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Court of Appeals
Division III
State of Washington

COA No. 345734

**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

**ESTATE OF MICHAEL DEMPSEY, by and through its Personal
Representative, ELLEN SMITH, and ELLEN SMITH,**

Appellants,

v.

**SPOKANE WASHINGTON HOSPITAL COMPANY d/b/a DEACONESS
MEDICAL CENTER,**

and

ROCKWOOD CLINIC and MICHAEL WUKELIC, M.D.,

Respondents.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIESii
I. REPLY.....	1
A. Reply to Restatement of the Issues	1
1. CR 26(b)(4)'s distinction between a testifying and a consulting expert is not a waiver of privilege; it is only a regulation of different access.	2
2. CR 26(b)(4) allows discovery only of materials that are “not privileged.”.....	3
3. Respondents’ precedent does not support its argument that privilege is waived with a testifying expert.....	4
4. Respondents can certainly obtain specific discovery from an expert— but not the way they did it here.....	7
5. A privilege log cannot be presented where the court has already ruled that no privilege exists	7
II. CONCLUSION.....	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Detwiler v. Gall, Landau & Young Const. Co.</i> , 42 Wn. App. 567, 572 (1986)	2-3
<i>Elm Grove Coal Co. v. Dir., O.W.C.P.</i> , 480 F.3d 278, 301 (4th Cir. 2007)	6
<i>Firestorm 1991 (In re)</i> , 129 Wn.2d 130 (1996)	4, 5
<i>Johnson v. Gmeinder</i> , 191 F.R.D. 638 (D. Kan. 2000).....	6
<i>Limstrom v. Ladenburg</i> , 110 Wn. App. 133 (2002)	4
<i>Det. of West (In re)</i> , 171 Wn.2d 383 (2011)	5, 6
<u>RULES:</u>	
CR 26(b)(1).....	3, 7
CR 26(b)(4).....	2, 3, 6, 7
CR 26(b)(5).....	<i>Passim</i>

I. REPLY.

A. Reply to Restatement of the Issues.

Respondents' position reveals urban myth—a “long held” and “established” rule that never existed at all. *Response* at p. 1. Respondents ask this Court to “keep faith with the distinction between testifying and consulting experts.” *see Response Brief*, p. 2. The distinction urged is that, “Once you provide information to someone who will testify, you waive the work product privilege.” *RP 21: 14-24*. But the distinction between a testifying expert and a consulting expert has never been that of a waiver of privilege; the distinction has always been only the difference between an adverse party accessing the identities, opinions, and certain limited materials of a testifying expert, whereas an adverse party is not allowed to access even the identities of a consulting expert. The distinction is the difference between something and nothing. Some things must be produced with a testifying expert; nothing at all need to be produced with a consulting expert. Nowhere is the distinction between these two types of experts a waiver of an attorney-expert privilege.

This Court Commissioner first began to unravel Respondents' argument, finding no specific guiding authority. Now, Respondents have provided no state nor federal civil rule, nor precedent, which supports the distinction they urge. Privilege has never been “waived” because an expert

is a testifying expert. This Court should reject the myth, and enforce the rule.

1. CR 26(b)(4)'s distinction between a testifying and a consulting expert is not a waiver of privilege; it is only a regulation of different access.

Civil Rule 26(b)(5)'s distinction between a testifying and a consulting expert is not a waiver of privilege; it is only the difference between the adverse party accessing the identities of, and specific materials used by, a testifying expert, as opposed to the adverse party not being allowed to access even the identities of a consulting expert. *CR 26(b)(5)(A) verses (5)(B)*. This distinction is not waiver of a privilege; it is a simple regulation of access allowed *because* of the privilege.

The opposing party may obtain the identity of a testifying expert, the subject matter, and “the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules.” *CR 26(b)(5)(A)*. With a consulting expert, however, that information may be obtained only upon a showing of exceptional circumstances. *CR 26(b)(5)(B)*. Even “the identities of non-witness experts are not discoverable absent a showing of exceptional circumstances.” *Detwiler v. Gall, Landau & Young Const. Co.*, 42 Wn.

App. 567, 572 (1986). CR 26(b)(5)'s distinction does not waive privilege. It simply requires the disclosure of something in one instance, and the disclosure of nothing in the other instance.

2. CR 26(b)(4) allows discovery only of materials that are “not privileged.”

There is no “distinction” within CR 26 that waives an attorney/expert communication privilege with a testifying expert. *CR 26(b)(5) (A) and (B)*. Under CR 26 (b)(4), discovery from a testifying expert under (b)(5) is subject to (b)(1)'s discovery of documents and tangible things that are “not privileged.” *CR 26(b)(4)*, referencing *26(b)(1)*. Even where privilege may ultimately apply, but is overridden by a CR 26(b)(4) showing of substantial need, attorney work product still remains protected:

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.”

CR 26(b)(4).

Throughout all of its terms, CR 26(b)(1), (4) and (5) enforce the protection of attorney work product privilege, even where a showing of hardship has been made.

3. Respondents' precedent does not support its argument that privilege is waived with a testifying expert.

Respondents argue that “Washington has long held that an otherwise applicable privilege is waived by providing information to a testifying expert,” and that privilege is waived by “sharing a protected document with a third person outside of the attorney-expert privilege.” Their reading of CR 26 purports to stand on five cases, none of which supports their proposition.

Limstrom v. Ladenburg, 110 Wn. App. 133, 145 (2002) doesn't apply. The holding concerns a situation where a party has turned over their protected communications to someone other than the communicators themselves, that is, to a third party, and thus waive the privilege by that disclosure. Respondents have not demanded attorney expert communications turned over to third parties. They demand the communications between the attorney and the expert. They seek communications which were never disclosed to another, and for which the privilege was never waived. They seek communications that remained purely within the attorney-expert communication privilege.

In re Firestorm 1991, 129 Wn.2d 130, 141-42 (1996) controverts Respondents' position. *Firestorm* reiterates CR 26(b)(5)'s limitation on discovery with experts: “The rule states “[d]iscovery of facts known and opinions held by experts ... may be obtained *only* as follows....” CR 26(b)(5)

(*emphasis added*). The decision reiterates that “[T]he rule does not contemplate discovery of experts outside of its explicit requirements.” *Id.* at 137, and see also 141-42.

In re Det. of West, 171 Wn.2d 383 (2011) controverts Respondents. Respondents argue that *West* stands for the proposition of broad discovery with respect to testifying experts. This misstates the case’s holding. The *West* court does state: “Accordingly, where the liberal discovery rule in CR 26(b)(5)(A) *lacks protections for testifying expert work product before trial*, we see no reason for retroactively creating such protections when trial concludes.”¹ But that comment must be placed in its context. The “lack of protection” being referenced as to testifying experts is the distinction made by CR 26(b)(5) itself. As discussed above, whereas a consulting expert’s identity cannot even be obtained, a non-testifying expert’s identify *can* be. The “lack of protection” referenced is this distinction. Nowhere does *West* say that the privilege is waived with a testifying expert. To the contrary, *West* goes out of its way to reiterate *Firestorm* as protecting attorney work product:

“Finally, we clarify any confusion from our decision in *In re Firestorm 1991*.... CR 26(b)(5) pertains only to the ‘facts known and opinions held by *experts*.’ (*Emphasis added*). We do not say that ‘the mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the

¹ See 171 Wn.2d at 407, *emphasis added*.

litigation,' CR 26(b)(4), are subject to discovery under CR 26(b)(5).”

West, 171 Wn.2d at 407.

West firmly enforces the privilege.

Absent Washington authority, Respondents cite to the Kansas decision of *Johnson v. Gmeinder*, 191 F.R.D. 638, 645 (D. Kan. 2000). The Kansas court finds discoverable “production of *any information* which the expert considers.” *Id.* at 646. The opinion entertains disclosure under the guise of information considered by the expert even where not used, but Washington’s rule does not allow this. As of 2010, neither does the federal rule. CR 26(b)(5)’s production of information is limited to, but allows, information considered by the expert upon which the opinion is based. This Kansas decision in no way supports Respondents’ premise that “Washington law has long held that an otherwise applicable privilege is waived by providing information to a testifying expert.” *See Respondents’ Introduction*, p. 1.

Respondents acknowledge the federal rule’s amendment, but still cite the pre-amendment case of *Elm Grove Coal Co. v. Dir., O.W.C.P.*, 480 F.3d 278, 301 (4th Cir. 2007). They then argue that Washington should not “broaden Washington law” to evolve to the amended federal rule, and thereby embark on “legislation.” Washington’s law is not being

“broadened” by the federal law. The federal law only implements what Washington has always protected. *See CR 26(b)(1), (4) and (5).*

4. Respondents can certainly obtain specific discovery from an expert—but not the way they did it here.

Respondents argue that certain protected communications can be subject to discovery. That is not in dispute. Appellants have already pointed out the specific exceptions. But nowhere is it proper to issue a global subpoena duces tecum for all attorney-expert communications. The motion to quash Respondents’ subpoena should have been granted. Respondents could have re-issued a proper subpoena under CR 26. They chose not to. By upholding that violation of the rule, the trial court found that no privilege existed at all with a testifying expert. That ruling is plain error and should be reversed.

5. A privilege log cannot be presented where the court has already ruled that no privilege exists.

Respondents continue to argue that when a court has ruled that no privilege exists, the Appellants are still required to present a privilege log. A privilege cannot be asserted in a privilege log after a trial court has ruled that no privilege exists to assert. Respondents’ subpoena should have been quashed. Once the privilege is “reinstated” and respected, and a new subpoena issued in conformance with CR 26(b), then if any information is

subject to disclosure, a privilege may be asserted via such a log.²

II. CONCLUSION.

The Appellants' appeal should be granted.

DATED this 13th day of **April, 2017.**

Respectfully submitted,

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² Respondents claim that the Appellants refused to describe communications between its counsel and Dr. Simons. *CP 19*. To the contrary, Appellants stated "as to letters and correspondence, nothing of substance was received, only the forwarding of medical records, and attachments at #4 below." *CP 131: 8-9*.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 13th day of **April, 2017**, the foregoing document was delivered to the following persons in the manner indicated below:

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