

FILED

COA No. 345734-III

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

MAR 14 2017
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

v.

SPOKANE WASHINGTON HOSPITAL COMPANY LLC d/b/a
DEACONESS HOSPITAL, et al., Respondents

THE DEFENDANTS' JOINT RESPONSE BRIEF

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I. INTRODUCTION & RELIEF REQUESTED

This joint response brief is respectfully submitted by the Appellees, Defendants below, Spokane Washington Hospital Company d/b/a Deaconess Hospital (hereinafter “Deaconess”), Rockwood Clinic (hereinafter “Rockwood”), and Michael Wukelic, M.D. The Appellant and Plaintiff below, the Estate of Michael Dempsey (hereinafter the “Estate”), asserts that the attorney work-product privilege allows a plaintiff to provide information to an expert, designate that expert to testify at trial, yet preclude the defendants access to the information that the expert reviewed in forming her opinions.

Washington law has long held that an otherwise applicable privilege is waived by providing information to a testifying expert. On the other hand, litigants and counsel may freely communicate with consulting experts (non-testifying experts) without waiving any privilege. The Estate is trying to eliminate the long-observed difference between consulting experts and testifying experts.

By recognizing different roles for consulting and testifying experts, Washington’s Courts ensure fairness and equity. Free and privileged discussion with consulting experts allows a party to explore theories and learn specialized facts for litigation. Liberal and open discovery regarding a testifying expert’s opinions, the basis for those opinions, and the process

by which those opinions were reached facilitates fair litigation on the merits.

The Court should keep faith with the distinction between testifying and consulting experts. The Defendants, therefore, respectfully ask the Court of Appeals to affirm the trial court's decision in every respect.

II. RESTATEMENT OF THE ISSUE

A document that is prepared by an attorney in the course of litigation is eligible for protection under the work product privilege. To perfect and preserve that protection, the lawyer must either keep the document in confidence or share the document only with persons who are within the attorney/client privilege. Consulting experts are within the attorney/client privilege, but testifying experts are not. Does, therefore, an attorney waive the work product doctrine's protections by sharing an otherwise protected document with a testifying expert?

III. STATEMENT OF FACTS & STATEMENT OF THE CASE

A. THIS IS A MEDICAL NEGLIGENCE CASE.

This is a medical negligence case. *See* CP 3-14. Michael Dempsey was taken to the Deaconess Emergency Department after presenting to Rockwood's Urgent Care Clinic, complaining of shortness of breath. CP 6. His condition worsened, he suffered cardiac arrest, and he

lost consciousness. CP 8-9. Mr. Dempsey never regained consciousness. He passed away a few months later. CP 8-10.

The Estate sued in Superior Court. *See* CP 3-14. The Estate alleges that the Defendants' treatment was negligent and that but for that negligence, Mr. Dempsey would have survived. *Id.*

B. AS IN ALL MEDICAL NEGLIGENCE CASES, THE ESTATE IDENTIFIED EXPERT WITNESSES AND THE DEFENDANTS SUBPOENAED THOSE EXPERTS' FILES.

The Estate identified Dr. Steven Simons as an expert witness. *See* CP 28. The Defendants issued a subpoena to Dr. Simons. CP 38-43. That subpoena sought a complete copy of Dr. Simons' file, including all correspondence between Dr. Simons and the Estate's counsel. *Id.*

C. THE ESTATE RESISTED DISCOVERY, AND THE DEFENDANTS MOVED TO COMPEL.

The Estate objected to the subpoena. *See* CP 26, 45-46. The Estate asserted that the work product doctrine protected counsel's communications with testifying experts. *Id.*

The Defendants brought a motion to compel compliance with the subpoena to Dr. Simons. CP 22-23. The trial court had previously appointed a discovery master, and the issue was presented to the discovery master. *See* CP 17-21; *see also* VRP 8.

The Estate acknowledged having correspondence/communications with Dr. Simons. *See* VRP 2-8, CP 52-55. However, the Estate refused to describe those communications. *See id; see also* VRP 19. The Estate simply reported that the communications were not substantive. *See* VRP 19.

D. THE TRIAL COURT HELD THAT ANY POTENTIAL PRIVILEGE WAS WAIVED WHEN THE ESTATE PROVIDED INFORMATION TO DR. SIMONS.

The discovery master held that the Estate had waived all potential privileges by sharing whatever information the Estate had shared with Dr. Simons. *See* VRP 8. The Discovery Master ordered production. *Id., see also* 188-91.

The Estate asked the trial court to review the discovery master's order. *See* CP 186-87. The trial court agreed with the discovery master, holding that the work-product privilege is waived by sharing documents or information with a testifying expert. VRP 35-36, CP 283-86.

E. THE COURT OF APPEALS ACCEPTED DISCRETIONARY REVIEW.

The Estate filed a timely motion for discretionary review. CP 287-88. The Defendants agreed not to enforce the subpoena pending resolution by the Court of Appeals. The Court of Appeals initially declined the Estate's motion. However, discretionary review was granted on the Estate's motion to modify the prior order denying review.

V. ARGUMENT

A. THE ESTATE FAILED TO DEMONSTRATE THAT ANY DOCUMENTS WERE EVER PROTECTED WORK PRODUCT.

The work product privilege provides a “qualified immunity” from discovery for documents prepared in anticipation of litigation. *Harris v. Drake*, 152 Wn.2d 480, 486 (2004). The privilege is “incorporated in CR 26(b)(4), which . . . [permits discovery of protected documents] only upon a showing that the party seeking discovery has substantial need . . . and that he is unable without undue hardship to obtain the substantial equivalent of the material by other means.” *Id.* Like any other privilege, the party asserting work product protections bears the burden of demonstrating that the privilege applies. *See Guillen v. Pierce County*, 144 Wn.2d 696, 716 (2001); *Johnson v. Gmeinder*, 191 F.R.D. 638, 642 (D. Kan. 2000).

Contrary to the Estate’s arguments, Washington draws “no distinction between attorney and nonattorney work product.” *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396 (1985) (*quoted by In re Detention of West*, 171 Wn.2d 383, 402 (2011)). Documents prepared by parties, attorneys, consultants, sureties, or other representatives are equally protected. CR 26(a)(4).

The Defendants' subpoena requested communications and correspondence between the Estate's attorney and Dr. Simons. The Estate provided no description of the documents, yet the Estate refused to comply asserting a claim of privilege.

The discovery master noted that there is no way to confirm or test the Estate's assertion. *See* CP 188-94. The discovery master, therefore, ordered the Estate to "prepare and to serve and file a privilege log delineating specifically all letters, correspondence or other documents . . . not previously disclosed, which plaintiffs claim is protected by any privilege . . ." CP 195.

The Estate "appealed" the discovery master's decision to the trial court. However, the Estate did not provide the privilege log that was ordered. *See* VRP 32-33. The trial court was, thus, left without any basis to evaluate the Estate's claim of privilege. The trial court noted that "if Counsel [for the Estate] is claiming work product, then the Court would need to see a list or a log of each document that was claimed to be work product privilege and make a ruling based on the claim and the document." CP 286. Nonetheless, the Estate again refused to provide a privilege log.

The Estate has left the Court of Appeals in the same position. The Estate has still not provided any information upon which to evaluate the

asserted privilege. The Estate has simply failed to meet its burden to prove the privilege that it asserts. That failure requires the Estate's appeal to be rejected and the trial court's decision affirmed.

B. EVEN IF THE WORK PRODUCT PRIVILEGE ONCE APPLIED, THE ESTATE WAIVED THE PRIVILEGE BY PROVIDING THE DOCUMENTS TO DR. SIMONS.

The work product privilege is waived by sharing a protected document with a third person, outside of the attorney/client privilege. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145 (2002), *see also In re Firestorm 1991*, 129 Wn.2d 130, 141-42 (1996). This is as true with respect to a testifying expert as it is with respect to any other person. *See id.* Work product protections can only be maintained among persons within the attorney/client privilege. *See infra.*

Assuming that the documents at issue were ever privileged, the protection was waived when the Estate chose to share the documents with Dr. Simons. Washington's Rules of Civil Procedure allow for broad discovery with respect to testifying experts. *In re Detention of West*, 171 Wn.2d at 404. The Defendants are, therefore, entitled to discovery regarding all documents and all information that Dr. Simons evaluated, analyzed, relied upon, or chose not to rely upon when evaluating this case – whether the documents or information were gathered by him or provided to him.

The Estate's motion conflates the roles that consulting experts and testifying experts play. That distinction is central to this case.

Washington law shields consulting experts from discovery precisely so that attorneys can benefit from the consultant's assistance in developing theories and cases without subjecting the attorney's or the consultant's thought processes to discovery. *In re Detention of West*, 171 Wn.2d at 404-05. Disclosure of work product to a consulting expert does not constitute a waiver because the consulting expert is deemed to be "part of the attorney-client team." 14 Wn. Prac., Civil Procedure, 13:14 (2d Ed., 2015 Update).

A testifying expert is qualitatively different. Washington's Court Rules provide for liberal discovery with respect to any expert that a party designates for trial testimony. CR 26(b)(5). Washington's State Supreme Court acknowledged that pretrial access to expert witnesses is necessary to "make trials fairer and [to] improve [trials'] truth-finding function." *Id.* Thus, to the extent that work product documents are disclosed to a testifying expert, the disclosure "result[s] in a waiver of [the documents'] protected status." *Johnson v. Gmeinder*, 191 F.R.D. 638, 645 (D. Kan. 2000).

Effective cross-examination requires a party to be able to test the expert's knowledge of the subject matter, test the expert's knowledge of

the facts, and test the independence of the expert's opinions. The Seventh Circuit succinctly stated the issue:

As several courts have observed, it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including **whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.** See, e.g., *Musselman v. Phillips*, 176 F.R.D. 194, 200 (D.Md.1997) ('It cannot seriously be denied that the fact that an attorney has interjected him or herself into the process by which a testifying expert forms the opinions to be testified to at trial **affects the weight which the expert's testimony deserves.**'); *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D.Ind.1996) ('[T]he impact of expert witnesses on modern-day litigation cannot be overstated; yet, to some, they **are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired . . .** Thus, full, effective cross examination is critical to the integrity of the truth-finding process.' (citations omitted)); *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 615-16 (D.N.J.1989) (noting that the 'weight accorded to an expert's opinion must vary in accordance with the expert's competence and knowledge; **an expert who can be shown to have adopted the attorney's opinion as his own stands less tall . . . than an expert who has engaged in painstaking inquiry and analysis before arriving at an opinion**').

Elm Grove Coal Co. v. Dir., O.W.C.P., 480 F.3d 278, 301 (4th Cir. 2007)

(emphasis added). Full discovery into an expert's opinions, the factual basis for those opinions, and the sources for that factual basis is, therefore, central to effective cross-examination. That discovery must include access to any documents that counsel provided to the expert.

The Estate waived whatever work product protections may have applied to the documents at issue by providing them to Dr. Simons. The Defendants are entitled to discovery with respect to those documents. The Defendants are entitled to test to what extent those documents impacted Dr. Simons' analysis. And the Defendants are entitled to test the extent to which Dr. Simons relied upon the Estate's analysis, as well as why or why not the expert chose to do so.

C. EVEN UNDER THE FEDERAL STANDARD, THE DOCUMENTS AT ISSUE ARE DISCOVERABLE.

Expert discovery is an area of significant disagreement between the State and Federal Rules of Civil Procedure. However, prior to 2010, Federal Rule 26's expert discovery rules were similar to the rules contained in Washington's CR 26. Pursuant to the pre-2010 rule, many federal courts authorized discovery of all communications between counsel and testifying experts. *See supra., see also* FRCP 26 advisory committee note. The pre-2010 Federal rule bound courts allow broad discovery into expert/counsel communications.

In 2010, the Federal Rule was amended to afford work-product protections for communications between counsel and testifying experts. *See* FRCP 26. Contrary to the Estate's arguments, a similar broadening of Washington's law can only come from a legislative rules amendment.

Washington's courts are bound by CR 26's text and by Washington's settled waiver law.

However, even if this matter could be evaluated under the post-2010 Federal Rule, the trial court's decision must be affirmed. Since 2010, Federal Rule 26 has read (in pertinent part):

[The] Rules . . . protect communications between the party's attorney and [a testifying expert], regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

FRCP 26(b)(4)(C). Litigants are entitled to discovery regarding communications between counsel and a testifying expert, so long as the communications fit within one of the rule's three broad categories for disclosure: (i) expert compensation; (ii) facts or data that was provided to the expert; or (iii) assumptions that were provided to the expert. It is difficult to imagine the Estate resisting discovery unless the documents at issue contain facts, data, or assumptions that Dr. Simons considered or relied upon.

More importantly, the Estate failed to demonstrate that the documents did not fit within one of FRCP 26(b)(4)(C)'s three categories of permissible discovery. *See Guillen*, 144 Wn.2d at 716 (holding that the proponent of a privilege bears the burden of proof). Thus, even if the Court was able to apply the post-2010 Federal Standard, it could not be applied in this case. It was the Estate's burden to prove the privilege that it asserts, and the Estate's failure to meet that burden with a privilege log (despite being twice ordered to do so) requires the Estate's appeal to be rejected.

V. CONCLUSION

Based upon the foregoing, the Court file, and the pleadings therein, the Defendants respectfully ask the Court to reject the Estate's invitation to rewrite Washington's privilege law. The trial court's decision was in perfect fidelity with accepted Washington State law. And though the Estate argues that the broader Federal standard should be applied, the Estate failed to provide sufficient information to evaluate the Estate's claim pursuant to the Federal standard. Therefore, no matter how the matter is viewed, the Estate's appeal should be rejected, and the trial court's decision should be affirmed in every respect.

RESPECTFULLY SUBMITTED, this 4th day of March, 2017.

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CERTIFICATE OF SERVICE

On the 14th day of March, 2017, I caused to be served a true and correct copy of the foregoing document on all interested parties to this action as follows:

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