three-part test for implied waiver of the privilege or other considerations courts undertake in analyzing implied waiver: Appellants did not commit an affirmative act leading to their assertion of the privilege because Washington law requires a trial court's determination of a covenant judgment settlement's reasonableness; as discussed above, Appellants' request for a reasonableness determination did not place attorney-client communications at issue; and prohibiting Philadelphia Indemnity from discovering these materials neither deprives

it of evidence vital to its defense nor is manifestly unfair because Philadelphia Indemnity has already received all objective evidence generated in the litigation, received defense counsel's entire file, and deposed the other attorneys involved in the settlement.

Likewise, the trial court's ruling results in an automatic implied waiver of work product protection for "relevant" attorney opinions and mental impressions. First, in contrast to ordinary work product's discoverability on a showing of "substantial need," opinion and mental impression work product is *absolutely* protected unless directly placed at issue in the litigation. Mere relevancy is insufficient to meet the substantial need requirement for ordinary work product discovery, much less the near-absolute hurdle to discovery of the work product at issue here. Second, as previously addressed by this Court and other jurisdictions, a trial court's *objective* reasonableness determination does not place *subjective* evidence such as attorney opinions, beliefs, mental impressions, or theories directly at issue.

Finally, Washington public policy cautions against a holding that Appellants impliedly waived either discovery protection in general or under the facts of this case. Such a holding would create a chilling effect severely undermining the societal good served by both privileges, as plaintiffs and their counsel would have to contemplate the possibility that any case involving an insured defendant might culminate in a covenant judgment scenario and waiver of these critical discovery protections. Moreover, Philadelphia Indemnity seeks this extraordinary discovery

despite failing to obtain and provide for its insureds even the most basic discovery as part of their underlying defense prior to trial. Any alleged “need” Philadelphia Indemnity has for this invasive discovery is of its own creation, and allowing Philadelphia Indemnity this discovery will only incentivize insurers to deny their insureds an adequate defense—the primary benefit of an insurance contract—knowing they can protect their own interests by receiving extraordinary discovery in a reasonableness proceeding. Thus, for all these reasons, this Court should hold the trial court erred in ordering Appellants to produce their attorney-client communications and attorney opinion and mental impression work product.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- No. 1 The trial court erred in entering its August 27, 2013 Order Appointing Special Master.
- No. 2 The trial court erred in entering its November 22, 2013 Order Re Intervenor’s Motion to Compel and Special Discovery Master’s Recommendations.

Issues Pertaining to Assignments of Error

- No. 1 Whether the trial court erred in ruling that the “implied waiver” doctrine applies outside the context of legal malpractice claims or other claims and defenses where attorney advice and other attorney-client communications form the basis of a claim or defense?

(Assignment of Error No. 1, 2)

No. 2 Whether the trial court erred in ruling that a plaintiff seeking a determination under RCW 4.22.060 of the reasonableness of a covenant judgment settlement automatically commits an implied waiver of attorney-client privilege regarding relevant documents?

(Assignment of Error No. 1, 2).

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No. 4: Whether the trial court erred in ruling that a plaintiff seeking a determination under RCW 4.22.060 of a covenant judgment settlement's reasonableness automatically commits an implied waiver of work product protection of relevant attorney opinions and mental impressions? *(Assignment of Error No. 1, 2).*

- No. 5: Whether the trial court erred in ruling that an insurance company intervening in a reasonableness hearing under RCW 4.22.060 is entitled to discovery of a plaintiff's attorney opinions and mental impressions where a showing of relevancy is insufficient even to justify disclosure of ordinary work product? (*Assignment of Error 1, 2*).
- No. 6: Whether the trial court erred in ruling that a plaintiff seeking a determination under RCW 4.22.060 of a covenant judgment settlement's reasonableness automatically commits an implied waiver of work product protection of relevant attorney opinions and mental impressions where a reasonableness proceeding does not place such materials directly at issue? (*Assignment of Error No. 1, 2*)
- No. 7: Whether requiring disclosure of a plaintiff's attorney-client communications or attorney work product in a reasonableness proceeding contravenes Washington public policy recognizing the near-inviolable sanctity and social goods served by the attorney-client privilege and work product doctrine? (*Assignment of Error 1, 2*).

No. 8: Whether allowing an intervening insurance company to discover attorney-client communications or attorney opinion and mental impression work product in a proceeding under RCW 4.22.060 to determine the reasonableness of a covenant judgment settlement—either in general or under the specific facts of this case—contravenes Washington public policy incentivizing insurers to provide a vigorous, robust defense to their insureds?⁷ (*Assignment of Error No. 1, 2*).

III. STATEMENT OF THE CASE

At all times relevant, Olympia Early Learning Center (“OELC”) was responsible for children as a professional daycare service provider.¹ Steven Olson was OELC’s executive director, and Rose Horgdahl was its program director.² In 2008, OELC hired 17-year-old Elisha Tabor, who also was Horgdahl’s step son.³ OELC did not perform a reference check.⁴

Despite repeated staff reports of Tabor’s inappropriate isolation and touching of children attending OELC and multiple parental reports of children being inappropriately touched by “Eli,” Tabor continued to work at OELC until 2011, just before he was arrested, charged, and subsequently convicted of counts of child rape in the first degree and child molestation in the first degree involving children who attended OELC.⁵

¹ Clerk’s Papers (CP) at 545.

² *Id.*

³ CP at 456.

⁴ CP at 456-458.

⁵ *Id.*

Based on Tabor’s extensive and prolonged abuse, Appellants, seven parents—in their individual capacity and on behalf of their six children who attended OELC—filed suit against OELC, Olson, and Horgdahl (collectively “defendants” or “insureds”).⁶

In March 2011, Philadelphia Indemnity assumed the defense of its insured—OELC—and its employees, and retained defense counsel in May 2011 to represent them.⁷ Philadelphia Indemnity admitted that it was ultimately responsible for managing defense preparations and for directing defense counsel to “make changes” if the prepared defense was inadequate.⁸ Despite the severity of the claims against the defendants, however, Philadelphia Indemnity failed to ensure that OELC had a proper trial defense, including discovery. Four weeks before a series of trials against the defendants were set to begin, none of the abuse victims, Appellants’ expert witness, or Appellants’ lay witnesses had been deposed.⁹ Likewise, Philadelphia Indemnity did nothing to ensure discovery was being obtained regarding Tabor’s actions, the defendants’ liability or Appellants’ damages.¹⁰ In fact, Philadelphia Indemnity admitted:

Q. You had mentioned that [Philadelphia Indemnity] was looking to discovery to help it evaluate the damages from this point in June of 2011 forward, correct?

⁶ CP at 13-18, 3020-3027, 3074-3089, 3136-3141, 3189-3196, 3243-3250. The trial court consolidated the three separate lawsuits into this current action. Appendix at 525.

⁷ CP at 1219, 1539.

⁸ CP at 1203-1206, 1223-1224, 1516.

⁹ CP at 30, 1504-1506.

¹⁰ CP at 1213-1214.

A. Yes.

Q. *And yet [Philadelphia Indemnity] did no discovery as to damages over the next year, did it?*

A. *It appears not.*¹¹

Without any meaningful discovery or other trial preparations undertaken on their behalf, Philadelphia Indemnity left the defendants—who, by then, had retained their own insurance coverage counsel in addition to the defense counsel appointed by Philadelphia Indemnity—with no other choice but to settle with Appellants by entering into covenant judgments to avoid the certainty of being personally liable for substantial excess verdicts.¹² The defendants stipulated to judgments against them totaling \$25,000,000 and an assignment of any bad faith claims they might have against Philadelphia Indemnity to Appellants.¹³ In exchange the defendants received Appellants’ promise not to execute the judgments against them.¹⁴

On October 19, 2012, Philadelphia Indemnity moved to intervene in this case for purposes of conducting “focused discovery” over “a short period of time” and to participate in any hearing determining the reasonableness of the covenant judgment settlements under RCW 4.22.060.¹⁵ Appellants did not object to Philadelphia’s intervention, but

¹¹ CP at 1445-1446, 1593 (emphasis added).

¹² CP at 38-76, 752-1016. A “covenant judgment” describes a type of settlement in which plaintiffs settle with a defendant and enter a judgment for a stipulated amount against that defendant in exchange for a promise not to execute the judgment against that defendant and an assignment of the defendant’s right to sue its insurer for bad faith. *Bird v. Best Plumbing Group*, 175 Wn.2d 756, 764-66, 287 P.3d 551 (2012).

¹³ *Id.*; see, e.g., CP at 996-998.

¹⁴ *Id.*

¹⁵ CP at 110-111, 121.

opposed any discovery based on Philadelphia's familiarity with the case and failure to ensure adequate discovery was conducted during its insureds' defense.¹⁶ On October 26, the trial court allowed Philadelphia Insurance to intervene.¹⁷

Philadelphia Indemnity then proceeded, however, to embark on an eight-month long campaign of increasingly invasive discovery. Over Appellants' continuing objection that Philadelphia Indemnity was not entitled to reopen the discovery process in order to obtain documents that it failed to ensure defense counsel obtained for its insureds, Appellants produced nearly 200,000 pages of discovery at the trial court's direction and in good faith.¹⁸ Appellants also arranged for the lawyers representing Philadelphia Indemnity to have direct contact with defense counsel's law firm to ensure production of materials which defense counsel struggled to locate.¹⁹ In sum, after these production and arrangements, Philadelphia Indemnity possessed all evidence and work product created by defense counsel; everything exchanged between Appellants and Defendants during discovery; access to defense counsel and his office to procure his records directly; and all correspondence, including all email, between Appellants' counsel, defense counsel, OELC's coverage counsel, and Steve Olson's coverage counsel through the date the covenant judgments were executed.²⁰

¹⁶ CP at 391, 449-452.

¹⁷ CP at 1812-1815.

¹⁸ Appendix at 1812.

¹⁹ CP at 1813.

²⁰ CP at 1703-1705.

Philadelphia Indemnity, however, pressed for further discovery, successively requesting the trial court through a series of motions to compel Appellants’s counsel to produce *their entire case file*—including all attorney-client privileged materials and work product containing attorney mental impressions—under the theory that a plaintiff automatically commits an implied waiver of such discovery protections by moving for a reasonableness hearing.²¹ Specifically, Philadelphia argued that Appellants’ counsel’s attorney work product, including attorney mental impressions and opinions, was “critical to an assessment of the reasonableness factors plaintiffs have asked this Court to apply in ruling on whether the settlements were reasonable.”²² Regarding attorney-client privileged communications, Philadelphia argued that the privilege was “impliedly waived in this [reasonableness hearing] setting” because (1) “[a]ny privilege claims Plaintiffs’ [sic] could have asserted . . . was the result of plaintiffs’ affirmative act of requesting that the Court” make a reasonableness determination; (2) “by seeking a reasonableness determination, Plaintiffs put the privileged communication at issue”; and (3) considerations of fairness required that Philadelphia have access to privileged communications.²³

On April 19, 2012, the trial court orally ruled that Appellants’ counsel’s non-mental impression work product was discoverable, but work product containing attorney opinions or mental impressions would

²¹ CP at 1794, 1799-1802, 1810, 2274, 2284, 2503, 2508-2511.

²² CP at 1801.

²³ CP at 2509-2510.

only be discoverable upon a “compelling” showing that such materials were “directly at issue with respect to the eight *Glover/Chaussee*^[24] factors,” and that Appellants should file a privilege log of those materials.²⁵ The trial court identified two bases for its ruling:

(1) acknowledging that “[i]t may be a matter of first impression as to whether plaintiff’s files are directly discoverable,” the trial court was “persuaded from the anecdotal evidence” presented by Respondent—specifically, that other trial courts had allowed intrusion into a plaintiff’s file materials in the reasonableness hearing context—that discovery into such matters was appropriate ; and

(2) in light of other trial courts allowing such discovery, the trial court here had to allow such discovery in order to “do a diligent job in analyzing the settlement.”²⁶

Over their continuing objection, Appellants complied with the trial court’s ruling, producing over 34,000 pages of work product and other, non-privileged materials.²⁷ These materials included Appellants’ medical records; responses to public records requests made by Appellants and all records produced in response to those requests; Appellants’ communications with lay witnesses; Appellants’ communications with

²⁴ In making a reasonableness determination, a trial court considers a list of factors originating from *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 716-717, 658 P.2d 1230 (1983) and *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487 (1991). The trial court referred to them as the “*Glover/Chaussee*” factors.

²⁵ Report of Proceedings (“RP”) (April 19, 2013) at 27, 30.

²⁶ *Id.* The trial court never entered a written order formalizing and finalizing these rulings.

²⁷ CP at 2308-2309.

expert witnesses, including expert reports prepared for trial; subpoenas; pleadings; documents received in discovery; and all other similar documents generated, maintained, or obtained in this case.²⁸ In other words, Appellants produced all the objective evidence in their files relating to this case, their investigation, and their trial preparation.

Appellants then moved for a protective order and attached a privilege log for materials that contained protected attorney opinions or mental impressions, as well as attorney-client privileged communications.²⁹ Philadelphia Indemnity then moved to compel production of Appellants' entire case file other than designated attorney mental impression or opinion work product, including attorney-client privileged materials.³⁰ Philadelphia Indemnity also sought to depose Appellants' lead attorney concerning the covenant judgments and to subpoena production of counsel's entire case file at the deposition, announcing its specific intent to question him using materials protected under the attorney-client privilege and work product doctrine.³¹ Appellants correspondingly moved for a protective order quashing the subpoena and prohibiting Appellants' counsel from being deposed on privileged matters.³² However, Appellants allowed Philadelphia to depose OELC's coverage counsel and Olsen's coverage counsel without

²⁸ CP at 2242, 2309, 2368.

²⁹ CP at 2113-2169.

³⁰ CP at 2274, 2284.

³¹ CP at 2731-2732, 2735-2738, 2752, 2761-2764.

³² CP at 2752, 2761, 2764.

objection.³³

These motions resulted in the next written order entered by the trial court. On August 27, 2013, the trial court entered an order appointing a special discovery master to review *in camera* the materials Appellants designated as protected from discovery.³⁴ In its order, the trial court stated:

The review shall apply the standard declared by [the trial court] on April 19, 2013 . . . **specifically that the claimed exception to the attorney opinion and mental impression work product protection shall be . . . approved only when the record is directly related to one of the eight applicable *Glover/Chaussee* factors.**³⁵

The trial court further declared the following standard for reviewing attorney-client privileged materials:

The standard for review shall be first, whether the record is a communication that would be privileged unless waived; and second, whether the communication is directly related to one of the eight applicable *Glover/Chaussee* factors and is **therefore waived for the purposes of a reasonableness hearing.**³⁶

After reviewing the materials *in camera*, the special discovery master reported that 94 documents indeed contained attorney-client privileged communications or attorney opinions and mental impressions, but—based on the trial court’s announced standard—recommended their production due to their relevance to one of the *Glover* factors.³⁷

³³ CP at 2768.

³⁴ CP at 2826.

³⁵ CP at 2826-2827 (emphasis added).

³⁶ CP at 2827 (emphasis added).

³⁷ CP at 2898-2909, 2925-2949.

On November 22, 2013, the trial court entered an order adopting the special discovery master's recommendations.³⁸ The trial court also certified its order for appellate review under RAP 2.3(b)(4).³⁹ On the same day, the trial court entered an order denying Appellants' motion for a protective order preventing Philadelphia Indemnity from deposing Appellants' counsel regarding attorney-client privileged communications and work product containing attorney mental impressions and quashing Philadelphia Indemnity's subpoena for production of such documents at the deposition.⁴⁰

Appellants then filed a timely notice for discretionary review and a motion for direct review with our Supreme Court.⁴¹ A Supreme Court commissioner transferred the motion for discretionary review to this Court, citing a decision of this Court and stating in particularity that "Discretionary review may be warranted in this matter, as 'no bell can be unrung' once attorney-client privileged communications and work product materials are disclosed."⁴²

After transfer of the motion to this Court, Commissioner Schmidt granted discretionary review in part, ruling that the trial court "properly certified the Order Compelling Production" as to the "controlling question of whether entering into a settlement waives the attorney-client and

³⁸ CP at 2953.

³⁹ *Id.*

⁴⁰ CP at 2996-2997.

⁴¹ CP at 2988-2990.

⁴² Appendix at 2-3.

attorney mental impression privileges as to documents that are directly related to *Glover/Chaussee* factors.”⁴³ A panel of judges of this Court subsequently denied Philadelphia’s motion seeking to modify the Commissioner’s ruling to deny review. Finally, after Philadelphia renewed its efforts to subpoena the documents that are the subject of this appeal and to depose Appellants’ counsel using their contents, Commissioner Schmidt granted Appellants’ motion for an emergency stay, ruling that allowing the deposition to proceed would destroy the fruits of this appeal.⁴⁴

IV. ARGUMENT

A. The Trial Court Erred in Ordering Disclosure of Attorney-Client Communications Under the Implied Waiver Doctrine

1. Standard of Review

Appellants anticipate that Philadelphia Indemnity will argue that the trial court’s order should be reviewed for abuse of discretion, as it is a discovery order. However, the issue presented by this appeal is whether Appellants waived either the attorney client privilege or work product protection of attorney opinions and mental impressions by seeking a determination of the reasonableness of their settlement with the underlying defendants. Washington law is clear that appellate courts review issues of waiver of attorney-client privilege de novo, *Pappas v. Holloway*, 114 Wn.2d 198, 204, 787 P.2d 30 (1990), and it generally considers issues of

⁴³ Appendix at 13-14.

⁴⁴ Appendix at 15-16.

waiver as mixed questions of law and fact, which are also reviewed de novo. *Clayton v. Wilson*, 168 Wn.2d 57, 62, 227 P.3d 278 (2010) (court reviews mixed question of law and fact de novo); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 191 P.3d 879 (2008) (waiver issues present a mixed question of law and fact). Accordingly, the purely legal issue in this case—whether Appellants waived attorney-client privilege by seeking a reasonableness hearing—is properly reviewed de novo.⁴⁵

2. The trial court erred in applying the “implied waiver” doctrine outside the context of legal malpractice claims or other claims or defenses directly relying on attorney-client communications

Although never expressly cited or referred to by the trial court, as Commissioner Schmidt observed in his order granting discretionary review, the trial court’s ruling that Appellants waived attorney-client privilege regarding documents relevant to the *Glover* factors appeared to derive from the “implied waiver” doctrine originating in *Pappas*, 114 Wn.2d at 207. But *Pappas* was a legal malpractice case and, as this Court has previously held, did not “announce a sweeping implied waiver doctrine that would swallow the common law attorney-client privilege.” *Dana v. Piper*, 173 Wn. App. 761, 774, 295 P.3d 305 (2013). To the contrary, *Pappas*, *Dana*, and authority from other jurisdictions make clear

⁴⁵ Appellants recognize that, in *Dana v. Piper*, 173 Wn. App. 761, 769, 295 P.3d 305 (2013), this Court reviewed a trial court’s discovery order regarding waiver of attorney-client privilege for abuse of discretion. The *Dana* court did so, however, only after reasoning that because the trial court abused its discretion based on an erroneous view of the law, the *Dana* court did not have to decide whether to apply de novo review as did the *Pappas* court. *Id.* at 769 n. 8.

Even if this Court applies an abuse of discretion standard, the result remains the same. As in *Dana*, in this case the trial court exercised any discretion it had based on an erroneous view of the law regarding implied waiver.

that the implied waiver doctrine should be limited to claims of legal malpractice or, if extended, only to other claims or defenses that directly rely on attorney-client communications. Because a trial court's determination of the "reasonableness" of a settlement is qualitatively distinct from legal malpractice or other similar claims, the trial court erred in ruling that Appellants waived attorney-client privilege by seeking such a determination.

(a) Washington precedent has limited the implied waiver doctrine to legal malpractice claims

In *Pappas*, the Holloways were sued in connection with the sale of cattle infected with brucellosis. *Pappas*, 114 Wn.2d at 199-200. For the nearly three years leading up to trial, the Holloways were represented by attorney Pappas. *Id.* at 200. In the months before trial, two other attorneys—paid by the Holloways' insurer, Grange Insurance Association ("Grange")—commenced joint representation with Pappas of the Holloways. *Id.* One month before trial, Pappas, with the trial court's permission, withdrew from representing the Holloways. *Id.*

Pappas then sued the Holloways for his attorney fees. *Id.* The Holloways, who had incurred a \$2.9 million judgment against them at trial before Grange settled the claims against them for \$1.5 million while the brucellosis litigation was on appeal, answered with counterclaims of legal malpractice, specifically alleging Pappas'

- (1) failure to perform a full investigation of the Whatcom County cases; (2) failure to interview and designate expert witnesses; (3) failure to conduct an investigation through

the discovery process; (4) failure to analyze properly critical insurance issues and to tender timely defense of the matter to Grange Insurance; (5) failure to prepare and present a summary judgment motion on the issue of strict liability; (6) withdrawal as counsel 1 month before trial; and (7) failure to conduct investigation through the discovery process resulting in the loss of documentary evidence.

Id. at 200-01. In turn, Pappas responded with third-party complaints against all the other attorneys who represented the Holloways in the brucellosis litigation, raising multiple allegations of legal malpractice in the course of their representation of the Holloways that were “virtually identical” to the malpractice claims against him. *Id.* at 201, 208. Pappas also alleged bad faith claims against Grange. *Id.*

After the trial court granted Pappas’ motion to compel the Holloways’ communications with their other attorneys and Grange (“third-party defendants”), our Supreme Court granted review. *Id.* at 202. On review, our Supreme Court observed that, where a client sues an attorney for malpractice, the client generally waives attorney-client privilege between himself and the sued attorney on the basis that the attorney would otherwise be prejudiced in defending his own rights. *Id.* at 204. However, the *Pappas* court recognized that the issue was one of first impression, carefully framing it as: “[w]hether waiver of the attorney-client privilege should extend to third-party defendants ***under the particular facts presented by this case.***” *Id.* (emphasis added).

Ultimately, the *Pappas* court elected to apply the three-part “implied waiver” test of *Hearn v. Rhay*, 68 F.R.D. 574 (D.C. Wash. 1975).

Pappas, 114 Wn.2d at 207-08. Although the *Pappas* court acknowledged criticisms of *Hearn* by multiple courts, it reasoned that it “disagree[d] with this criticism of *Hearn in the context of the present case.*” *Id.* at 208 (emphasis added). It concluded that “the record support[ed] an implied waiver of the attorney-client privilege as to all the attorneys who were involved in *defending* the Holloways *in the underlying litigation.*” *Id.* (emphasis added). The *Pappas* court found particularly persuasive that Pappas had alleged “the same cause of action against the third-party defendants as the Holloways [had] alleged against him,” i.e., legal malpractice; Pappas’ allegations against the third-party defendants were “virtually identical” to those made against him by the Holloways; and those specific claims and allegations would involve “examining decisions made at various stages of the litigation” to determine whether Pappas or the third-party defendants, if anyone, had breached their duties to the Holloways as their attorneys and caused any of the Holloways’ damages. *Id.* at 206-09.

In sum, the *Pappas* court’s careful limiting language in its opinion demonstrates that, at most, the implied waiver doctrine is applicable to legal malpractice claims (1) brought by clients against their attorneys or (2) brought by a first-party defendant attorney against third-party defendant attorneys who also represented the client in the litigation or transaction underlying the malpractice suit. *Pappas* does not support an extension of the implied waiver doctrine beyond legal malpractice claims.

Subsequent Washington appellate decisions confirm this reading of

Pappas. In *Dana*, Troy Dana received legal advice from a law firm, Sussman Shank, during a sale of a controlling stake in Dana's company to an interested buyer, CMN, Inc. 173 Wn. App. at 763-64. After the sale, the relationship between Dana and CMN soured; Dana retained counsel, the Cushman law firm; Dana sued CMN; and CMN fired Dana. *Id.* at 764. Dana then retained another firm, Stokes Lawrence, P.S., to represent him, eventually settling his claims against CMN. *Id.* at 764.

Dana, still represented by the Cushman firm, filed a legal malpractice suit against Sussman Shank. *Id.* As an affirmative defense, Sussman Shank alleged that Dana had received advice from others "with respect to the transaction at issue," and that the faulty advice, if any, had been given by those advisors, not Sussman Shank. *Id.* at 765. During the malpractice litigation, Sussman Shank moved to compel production of the complete case files of all attorneys who represented Dana during the CMN litigation. *Id.* at 765-66. After an *in camera* examination of these case files, and over Dana's assertion of attorney-client privilege, the trial court granted the motion. *Id.* at 766.

On discretionary review, this Court began with the premise that, "[b]y suing his attorney for malpractice, a client impliedly waives the privilege with respect to the defendant attorney and with respect to all other attorneys who represented the client in the underlying matter of the malpractice suit." *Dana*, 173 Wn. App. at 770 (citing *Pappas*, 114 Wn.2d at 206) (emphasis added). This Court observed that the *Pappas* court applied the *Hearn* implied waiver test "without stating that it governed all

cases of implied waiver.” *Dana*, 173 Wn. App. at 773. Acknowledging criticisms of the amorphous nature of the *Hearn* test, this Court reasoned that it did not read *Pappas* “to announce a sweeping implied waiver doctrine that would swallow the common law attorney client privilege.” *Dana*, 173 Wn. App. at 774. This Court recognized that the *Pappas* court had carefully analyzed “the danger of making illusory the attorney-client privilege *in legal malpractice actions*” before applying the *Hearn* test. *Dana*, 173 Wn. App. at 774 (quoting *Pappas*, 114 Wn.2d at 206) (emphasis added). Relying on this limited reading of *Pappas*, this Court also elected to apply the *Hearn* implied waiver doctrine to the legal malpractice case before it. *Dana*, 173 Wn. App. at 775.

Accordingly, both *Pappas* and *Dana* demonstrate that extension of the implied waiver doctrine beyond legal malpractice claims is improper. After consideration of the dangers of rendering the attorney-client privilege illusory, both our Supreme Court and this Court have carefully limited application of the doctrine to the context of legal malpractice cases based on the unique allegations and issues inherent in such claims. Thus, in this case, the trial court’s extension of the doctrine beyond such claims contravenes Washington appellate courts’ lack of intent “to announce a sweeping implied waiver doctrine that would swallow the common law attorney client privilege.” *Dana*, 173 Wn. App. at 774. Accordingly, this Court should vacate the trial court’s discovery orders requiring disclosure of such materials.

(b) Other jurisdictions have limited the implied waiver doctrine to claims or defenses that directly rely on attorney-client communications as proof of the claim or defense

Even where other jurisdictions have applied the implied waiver doctrine outside the context of legal malpractice claims, they have done so only where a party's claims or defenses directly rely on attorney-client communications as proof of the claim or defense. In *Hearn*, itself, for example, the plaintiff sued prison officials for civil rights violations. *Hearn*, 68 F.R.D. at 576-77. The defendants raised a qualified immunity affirmative defense on the grounds that they acted in good faith and on advice of their legal counsel. *Id.* at 577; *see also Pappas*, 114 Wn.2d at 207 (stating the same). In this context, the *Hearn* court held that defendants had impliedly waived attorney-client privilege.

Similarly, both the Second and Third Circuits have held that a party's express reliance on attorney-client communications is required for implied waiver of the privilege between that party and their attorney. *In re the County of Erie*, 546 F.3d 222, 229 (2d Cir. 2008) (a party's "reliance on privileged advice in the assertion of the claim or defense" is the "essential element" of implied waiver); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3rd Cir. 1994) (implied waiver of attorney-client privilege occurs where a client "asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication."). Likewise, Ninth Circuit precedent accords with this principle. *Home Indem. Co. v. Lane Powell Moss &*

Miller, 43 F.3d 1322, 1327 (9th Cir. 1995) (no implied waiver of attorney-client privilege where insurance company bringing contribution claim against law firm appointed as counsel for insured in underlying litigation did not rely on attorney-client communications in asserting or proving contribution claim).

(c) The implied waiver doctrine does not apply to a trial court's reasonableness determination under RCW 4.22.060

The implied waiver doctrine applies to legal malpractice claims or, at most, claims or defenses that directly rely on attorney-client communications as proof of the claim or defense. Although Washington appellate courts have never directly considered whether a plaintiff seeking a covenant judgment reasonableness determination under RCW 4.22.060 waives the privilege, existing precedent readily settles the issue. Because a trial court's determination of a covenant judgment involves no claims directly relying on attorney-client communications as proof, implied waiver doctrine is inapplicable in reasonableness hearings under RCW 4.22.060.

“RCW 4.22.060(1)^[46] requires a hearing on the reasonableness of a

⁴⁶ RCW 4.22.060(1) provides:

A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

settlement with a release or covenant not to sue.” *Meadow Valley Owners Ass’n v. St. Paul & Marine Ins. Co.*, 137 Wn. App. 810, 817, 156 P.3d 240 (2007). Our Supreme Court has held that RCW 4.22.060 applies to reasonableness hearings involving covenant judgments. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 287 P.3d 551 (2012). In determining whether a settlement is reasonable under RCW 4.22.060, the trial court must consider the following factors, as applicable:

(1) [T]he releasing party’s damages; (2) the merits of the releasing party’s liability theory; (3) the merits of the released party’s defense theory; (4) the released party’s relative fault; (5) the risks and expenses of continued litigation; (6) the released party’s ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing party’s investigation and preparation; and (9) the interests of the parties not being released.

Bird, 175 Wn.2d at 766. The settling parties have the burden to prove reasonableness. *Id.*

Philadelphia argued below—and the trial court apparently agreed—that discovery of Appellants’ attorney-client communications are necessary to determine the settlement’s reasonableness. But this Court has already rejected an identical argument in *Dana*. 173 Wn. App. at 773. In *Dana*, Sussman Shank argued that the Cushman law firm—who represented Dana during his settlement with CMN in the underlying litigation—caused Dana’s damages because the settlement was unreasonable. *Id.* at 776. This Court expressly stated, “Nine factors inform the trial court’s determination of the settlement’s *objective reasonableness*, and none of these factors depends on whether Dana or the

Cushman attorneys considered the settlement reasonable.” *Id.* at 776 (emphasis added). Accordingly, this Court concluded, “a fact-finder can determine whether Dana’s settlement with CMN was objectively reasonable by comparing the strength of Dana’s claims to the terms of the settlement—without referring to the subjective beliefs of the Cushman attorneys.” *Id.* at 773 (citing *Fischel & Kahn, Ltd. v. van Straaten Gallery*, 189 Ill.2d 579, 590, 244 Ill.Dec. 941, 727 N.E.2d 240, 246 (Ill. 2000); *1st Sec. Bank of Wash. v. Eriksen*, No. CV06-1004RSL, 2007 WL 188881, at *3 (W.D. Wash. Jan. 22, 2007).

Authority from other jurisdictions accords with this Court’s reasoning in *Dana*. For example, in a directly analogous Florida case, an insurer sought to depose the settling parties’ counsel, including plaintiffs’ counsel, regarding the reasonableness and good faith of a covenant judgment plaintiffs had entered into with the underlying defendants. *Chomat v. Northern Ins. Co. of New York*, 919 So.2d 535, 538 (Fla. Dist. Ct. App. 2006). After the plaintiffs objected on grounds of attorney-client privilege, the insurer argued that the parties had waived the privilege by “injecting” the issue of the settlement’s reasonableness into the case. The *Chomat* court rejected the insurer’s argument, reasoning:

The determination of whether a settlement is reasonable is made by a “reasonable person” standard. If counsel’s advice were required to be disclosed, it would still not be binding on the insurance company. Instead, proof of reasonableness is ordinarily established through use of expert witnesses to testify about such matters as the extent of the defendant’s liability, the reasonableness of the damages amount in comparison with compensatory awards

in other cases, and the expense which would have been required for the settling defendants to defend the lawsuit.

919 So.2d at 538.

Likewise, in a Connecticut case where an insurer sought discovery of attorney-client communications in response to an insured's burden to show that a settlement in underlying litigation was reasonable, the Connecticut Supreme Court reasoned, "The reasonableness of the settlement . . . should be examined under an objective standard." *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 55, n. 21, 730 A.2d 51, 61 (1999) (citing numerous cases from across the country holding that a settlement's reasonableness is determined under an objective standard). Accordingly, the Connecticut Supreme Court concluded, "although the reasonableness of the settlements is directly at issue, the exact communications between the plaintiff and its attorneys regarding the decision to settle, which would aid only in a subjective determination, are not at issue." *Metropolitan*, 249 Conn. at 56.

In sum, both this Court in *Dana* and multiple other jurisdictions have held that a party does not impliedly waive attorney-client privilege by putting a settlement's reasonableness at issue because attorney-client communications—subjective evidence—are irrelevant to the objective determination of a settlement's reasonableness. Therefore, this Court should hold that the implied waiver doctrine does not apply when a plaintiff seeks a determination under RCW 4.22.060 of a covenant judgment settlement's reasonableness and vacate the trial court's orders

requiring disclosure of attorney-client privileged communications.

(d) Parties do not automatically effect an implied waiver of privilege regarding attorney-client communications by seeking a covenant judgment reasonableness determination under RCW 4.22.060

Even if the implied waiver doctrine applies in the context of covenant judgment reasonableness hearings, the actual waiver standard the trial court announced in its August 27, 2013 written order was “whether the [attorney-client privileged] communication is directly related to one of the eight applicable *Glover/Chaussee* factors and [the privilege] is therefore waived for the purposes of a reasonableness hearing.” Because trial courts must consider the Glover factors in a reasonableness hearing, *Bird*, 175 Wn.2d at 765-66, the trial court’s announced standard is an automatic waiver standard: by virtue of moving for a reasonableness hearing, Appellants automatically committed an implied waiver any protection of documents containing attorney-client privileged communications if that information was deemed relevant to one of the Glover factors. But this standard also contravenes this Court’s decision in *Dana*.

In *Dana*, the trial court ordered disclosure of attorney-client communications between Dana and his attorneys on the basis that the case file materials were “material . . . if not to liability, [then] . . . to damages.” *Id.* at 766 (second alteration in original). On review, this Court recognized the danger of the implied waiver doctrine “render[ing] the attorney-client privilege illusory by transforming the privilege into a rule of mere relevance.” *Dana*, 173 Wn. App. at 774 n. 12. Turning to the trial court’s

implied waiver ruling, this Court reasoned:

In ruling that Dana waived the attorney-client privilege, the trial court relied exclusively on its determination that the protected communications were relevant to Dana's damages and Sussman Shank's defense. But relevance is not the test for waiver of attorney-client privilege.⁴⁷

Id. at 776. On that basis, this Court vacated the trial court's discovery orders requiring production of attorney-client communications and the depositions of Dana's attorneys. *Id.*

As in *Dana*, in this case the trial court applied a mere relevancy standard in ruling that Appellants had waived attorney-client privilege and were required to produce attorney-client communications. In doing so, the trial court committed the same reversible error as the trial court in *Dana*. Moreover, combined with the trial court's ruling that attorney-client communications are relevant to the *Glover* factors, the relevancy standard was an automatic waiver standard. This is the very danger warned against by this Court in *Dana*: rendering our highest discovery protections illusory by transforming them into mere relevancy standards. And the de facto result of the trial court's standard—plaintiffs waive discovery privileges and protections by seeking a covenant judgment reasonableness determination—is the very “sweeping implied waiver doctrine” this Court

⁴⁷ Authority from other jurisdictions accord with this Court's conclusion that relevance of attorney-client communications is insufficient to support a finding of implied waiver. *U.S. v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (quoting *Southern Calif. Gas Co. v. Public Utilities Comm'n*, 784 P.2d 1373, 1381 (Cal. 1990)) (“It is true that ‘privileged communications do not become discoverable simply because they are related to issues raised in the litigation.’”); *Frontier Refining Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 701, (10th Cir. 1998) (“Mere relevance is not the standard.”); *1st Sec. Bank*, 2007 WL 188881, at *3 (“Mere relevance to defendant's case is not sufficient.”); *Metropolitan*, 249 Conn. at 54 (“Merely because the communications are relevant does not place them at issue.”).

reasoned is impermissible. Accordingly, this Court should hold that the trial court erred in ruling that Appellants impliedly waived the attorney-client privilege under this relevancy standard and vacate the discovery orders.

(e) Under the test for implied waiver, Appellants did not impliedly waive attorney-client privilege by seeking a reasonableness determination

Finally, even if the implied waiver doctrine applies to covenant judgment reasonableness hearings under RCW 4.22.060, proper application of the doctrine demonstrates that Appellants did not waive the privilege. According to the *Hearn* test adopted by our Supreme Court in *Pappas*, the privilege is waived where

- (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party;
- (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
- (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Pappas, 114 Wn.2d at 207-08. Additionally, “the *Hearn* test will waive the privilege only where allowing the privilege to prevent disclosure would be manifestly unfair to the opposing party.” *Dana*, 173 Wn. App. at 774. In this case, Philadelphia cannot meet any of these four criteria.

First, Appellants’ assertion of the privilege was not the result of an “affirmative” act. As discussed above, courts across the country typically find implied waiver when a party brings a claim or defense that places attorney-client communications at issue. The commonality among these

scenarios is that the claims or defenses are *voluntarily* brought by the party; for instance, a plaintiff has control over whether to sue an attorney for legal malpractice, and government officials may elect to raise affirmative defenses such as qualified immunity. However, our Supreme Court's decision in *Bird* appears to require the settling parties to seek a reasonableness hearing after executing a covenant judgment and settlement. *See Bird*, 175 Wn.2d at 767; *Meadow Valley Owners Ass'n*, 137 Wn. App. at 817. Thus, because Appellants were required to seek a reasonableness determination, they did not perform an "affirmative"—i.e., voluntary—act leading to their assertion of the privilege.

Second, Appellants' act of seeking a reasonableness determination did not place attorney-client communications "at issue." As this Court reasoned in *Dana*, none of the nine factors the trial court considers in its determination of the settlement's *objective* reasonableness depends on *subjective* evidence such as attorney-client communications. 173 Wn. App. at 776. And, courts in other jurisdictions have expressly held, seeking an objective determination of a settlement's reasonableness does not place subjective evidence "at issue" for purposes of implied waiver. *See, e.g., Metropolitan*, 249 Conn. at 56. Accordingly, Appellants act did not satisfy this factor,

Finally, regarding the third and fourth factors, Philadelphia cannot show either that Appellants' attorney-client communications are "vital" to its defense or that refusing to find a waiver of the privilege would be "manifestly unfair" to it. "Protected communications are vital to a party's

case when they contain information about an issue that is not available from any other nonprivileged source.” *Dana*, 173 Wn. App. at 776. “But protected communications are not vital to a party’s case when there are other sources of indirect evidence about the issue.” *Id.*

As this Court observed in *Dana*, attorney-client communications are not vital to a trial court’s determination of the objective reasonableness of a settlement because none of the factors the trial court considers depends on subjective evidence. *Id.* Indeed, a fact-finder can determine the objective reasonableness of a settlement under these factors without any reference to the “subjective beliefs” of the attorneys involved in the settlement. This is so because the necessary information is readily available from other sources, such as “witnesses other than plaintiff’s attorneys who can shed light on the reasons for settlement” and “experts who could opine on the reasonableness of the settlement.” *1st. Sec. Bank*, 2007 WL 188881, at *3; *accord Chomat*, 919 So.2d at 538 (parties typically prove the reasonableness of settlements through expert witness testimony on the relevant reasonableness criteria); *Metropolitan*, 249 Conn. at 56 (“[T]he defendants in the present case can assess whether the settlements . . . were reasonable by examining the facts of the . . . tort actions—the same material plaintiff had available to it when making its decision—and by consulting experts, just as the plaintiff had the opportunity to do.”).

Here, as in *Dana*, subjective evidence such as attorney-client communications is irrelevant to the trial court’s objective reasonableness

determination. Moreover, Philadelphia has already received *every* piece of objective evidence generated in the underlying litigation: 200,000 pages of discovery exchanged between Appellants and defendants; defense counsel's entire case file; 34,000 pages of work product and other, non-privileged materials, such as Appellants' medical records, expert reports prepared for trial, and trial subpoenas; and all emails exchanged between Appellants' counsel, defense counsel, OELC's coverage counsel, and Olsen's coverage counsel up to the date of settlement. Additionally, Philadelphia has also deposed OELC's coverage counsel and Olsen's coverage counsel regarding the settlement. And, lastly, Appellants and Philadelphia agreed before the trial court that calling experts to testify regarding the settlement's reasonableness was necessary and proper.⁴⁸

Simply put, expert testimony and the hundreds of thousands of pages of objective evidence and trial preparation materials currently available to Philadelphia is more than sufficient to allow it to assess the settlement's reasonableness. Because prohibiting discovery of attorney-client communications would neither deny Philadelphia vital information for its defense nor subject it to manifest unfairness, it cannot meet the third and fourth *Hearn* factors. Accordingly, Appellants did not impliedly waive the attorney-client privilege, and this Court should vacate the trial court's discovery orders.

B. The Trial Court Erred in Ordering Disclosure of Attorney Opinion and Mental Impression Work Product

⁴⁸ RP (March 22, 2013) at 19; RP (April 19, 2013) at 36.

As with its ruling that Appellants impliedly waived attorney-client privilege of communications relevant to the reasonableness determination, the trial court also applied a relevancy standard in determining that Appellants waived work product protection of relevant attorney opinions and mental impressions. Although Washington appellate courts have never directly considered whether a plaintiff waives work product protection of attorney opinions and mental impressions by seeking a covenant judgment reasonableness determination under RCW 4.22.060, existing precedent in Washington and elsewhere also clearly resolves the issue in Appellants' favor. For many of the same reasons stated above, the trial court erred in ordering these disclosures under a relevancy standard or any standard. Because Philadelphia Indemnity did not and cannot meet the incredibly high standard for overcoming the near-absolute prohibition against discovery of such work product, the trial court erred in ordering its disclosure.

1. Standard of Review

Washington courts consider issues of waiver as mixed questions of law and fact, which are also reviewed de novo. *Clayton*, 168 Wn.2d at 62, (court reviews mixed question of law and fact de novo); *Brundridge*, 164 Wn.2d at 441 (waiver issues present a mixed question of law and fact). Thus, this court should review de novo the purely legal issue of whether Appellants waived work product protection of attorney opinions and mental impressions by seeking a reasonableness hearing.⁴⁹

⁴⁹ As stated above, even if this Court applies an abuse of discretion standard, the

2. Washington law provides near-absolute protection to attorney opinion and mental impression work product

Under Washington’s discovery rules and precedent, even the most basic forms of attorney work product are discoverable only on a showing by the party seeking discovery of “substantial need of the materials in the preparation of his case” and “undue hardship” in obtaining their “substantial equivalent” by other means. CR 26(b)(4)⁵⁰; *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 739, 174 P.3d 60 (2007). However, CR 26(b)(4) specifically provides, “In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party regarding the litigation.”⁵¹ Thus, as our Supreme Court has held, these specific categories of work product are “almost always exempt from discovery, regardless of the level of need.” *Soter*, 162 Wn.2d at 739. Indeed, such

result remains the same because the trial court exercised any discretion it had based on an erroneous view of the law regarding waiver of work product protection.

⁵⁰ CR 26(b)(4) provides in pertinent part:

A party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

⁵¹ For ease of reference, Appellants refer to all these types of work product as “attorney opinion” or “attorney mental impression” work product.

work product is “absolutely protected” from discovery unless the attorney’s mental impressions, opinions, legal theories, or conclusions are “directly at issue.” *Soter*, 162 Wn.2d at 740 (quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611-12, 963 P.2d 869 (1998)).

3. The trial court erred in ordering disclosure of attorney opinion and mental impression work product under a relevance standard

Initially, the trial court orally ruled that it would allow discovery of attorney opinion and mental impression work product only on a “compelling” showing that such materials were “directly at issue” with respect to one of the *Glover* factors. Ultimately, however, its April 19 written order provided only that such work product was discoverable only if it was *relevant* to one of the *Glover* factors.

The trial court’s application of a relevance standard clearly violates *Soter*’s requirements that such work product should be protected from disclosure regardless of need. Indeed, relevancy is a minimal “need” threshold that is insufficient to meet the “substantial need” requirement for discovery of ordinary work product. Compare CR 26(b)(1) (generally allowing discovery of matters on a showing of relevance), with CR 26(b)(4) (allowing discovery of ordinary work product only upon showing of substantial need). Accordingly, the trial court erred in requiring disclosure of attorney opinion and mental impression work product on a showing of mere relevance, and this Court should vacate its discovery orders.

4. Appellants did not place attorney opinion or mental impression work product directly at issue by seeking a reasonableness determination

Moreover, the record does not support discovery of attorney opinion and mental impression work product under the appropriate standard—that it is absolutely protected from discovery unless directly at issue. As this Court reasoned in *Dana* in the context of attorney-client communications, none of the *Glover* factors that a trial court considers in its objective determination of a settlement’s reasonableness depends on whether a settling attorney considered the settlement reasonable. *Dana*, 173 Wn. App. at 776. That is, a trial court may make its objective determination under these factors without referring to the subjective beliefs of a settling attorney or party. *Id.* at 773. Likewise, courts in other jurisdictions have expressly stated that seeking an objective determination of a settlement’s reasonableness does not place subjective evidence “at issue” for purposes of implied waiver. *See, e.g., Metropolitan*, 249 Conn. at 56.

Accordingly, if attorney-client communications are subjective evidence not directly at issue in a trial court’s reasonableness determination, then an individual attorney’s opinions, thoughts, mental impressions, and legal theories about the case—all inherently subjective—undoubtedly fall within the same category. Indeed, a Minnesota federal district court reached the same conclusion in *PETCO Animal Supplies Stores, Inc. v. Insurance Co. of N.A.*, No. CIV. 10-682 SRN/JSM, 2011 WL 2490298, at *20 (D. Minn. June 10, 2011). In *PETCO*, the district

court considered whether a settling party had put the work product of its attorney, Ponce, at issue by entering into a *Miller-Shugart* agreement, the Minnesota equivalent of a Washington covenant judgment, which also requires a reasonableness determination. 2011 WL 2490298, at *5, *24.

The district court reasoned:

The issues of the reasonableness of the settlement, or whether it was obtained by collusion or fraud, do not place at issue “the very soul of this litigation.” In short, the proof of these claims (*e.g.* customary evidence on liability and damages, expert opinion of trial lawyers evaluating this “customary” evidence; verdicts in comparable cases; the likelihood of favorable or unfavorable rulings on legal defenses and evidentiary issues; the judge’s own personal experience with jury awards in similar areas if the tort action had been tried), does not implicate evidence encompassed in the contents of Ponce’s communications to PETCO or his work product on the case.

Id., at *20. Ultimately, after reviewing cases from across the country and “the test of enforceability of a *Miller-Shugart* settlement—reasonableness and lack of fraud or collusion—“the district court held that there had been no waiver of protection of Ponce’s work product. *Id.*, at *24. It reasoned, “The test for reasonableness of a *Miller-Shugart* settlement is objective [u]nder this objective standard, [the attorney’s] subjective beliefs or opinions are irrelevant.”).

Thus, as implied by this Court in *Dana*, and as expressly held by other courts, attorney opinion and mental impression work product is subjective evidence that is irrelevant to or, at the very least, not directly at issue in a trial court’s objective reasonableness determination. Therefore, this Court should hold that the trial court erred in requiring disclosure of

such work product and vacate its discovery orders.

C. A Theory of Implied Waiver of Discovery Protections by Plaintiffs in the Covenant Judgment Reasonableness Hearing Context is Contrary to Washington Public Policy

In addition to all the reasons above, critical public policy considerations weigh against holding that Appellants or other plaintiffs impliedly waive attorney-client privilege and work product protection of attorney opinions and mental impressions work by seeking a reasonableness hearing. The first public policy consideration impacted by the Court's ruling in this case is the sanctity of the attorney-client privilege and work product doctrine and the integral roles they play in the functioning of the legal profession. Our Supreme Court has explained the perils of litigation against which the work product doctrine is designed to protect:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Pappas, 114 Wn.2d at 209-10 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).

Likewise, this Court has stated that the attorney-client privilege exists in order to allow the client to communicate freely with the attorney without fear of compulsory discovery. *State ex rel. Sowers v. Olwell*, 64

Wn.2d 828, 394 P.2d 681 (1964); *see also Pappas*, 114 Wn.2d at 203 (privilege encourages free and open communications by assuring that communications will not be disclosed to others directly or indirectly). The privilege is “instrumental in achieving social good because it induces clients to consult freely with lawyers and by doing so acquire expert legal advice and representation that helps them operate within the complex legal system.” *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 161, 66 P.3d 1036 (2003). “Because the privilege encourages clients to communicate fully with an attorney, lawyers are able to defend clients vigorously against charges and to assure them that the law will be applied justly.” *Schafer*, 149 Wn.2d at 161. “Without an effective attorney-client privilege, clients may be inhibited from revealing not only adverse facts but also favorable information that the client might mistakenly believe is damaging.” *Id.* at 161-162. “Impairing the attorney-client privilege must be avoided because ‘[t]he attorney-client privilege may well be the pivotal element of the modern American lawyer’s professional functions. It is considered indispensable to the lawyer’s function as an advocate . . . [and] confidential counselor in law.’” *Id.* at 162 (alterations and omissions in original) (quoting Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L.REV. 1061 (1978)).

Here, the trial court’s ruling that a plaintiff impliedly waives the attorney-client privilege and work product protection of attorney opinions and mental impressions contained tremendously undermines the fundamental purposes and social benefits of the attorney-client privilege

and work product doctrine. Parties litigating against insured defendants would labor under the specter that their privileged communications or the mental impressions of their counsel would be discoverable should the litigation develop into a covenant judgment settlement. Such a specter would undoubtedly distort both client communications with their counsel and counsel's own practices in giving advice and preparing cases for trial, thwarting the social goods promoted by the privilege and doctrine. Accordingly, this Court should hold that public policy dictates that plaintiffs do not impliedly waive either of these crucial discovery protections by seeking a covenant judgment reasonableness determination under RCW 4.22.060.

The second public policy consideration impacted by the Court's decision in this case is Washington law's incentivization of insurers to fulfill their duties to their insureds in defending them from lawsuits. "The insurer's duty to defend is one of the main benefits of the insurance contract." *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). Indeed, as this Court has recognized:

The defense may be of greater benefit to the insured than [indemnification] . . . An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go away.

Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 765-66, 58 P.3d 276, 284 (2002). Indeed, previous Washington appellate decisions have expressly recognized that insurance companies intervening in a reasonableness hearing are typically not a "stranger to the case," and, thus,

have prohibited them from reopening discovery and required them to proceed to a reasonableness hearing on a few days' notice. *Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 325-26, 116 P.3d 404 (2005); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379-80, 89 P.3d 265 (2004) (emphasis added), *review denied*, 153 Wn.2d 1009 (2005). Implicit in these cases is the principle that insurance companies, in contesting the reasonableness of a settlement, should be held to the same evidence generated in the defense they provided for their insureds as an incentive for insurance companies to provide a vigorous and robust defense. As a corollary, per *Truck*, an insurer who failed to ensure its insureds received the fruits of an adequate defense—including discovery—should not be permitted to reap those same fruits in attacking the reasonableness of a settlement.

This case presents the exact scenario denounced by *Truck*. Philadelphia Indemnity admitted it was responsible for providing OELC's, Olson's, and Horgdahl's defense, and it had the opportunity to participate in discovery for over a year after Appellants initially filed the underlying lawsuits. However, after failing to ensure any meaningful discovery was conducted prior to the covenant judgments, Philadelphia Indemnity sought extensive discovery to protect its own financial interests⁵²—including

⁵² Once the amount of a covenant judgment is deemed reasonable by a trial court, it become the presumptive measure of damages in a later bad faith action against the insurer. *Bird*, 175 Wn.2d at 765.

unprecedented access to Appellants' attorney-client communications and attorney mental impressions.

In short, Philadelphia created its own "need" for discovery at the expense of its insureds, and then relied on that self-created need as its justification for seeking nearly limitless discovery for the reasonableness hearing. Thus, the trial court's decision not only to reopen discovery for the reasonableness hearing, but also to require disclosure of materials that would have been undiscoverable had the case proceeded to trial serves only to incentivize insurance companies to "do nothing" to defend their insureds, knowing that they will have access to extraordinarily invasive discovery in challenging the amount of a covenant judgment that may be later used against them. Such a result would completely undermine our Supreme Court's express policy statements in *Truck* and the fundamental relationship between insurers and their insureds under Washington law. Accordingly, this Court should hold that public policy dictates that Philadelphia Indemnity is not entitled to the discovery it seeks, either as a general proposition or under the specific facts of this case.

V. CONCLUSION

For the foregoing reasons, Appellants respectfully ask this court to vacate the trial court's August 27 and November 22, 2013 discovery orders requiring Appellants to produce their attorney-client communications and attorney opinion and mental impression work

product.⁵³

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RESPECTFULLY SUBMITTED this 28th day of April 2015.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832
PFAU COCHRAN VERTETIS AMALA, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402
(253) 777-0799

⁵³ Appellants also respectfully request that this Court make clear that its holding that Appellants have not waived either discovery protection applies in general, not just to the documents the trial court's orders require to be disclosed. Because Appellants have not either discovery protection, it is highly unlikely that Philadelphia Indemnity can depose Appellants' counsel at all, given that anything he might say is likely protected by one of the two discovery protections. *See Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) (even deposing an attorney about the facts or documents in a case violates the work product doctrine, as it reveals the attorney's legal theories and mental impressions regarding which facts or documents the attorney identified as important). As evidenced by Philadelphia Indemnity's attempt to depose Appellants' counsel using the documents and on the matters subject at issue in this appeal during its pendency, however, it is likely that on remand Philadelphia Indemnity will renew its efforts to use its subpoena for the protected documents and depose Appellants' counsel on protected matters unless this Court specifically forecloses it from doing so.

FILED
COURT OF APPEALS
DIVISION II
2015 APR 28 PM 3:39
STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

Kim Snyder, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on April 28th, 2015, I personally delivered, a true and correct copy of the above document, directed to:

Steve Soha
Paul Rosner
Soha & Lang PS
1325 Fourth Ave. Suite 2000
Seattle, WA 98101-2570
Attorneys for Philadelphia Indemnity

Harold Carr
Karen Kay
Law Office of Harold Carr, PS
4239 Martin Way E
Olympia, WA 98516-5335

William Ashbaugh
Hackett Beecher & Hart
1601 5th Ave. Ste. 2200
Seattle, WA 98101
Attorney for: Steve Olson

Paul Meyer
402 Capitol Way S Ste. 12
Olympia, WA 98501
Attorney for: Olympia Early Learning Center

Michael C. Bolasina
Summit Law Group
315 Fifth Avenue
Suite 1000
Seattle, WA 98104-2682
Attorney for: Rose Horgdahl

//

DATED this 28th day of April 2015.

A handwritten signature in black ink that reads "Kim Snyder". The signature is written in a cursive style with a large initial "K".

Kim Snyder
Legal Assistant to Darrell Cochran

4846-4787-0754, v. 4

APPENDIX

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LISA STEEL, individually and as
Guardian ad Litem for J.T., a minor,
DOUGLAS THOMPSON, and KRISTI
BARBIERI, individually and as Guardian
ad Litem for S.R.B., a minor,

Petitioners,

v.

OLYMPIA EARLY LEARNING
CENTER, STEVE OLSEN, individually,
ROSE HORGDAHL, individually,

v.

PHILADELPHIA INDEMNITY
INSURANCE COMPANY,

Respondents/Intervenor.

NO. 89601-1

RULING TRANSFERRING MOTION
FOR DISCRETIONARY REVIEW

Filed 
Washington State Supreme Court

MAR 27 2014

Ronald R. Carpenter 
Clerk

Petitioners seek direct discretionary review of two discovery orders entered by the Thurston County Superior Court on November 22, 2013. These orders require the plaintiffs to produce documents or provide deposition testimony even if the attorney-client privilege or the work product doctrine apply where the documents or testimony relate to factors the court considers in making a reasonableness determination under the tort reform act, chapter 4.22 RCW. These factors are outlined in *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), and *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 511-12, 803 P.2d 1339 (1991).

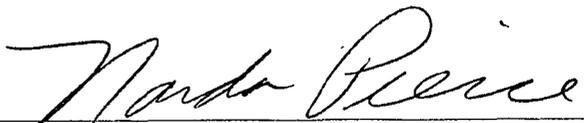
The first superior court order required plaintiffs' counsel to produce all documents designated as "not protected" by the special discovery master following in camera review. The special discovery master found some of these documents contained attorney opinions or mental impressions, but designated them "not protected" because the documents related to one of the "*Glover/Chaussee*" factors. The superior court certified that "this order meets the criteria of RAP 2.3(b)(4)," indicating the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The second order denied plaintiffs' motion for a protective order and to quash the accompanying subpoena in relation to the deposition of plaintiffs' attorney. This order required plaintiffs' attorney to "substantively respond to all deposition questions directly related to the nine *Glover/Chaussee* reasonableness factors."

The Philadelphia Indemnity Insurance Company argues that the notice of discretionary review designating the November 22, 2013, orders is untimely because the superior court established the challenged standard governing the special master's review in an earlier August 27, 2013, order. Additionally, Philadelphia contends the superior court's rulings were based on evaluations of the specific factual circumstances of this case. Further, Philadelphia argues the discovery orders should be reviewed only after final judgment.

Discretionary review may be warranted in this matter, as "no bell can be unrung" once attorney-client privileged communications and work product materials are disclosed. *See Dana v. Piper*, 173 Wn. App. 761, 295 P.3d 305 (2013). However, I am not persuaded that this case raises a fundamental and urgent issue of broad public import which requires prompt and ultimate determination. RAP 4.2(a)(4). Situations in which these issues arise in the context of a reasonableness hearing are relatively

rare. Further, resolution of this matter may prove to be fact-driven and require close review of a lengthy record of discovery. This motion for discretionary review should be left for initial decision in the Court of Appeals.

The motion for discretionary review is hereby transferred to the Court of Appeals for determination pursuant to RAP 4.2(e)(2).


COMMISSIONER

March 27, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA STEEL, individually and as GAL for J.T., a minor and DOUGLAS THOMPSON and KRISTI BARBIERI, individually and as GAL for S.R.B., a minor,

Petitioners,

v.

OLYMPIA EARLY LEARNING CENTER,

Respondents,

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Respondents/Intervenor.

No. 46301-6-II

RULING GRANTING REVIEW IN PART

FILED
COURT OF APPEALS
DIVISION II
2014 AUG 28 AM 11:26
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Petitioners Lisa Steel, Douglas Thompson, and Kristi Barbieri, as individuals and as guardians ad litem (GAL), for the minor children J.T. and S.R.B., (Steel) seek discretionary review of trial court orders entered on November 22, 2013: (1) Order re Intervenor’s Motion to Compel and Special Discovery Master’s Recommendations, which compels Steel’s counsel to produce to the intervenor, Philadelphia Indemnity Insurance Company, all documents designated by the special discovery master as not protected (Order Compelling Production); and (2) the Order Denying Plaintiffs’ Motion for a Protective Order re the Deposition of Darrell L. Cochran and to Quash Subpoena

(Order Denying Protective Order).¹ Concluding that Steel has met the criteria for discretionary review under RAP 2.3(b)(4) as to the Order Compelling Production, this court grants review on the issue of whether the attorney-client privilege or the attorney opinion or mental impression privilege is waived for the purpose of determining the reasonableness of a settlement. As to all other issues, this court denies review.

FACTS

J.T. and S.R.B., among other minors, were enrolled at the Olympia Early Learning Center (OELC), where they were sexually assaulted by Eli Tabor, an employee of OELC.² Steel and other plaintiffs sued OELC for negligence, breach of contract, and breach of implied warranty. Philadelphia, OELC's insurer, retained counsel on behalf of OELC in order to defend against the claims.

One month before the scheduled trial date, OELC settled with the plaintiffs for a total of \$25 million. As part of the settlement agreements, OELC admitted to breaching its duty of care toward the plaintiffs and assigned its insurance claims against Philadelphia to the plaintiffs. In exchange, the plaintiffs entered into a covenant not to execute any judgment against OELC.

¹ Steel argues at some length that Philadelphia should not be allowed to obtain discovery at all. But the orders designated in Steel's motion only called for production of those materials described in petitioners' privilege log and designated by the special master as not protected, as well as the deposition of plaintiffs' counsel. Steel did not timely seek discretionary review of the issue of whether Philadelphia may obtain discovery at all.

² Two officers of OELC were later joined as co-defendants. For the purpose of clarity, all defendants are referred to collectively as OELC.

Philadelphia subsequently moved to intervene to obtain “focused discovery related to the reasonableness of covenant judgment settlements.” Mot. for Disc. Rev., App. at 242. The trial court granted Philadelphia’s motion to intervene and ordered the Steel to produce all of the discovery exchanged by the parties, all materials exchanged related to settlement; and all attorney work product created during the pendency of the settlement. However, the court later limited its discovery order concerning attorney work product.

Philadelphia moved to reconsider, arguing that to assess the reasonableness of the settlement required evidence of “the information and knowledge known to plaintiff’s counsel at the time the case was settled, as well as plaintiff counsel’s preparation for trial including anticipated expert testimony.” Mot. for Disc. Rev., App. at 260. Philadelphia argued that Steel had waived the attorney-client and work product privileges by entering into the settlement agreement. The trial court agreed, ruling that “some access into plaintiff’s file is appropriate” in order to analyze the reasonableness of the settlement under the controlling test as articulated in *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983), *abrogated on other grounds by*, *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), and *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339, 812 P.2d 487, *review denied*, 117 Wn.2d 1018 (1991). Mot. for Disc. Rev., App. at 290 (Report of Proceedings (RP) Apr. 19, 2013 at 27). The court ordered that the petitioner’s counsel’s file be subject to discovery until the time of settlement except for those records that constituted attorney opinion or mental impressions, or attorney work product. As to these protected records,

the court ordered a privilege log created. Finally, the court noted that deposing Steel's counsel might shed light on the settlement process, obviating the need for discovery of privileged information: "There is no question in my mind, as I read these settlement hearing cases, that what plaintiff's counsel thought about the value of his case . . . is evidence that the Court considers when they make a determination of the reasonableness of the settlement." Mot. for Disc. Rev., App. at 292 (RP Apr. 19, 2013 at 29).

Steel produced the required discovery and privilege log. The privilege log contained 456 entries purportedly protected by the attorney-client privilege or as attorney opinions or mental impressions.³ The court then appointed a special discovery master under CR 53.3 to review the privilege log and determine which records should be made subject to discovery. The order specified that only those records that were "directly related to one of the eight applicable *Glover/Chaussee* factors" should be produced, and only "for the purposes of a reasonableness hearing." Mot. for Disc. Rev., App. at 294-95.

Of the 456 privilege log entries, the special master identified 63 entries as not protected because they were not expressions of attorney opinion or mental impression; 57 entries as not protected because they were not attorney-client communications; and 94 entries as not protected because they were directly related to *Glover/Chaussee* factors. The trial court adopted the special master's recommendations in its Order

³ Petitioners did not claim attorney work-product protection, although "[n]early without exception, the records reviewed fit the definition of work product." Mot. for Disc. Rev., App. at 309.

Compelling Production and ordered Steel's counsel to produce all of the records that the special master had identified as not protected. The court also certified that the Order Compelling Production met the criteria of RAP 2.3(b)(4).

In a separate order on the same day, the trial court entered its Order Denying Protective Order. The court did not certify this order. Steel sought discretionary review of both orders from the Washington State Supreme Court. That court denied direct review of the orders and transferred Steel's motion to this court.

ANALYSIS

This court may grant discretionary review only when:

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

RAP 2.3(b). Steel seeks discretionary review under RAP 2.3(b)(2) and (b)(4). These orders are analyzed in turn.

I. Order Compelling Production

Steel argues that the trial court correctly certified the Order Compelling Production, making discretionary review appropriate under RAP 2.3(b)(4). Alternatively, Steel argues that the trial court committed probable error that substantially altered the status

quo, making discretionary review appropriate under RAP 2.3(b)(2). In response, OELC argues that the order did not decide a controlling question of law and that immediate review would not advance the ultimate termination of the litigation.

A. Documents Not Protected Because Not Privileged

As to the part of the Order Compelling Production that requires production of documents that were not protected because they did not constitute attorney-client communications or attorney opinions or mental impressions, both the trial court's certification and discretionary review are unwarranted. In order to determine whether the documents were attorney-client communications, the special master was required to determine whether those records constituted "communications made by the client to [the attorney], or his or her advice given thereon in the course of professional employment." Former RCW 5.60.060(2)(a) (2009). In order to determine whether the documents were attorney opinions or mental impressions, the special master was required to determine whether those records reflected the "mental impressions, conclusions, opinions, or legal theories" of petitioners' counsel. CR 26(b)(4). There is no "controlling question of law" as to how attorney-client communications or mental impressions are defined, making certification under RAP 2.3(b)(4) inappropriate. Rather, the special master's inquiries were those of fact: to determine whether the purportedly privileged communications were actually made from attorney to client and whether the purportedly privileged records actually described a mental impression or legal theory. The special master carried out an intensive in camera review of the records and examined them in their original context. This court generally does not grant

discretionary review of discovery matters because it is “not competent to review most evidentiary rulings when a trial has not yet occurred both because it does not find its own facts and because it is incapable of assessing the impact of the evidence on the whole case.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, *review denied*, 169 Wn.2d 1029 (2010). Further, Steel offers no argument that the special master misidentified any records as falling outside of the attorney-client privilege or the attorney mental impression privilege, making discretionary review of those documents under RAP 2.3(b)(2) inappropriate. Accordingly, as to those records that the special master designated as not protected because they did not constitute attorney-client communications or attorney mental impressions, review is denied.

B. Documents Not Protected Because
Directly Related to *Glover/Chaussee* Factors

In its order appointing the special master, the trial court directed the special master to review “first, whether the record is a communication that would be privileged unless waived; and second, whether the communication is directly related to one of the applicable *Glover/Chaussee* factors and is therefore waived for the purposes of a reasonableness hearing.” *Mot. for Disc. Rev.*, App. at 295. The court’s legal conclusion seems to derive from the implied waiver doctrine. An implied waiver of the attorney-client privilege occurs when:

- (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Pappas v. Holloway, 114 Wn.2d 198, 207, 787 P.2d 30 (1990).

Philadelphia argues that the Steel put attorney-client communications and attorney mental impressions at issue by entering into a settlement, making those documents relevant to the determination of whether the settlement was reasonable,⁴ or if—as Philadelphia asserts—it was the result of collusion.⁵ Whether the mere act of entering into a settlement satisfies the requirements of *Pappas* involves an interpretation of law—that is, it is a “controlling question of law” as opposed to a question of fact. Therefore, the first element of RAP 2.3(b)(4) is satisfied.

Furthermore, there is “substantial ground for difference of opinion.” RAP 2.3(b)(4). The applicability of an implied waiver theory in the context of a settlement reasonableness hearing is a question of first impression in this state that different jurisdictions have answered in different ways. See *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995) (no implied waiver); *Chomat v. Northern Ins. Co. of New York*, 919 So.2d 535 (Fla. 2006) (same), *review denied*, 937 So. 2d 123 (2006); *Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co.*, 249 Conn. 36, 730 A.2d

⁴ Washington courts analyze the reasonableness of a settlement by weighing the releasing person’s damages; the merits of the releasing person’s liability theory; the merits of the released person’s defense theory; the released person’s relative faults; the risks and expenses of continued litigation; the released person’s ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person’s investigation and preparation of the case; and the interests of the parties not being released.

Glover, 98 Wn.2d at 717 (quotation omitted).

⁵ Here, an insured party (OELC) entered into a consent judgment that it would not be personally responsible for. In such circumstances, the courts must be cognizant of the risk of collusion between plaintiff and insured. See *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002); *Chaussee*, 60 Wn. App. at 510-11; *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22, *review denied*, 155 Wn.2d 1025 (2005).

51 (1999) (same). *But see Conoco Inc. v. Boh Bros. Const. Co.*, 191 F.R.D. 107 (W.D.La. 1998) (privilege waived where communications would be necessary to show reasonableness); *Walters Wholesale Elec. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 247 F.R.D. 593 (C.D.Cal. 2008) (same). There is no consensus as to whether a party waives the attorney-client privilege or the attorney mental-impression privilege by entering into a settlement that is subject to a reasonableness hearing. Accordingly, the second element of RAP 2.3(b)(4) is satisfied.

Finally, resolution of the privilege question "may materially advance the ultimate termination of the litigation." RAP 2.3(b)(4). The information contained in the attorney-client communications and attorney mental impressions sought is likely to affect the superior court's determination of whether the settlement was reasonable. Federal courts have found that the analogous statute 28 U.S.C. § 1292(b)⁶ may permit interlocutory review "where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal." *Garner v. Wolfenbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Atlantic City Elec. Co. v. General Elec. Co.*, 207 F.Supp. 613 (S.D.N.Y.), *aff'd*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) ("The preconditions for § 1292(b) review . . . are most likely to be satisfied when a privilege ruling involves a

⁶ "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." 28 U.S.C. § 1292(b).

new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases.”) The third element of RAP 2.3(b)(4) is satisfied. Accordingly, this court grants Steel’s motion for discretionary review of the Order Compelling Production to the extent that it orders production of records that would otherwise be privileged but that were directly related to *Glover/Chaussee* factors.

Having concluded that review is authorized under RAP 2.3(b)(4), this court does not reach Steel’s RAP 2.3(b)(2) argument as to those records.

II. Order Denying Protective Order

Steel designated for discretionary review the trial court’s Order Denying Protective Order. But it did not address this order in its motion for discretionary review. Thus, Steel fails to demonstrate that the trial court committed probable error in entering this order, as required by RAP 2.3(b)(2). Further, the superior court did not certify this order for immediate review, making discretionary review under RAP 2.3(b)(4) inappropriate. Accordingly, Steel’s motion for discretionary review of the Order Denying Protective Order is denied.

CONCLUSION

The trial court properly certified the Order Compelling Production as involving a controlling question of law as to which there is a substantial ground for a difference of opinion and the immediate resolution of which may materially advance the ultimate termination of the litigation. But that certification is appropriate only as the controlling question of whether entering into a settlement waives the attorney-client and attorney mental impression privileges as to documents that would otherwise be privileged but

46301-6-II

that are directly related to *Glover/Chaussee* factors. Thus, review is granted as to that issue under RAP 2.3(b)(4). As to the remaining documents ordered produced in the Order Compelling Production and as to the Order Denying Protective Order, Steel fails to show that review is appropriate under RAP 2.3(b)(2) or (4). Accordingly, it is hereby

ORDERED that Steel' motion for discretionary review is granted in part, as discussed above, and is otherwise denied.

DATED this 28th day of August, 2014.



Eric B. Schmidt
Court Commissioner

cc: Darrell L. Cochran
Loren A. Cochran
Kevin M. Hastings
Harold D. Carr
Karen M. Kay
Christopher E. Love
Tyna Ek
Paul M. Rosner
Michael C. Bolsina
J. William Ashbaugh
Paul H. Meyer



Washington State Court of Appeals Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4.

December 9, 2014

Tyna Ek
Soha & Lang PS
1325 4th Ave Ste 2000
Seattle, WA, 98101-2570
ek@sohalang.com

Paul Mark Rosner
Soha & Lang, P.S.
1325 4th Ave Ste 2000
Seattle, WA, 98101-2570
rosner@sohalang.com

Darrell L. Cochran
Pfau Cochran Vertetis Amala PLLC
911 Pacific Ave Ste 200
Tacoma, WA, 98402-4413
darrell@pcvalaw.com

Harold D. Carr
Attorney at Law
4239 Martin Way E
Olympia, WA, 98516-5335
haroldcarrlaw@comcast.net

Karen Marie Kay
Lockner & Crowley, P.S.
524 Tacoma Ave S
Tacoma, WA, 98402-5416
karen@524law.com

Loren A Cochran
Pfau Cochran Vertetis Amala
911 Pacific Ave Ste 200
Tacoma, WA, 98402-4413
loren@pcvalaw.com

Christopher Eric Love
Pfau Cochran Vertetis Amala, PLLC
911 Pacific Ave Ste 200
Tacoma, WA, 98402-4413
chris@pcvalaw.com

Kevin Michael Hastings
Pfau Cochran Vertetis Amala
911 Pacific Ave Ste 200
Tacoma, WA, 98402-4413
kevin@pcvalaw.com

Pamela Jones
Thurston Co Ct Rptr
2000 Lakeridge Dr SW
Olympia, WA, 98502

Sonya Wilcox
Thurston Co Ct Rptr
2000 Lakeridge Dr SW
Olympia, WA, 98502

Aurora Shackell
Thurston Co Ct Rptr
2000 Lakeridge Dr SW
Olympia, WA, 98502

CASE #: 46301-6-II/Lisa Steel, et al v. Olympia Early Learning Center, et al.

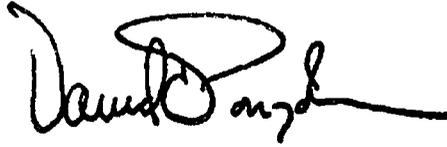
Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The motion to stay the deposition of Darrell Cochran pending the decision of this court in this appeal is granted. Allowing the deposition, which would involve inquiry into the documents in dispute in this appeal, would destroy the fruits of the appeal. The motion to stay all other discovery pending the decision of this court is denied. Appellants have not shown that such a broad stay is warranted.

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. Ponzoha". The signature is fluid and cursive, with a large loop at the top and a long horizontal stroke at the end.

David C. Ponzoha
Court Clerk

DCP:saf