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No. 46301-6-II

COURT OF APPEALS, DIVISION II,
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,

Appellants/Plaintiffs,

vs.

OLYMPIA EARLY LEARNING CENTER, et al.,

Respondents/Defendants,

vs.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondents/Intervener

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondent Philadelphia Indemnity Insurance Company's ("Philadelphia") response brief spends a substantial amount of time avoiding the merits of this appeal—whether a plaintiff *per se* waives protection of *subjective* evidence such as attorney-client privileged communications and attorney mental impression and opinion work product by asking a trial court to determine the *objective* reasonableness of a covenant judgment settlement—instead focusing most of its efforts on waiver arguments raised in passing before the trial court, not subject to any findings by the trial court, not relied on by the trial court in ordering production of these materials, and not within the scope of this Court's limited grant of discretionary review.

Even setting these issues aside, neither the record nor the law supports Philadelphia's numerous claims of "waiver." First, Philadelphia claims that Appellants failed to preserve for appeal their argument that subjective evidence such as attorney-client privileged communications and attorney mental impressions and opinions are irrelevant to a trial court's reasonableness determination using objective evidence, such as traditional evidence generated and exchanged during discovery and expert opinions on reasonableness. However, as early as November 2012, the trial court itself concluded that an objective reasonableness determination depends on traditional, *extrinsic* evidence, not an attorney's privileged and protected file materials. Appellants subsequently and repeatedly asserted the same theory they assert on appeal—that objective reasonableness can

and must be determined using generally discoverable extrinsic, objective evidence—as a different trial court judge, months later on reconsideration, concluded such subjective file materials were discoverable if relevant to the *Glover* factors. Thus, the record demonstrates that Appellants adequately and repeatedly preserved this issue for review.

Second, Philadelphia contends that Appellants invited any error in the production of their file materials by moving the trial court to compel Philadelphia to produce its own file materials under the same theory asserted by Philadelphia. However, the record demonstrates that Appellants so moved only *after* the trial court had already ordered production of Appellants’ “ordinary,” non-mental impression and non-opinion attorney work product; Appellants continued to object that an attorney’s file materials are unnecessary for a determination of objective reasonableness and their production was erroneous but asserted that, if the Court was going to require production of Appellants’ ordinary work product, the trial court’s rationale and the equitable nature of reasonableness hearings required production of Philadelphia’s ordinary work product as well. Appellants could not have “invited” the error asserted in this appeal—the trial court’s order requiring production of Appellants’ privileged materials and attorney opinions and mental impressions—by, under a continuing objection, asking the trial court to mitigate the effects of a ruling on a different issue.

Third, Philadelphia contends that Appellants waived protection of their privileged materials and attorney mental impression and opinions by

selectively disclosing the “mental impressions and opinions” of Appellants’ counsel and the attorney-client communications and attorney mental impressions and opinions of defendants’ counsel as evidence for the reasonableness hearing, thus gaining a “tactical advantage” in the reasonableness determination; making Appellants’ counsel a “necessary witness” for the reasonableness hearing; and committing an “implied waiver” of discovery protections by seeking a reasonableness determination. However, where such *subjective* materials are irrelevant to a trial court’s *objective* reasonableness determination, these “waiver” arguments necessarily fail; alleged disclosures of irrelevant matters cannot suddenly render additional irrelevant materials relevant and subject to discover.

Fourth, even if Appellants’ attorney-client communications and attorney mental impressions and opinions were relevant, no such “selective disclosures” requiring their production occurred. Philadelphia points to alleged disclosures of Appellants’ counsel’s mental impressions and opinions that were offered as evidence for the reasonableness hearing. However, this ignores the fact that *the reasonableness hearing has not yet occurred*. Indeed, the trial court has not yet set a reasonableness hearing or finalized the parameters for presentation of evidence at the hearing, much less received any formal reasonableness hearing evidentiary submissions from the party. Moreover, the “selective disclosures” claimed by Philadelphia were, in reality, *legal arguments and conclusions* drawn from the evidence available in the case. Finally, the

“disclosures” of alleged attorney-client communications and attorney mental opinions of the underlying defendants and their counsel were likewise legal arguments educating the trial court on the case; and, even assuming they were actual disclosures, Philadelphia offers no support for its conclusion that disclosure of one party’s file materials leads to waiver of *an entirely different party’s* file materials.

Fifth, Philadelphia asserts that Appellants waived protection of their file materials under the four-part “implied waiver” test because Appellants moved for a reasonableness determination, the mere act of doing so put counsel’s file materials directly at issue by making them relevant to the case, and such materials are vital to Philadelphia’s case. Even if these materials were not irrelevant, however, Philadelphia already possesses all objective evidence exchanged between the parties in the underlying litigation, totaling over 200,000 pages; the entire file materials of defense counsel and defendants’ coverage attorneys; and Appellants’ “ordinary,” non-mental impression and opinion work product. Accordingly, because Philadelphia possesses ample objective and other evidence with which to evaluate the settlements’ reasonableness, Appellants’ counsel’s file materials are not vital, central, or directly at issue.

Finally, Philadelphia contends that production of Appellants’ file materials is required under the “crime-fraud” exception to discovery protections because, according to Philadelphia, Appellants have not offered sufficient evidence of the settlements’ reasonableness. Again,

however, this ignores the fact that no reasonableness hearing has occurred and no reasonableness submissions have been made to the trial court. Moreover, no documents were reviewed *in camera* or ordered produced under a “crime-fraud exception” standard, necessities for affirming under this ground.

II. RELEVANT FACTS

In support of many of its waiver arguments, Philadelphia misrepresents the record either affirmatively or through omission. Accordingly, Appellants provide this recitation of facts responsive to the waiver arguments, other issues, and factual misrepresentations in Philadelphia’s response brief.¹

¹ In addition to misrepresenting the record on appeal, Philadelphia repeatedly makes factual assertions throughout its brief without any citation to the record. This Court does not consider statements that are not supported by citation to the record. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Appellants have attempted to identify each unsupported statement, although Appellants cannot certify that the following list is exhaustive, given the sheer number of unsupported statements, Philadelphia’s habit of providing citations that support some portions of “factual” assertions but not others, and Philadelphia’s habit of presenting legal arguments as assertions of “fact.” Accordingly, Appellants move to strike the following unsupported statements in Philadelphia’s brief, as well as any others this Courts finds are unsupported:

p. 4-5 (“Eli Tabor, a former employee of Olympia Early Learning Center (“OELC”), who was never a defendant in the underlying consolidated litigation, has been convicted and incarcerated for sexual molestation of two children who attended daycare at OELC, including one of the minor plaintiffs and another child, whose family has not yet brought a claim against OELC. In addition, despite a lack of evidence, Plaintiffs alleged that Tabor sexually abused other children who attended the daycare. OELC’s insurer, Philadelphia retained as defense counsel attorney Michael Bolasina, a lawyer experienced in defending sex abuse cases. Philadelphia never disputed coverage, defended without reserving rights, looked for early opportunities to settle, offered to participate in mediation, and offered its policy limits to settle all claims against the defendants.”);

p. 5 (“Third, Plaintiffs claimed that they could ‘stack’ four \$1 million limits to achieve \$4 million in insurance.”);

p. 6-7 (“On September 24, 2012, before either side had conducted expert discovery and before potential witnesses had been disclosed in three of the cases, Defendants agreed to Plaintiffs’ counsel’s request that they stipulate to entry of judgments totaling \$25 million in exchange for Plaintiffs’ written agreement that they

would only seek to collect the judgments from Defendants' insurer. The proposed stipulated judgments were supported by factual "confessions" drafted by Plaintiffs' counsel and signed by Defendants, *which contradicted the evidence*, defense counsel's reports to Philadelphia, and *Defendants' prior statements and testimony*." (emphases added)—although Philadelphia provides a citation to the record for the last sentence, the citation refers only to one of the minor children, not all the minor children and adult plaintiffs, contains a vague reference to "the evidence" in the underlying case, and refers without citation to prior testimony by the underlying defendants;

p.7 ("Defendants produced to plaintiffs' counsel complete un-redacted copies of their defense and personal counsels' files including attorney-client communication and mental impression work product, which, as discussed below, Plaintiffs have been using offensively in the reasonableness phase of the litigation.");

p. 7 ("Shortly after the settlement, Plaintiffs requested a ruling that the proffered judgments totaling \$25 million reflected the "reasonable" value of Plaintiffs' claims, offering as support, factual "confessions" that were drafted by Plaintiffs' counsel.");

p. 10 n. 23 ("Plaintiffs continue to infuse bad faith allegations against Philadelphia into the reasonableness hearing. However, these scurrilous allegations are irrelevant to the determination of reasonableness and they lack merit. Philadelphia retained counsel experienced in defending sex abuse cases to defend OELC and the managerial employees under policies that contained a sexual abuse rider subject to a single \$1 million limit. Philadelphia never disputed coverage, defended without a reservation of rights, and offered to pay its limits to settle the claims.");

p. 13 ("Plaintiffs' counsel appears to be the only witness who has any material knowledge about the basis of the \$25 million settlement amount he unilaterally set, the unequal allocation of that settlement among six stipulated judgments, and the factual confessions he authored to support the judgments.");

p. 13-14 ("Defendants' attorneys could not explain the factual contradictions between their clients' pre-settlement testimony and written confessions offered in support of the proposed judgments. They testified that Plaintiffs' counsel drafted their clients' confessions without any input from Defendants, and first presented the confessions in final form for Defendants' signature with the final draft of the settlement documents.");

p. 14 ("On October 26, 2012, the trial court granted Philadelphia's motion to intervene and conduct discovery related to the *Glover* factors. Over the next year, the trial court issued a series of discovery orders tailored to the extraordinary facts of this case. Despite these extraordinary facts, the trial court did not find a blanket privilege waiver.");

p. 14-15 ("The special master issued a series of directives and recommendations following an arduous, multi-phase *in camera* review of documents. On November 22, 2013 the trial court held a hearing to address whether the trial court should adopt the discovery master's recommendations.");

p. 15 ("In all, Plaintiffs were required to produce four percent of the documents they withheld following the *in camera* review and determination that the documents were critical to a reasonableness determination. The trial court properly exercised its discretion to tailor discovery to this case, which is precisely what appellate courts have directed trial courts to do when tasked with determining the reasonableness of stipulated settlements.");

p. 17 ("Further, Plaintiffs agreed to the appointment of the special master to resolve the discovery dispute, agreed to the scope of the special master's assignment, and did not object to the standard set by the trial court for the special master's review in the trial court's August 27th order.");

p. 26 ("Plaintiffs' counsel has had defense counsel's files including defense counsel's mental impression work product and privileged communication regarding the

value of Plaintiffs' claims since the ink was dry on the settlement agreements and has been using privileged information offensively.");

p. 27 ("In this case, Philadelphia argued that Plaintiffs' counsel was the central factual witness to the settlement, and critical information could only come from his knowledge and documents.")—Philadelphia provides a citation not to the trial court record, but to some of its briefing in one of its many motions in this appeal;

p. 27 n. 82 ("Indeed, in the *Best Plumbing* case, Plaintiffs' counsel's entire unredacted file was produced in discovery. *See* Decl. of Tyna Ek, Resp't Appx. at pp. 75-78, Decl. of Janis Puracal (counsel for intervening insurer in *Best Plumbing*, 175 Wn.2d 756, verifying that Plaintiffs' counsel's entire unredacted file was produced in discovery in that case, Resp't Appx. at pp. 69-70")—Philadelphia again provides a citation not to the trial court record, but to some of its previous appellate motion briefing;

p. 27-28 ("Instead, the trial court applied extra protection and required that a discovery master review the documents with instructions to narrowly construe relevance such that only documents directly related to the reasonableness determination would be produced.")—Philadelphia again provides a citation not to the trial court record, but to some of its appellate briefing;

p. 31-32 ("Nor have Plaintiffs explained how they could meet their burden of proving that the \$25 million settlement of these claims is reasonable without Plaintiffs' counsel's testimony when there is a complete lack of evidence related to abuse of 5 of the 6 child plaintiffs (other than **the factual confessions that contradict Defendants' prior testimony and the objective evidence**) and the settlement occurred before any mediation, without negotiation, and without even discussion of liability and damages.") (emphasis added);

p. 32 n. 91 ("Defendants had few assets other than 1) the Philadelphia policy, which is subject to a \$1 million limit for all sexual abuse claims; and 2) a building owned by OELC worth about \$150,000. As discussed above, in addition to the Plaintiffs' claims, Defendants were concerned about a potential claim by N.D.'s family, which, unlike 5 of the 6 plaintiffs' claims, was not a nuisance claim. Yet the stipulated settlement amount is 25 times the limits of the Philadelphia policy!");

p. 37 ("In this case, what was known to Plaintiffs is particularly important because: 1) the factual "confessions" unilaterally authored by Plaintiffs' counsel completely contradict the Defendants' prior sworn testimony and the evidence that has been produced to date; 2) virtually all of the pertinent information about the reasonableness of this \$25 million settlement appears to be in the exclusive possession of Plaintiffs' counsel; 3) every client communication, internal file note and thought process of defense counsel and Defendants' personal counsel were immediately turned over to Plaintiffs' counsel without redaction; and 4) Defendants' personal counsel were deposed without restriction as to all relevant reasonableness factors providing Plaintiffs' counsel unfettered access to every weakness that existed in the defense case at the time of settlement.");

p. 38 ("Philadelphia has shown that the information is not available from any other source because the only evidence offered to support the covenant judgment amounts has been factual confessions of Defendants that contradict their prior sworn testimony and legal positions taken throughout the case[.]");

p. 45 ("Moreover, the only evidence offered to support the covenant judgment amounts has been factual "confessions" authored by Plaintiffs' counsel that contradict Defendants' prior sworn testimony and legal positions taken throughout the case. **Further, recently produced evidence, such as the internal email correspondence discussed above, indicates that Plaintiffs' counsel's files likely contain evidence that the amount of the stipulated settlements was many times higher than Plaintiffs' counsel's own evaluation.**") (emphasis added)—in addition to not being supported by a

On October 26, 2012, Judge McPhee entered an order allowing Philadelphia to intervene in this case.² The October 26 order also required Appellants to produce certain categories of materials to Philadelphia: (1) “[a]ll discovery exchanged by the parties,” (2) “[a]ll material exchanged between the parties and/or their counsel (including defendants’ personal counsel) related to settlement,” and (3) “[a]ll attorney work product generated by all counsel through the date of the final execution of the settlement documents including the final fully executed settlement agreements.”³ Notably, the October 26 order did not require production of attorney-client privileged materials.

On November 28, 2012, Judge McPhee entered a memorandum opinion granting Appellants’ resulting motion for reconsideration.⁴ In that opinion, Judge McPhee began by addressing the original application of reasonableness hearings under RCW 4.22.060 to “contribution settlements” involving settling and nonsettling tortfeasors and the expansion of reasonableness hearings to covenant judgment settlements.⁵ Judge McPhee concluded that the distinction between reasonableness determinations for contribution settlements and covenant judgments was “important”: “in the former reasonableness focuses on a too small amount

citation to the record, the emphasized portion mischaracterizes documents that Philadelphia unsuccessfully moved to inject into the record for the first time on appeal and that a panel of judges of this Court ordered Philadelphia not to refer to in its appellate response brief; Philadelphia, however, chose to ignore the Court’s clear order.

² Clerk’s Papers (“CP”) at 525-26.

³ CP at 527.

⁴ CP at 1017.

⁵ CP at 1017-1018.

for the settlement and in the latter reasonableness focuses on a too large amount.”⁶

Informed by this distinction, Judge McPhee then specifically addressed “the limits of discovery permitted the insurance company in challenging the reasonableness of plaintiff’s settlement with its insured.”⁷ He reasoned that *Glover* factors⁸ 1, 2, 3, 4, and 6 are “dependent on *extrinsic* evidence” which is “discoverable without dispute”; factors 5 and 7 “may focus on the work product of the attorneys for either or both sides”; factor 8 “may” involve attorney work product; and factor 9 was inapplicable to this case.⁹ However, Judge McPhee ultimately concluded:

In considering the limits of discovery into the work product of plaintiff’s attorney in challenging the reasonableness of the settlement, the distinction between a contribution settlement and a covenant judgment is important. *It is not bad faith by a plaintiff to settle or attempt to settle a case for more than plaintiff’s attorney values the case. It is not bad faith in negotiating to minimize the risk of liability even if plaintiff’s attorney evaluates risk higher. Discovery into plaintiff’s attorney work product on these issues is not relevant to the Glover factors and is therefore not discoverable.* Plaintiff is protected from this discovery.

⁶ CP at 1018.

⁷ CP at 1018.

⁸ Those factors are:

(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 v. Best Plumbing Group, LLC, 175 Wn.2d 756, 766, 287 P.3d 551 (2012).

⁹ CP at 1018-1019 (emphasis added).

Judge McPhee accordingly ordered that Appellants' counsel's work product was not discoverable "unless communicated to defendants' counsel or specifically identified with a fraudulent assertion."¹⁰ Judge McPhee further reserved ruling on the discoverability of attorney-client privileged materials.¹¹ Thus, as early as October 26, 2012, the trial court itself recognized that (1) the reasonableness of a covenant judgment settlement can and should be determined using extrinsic, i.e., *objective* evidence and (2) subjective evidence such as Appellants' counsel's mental impressions or opinions regarding the case's value, the risk of establishing liability, or other aspects of the case is irrelevant to the *Glover* factors.

The next day, Philadelphia filed (without noting) a motion for reconsideration of the November 28 order and a motion to shorten the time for hearing the motion for reconsideration to November 30.¹² Judge McPhee denied the motion to shorten time.¹³ Philadelphia never renoted the motion for reconsideration.

After five months of inactivity by Philadelphia, on March 7, 2013, Appellants moved the trial court—having reassigned the case to Judge Price—to special set a hearing for entering the covenant judgments and determining the reasonableness of the settlements.¹⁴ The March 7 motion reiterated Judge McPhee's rulings regarding determination of the

¹⁰ CP at 1019.

¹¹ CP at 1019.

¹² CP at 1431, 1435.

¹³ CP at 1429.

¹⁴ CP at 1245.

settlement's reasonableness utilizing objective, extrinsic evidence and the irrelevance of counsel's mental impressions and opinions to that determination.¹⁵ On that basis, Appellants asserted that no further discovery was necessary and asked the trial court to set the reasonableness hearing itself, as well as a briefing schedule for reasonableness submissions.¹⁶

Subsequently, Judge Price allowed Philadelphia to file a significantly-expanded motion for reconsideration of the November 28 order. That motion argued only for production of Appellants' counsel's work product.¹⁷ Appellants' April 17, 2013 opposition briefing countered in part by reiterating Judge McPhee's previous observations and rulings regarding determinations of objective reasonableness using extrinsic evidence, not subjective evidence such as attorney mental impressions or opinions, arguing:

[Appellants'] counsel's thoughts about or valuation of this case at the time of settlement are irrelevant to the Court's reasonableness determination. Regardless of what counsel thought about the case, the Court will examine the *extrinsic evidence* known to the parties at the time of settlement and determine whether, under Washington law, *objectively reasonable* parties could settle for such an amount.¹⁸

Appellants further rebuffed Philadelphia's contention that Appellants' counsel had directly placed his mental impressions at issue through

¹⁵ CP at 1258-1259.

¹⁶ CP at 1261, 1264.

¹⁷ CP at 1798-1810.

¹⁸ CP at 1827-1828 (emphasis added).

previous statements made in briefing, arguing that the specific statements identified by Philadelphia either were irrelevant to the reasonableness of the settlement amounts or were actually legal arguments based on extrinsic facts available to the parties.¹⁹ At the April 19 motion hearing, Judge Price acknowledged that he was “not convinced” that intervening insurers do not contest the reasonableness of settlements with only “extrinsic evidence,” and that “it may be that those are the types of arguments that are going to have to be made by Philadelphia in this case,” but nonetheless orally ordered production of Appellants’ counsel’s work product other than attorney opinion and mental impression work product.²⁰

In the wake of this oral ruling requiring production of Appellants’ counsel’s “ordinary” work product, on May 8, 2013, Appellants unsuccessfully moved for production of Philadelphia’s counsel’s work product through the date the covenant judgment settlements were executed.²¹ However, Appellants clearly reiterated their objection to the trial court’s ruling requiring production of their work product: “*Although [Appellants’] counsel disagrees with the Court’s eventual ruling, [Philadelphia’s] counsel successfully argued to the Court during the last hearing that the parties’ knowledge comes through their attorneys, which requires opening attorneys’ files.*”²² Appellants further qualified their

¹⁹ CP at 1828.

²⁰ RP (April 19, 2013) at 27, 30.

²¹ CP at 2182.

²² CP at 2184 (emphasis added).

motion by specifically asking for production of Philadelphia's counsel's ordinary work product "to the extent with which the Court has ordered for Plaintiffs' counsel" under the theory that, under Philadelphia's own arguments and the trial court's rulings to date, Philadelphia's counsel was so actively involved with the defense even past the settlement date that Philadelphia's work product contained information relevant to the *Glover* factors.²³

Also in the wake of the trial court's April 19 oral ruling regarding "ordinary" work product, on May 10, 2013, Philadelphia filed a motion to compel "*everything*" from Appellants' files "other than designated attorney mental impression work product," taking issue with Appellants' assertion of attorney-client privilege regarding some documents.²⁴ Appellants' opposition pointed out that Philadelphia's previous motions had focused on production of work product; Philadelphia had not demonstrated to date "how discovery of attorney-client privileged communications is relevant to the *Glover/Chaussee* factors, let alone what reasons would justify breaching that privilege"; and the trial court's rulings to date had been limited to the issue of work product production; and argued that Philadelphia's unsupported demand for attorney-client privileged materials was outside the scope of the trial court's previous rulings and should have been denied.²⁵

²³ CP at 2184-2189, 2533.

²⁴ CP at 2274, 2280 (emphasis in original).

²⁵ CP at 2404, 2416.

On May 24, 2013, at the hearing addressing both Philadelphia's motion to compel and Appellants' motion to compel, Appellants reminded the trial court that they had already produced "every document . . . that went from our office outside to third parties or third parties into our office," the evidence they "believe[d] is at most required under the *Chaussee* and *Glover* factors."²⁶ Appellants also reiterated that production of attorney-client privileged materials had not been "a part of this discussion."²⁷ Further, Appellants asserted that such materials are irrelevant to a trial court's objective reasonableness determination, arguing:

Communications between your attorney and clients isn't involved in the *Chaussee* [sic] and *Glover* analysis. Again they are trying to understand what level of preparation and investigation was done. That is the only basis for us even having this discussion. So attorney-client is not part of the discussion.²⁸

Finally, regarding their own motion to compel, Appellants repeated their objection to requiring any productions of work product "as a continuation of a misapprehension of *Chaussee* [sic] and *Glover*," but asserted that "if the Court is going to make the order requiring us to do that," then "we have to go all of the way, because [Philadelphia's counsel] was in acting as counsel all the way up through this time period."²⁹

Despite acknowledging that "the issue of attorney-client privilege

²⁶ VRP (May 24, 2013) at 6.

²⁷ *Id.* at 18.

²⁸ *Id.*

²⁹ *Id.* at 15, 17.

did not rear its head in a direct way in earlier rulings,”³⁰ the trial court orally stated, without any opportunity for further briefing by the parties, that its intended “provide what it believes is rightfully relevant to the *Glover Chausse* [sic] factors to Philadelphia” and would order production of attorney-client privileged materials “directly relevant” to one of the *Glover* factors when “that is shown more directly.”³¹ The trial court concluded the hearing, however, by observing the lack of appellate guidance regarding whether attorney-client privileged materials are relevant to or discoverable in the reasonableness hearing context and stating that it was “not adverse to an interlocutory appeal on this” and that “under RAP 2.3” there were “things [it could] do to help that along.”³²

Subsequently, the trial court entered its next written order on August 27, 2013, appointing a special discovery master and ordering the special master to apply the standard that protection of attorney mental impression and opinion work product and attorney-client communications was waived where the materials were “directly related” to one of the *Glover* factors.³³ After the special master completed his review, determined that some documents were attorney-client privileged or protected mental impression or opinion work product but were also relevant to the *Glover* factors, and submitted his recommendation for

³⁰ *Id.* at 34.

³¹ *Id.* 31, 34.

³² *Id.* at 57.

³³ CP at 2826-2827.

production of those documents to the trial court, Appellants informed the trial court of the ripeness of those issues for certification for appellate review and Appellants' intention to seek such certification.³⁴ At the next hearing before the trial court, on November 22, 2013, the trial court acknowledged Appellants' continuing objection to "the whole premise" of producing such materials, entered a written order requiring production of the attorney-client privileged materials and attorney mental impression and opinion work product, and certified the order for appellate review under RAP 2.3(b)(4).³⁵

³⁴ CP at 2910-2911.

³⁵ VRP (Nov. 22, 2013) at 16.

III. ARGUMENT³⁶

A. Both the Trial Court and Appellants Repeatedly Raised the Issue of the Relevance of Extrinsic, Objective Evidence and Irrelevance of Subjective Attorney File Materials and Did Not Invite the Error They Challenge on Appeal

As an initial matter, Philadelphia claims that Appellants did not raise their argument that “the contents of an attorney’s files are irrelevant to reasonableness” before the trial court.³⁷ However, the record flatly contradicts Philadelphia’s complete misrepresentation of the record. Indeed, *the trial court itself* raised the issue in its November 28, 2012

³⁶ As an initial matter, Philadelphia asks this Court to strike Appellants’ Assignment of Error No. 1 and all related issues because the trial court’s August 27, 2013 order appointing the special discovery master and prescribing for the first time in a written order the applicable waiver standard is “not subject to this appeal.” Br. of Respondent at 3. Philadelphia further asks this Court to strike Assignment of Error No. 2 and related issues 1 through 6 because “they exceed the limited issue under appeal.” Br. of Respondent at 3-4.

First, Appellants believe the Court can reach the error in appeal through review of only the November 22 order erroneously requiring production of attorney-client privileged materials and attorney mental impression and opinion work product, but included Assignment of Error 1 and its related issues in an abundance of caution, as that order contained the erroneous “waiver” standard ultimately applied in ordering the productions. However, if necessary, this Court may consider the trial court’s previous orders in deciding whether it erred in entering the November 22 order. Under RAP 2.4(b), this Court reviews an order or ruling not designated in the notice of appeal where it “prejudicially affects the decision designated in the notice” and “is made [] before the appellate court accepts review.” An order or ruling “prejudicially affects” the decision designated in the notice of appeal where the designated decision would not have occurred in the absence of the undesignated ruling or order.³⁶ Simply put, without the trial court’s August 27, 2013 order announcing attorney mental impression and opinion work product and attorney-client privileged materials were discoverable if relevant to one of the *Glover* factors, the trial court never would have issued its November 22, 2013 order requiring production of protected materials. Thus, the previous orders prejudicially affected the November 22 order and are subject to this Court’s review under RAP 2.4(b), if necessary.

Second, Philadelphia’s assertions regarding the scope of review in this case are ironic, as every argument other than its “implied waiver” argument lie outside the scope of the Court’s grant of review. Regardless, the issues for which this Court granted discretionary review were as follows: “[w]hether the mere act of entering into a settlement satisfies the requirements of [the implied waiver doctrine]” and “the applicability of an implied waiver theory in the context of a settlement reasonableness hearing.” August 28, 2014 Order Granting Motion for Discretionary Review at 8. Appellants’ stated issues clearly lay within the Court’s framing of the issues in this interlocutory appeal.

³⁷ Br. of Respondent at 15-17.

memorandum opinion when it concluded that, in the covenant judgment context, the *Glover* factors rely on extrinsic, i.e. *objective*, evidence, not attorney file materials. Appellants repeatedly continued to reassert this conclusion in support of their own arguments in their March 7 and April 17, 2013 briefing. Unsurprisingly, the trial court acknowledged this “extrinsic evidence” argument at the April 19, 2013 hearing.

Additionally, at the May 24, 2013 hearing specifically addressing Philadelphia’s demands for Appellants’ attorney-client privileged documents, Appellants’ counsel again asserted to the trial court that they had produced all documents and materials exchanged by the parties during the underlying litigation, i.e., the objective evidence generated during the discovery process, and that these were the only productions required under the *Glover* factors. Appellants’ counsel further asserted that attorney-client privileged documents were irrelevant to the reasonableness determination under those factors. Any doubt that the trial court understood that Appellants’ objection to any production of attorney-client privileged materials under relevance grounds is dispelled by the trial court’s own offer to *certify the issue for appellate review* when appropriate. Accordingly, the issue was repeatedly raised before the trial court and preserved for appellate review.

Second, Philadelphia asserts in passing, conclusory fashion that Appellants invited any error in the trial court’s November 22, 2013 order requiring them to produce their attorney mental impression and opinion

work product and attorney-client privileged communications.³⁸ But this Court does not consider conclusory arguments. RAP 10.3(a)(6), .4. “Such [p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Accordingly, the Court should not consider this argument.

Even if the Court does consider this argument, however, Philadelphia’s argument appears to be that Appellants invited the error they challenge on appeal by moving the trial court to compel production of Philadelphia’s “ordinary,” non-mental impression and opinion work product. However, the record clearly demonstrates that Appellants maintained their objection to production of their own “ordinary” work product under the *Glover* rubric, much less the production of the categorically-distinct materials they challenge on appeal. The record further demonstrates that Appellants conditioned their motion to compel on the premise that if the Court was going to persist in erroneously ordering production of Appellants’ “ordinary” work product, the rationale adopted by the trial court required it to order Philadelphia to produce its ordinary work product as well. Accordingly, Appellants maintained at all times their objection to producing their own mental impression and opinion work product and attorney-client privileged materials, and it was

³⁸ Br. of Respondent at 17.

not invited error “to try to persuade the court to impose . . . the least harmful consequences” of the trial court’s erroneous ruling regarding ordinary work product. *Cook v. Tarbert Logging, Inc.*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 5771329, at * 4 n. 6 (2015).

B. General Legal Standards for Work Product, Attorney-Client Privilege, and Reasonableness Hearings

Philadelphia also, either affirmatively or through omission, misrepresents Washington law generally governing the work product doctrine, the attorney-client privilege, and reasonableness hearings.³⁹ First, the attorney-client privilege “applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication.” *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997). Contrary to Philadelphia’s suggestion that the privilege, when applicable, is easily and routinely disregarded in favor of production of discovery, our Supreme Court has unequivocally stated, “Impairing the attorney-client privilege *must* be avoided.” *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 162, 66 P.3d 1036 (2003) (emphasis added).

³⁹ In the same vein, Philadelphia misrepresents the facts of the *Bird* case when it states that “Plaintiffs’ counsel’s entire unredacted file was produced in discovery.” Br. of Respondent at 27. Philadelphia fails to mention that Plaintiffs’ current counsel’s file was not produced at all, and Plaintiffs’ former counsel’s file was produced only because current counsel chose not to contest the trial court’s decision requiring its production. CP at 2560-2561.

In addition to illustrating Philadelphia’s pattern of misrepresentations, these submissions of trial court materials from *Bird* by Philadelphia to the trial court in this case illustrate the imperative need for this Court to provide further guidance regarding the objective nature of reasonableness determinations and the corresponding scope of relevant evidence. In the absence of further appellate guidance, intervening insurers are urging “cargo cult” like reliance on favorable trial court orders completely divorced from the context and meaning of their originating cases.

Likewise, Philadelphia discusses the “substantial need” standard for discovery of ordinary work product, but utterly fails to discuss the much higher standard for attorney mental impressions and opinions. 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 v. Cowles Pub. Co.*, 162 Wn.2d 716, 739, 174 P.3d 60 (2007). Indeed, such 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)).

Moreover, Philadelphia contends without any citation to legal authority that it “has the same right to discovery as any other party.”⁴⁰ This court does not consider claims unsupported by citation to legal authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Even if the Court considered this argument, however, it is disingenuous, as Philadelphia does not ask for the same discovery ordinarily received by parties in cases, but an extraordinary level of discovery sweeping aside protections of nigh-undiscoverable materials. More importantly, Philadelphia misrepresents through omission the nature of its involvement in this case: intervening insurance companies are *not* a garden-variety party entering the case at the beginning of the discovery process. Rather, intervening insurance

⁴⁰ Br. of Respondent at 18.

companies inhabit a unique position by controlling an insured's defense and having the means to conduct and to access discovery prior to a settlement. *See Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379-80, 89 P.3d 265 (2004), *review denied*, 153 Wn.2d 1009 (2005). Indeed, previous Washington appellant 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. *Id.*; *Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 325-26, 116 P.3d 404 (2005).

Finally, Philadelphia cites to *Bird*, 175 Wn.2d 756, 766, 287 P.3d 551 (2012), and *Water's Edge Homeowners' Ass'n v. Water's Edge Associates*, 152 Wn. App. 572, 594-595, 216 P.3d 1110 (2010) for the proposition that trial courts must examine "any evidence" of "bad faith, collusion or fraud," arguing that this requires discovery of attorney mental impression and opinion work product and attorney-client privileged materials. But these citations are misleading, as the scope of discovery in covenant judgment settlement reason was not at issue in those cases.

C. Appellants Did Not Waive Attorney-Client Privilege or Protection of Attorney Mental Impressions or Opinions through Selective Disclosure

Philadelphia next contends that Appellants waived protection of attorney-client privileged materials or attorney mental impression and opinion work product through selectively disclosing such materials in this

case.⁴¹ First, regarding attorney-client privileged materials, the only attorney-client privileged communications that Philadelphia identifies as having been disclosed are Appellants' counsel's settlement discussions with defendants' coverage attorneys prior to settlement, communications from defendants' coverage attorneys to them prior to settlement, attorney-client and communications between defendants' appointed defense attorney and Philadelphia prior to settlement.⁴² Because Philadelphia merely concludes that these materials were, in fact, attorney-client privileged materials without any analysis or citation to authority, this Court should not consider these arguments. RAP 10.3(a)(6); *West*, 168 Wn. App. at 187 (conclusory arguments insufficient to warrant appellate review); *Cowiche*, 118 Wn.2d at 809 (court does not consider arguments unsupported by citation to legal authority). Even if these arguments were considered, however, the first set of "disclosures" were not communications between attorney and client, but between attorneys who were adverse at the time; accordingly, these were not confidential communications between Appellants and their counsel.

Likewise, regarding the second and third sets of "disclosures," Philadelphia cites no authority for the proposition that disclosure of attorney-client communications between defendants and their defense and coverage counsel or between defense counsel and Philadelphia constitutes a waiver of privilege between Appellants and their counsel. This

⁴¹ Br. of Respondent at 28-30, 39-41.

⁴² Br. of Respondent at 11-13, 29-30.

argument, too, should not be considered. Even if it were considered, Philadelphia contends that selective disclosure of protected materials requires a waiver of privilege “in order to give context and meaning to what the client has disclosed.”⁴³ But the context of selectively-disclosed communications between defendants and their defense and coverage attorneys would come from *those attorneys’ files*, which have already been produced to Philadelphia.⁴⁴ Philadelphia already has any context it requires and cannot demonstrate how Appellants’ attorney-client privileged materials would add to that context.

Finally, even if “disclosures,” if any, of communications between defendants and their counsel or defense counsel and Philadelphia somehow brought Appellants’ assertion of privilege into question in the abstract, Washington precedent holds only that “[s]elective disclosure of a communication *may* also waive the privilege as to all related portions of the communication . . . if the selective disclosure is used to gain a tactical litigation advantage.” *Seattle Nw. Sec. Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 739, 812 P.2d 488 (1991). Once again, Philadelphia cannot point to any portion of a communication between Appellants and Appellants’ counsel that was disclosed. Furthermore, as this Court has held in *Dana v. Piper*, 173 Wn. App. 761, 773, 776, 295 P.3d 305 (2013) *subjective* evidence such as attorney-client communications is irrelevant to the trial court’s *objective* determination of the settlement’s reasonableness.

⁴³ Br. of Respondent at 28.

⁴⁴ CP at 540-541, 707-708, 739-740, 1703-1705.

See also Chomat v. Northern Ins. Co. of New York, 919 So.2d 535, 538 (Fla. Dist. Ct. App. 2006) (objective reasonableness determined using objective evidence such as comparison of settlement amount with verdicts in comparable cases, reasonableness expert witnesses, and expense of defending lawsuit, not attorney-client privileged materials); *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 55, n. 21, 56, 730 A.2d 51, 61 (1999) (attorney-client communications are subjective evidence not at issue in objective reasonableness determination). Accordingly, Philadelphia fails to explain how Appellants have gained a “tactical advantage” by disclosing *irrelevant* materials. Accordingly, for all these reasons, Appellants have not waived attorney-client privilege regarding their own materials through any alleged selective disclosures.

Second, regarding Appellants’ attorney mental impression and opinion work product, Philadelphia points to disclosures of such work product by defense or coverage counsel and alleged disclosures of Appellants’ counsel’s legal “opinions” “regarding the strength of Plaintiffs’ liability theory and damage claim, Plaintiffs’ settlement strategy, weakness in defense counsel’s defense, and his opinions about whether the settlement was the product of collusion.”⁴⁵ Again, however, Philadelphia offers no citation to authority for the proposition that selective disclosure of defense or coverage counsel’s mental impressions or opinions constitutes waiver of protection of the same work product of

⁴⁵ Br. of Respondent at 29, 39.

counsel for a different, formerly adversarial party, and this Court should not consider such arguments.

Moreover, the statements by Appellants' counsel characterized by Philadelphia as "legal opinions" were actually legal conclusions and arguments. For example, in *Seattle Nw. Sec. Corp.*, 61 Wn. App. at 739, this Court rejected the argument that a party had waived privilege with its counsel by sending a letter from counsel to an adverse attorney "stating that there was a reasonable possibility of successfully defending the claim." This Court held that "[t]he statement that 'strong and valid defenses are available to the [WPPSS] class plaintiffs' claims' found in [the] letter is at most a disclosure of a legal *conclusion*, not a confidential legal opinion." *Id.* As the court reasoned,

If such a disclosure did waive the attorney-client privilege, every letter an attorney writes to opposing counsel, an audit firm, or a witness in a case could be construed as waiving the privilege. To penalize a disclosure of a legal conclusion by characterizing it as a waiver would greatly hamper attorneys in their ability to effectively represent and advise their clients. The exception would swallow the rule and render the privilege a virtual nullity. We conclude that no partial disclosure of confidential materials sufficient to constitute a waiver of the attorney-client privilege occurred in the present case.

Id. at 739-740.

Although *Seattle Nw. Sec. Corp.* dealt with alleged disclosures of attorney-client privilege, its rationale is equally applicable to the alleged disclosures of Appellants' counsel's mental impression and opinion work product in this case. The alleged disclosures recited by Appellants'

counsel are in the nature of statements such as Appellants having a “very strong liability claim” and a “multimillion dollar case.”⁴⁶ These were legal *arguments* and *conclusions*, not confidential legal opinions. The fact that these arguments and conclusions were offered in a declaration makes no difference, as legal conclusions and other surplusage in declarations are to be disregarded. *Am. Linen Supply Co. v. Nursing Home Building Corp.*, 15 Wn. App. 757, 763, 551 P.2d 1038 (1976). Under the rule proposed by Philadelphia, any time a plaintiffs’ attorney offers legal arguments or conclusions in support of setting a reasonableness hearing or the reasonableness hearing itself, the attorney has waived protection of all such work product. This is the precise “exception swallowing the rule” scenario denounced in *Seattle Nw. Sec. Corp.* and should be rejected.

Finally, and once again, this Court held in *Dana* that objective reasonableness under the *Glover* factors can be determined “without referring to the subjective beliefs of the . . . attorneys,” 173 Wn. App. at 773, and courts around the country have similarly held that such subjective evidence is irrelevant to a court’s determination of objective reasonableness. *See, e.g., PETCO Animal Supplies Stores, Inc. v. Insurance Co. of N.A.*, No. CIV. 10-682 SRN/JSM, 2011 WL 2490298, at *20, *24 (D. Minn. June 10, 2011) (“Under this objective standard, [the attorney’s] subjective beliefs or opinions about the settlement are irrelevant.”). Philadelphia entirely fails to explain how alleged disclosures

⁴⁶ Br. of Respondent at 8 (quoting CP at 395).

of irrelevant evidence requires discovery of yet more irrelevant evidence. Nor can it, as parties are entitled only to discovery of matters “*relevant* to the subject matter involved in the pending action.” CR 26. Accordingly, Philadelphia’s claims of waiver of work product protection through selective disclosure necessarily fail.

D. Appellants Did Not Waive Attorney-Client Privilege under the “Necessary Witness” Doctrine

Philadelphia, citing to *Stephens v. Gillispie*, 126 Wn. App. 375, 108 P.3d 1230 (2005), further argues that Appellants waived attorney-client privilege by making Appellants’ counsel a “necessary witness” in the reasonableness proceeding.⁴⁷ As an initial matter, *Stephens* was decided under the civil fraud exception to privilege, not the “necessary witness” doctrine. 126 Wn. App. at 381-382. Philadelphia again fails to provide any citation to authority supporting its mere conclusory assumption that Appellants’ counsel is a necessary witness in this case, and these arguments should be disregarded.⁴⁸

Even if they were considered, however, Philadelphia grossly misstates the “holding” of *Stephens*, which is entirely distinguishable. That case involved an attempt to execute a judgment against a defendant, Jeremy Gillispie, after the plaintiff and other two defendants, Jeremy’s parents executed a stipulation of order and dismissal. 126 Wn.

⁴⁷ Br. of Respondent at 30-33.

⁴⁸ As discussed below, Philadelphia does cite authority for the proposition that, whether necessary or not, an attorney testifying at trial results in a waiver of privilege. This in no way serves to establish that Appellants’ counsel is a *necessary* witness in this case, however.

App. at 378. In response to the attempt to execute the judgment, the parents, Bob and Mina, filed declarations with the trial court stating that they had intended to include Jeremy within the stipulation and dismissal and would not have allowed their attorney to make a contrary representation. *Id.* at 378-379. Division Three reasoned that the “central issue” in the case was whether the parties had intended to include Jeremy within the dismissal of claims. *Id.* at 381. It further reasoned, “What Bob and Mina intended by this stipulation and order of dismissal is not confidential. Indeed, it was the very core of the stipulation and order of dismissal.” *Id.* Thus, it concluded that allowing Mina and Bob to potentially have one intention during discussions with their attorney but to represent a different intention to the trial court was impermissible. *Id.* at 381-382. Division accordingly Three remanded for an *in camera* examination of attorney-client privileged materials. *Id.* at 382.

Unlike in *Stephens*, Appellants’ and defendants’ subjective intent is not at issue, much less the central issue, in the trial court’s objective determination of reasonableness; rather, the issue is whether extrinsic, objective evidence supports the settlement amounts. Accordingly, *Stephens* in no way supports discovery of Appellants’ attorney-client privileged materials.

Philadelphia further contends that Appellants’ counsel is a “necessary witness” for the reasonableness hearing because Appellants “have failed to explain . . . the basis for the factual confessions”; the “basis for each of the stipulated settlement amounts”; and how Appellants “could

meet their burden of proving that the \$25 million settlement of these claims is reasonable because, as Philadelphia claims, “there is a complete lack of evidence.”⁴⁹ These improper arguments—baseless accusations in reality—lack ripeness, however, because they completely ignore that no reasonableness hearing has occurred and, although all the objective, extrinsic evidence in this case has been exchanged between the parties, it is not yet in the record⁵⁰ because no reasonableness submissions have been made to the trial court.⁵¹ As Philadelphia admits, it is Appellants’ burden to establish the reasonableness of the settlement amounts, and they will do so when the time comes using objective, extrinsic evidence. Regardless, Philadelphia fails to explain how any inability of Appellants to meet their burden creates a need for Philadelphia to invade Appellants’ attorney-client privileged materials; indeed, if one accepts Philadelphia’s premise that Appellants cannot prove the amounts were reasonable, then Philadelphia has no compelling need for further discovery, as its job at the reasonableness hearing will be relatively easy.

Philadelphia additionally argues, in conclusory fashion, that

⁴⁹ Br. of Respondent at 31-32.

⁵⁰ Nonetheless, Philadelphia’s irrelevant assertions are belied by the record. For example, settlement guardians *ad litem* were appointed for each settling child; those guardians have examined the objective evidence in this case and opined on the reasonableness of each child’s settlement amount. *See, e.g.*, CP at 529-538 (report of settlement guardian *ad litem* Fred Diamondstone examining the objective evidence of trial preparation, liability, damages, and other factors contributing to the settlement amount for minor plaintiff J.T.).

⁵¹ RP (March 22, 2013) at 4-5 (trial court was not ready to resolve issues of status of discovery or whether discovery had been completed or what type of reasonableness hearing that was going to be held); RP (April 19, 2013) (trial court reserves ruling on how many and which types of depositions may be taken before reasonableness hearing).

Appellants' counsel is "a key witness regarding the factual confessions" signed by defendants and Appellants' "investigation and preparation of the case." Again, this Court does not consider such conclusory arguments. Even if it did, defendants' confessions executed in order to facilitate entry of the covenant judgments against them in lieu of proceeding to trial is irrelevant to the trial court's inquiry into whether the settlement amounts were objectively reasonable under the *Glover* factors, including the strength of each party's cases and the risk of trying the claims. Likewise, all evidence generated during discovery has been exchanged between the parties, and Appellants have produced their "ordinary" work product to Philadelphia, including 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 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.⁵² Philadelphia fails to explain how Appellants' counsel is a "necessary witness" regarding Appellants' investigation and preparation of their case when the entire paper trial generated by that process has been produced.

Moreover, for the above reasons, an actual examination of the "necessary witness" doctrine demonstrates that Appellants' counsel is not a necessary witness in this case. An attorney is a necessary witness when,

⁵² CP at 2242, 2309, 2368.

among other factors, the attorney ““will give evidence material to the determination of the issues being litigated”” and ““the evidence is unobtainable elsewhere.”” *Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wn. App. 461, 467, 220 P.3d 1283 (2009) (quoting *Pub. Utility Dist. No. 1 of Klickitat County v. Int’l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994)). As discussed above, subjective evidence such as attorney-client privileged materials is irrelevant to objective reasonableness determinations, and the specific evidence identified by Philadelphia, like the confessions, are further removed from relevancy. Likewise, as discussed above, evidence of Appellants’ preparation and investigation of the case is obtainable (and, in fact, has been obtained) through production of Appellants’ related, “ordinary” work product. Accordingly, Appellants’ counsel is not a necessary witness on these matters.⁵³

⁵³ In its necessary witness arguments, Philadelphia does not specifically reference statements made by Appellants’ counsel in a declaration and recited by Philadelphia in a footnote earlier in its brief. Br. of Respondent at 9 n. 21. In an abundance of caution, however, Appellants address these statements to simply point out that, as discussed above, the statements consist either of either irrelevant, subjective legal arguments and conclusions or statements based on objective evidence already produced to Philadelphia regarding settlement discussions and the settlement process with defendants’ defense and coverage counsel. Counsel does not act as a witness merely by reciting available evidence in the course of advocating for his client. *See Kalina v. Fletcher*, 522 U.S. 118, 130-131, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (prosecutor has a duty to advocate for the state and properly acts as an advocate, not a witness, when he conveys information to the court in support of a certificate of probable cause). Philadelphia already possesses sufficient discovery regarding the settlement discussions and process, as all the attorneys have produced their communications and work product related to the settlement to Philadelphia, and Philadelphia has deposed defendants’ coverage attorneys. CP at 1703-1705; 2752-2754. Should Philadelphia require further evidence, it may also seek to depose the defense attorney it appointed. Accordingly, Appellants’ counsel is not a necessary witness on this matter because the evidence is obtainable and has in fact been obtained elsewhere. *Kommavongsa*, 153 Wn. App. at 467.

Finally, Philadelphia contends that Appellants have waived attorney-client privilege because Appellants' counsel has "refused" "during discovery" to elect whether he will testify as a witness during the reasonableness hearing. However, the case cited by Philadelphia, *Seattle Nw. Sec. Corp.*, 61 Wn. App. at 744, actually states that a "party must make an election *prior to any deadline for completion of discovery.*" Emphasis added. Again, Philadelphia fails to inform the Court that no reasonableness hearing has been set by the trial court; no procedures for the hearing have been finalized; no reasonableness submissions have been filed with the trial court; and discovery is ongoing.⁵⁴ Thus, Philadelphia's "argument" is at best premature and at worst yet another blatant misrepresentation of the record. Its argument fails.

E. Appellants Did Not Impliedly Waive Attorney-Client Privilege or Work Product Doctrine Protection

Next, Philadelphia argues that Appellants waived privilege under the "implied waiver" doctrine.⁵⁵ Philadelphia further contends that Appellants impliedly waived any work product doctrine protection of Appellants' counsel's mental impressions and opinions by moving for a reasonableness hearing and, thus, placing that work product "directly at issue."⁵⁶ However, as discussed in Appellants' opening brief, Washington

⁵⁴ CP at 1301 (Philadelphia discussing need for future conference for setting procedures for reasonableness hearing, including timelines); RP (April 19, 2013) at 30, 37 (trial court discussing possibility of future discovery, including potential future depositions, and need to set reasonableness hearing for a future indeterminate date).

⁵⁵ Br. of Respondent at 33.

⁵⁶ Br. of Respondent at 39-40.

courts have carefully confined the “implied waiver” doctrine for attorney-client privilege to legal malpractice cases and the unique issues contained therein. The federal cases cited by Philadelphia applying Washington law only reinforce that principle, as they are all legal malpractice cases. Furthermore, even if this Court extended the doctrine to this case, Philadelphia cannot meet any of the four criteria necessary to establish an implied waiver of privilege. Finally, Appellants did not impliedly waive work product doctrine protection of their attorney mental impressions and opinions because such subjective evidence is irrelevant to a trial court’s objective reasonableness determination and, regardless, Appellants have not placed them directly at issue.

1. Washington law has limited application of the “implied waiver” doctrine of attorney-client privilege to legal malpractice cases

Philadelphia cites *1st Sec. Bank of Wash. v. Eriksen*, No. CV06-1004RSL, 2007 WL 188881 (W.D. Wash. Jan. 22, 2007), and *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1327 (9th Cir. 1995), as examples of cases applying implied waiver of privilege under Washington law outside the context of legal malpractice cases. However, Philadelphia fails to inform the Court that ***both cases were legal malpractice cases***. *Eriksen*, 2007 WL 188881, at *1 (Plaintiff has now filed a malpractice lawsuit against defendants”); *Home Indem. Co.*, 43 F.3d at 1325 (“Home then brought a diversity action against Lane Powell for legal malpractice”), 1326 (“Lane Powell’s main defense was that its conduct did not cause the failure to settle because the plaintiffs

never intended to settle because the plaintiffs . . . only wanted to ‘set up’ a bad faith action.”)⁵⁷ Indeed, the *Eriksen* court’s analysis applying Washington substantive law took great pains to observe the implied waiver doctrine’s adoption in the unique context of legal malpractice claims and even the limits legal malpractice claims impose on the doctrine. 2007 WI 188881, at *2 (discussing *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990) and stating, “Once malpractice became an issue in [*Pappas*], the decisions, actions and duties of the other attorneys involved in the underlying litigation became central to determining the legal and factual issues of the case.”); *3 (discussing the limits of implied waiver due to the nature of legal malpractice claims). Thus, Philadelphia fails to cite a single case applying the doctrine under Washington law outside the context of legal malpractice claims, and for good reasons. As discussed in Appellants’ opening brief, Washington courts have carefully limited the doctrine to the unique legal and factual considerations of legal malpractice claims in order to avoid rendering the attorney-client privilege illusory.⁵⁸ Accordingly, this Court should not further extend the doctrine.

2. Philadelphia cannot demonstrate any of the four criteria necessary for implied waiver of the privilege

Even if this Court extended the implied waiver doctrine to this case, an implied waiver of privilege occurs only where

⁵⁷ Moreover, to any extent that the *Home Indem Co.* implied waiver analysis involved more than legal malpractice claims, that court was applying Alaska substantive law, and the parties had not objected to application of the implied waiver doctrine. 43 F.3d at 1326.

⁵⁸ Br. of Appellants at 18-22.

(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.

(a) Appellants did not assert the privilege as a result of an affirmative act

First, Philadelphia contends that Appellants asserted the privilege as a result of the voluntary, affirmative act of seeking a reasonableness determination necessarily putting their attorney-client privileged materials at issue.⁵⁹ However, Appellants were required by Washington law to seek a determination of the covenant judgment settlement’s reasonableness. In *Bird*, 175 Wn.2d at 767, our Supreme Court “explicitly approve[d] the application of RCW 4.22.060 to reasonableness hearings involving covenant judgments.” RCW 4.22.060 expressly applies to parties entering into a “covenant not to sue, covenant not to enforce judgment, or similar agreement” and expressly provides: “A hearing *shall* be held on the issue of reasonableness.” Emphasis added. Thus, Appellants were required to seek a reasonableness determination.⁶⁰

⁵⁹ Br. of Respondent at 35-36.

⁶⁰ In support of the proposition that the reasonableness hearing was merely optional, Philadelphia contends that Appellants instead could allowed the federal district

Second, Philadelphia contends that Appellants’ “obtaining and us[age]” of defense counsel’s and coverage counsel’s attorney-client communications “in the reasonableness proceedings” were affirmative acts putting Appellants’ privileged materials at issue.⁶¹ This is pure *non sequitur*. No reasonableness hearing has occurred nor have reasonableness submission been made to the trial court. And, even if any “usage” of these materials sufficed as affirmative acts for an implied waiver analysis, they at most placed *defendants*’ attorney-client materials at issue, not Appellants’ materials.

Finally, Philadelphia conclusorily argues that Appellants’ counsel’s “unilateral set[ting] the amount of the stipulated settlements and draft[ing] factual confessions signed by Defendants” were affirmative acts resulting in Appellants’ assertion of privilege. Again, this Court should refuse to consider conclusory arguments. Even if it did, however, this argument is also *non sequitur*. As discussed above, regardless of who set the settlement amounts, the trial court can and will be able to determine whether those amounts were reasonable using extrinsic, objective evidence, and the factual confessions are irrelevant to that determination.

court to allocate policy limits in the federal interpleader action, pursued a garnishment action, or elected to prove damages in a subsequent bad faith suit. Br. of Respondent at 36. None of these contentions are responsive to either *Bird* or RCW 4.22.060’s plain language. Moreover, the first and second contentions are *non sequitur*, as Philadelphia fails to explain how either proceeding would have addressed the settlements’ reasonableness. Finally, the third contention misapprehends the effect of the trial court’s reasonableness determination in a subsequent bad faith suit. The reasonable settlement amount determined by the trial court, even though it serves as a presumption of damages in a subsequent bad faith suit, is not a *substitute* for a damages determination in that subsequent suit. Rather, “the presumptive amount is *added* to any other damages found by the jury.” *Bird*, 175 Wn.2d at 770.

⁶¹ Br. of Respondent at 36.

Accordingly, Philadelphia's arguments fail.

(b) The alleged affirmative acts did not put Appellants' attorney-client materials at issue

Second, Philadelphia continues—without specifying any particular affirmative act—that Appellants “put the protected information at issue by making it relevant to the case,” apparently because the trial court must consider the *Glover* factors in making reasonableness determinations and such determinations are based on “what was known to the parties at the time of settlement,” *Bird*, 175 Wn.2d at 775-776.⁶² However, as discussed above, *Bird* is not on-point as the scope of discovery in reasonableness hearings was not before our Supreme Court; accordingly, *Bird* cannot be read as having created, in a single sentence, a new rule sweeping aside all discovery protections in reasonableness hearings.

Further, as also discussed above, subjective evidence such as attorney-client privileged materials is not relevant to the objective reasonableness determination. Moreover, even if it were, this Court has already stated, “Relevance is not the test for waiver of attorney-client privilege.”⁶³ *Dana*, 173 Wn. App. at 776. Accordingly, Philadelphia's

⁶² Br. of Respondent at 37. Philadelphia's argument is curious, given its insistence that it does not argue for a *per se* waiver standard, as this argument seeks *precisely* such a standard: if a plaintiff seeks a reasonableness determination, she places attorney-client privileged materials directly at issue because such materials are allegedly relevant to the *Glover* factors.

⁶³ Philadelphia contends that “what was known to Appellants is particularly important” because Appellants' counsel drafted the factual confessions signed by defendants, “virtually all” of the evidence of the settlements' reasonableness is in the “exclusive possession” of Appellants' counsel, all of defense counsel's and coverage counsels' files were turned over to Appellants, and coverage counsel were deposed “without restriction as to all relevant reasonableness factors “providing [Appellants'] counsel unfettered access to every weakness that existed in the defense case at the time of settlement. Br. of Respondent at 37.

argument fails.

(c) Appellants' attorney-client privileged materials are not vital to Philadelphia's ability to contest the settlements' reasonableness

Third, Philadelphia further asserts that “[t]he privileged information is vital because it is directly relevant to the reasonableness of the stipulated settlement.”⁶⁴ Again, however, subjective evidence such as attorney-client communications is not relevant to objective reasonableness determinations and, even if it were, relevancy is not the test for waiver of attorney-client privilege. *Id.*

Moreover, “protected communications are not vital to a party’s case when there are other sources of indirect evidence about the issue.” *Id.* Philadelphia argues that “the information” is not available from any other source because “the only evidence offered to support the covenant judgment amounts has been factual confessions of Defendants” drafted by Appellants’ counsel.⁶⁵ Again, as discussed above, these factual

But these contentions are also contradicted by the record and consist of *non sequitur*. As discussed above, the factual confessions are irrelevant to the reasonableness determination. And, contrary to Philadelphia’s misrepresentations, all objective evidence in this case, as well as Appellants’ ordinary work product, has been produced to Philadelphia. Further, Philadelphia once again fails to explain how the production of defense counsel’s and coverage counsel’s file materials—also produced to Philadelphia—somehow place Appellants’ attorney-client privileged materials at issue. Finally, Philadelphia fails to inform the Court that defendants’ coverage attorneys were deposed *at Philadelphia’s* insistence, not through any act by Appellants, CP at 2752-2754; both Appellants and Philadelphia have the transcripts from these depositions taken by Philadelphia; and, again, depositions of coverage counsel at most place only defendants’ attorney-client communications at issue in order to give them context. Philadelphia’s arguments fail.

⁶⁴ Br. of Respondent at 38.

⁶⁵ Br. of Respondent at 38. Again, Appellants remind Philadelphia and the Court that no reasonableness hearing has occurred; no reasonableness submissions have been made to the trial court; and although the vast amount of objective evidence and work product generated in this case has been exchanged between the parties, it is not a

confessions are irrelevant to the determination of the settlement amounts' reasonableness. And, even if they were relevant, they pertain to the strengths of Appellants' liability case and defendants' case. As repeatedly discussed, every shred of objective evidence generated in discovery during the underlying litigation, as well as defense counsel's and coverage counsels' files and Appellants' ordinary work product, have been produced to Philadelphia. Philadelphia possesses ample other sources for challenging the strength of Appellants' liability case. And, additionally, Appellants ultimately bear the burden of demonstrating the settlements' reasonableness; if one accepts Philadelphia's premise that Appellants lack the objective evidence to do so, then Philadelphia's "need" for invading Appellants' privileged materials is virtually non-existent, not "vital." Accordingly, Philadelphia's arguments fail.

(d) No "manifest unfairness" results from prohibiting Philadelphia from invading Appellants' privileged materials

Finally, Philadelphia contends that it would be "manifestly unfair" to deny discovery of Appellants' privileged materials because Appellants have obtained "their former opponents previously privileged and protected materials . . . while not allowing Philadelphia the reciprocal."⁶⁶ Again, even assuming arguendo that such subjective evidence is relevant to objective reasonableness, "the reciprocal" would be producing defense counsel's and coverage counsels' files to Philadelphia. *That has already*

part of the record in this interlocutory appeal.

⁶⁶ Br. of Respondent at 38.

occurred. Philadelphia’s claim of “manifest unfairness” or “inequity” is pure fabrication.

Additionally, Philadelphia argues a manifest unfairness would result because “only [Appellants’] counsel knows how the amount of the settlement was determined and the basis of the factual confessions.”⁶⁷ But the factual confessions are irrelevant to the reasonableness determination and, regardless, counsel’s subjective mental impressions and evaluations regarding the settlement amounts are irrelevant to objective reasonableness; instead, when called for by the trial court, each party will make reasonableness presentations based on the objective, extrinsic evidence, and Appellants will either marshal sufficient evidence to validate the settlement amounts or they will not. Philadelphia once again fails to explain how this scenario requires intrusion into Appellants’ privileged materials. Accordingly, Philadelphia’s argument fails.

F. Appellants Have Not Impliedly Waived Work Product Doctrine Protection of Their Attorney Mental Impressions and Opinions

Philadelphia next asserts that Appellants have impliedly waived work product protection of their attorney mental impressions and opinions by placing such work product “directly at issue” and making it “central” through seeking a reasonableness determination.⁶⁸ Philadelphia claims this is so because “[Appellants’] counsel’s preparation for trial including

⁶⁷ *Id.*

⁶⁸ Br. of Respondent at 39-40. Again, this resembles the precise sort of relevancy *per se* waiver standard Philadelphia otherwise claims not to seek.

anticipated expert testimony, is critical to an assessment of the reasonableness factors.”⁶⁹ Appellants reiterate that subjective evidence such as an attorney’s mental impressions and opinions are irrelevant to objective reasonableness. *Dana*, 173 Wn. App. at 773; *PETCO*, 2011 WL 2490298, at *20, *24. Even if it were relevant, however, Philadelphia has received all objective, extrinsic evidence exchanged between the original parties in discovery, as well as Appellants’ ordinary work product, including their expert reports.⁷⁰ Thus, Philadelphia already possesses more than enough evidence to assess Appellants’ trial preparation and anticipated expert testimony. Accordingly, Appellants’ counsel’s mental impressions are not directly at issue or central because these matters can be evaluated without resorting to the subjective beliefs of the attorneys involved. *Dana*, 173 Wn. App. at 773; *PETCO*, 2011 WL 2490298, at *20, *24.

Philadelphia also asserts that Appellants’ counsel’s mental impressions and opinions are “particularly central” where counsel drafted the defendants’ factual confessions and set the settlement amounts.⁷¹ But, as discussed above, the factual confessions are irrelevant to the reasonableness of the settlement amounts, and the trial court will evaluate the reasonableness of those amounts using objective, extrinsic evidence. Accordingly, Philadelphia’s arguments fail.⁷²

⁶⁹ *Id.* at 40.

⁷⁰ CP at 2242, 2309, 2368.

⁷¹ Br. of Respondent at 40.

⁷² Philadelphia also contends that discovery of Appellants’ counsel’s mental

G. Production of Appellants’ Attorney-Client Privileged Materials or Attorney Mental Impression and Opinion Work Product is not Warranted under Any “Civil Fraud” Exception

Finally, Philadelphia contends that production of Appellants’ privileged materials and attorney mental impression and opinions is warranted under a “civil fraud” exception to the privilege and the work product doctrine.⁷³ As an initial matter, Philadelphia cites *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 895, 130 P.3d 840 (2006), as recognizing the existence of a “civil fraud” exception to work product protection.⁷⁴ But *Soter* applied the “directly at issue” and “central to a claim or defense” standard discussed above, not a “civil fraud” exception. *Id.* Because Philadelphia fails to cite any authority supporting the existence of a civil fraud exception to work product protection of attorney mental impressions and opinions, this Court should not consider that argument.⁷⁵

impressions and opinions is justified under the “substantial need” standard. Br. of Respondent at 41-42. As discussed above, however, the lower “substantial need” standard is applicable to “ordinary” work product, not attorney mental impressions and opinions. Even if the standard were applicable, Philadelphia’s argument fails for the same reasons that its argument that such work product is discoverable under the higher “directly at issue” standard fails; the trial court can and will properly evaluate the reasonableness of the settlement amounts using the plethora of subjective, objective evidence already produced, not subjective evidence like Appellants’ counsel’s beliefs and opinions.

⁷³ Br. of Respondent at 42-46.

⁷⁴ Br. of Respondent at 42.

⁷⁵ In further support of extending some type of fraud exception to covenant judgment reasonableness proceedings, Philadelphia cites *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 295 P.3d 239 (2013). But *Cedell* was a case involving claims of bad faith handling of insurance claims brought by an insured against his first party insurer. *Cedell*, 176 Wn.2d at 690. Our Supreme Court recognized the “unique considerations” arising in bad faith claims handling cases and are rooted in “two important public policy pillars: that an insurance company has a quasi-fiduciary duty to its insured and that insurance contracts, practices, and procedures are highly regulated and of substantial public interest.” *Id.* at 696, 698. Thus, in order to “protect these principles,” the *Cedell* court adopted a unique procedure for addressing privilege claims by a first party insurer within the context of bad faith claims handling cases: courts should start with the presumption that the attorney-client privilege and work product doctrine do not protect the insurance company’s claims file from discovery by the

Regardless, for any civil fraud exception to apply, Philadelphia would have to demonstrate a “factual showing sufficient to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the . . . fraud exception . . . has occurred.” *Seattle Nw. Sec. Corp.*, 61 Wn. App. at 740 (alterations in original) (quoting *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 394, 743 P.2d 832 (1987)). Philadelphia argues such a showing has been made because, according to Philadelphia, the “only evidence offered to support the covenant judgment amounts has been factual “confessions” drafted by Appellants’ counsel, and that other evidence contradicts these confessions.⁷⁶ As repeatedly discussed above, however, the confessions are irrelevant to the reasonableness determination; no reasonableness hearing has been set; no reasonableness submissions have been presented to the trial court; and, as a necessary result, the evidence supporting the settlements is not yet part of the record.⁷⁷ Simply put, Philadelphia proposes a bizarre scheme where

insured, a presumption arising from the quasi-fiduciary relationship between the insurer and insured. *Id.* at 696-698. The insurer may then overcome this presumption by demonstrating its attorney was not acting in a quasi-fiduciary capacity. *Id.* Finally, on such a showing, the insured may nonetheless obtain discovery by satisfying the civil fraud exception to privilege. *Id.*

Simply put, Philadelphia fails to demonstrate how the specific quasi-fiduciary relationship between insureds and first party insurers, insurance regulations, and the other animating principles of *Cedell* warrant extension of a presumption of discoverability or civil fraud exception to evaluating the reasonableness of a settlement between a plaintiff or defendant. Instead, Philadelphia claims that such an extension is proper because previous cases have stated that courts making reasonableness determinations must examine “any evidence” of bad faith, fraud, or collusion, but, as discussed above, the scope of discovery in reasonableness proceedings was not at issue in those cases. Those broad, generalized statements were unnecessary to the outcome of those cases, were accordingly dicta, and certainly did not passingly announce a sweeping new exception to privilege in reasonableness proceedings. Philadelphia’s argument fails.

⁷⁶ Br. of Respondent at 45.

⁷⁷ Moreover, as discussed above, the record demonstrates that court-appointed

plaintiffs requesting merely seeking to set a reasonableness hearing waive privilege under a “fraud” exception unless they present their reasonableness case prior to the trial court asking for reasonableness submissions. Appellants can and will make their presentation of objective evidence supporting the settlement amounts once a reasonableness hearing is set and reasonableness submissions requested by the trial court. While Philadelphia’s arguments may be proper in contesting reasonableness at the reasonableness hearing, if anywhere, they fail in support of any civil fraud exception on appeal.

Finally, in order to justify discovery under a civil fraud theory, Philadelphia would also have to show that an *in camera* inspection of documents demonstrated that “there was a foundation in fact sufficient to waive the privilege based upon ‘civil fraud.’” *Seattle Nw. Sec. Corp.*, 61 Wn. App. at 740 (quoting *Escalante*, 49 Wn. App. at 394). Here, the trial court ordered an *in camera* examination of documents only for whether they were directly related to one of the *Glover* factors and subsequently ordered their production based on the special master’s recommendation

settlement guardians *ad litem* have examined the objective evidence in this case and found the settlement amounts were reasonable. CP at 529-538. Indeed, instead of fixating on only the strength of Appellants’ case, as Philadelphia’s argument does, the settlement guardians *ad litem* examined the entire range of *Glover* factors and relevant objective evidence, such as defendants’ near-total lack of trial preparation and the risk of proceeding to trial posed by verdicts in comparable cases. *Id.* When properly examined within the context of all the *Glover* factors, Philadelphia cannot demonstrate bad faith tantamount to fraud on the part of defendants choosing to settle in the face of multiple serious allegations of child sexual abuse when, four weeks before the first of a series of trials against defendants were set to begin, none of the abuse victims, Appellants’ expert witnesses, or Appellants’ lay witnesses had been deposed; and Philadelphia, who had control and ultimately responsibility over the defense, did nothing to ensure discovery was obtained regarding defendants’ liability or Appellants’ damages. CP at 30, 1213-1214, 1504-1506.

that the documents met that particular standard.⁷⁸ The trial court did not order an *in camera* examination for evidence of civil fraud, and no such findings were made. Accordingly, the record does not support affirming the trial court's November 22, 2014 order requiring production of privileged materials and attorney mental impressions and opinions under an alternate civil fraud theory, and Philadelphia's contentions fail.

IV. 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.⁷⁹

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⁷⁸ CP at 2826-2827.

⁷⁹ 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 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'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.

RESPECTFULLY SUBMITTED this 7th day of December 2015.

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CERTIFICATE OF SERVICE

Laura Neal, 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 December 7, 2015, I personally delivered, a true and correct copy of the above document, directed to:

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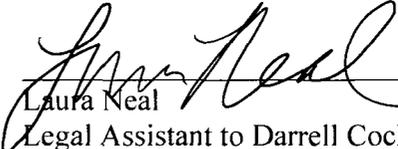
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DATED this 7th day of December 2015.



Laura Neal
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