95827-1

NO. 346714

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

MONICA DIAZ BARRIGA FIGUEROA, AS PARENT
AND NATURAL GUARDIAN OF BRAYAN MARTINEZ,
A MINOR,

Appellant,

v.

CONSUELO PRIETO MARISCAL,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

Joseph D. Hampton, WSBA #15297
Michelle E. Kierce, WSBA #48051
Attorney for Respondent Consuelo
Prieto Mariscal
Betts Patterson & Mines
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053

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WASHINGTON RULES AND REGULATIONS

I. IDENTITY OF PETITIONER

Petitioner Consuelo Prieto Mariscal ("Ms. Prieto"), Defendant below and Respondent on appeal, petitions the Supreme Court for review of the published decision of the Court of Appeals, Division III, designated in Part, II pursuant to RAP 13.4(b)(1), (2) and (4).

II. CITATION TO COURT OF APPEALS DECISION

Barriga Figueroa v. Prieto Mariscal, ___ Wn. App. ___, 414 P.3d 590, (No. 34671-4-III), filed April 3, 2018 ("Decision"), (Korsmo, J., dissenting) ("Dissent"). A copy is in the Appendix.

III. ISSUE PRESENTED FOR REVIEW

Should this Court accept review, under RAP 13.4(b)(1), (2) or (4), of these errors by the Court of Appeals: (1) concluding an application for benefits qualified as work product even though it was not prepared in anticipation of litigation, but contained no confidential information and was admittedly prepared in the normal course of business, and (2) not holding the admission of the application was harmless because the same evidence was admitted from other sources and plaintiff below did in fact present refuting evidence?

IV. STATEMENT OF THE CASE

A. Brayan Martinez Gave Two Inconsistent Statements Regarding the Events Leading up to the Underlying Accident

On October 23, 2013, Ms. Prieto was driving her minivan down a residential street in Pasco. Her teenage daughter was a passenger. Vehicles were parked on the right side of the street, including an orange

pickup truck. As she passed it, she heard a noise and felt a bump on the right side. She saw Brayan Martinez ("Brayan"), son of Monica Diaz Barriga Figueroa ("Ms. Diaz") lying in the street behind her car, injured. Ms. Prieto's daughter called 911 and the police arrived. VRP 279.

After interviewing Ms. Prieto, her daughter, and possibly a neighbor, the police prepared a report stating that Brayan had ridden his bike from between two parked cars and into the roadway immediately prior to being struck by the minivan. CP 304-5. Later, Brayan told Ms. Diaz's accident reconstruction expert the same story when they first met at the accident scene. It was also consistent with the original complaint, filed by Ms. Diaz for Brayan. But in deposition, Brayan's account of the accident changed markedly. He said that his shoelace became tangled in his bike chain and that, while attempting to untangle the shoelace, he had extended his right leg out into the street for three to four minutes prior to being struck by the minivan. This revised story surfaced in the amended complaint. CP 2, 12, 379-86.

B. Ms. Diaz Signed a Blank Form that was Later Submitted to Obtain PIP Benefits for Brayan from Ms. Prieto's Insurer

On November 21, 2013, Ms. Diaz met with her lawyers' legal assistant and signed a blank form application for personal injury protection ("PIP") benefits for Brayan. See Exh. D101.[1] Because Brayan was injured as a pedestrian, his PIP claim was made upon Ms. Prieto's auto

[1] The application, admitted as Exhibit D101, was not part of the original record on appeal. The Court of Appeals wrote to counsel requesting a copy. The copy of D101 was provided. However, it is a redacted copy of the original.

insurance policy.[2] VRP 120-1; *see* RCW 48.22.085(b)(ii). So, the parties did not "hav[e] the same insurance company." Decision at 4, n.1.

The legal assistant filled out the form later. To describe the accident, she simply copied from the police report. VRP 469-71. This is apparently Ms. Diaz's counsel's regular practice. VRP 478. The legal assistant wrote:

> Vehicle was traveling on North Cedar when child on a bike rode into road. There were 2 parked cars on the road creating a blinde [*sic*] spot for the driver. Child was struck and had right leg ran over.

The form was submitted to Ms. Prieto's insurer and PIP benefits were paid for Brayan's medical expenses. VRP 12-13.

C. Procedural History

1. Suit filing; defense verdict at trial; appeal

On May 6, 2014, Ms. Diaz filed this suit, alleging that the accident occurred while Brayan "was riding a bicycle[.]" CP 1, 2. On January 25, 2016, Ms. Diaz filed an Amended Complaint, changing the allegations to state that Brayan was not riding the bicycle. CP 12.

The case was tried in June, 2016. VRP 1. At trial, Ms. Diaz argued that the PIP application was a "privileged document" that should be excluded. VRP 120. The trial court admitted the PIP application with redactions of insurance information, finding it was not a privileged

[2] That the insurer was Ms. Prieto's is patent from the face of the unredacted PIP application. The unredacted version is not in the record; only the redacted version (D101) is. Ms. Prieto offers to provide the unredacted version promptly on request.

document and, in its redacted form, did not violate the collateral source rule. VRP 135. Ms. Diaz and the legal assistant testified that the accident description in the PIP application was not Ms. Diaz's testimony. VRP 299; VRP 469-70.

The jury returned a defense verdict on liability. VRP 627. Ms. Diaz moved for Judgment Notwithstanding the Verdict and for a new trial. CP 540-58. She argued the PIP application should not have been admitted because the statement of the accident it contained was made with an expectation of confidentiality; therefore *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004), compelled its exclusion. VRP July 11, 2016, 5-7.

But there is nothing in the record suggesting that Ms. Diaz, Brayan, or their lawyers had an "expectation of confidentiality" over the application's content. See VRP 119-24 (colloquy), 124-30 (Diaz testimony), 469-71 (legal assistant testimony). In fact, the application was submitted to Ms. Prieto's insurer, not Ms. Diaz's. VRP 12-13.

The Court denied the motion but did not make any findings as to whether the PIP application was work product. VRP 14. The Court found only that the PIP application was admissible under the evidence rules because it contained a prior inconsistent statement. VRP July 11, 2016, 8-12, 14. Ms. Diaz appealed.

2. Ms. Diaz argued on appeal that the PIP application was confidential work product

Ms. Diaz identified six assignments of error. Assignment of Error 1 contended that the PIP application's admission violated hearsay and work product rules. Brief of Plaintiff-Appellant at 1. Ms. Diaz stated the corresponding issue as "whether a Plaintiff's PIP application completed by a Plaintiff's attorney's office is privileged and/or work product." *Id.* at 3.

Ms. Diaz argued that she had a reasonable expectation that the PIP application would be kept confidential because she was contractually obligated to complete the PIP form to obtain benefits. *Id*. at 12. But just as she failed to provide the trial court with any evidence of that supposed expectation, she cited nothing in the appellate record, either. Ms. Diaz also argued that because PIP is a no-fault coverage, the statement of the accident provided on the PIP application was a mere formality and the accuracy of the statement had no bearing on coverage. *Id.* at 20-21.

Ms. Prieto argued that the PIP application was not work product because there was no proof in the record that the description of the accident was given in anticipation of litigation. Brief of Defendant-Respondent at 12. Further, Ms. Prieto pointed out that the work product protection does not apply to documents prepared in the normal course of business (*id.*), which is precisely how Ms. Diaz's lawyers admittedly process PIP applications. VRP 478.

3. Court of Appeals erroneously held that the PIP application should have been deemed work product

The Court of Appeals majority affirmed the trial court's ruling that the PIP application was not hearsay. However, proceeding to address whether the PIP application qualified as work product,[3] the majority concluded that the trial court erred when it declined to give work protections to the PIP application. Decision at 11.

The majority decision did not address the threshold question of whether the PIP application was prepared in anticipation of litigation, which is the test built into CR 26(b)(4) and the prior decisions of this Court. Indeed, there was no evidence in the trial court record as to whether the document was prepared in anticipation of litigation.[4] Further, the majority did not engage in any analysis as to whether the PIP application may have been prepared in the ordinary course of business. Finally, the majority merely assumed an "expectation of confidentiality" existed, without evidence to support that proposition. Decision at 11.

Instead, the majority isolated its conclusion that Ms. Diaz had a contractual obligation to cooperate with the PIP insurer, which included an obligation to complete the PIP application, in order to obtain benefits. *Id.*. The court analogized this contractual obligation to the contractual

[3] The dissent said that the majority should not have decided the issue in the first instance, due to the insufficient record, assignment of error, and briefing. The dissent also disagreed with the majority's ruling on the work product issue. Ms. Preito agrees; beyond the items identified by the dissent, the unredacted application that Ms. Diaz signed is not in the record.

[4] The Court of Appeals also did not call for additional written argument on the work product issue, as it could have under RAP 12.1(b).

obligation of a PIP insured to submit to an IME, as discussed in *Harris v. Drake*, *supra*. *Id*. It did not acknowledge the fact that Ms. Diaz had no relationship with Ms. Prieto's insurer when she signed the PIP application.

Relying only upon *Harris*, the majority reasoned that because it believed Ms. Diaz had a contractual obligation to cooperate with the PIP insurer in order to obtain benefits, she had a reasonable expectation that her PIP application would be kept confidential. *Id*. On this presumption alone, the Court of Appeals held that the PIP application was confidential work product. *Id*.

The majority decision's finding that the PIP application was "privileged" (a misnomer) cannot be reconciled with the existing applications of CR 26(b)(4) or this Court's prior holdings. The majority should have affirmed the trial court and concluded that work product protection did not attach to the PIP application because it failed to: recognize that the PIP application was not, in fact, prepared in anticipation of litigation; examine the specific parties and their intentions as required by *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985); realize that Ms. Diaz could not have formed an expectation of confidentiality over the content of the application because she signed the form in blank; or recognize that the applicability of *Harris* is, on its face, limited to PIP IME reports and the testimony of the PIP physician. Further, the decision effectively expanded *Harris* and work production protection to cover all statements made by a claimant to a PIP insurer, regardless of whether such

statements were made in anticipation of litigation, and it does so in a decision supported by an insufficient record.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals Erroneously Held the PIP Application to be Work Product, Contrary to *Heidebrink v. Moriwaki*

The majority erroneously held that the PIP application qualifies as confidential work product. This Court should accept review under RAP 13.4(b)(1) because Division III engaged in an improper and incomplete analysis when it failed to establish that the document was prepared in anticipation of litigation or look at the specific parties and their expectations as required by *Heidebrink*, *supra*.

CR 26(b)(4) sets forth the general rule governing work product, which is that documents *prepared in anticipation of litigation* are discoverable upon a showing of substantial need. *See also, e.g., Richardson v. Government Employees Ins. Co.*, 200 Wn. App. 705, 712, 403 P.3d 115 (2017). The work product doctrine provides only a qualified immunity from discovery. *Harris,* 152 Wn.2d at 486. This Court has previously held that facts remain discoverable even though they may be embodied in a protected document or conversation. *Matter of Firestorm 1991*, 129 Wn.2d 130, 141, 916 P.2d 411 (1996) (citing 4 Lewis H. Orland & Karl B. Tegland, Wash. Prac., *Rules Practice*, at 34 (4th ed. 1992) (fact that investigation was performed and observations of personnel who participated in the investigation disclosed by expert were not work product); *see also Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 747-48, 174

P.3d 60 (2007) (pictures and hand-sketched map of incident location drawn by investigator is "ordinary work product" subject to disclosure upon a showing of substantial need). Only "opinion work product," meaning the mental impressions, notes, and strategies of an attorney enjoy a nearly absolute immunity. *Soter*, 131 Wn. App. at 894.

The party seeking protection has the burden to show the materials qualify as work product. *Lindstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998); *see also Guillen v. Pierce County*, 144 Wn.2d 696, 716, 31 P.3d 628 (2001), *rev'd in part*, *Pierce County v. Guillen*, 537 U.S. 129, 123 S. Ct. 720 (2003) (burden of showing a privilege applies in any given situation rests entirely upon the entity asserting the privilege). Under *Heidebrink*, a court must examine the specific parties and their expectations to determine whether material was prepared in anticipation of litigation and thus qualifies as work product. *Heidebrink*, 104 Wn.2d. at 400. Courts do not apply the doctrine in the abstract. *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 795, 810 P.2d 507, 511 (1991).

In *Heidebrink*, an investigator hired by Mr. Moriwaki's liability insurance carrier tape recorded his statement after a cloud of smoke from burning grain stubble in his field allegedly caused an accident on the adjacent roadway. *Heidebrink*, 104 Wn.2d. at 394. Mrs. Heidebrink and another motorist were involved in the collision. Several months later, the Heidebrinks sued and subsequently sought discovery of the tape-recorded statement. In looking at the specific parties and their expectations as to the tape-recorded statement, this Court observed that the case involved

statements by a defendant in a third-party liability situation, where litigation was to be expected following an automobile accident. *Id.* at 400. Therefore, this Court held that the statement was protected from discovery under what is now CR 26(b)(4). *Id*. at 401.

However, this Court declined to broadly apply the work product protection to all insurer investigations, as "it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared in anticipation of litigation." *Id.* at 400 (internal quotations omitted). Again, the threshold criterion for allotment of work product protection is preparation of the document in anticipation of litigation. *Id.* at 396.

Here, the majority failed to examine the specific circumstances surrounding the application as required by *Heidebrink* to determine whether the application was prepared in anticipation of litigation. The record below is clear that Ms. Diaz did not herself complete the PIP application and signed it before it was complete. The record is also clear that the statement of the accident provided in the PIP application was apparently not what Ms. Diaz believed to be true at the time, and that if Ms. Diaz knew what the legal assistant had wrote she would not have signed the application. Further, it is undisputed that the insurer in question was Ms. Prieto's insurer, and Brayan could make a PIP claim simply because he was struck as a pedestrian. *See* RCW 48.22.085(b)(i). He had no relationship with the insurer prior to submitting the PIP application. Indeed, there could be no duty to cooperate in an investigation until after

the document was prepared and submitted. Thus, the specific circumstances of this case and the parties' statements demonstrate that there was no anticipation of litigation.

Notwithstanding, the majority held that the application was confidential work product. In making this determination, the majority summarily concluded that Ms. Diaz had a contractual obligation to cooperate with the PIP insurer, which included an obligation to complete the PIP application, and therefore had a reasonable expectation the PIP application would be kept confidential. Of course, no contractual relationship or obligations existed between Ms. Diaz (or Brayan) and the PIP insurer at the time the PIP application was prepared. The contrary proposition adopted by the majority is not supported by the record, and the Court of Appeals unfortunately did not call for additional briefing on the issue. Very simply, the court did not analyze the specific parties and their expectations, or the relationship between Ms. Diaz and the PIP insurer, all as required by *Heidebrink*.

Further, the majority failed to analyze, let alone mention, whether the PIP application was prepared in anticipation of litigation, publishing a decision granting work product protection over an innocuous PIP application based on an insufficient record and without answering the applicable threshold question. Thus, the decision erroneously applied the work product doctrine in the abstract, without properly analyzing the parties and their expectations, contrary to *Heidebrink*.

B. The PIP Application was Prepared in the Normal Course of Business and Ms. Diaz had no Expectation of Confidentiality

The majority failed to recognize that the PIP application was prepared in the normal course of business and was, therefore, not work product. This Court should accept review under RAP 13.4(b)(1) or (2) because Division III contradicts the rule of *Escalante* and this Court's decision in *Morgan*, *infra*. If the majority had analyzed whether the PIP application was prepared in anticipation of litigation, it should have concluded that the PIP form was merely filled out in the normal course of plaintiff's counsel's business, as shown by the record and Ms. Diaz's appellate briefing.

Work product protection does not apply to documents prepared in the normal course of business. *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 395, 743 P.2d 832 (1987). As Division III has previously explained, "the business records exception prevents parties from exploiting the work product rule by adopting routine practices whereby all documents appear to be prepared in anticipation of litigation." *Soter*, 131 Wn. App. at 896 (internal quotations omitted). Further, the court noted that "of course, merely turning such records over to counsel does not make them work product." *Id.* at 882.

In her appellate brief below, Ms. Diaz argued that "the statement provided on the PIP application was merely a formality that contractually needed to be provided in order to obtain PIP benefits . . . ." Brief of Plaintiff-Appellant at 20. She further admitted that the PIP application is

"normally filled out very early in the process," and that "the statements in the PIP application were never intended to be adopted . . . ." *Id.* at 21. These admissions show her expectations and demonstrate that the application was an innocuous, routinely-prepared piece of paperwork that was submitted without care or attention in order to claim PIP coverage. These facts are even less compelling than those in *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), where the City of Federal way hired an attorney to prepare an investigation into claims of hostile work environment. At the time, no litigation was threatened or anticipated as to these claims. *Id*. at 755. Rather, the investigation was prompted by the City's antiharassment policy requiring investigation into any such claim. *Id.* This Court held that the attorney investigation was conducted per the policy and had a remedial purpose, therefore it was neither prepared in anticipation of litigation nor protected by the work product doctrine. *Id.*

Similarly, Ms. Diaz could not have reasonably anticipated litigation with Ms. Prieto's PIP insurer over PIP coverage when she signed the blank form. The process Ms. Diaz followed to sign and submit the form to the PIP insurer is even less anticipatory of litigation than the investigation performed pursuant to policy in *Morgan.* It is certainly less anticipatory of litigation than the second PIP IME ordered by the insurer in *Harris* for the purpose of limiting benefits to its insured. There is no indication in the record that Ms. Diaz threatened or anticipated litigation

against the PIP insurer. In fact, quite the opposite, as Ms. Diaz admitted on appeal that coverage was automatic as long as the claim was opened.

The majority erroneously failed to recognize that the PIP application was not prepared in anticipation of litigation, but rather in the normal course of business, especially in light of the admissions of Ms. Diaz and her lawyers.

C. The Court of Appeals Misunderstood the Rationale Behind the Expectation of Confidentiality found in *Heidebrink* and *Harris*

In holding that the PIP application was protected work product because Ms. Diaz had a reasonable expectation of confidentiality, the majority misunderstood the rationale behind such expectation. This Court should accept review under RAP 13.4(b)(1) because Division III misunderstands *Heidebrink* and *Harris*. The reason for preparing the PIP application in this case is incongruent with the rationales articulated in *Heidebrink* and *Harris* as to the expectation of confidentiality, where the expectation of confidentiality held by the insured arises out of the insurer's expectation of candid disclosure.

In *Heidebrink*, the defendant was speaking to an investigator hired by his liability insurer for the purpose of determining the cause of the accident. He had a reasonable expectation that he would be sued and that his statement would be shared with the defense lawyer retained to represent him in such suit. *Heidebrink*, 104 Wn.2d at 396. Statements made by the insured in this context are protected so as to encourage honesty and transparency as if the insured is speaking to its lawyer.

Similarly, in *Harris*, the insured receiving PIP benefits from his own auto insurer was required to submit to an IME so the insurer could determine whether he was entitled to further benefits. *Harris*, 152 Wn.2d at 488. The initial question of coverage was irrelevant, as it is here, because PIP is a no-fault coverage. The insured in *Harris* not only had a duty to cooperate by participating in the IME, but also was subject to the insurer's expectation that he would speak honestly to the IME doctor and provide accurate information. Because the IME was performed at the insurer's request in anticipation of litigation, and because the insured enjoyed an expectation of confidentiality in exchange for the expectation of honesty, the insurer (the holder of the immunity) invoked the work product protection, which prohibited the IME report and the IME doctor's testimony from being used against the insured in the liability case.

Ms. Diaz has conceded that honesty and accuracy were of no concern to her when the PIP application was prepared. In fact, Ms. Diaz now disagrees with the entire statement of the accident contained in the PIP application. The majority erroneously created and focused on an expectation of confidentiality that was not demonstrated to exist. The lower court therefore disregarded guidance of this Court's prior decisions.

D. The Court of Appeals' Decision Relaxes the Standard for Applying Work Product Protection in a way that Substantially Affects the Public Interest

As mentioned above, the majority makes no effort to show that the PIP application was prepared in anticipation of litigation, and instead

relies only on what it deemed to be Ms. Diaz's reasonable expectation that the application would be kept confidential. This Court should accept review under RAP 13.4(b)(1), (2) and (4) because the majority's holding is different and substantially more relaxed than the long standing rule set forth in Washington cases, and because the scope of the work product protection is an issue of substantial public interest affecting the truth seeking process.

As the dissenting opinion below points out, "privileges are disfavored because they obstruct the truth seeking process and, for that reason, are narrowly construed." Dissent at 4. Even the attorney-client privilege is "not absolute, but is limited to the purpose for which it exists." *Dietz v. Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997). The majority has morphed the existing standard for work production protection – whether the document was prepared in anticipation of litigation — and relaxed it to anything in which a person claims an expectation of confidentiality. This new, relaxed standard not only conflicts with the decisions applying the proper standard, including *Heidebrink* and *Harris*, but also renders all other privileges superfluous as illustrated by *Maxon*, *infra*.

An expectation of confidentiality is common to <u>all privilege claims</u> and has never itself been deemed sufficient to justify a privilege claim. *State v. Harris*, 51 Wn. App. 807, 813, 755 P.2d 825 (1988) (holding that "[s]trong confidentiality requirements do not necessarily create a testimonial privilege"). Indeed, such an expectation of confidentiality is only the first of <u>four</u> factors this Court considers in deciding whether to

recognize a privilege. *State v. Maxon*, 110 Wn.2d 564, 572, 756 P.2d 1297 (1988). This is because "[the] exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Maxon*, 110 Wn.2d 564, 569, 756 P.2d 1297 (1988) *quoting United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974). In *Maxon*, this Court considered recognizing a parent/child privilege in the case of a child discussing pending murder charges against him with his parents. While this Court held that "defendant probably spoke to his parents about the murder charge in the belief that his conversation would not be disclosed," it declined to recognize a privilege because doing so was not "necessary to maintain the relationship between parents and children." *Maxon*, 110 Wn.2d at 572–73, 756 P.2d at 1301. Here, there is likewise no legitimate concern that people will be discouraged from applying for PIP benefits if the application might later be admissible. At most, anticipated disclosure of the application might encourage people to avoid including unnecessary detail or false statements in their applications.

Further, in declining to recognize a new parent/child privilege in *Maxon*, this Court emphasized that "creating a privilege is warranted only if the resulting public good transcends the normally predominant principle of using all rational means for ascertaining the truth." *Id.* at 576; *see also State v. Darden*, 145 Wn.2d 628, 41 P.3d 1189 (2002) (declining to recognize a new privilege absent basis of authority from Washington statutes or common law). By allowing work product protection to attach

where a document was not prepared in anticipation of litigation, but only subject to a later-argued expectation of confidentiality, the majority expands the scope of and relaxes the criteria for the qualified work product immunity to such an extent that the child's statements in *Maxon* would no doubt be deemed work product.

E. The Court of Appeals Erred in Finding the Admission was Prejudicial Error, Contrary to the Cumulative Evidence Rule

This Court should accept review under RAP 13.4(b)(1) and (2) as the majority erred in holding the admission of the PIP application was prejudicial error because the evidence was cumulative, and admission of cumulative evidence is harmless. *Driggs v. Howlett*, 193 Wn. App. 875, 903, 371 P.3d 61, *review denied*, 186 Wn.2d 1007, 380 P.3d 450 (2016) (citing *Hoskins v. Reich*, 142 Wn. App. 557, 570, 174 P.3d 1250 (2008)). Even if admission of the PIP application was improper, which it was not, "improper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole." *Hoskins*, 142 Wn. App. at 570; *see also State v. Eller*, 84 Wn.2d 90, 98, 524 P.2d 242 (1974).

In *Eller*, this Court reviewed the trial court's denial of defendant Eller's motion for a continuance to permit service of compulsory process upon a witness, whom Eller considered material to his defense to contradict testimony that he participated in a certain drug deal. Considering evidence already offered by the defendant at trial, including his admissions, and the record as a whole, this Court held that any

evidence that could have been offered by the missing witness would be merely cumulative to evidence available and adduced at trial. *Eller*, 84 Wn.2d at 98.

Here, the statement in the PIP application was cumulative of the trial testimony of Ms. Diaz's own accident reconstruction expert. Before the PIP application was admitted, Mr. Stadler testified as to Brayan's "explanation of how he rode that day, prior to being hit." CP 167. During their visit to the scene in January 2015, Brayan told Mr. Stadler that he would do a U-turn maneuver in the road in front of the orange pickup. CP 165-67. It is, therefore, undisputed in the record that Brayan himself told his expert that he rode into the street prior to being hit. Indeed, that is what the original complaint alleged. CP 2. The PIP application is merely cumulative of this evidence available and adduced at trial. *Eller*, 84 Wn.2d at 98. Further, the PIP application could not have had any qualitative impact or significant impact at trial because the same evidence was introduced by Ms. Diaz.

Review is appropriate because the majority failed to apply the cumulative evidence rule, which contradicts this Court's holding in *Eller*. Further, while the *Driggs* court declined to apply the cumulative evidence rule because there was a significant issue of the testifying expert's credibility, no such issue exists here. Thus, the majority improperly relied on *Driggs.*

VI. CONCLUSION

The majority's decision that an application for PIP benefits qualifies as confidential work product merits review pursuant to RAP 13.4(b)(1), (2) and (4). The decision should be reviewed under category (1) because its approach conflicts with this Court's guidance in *Heidebrink* and other cases, concerning work produced, and *Eller* and other cases on harmless error. The decision should be reviewed under category (2) because its ruling conflicts with other Court of Appeals decisions correctly following *Heidebrink* and other cases, and correctly following *Eller* and other cases. The decision should be reviewed under category (4) because the proper test for application of the work product immunity, and the reasonable scope of that immunity, are topics of substantial public and judicial interest.

This Court should grant review and reverse the decision of the Court of Appeals. Costs and attorney fees on appeal should be awarded to Ms. Prieto pursuant to RAP 14.1 and 14.2. Further, the judgment of the trial court should be upheld, including the award of attorney fees under MAR 7.3, pursuant to *Arment v. Kmart Corp.*, 79 Wn. App. 694, 700, 902 P.2d 1254 (1995).

RESPECTFULLY SUBMITTED this 3rd day of May, 2018.

BETTS, PATTERSON & MINES, P.S.

By:_____
Joseph D. Hampton, WSBA #15297
Michelle E. Kierce, WSBA #48051
Attorneys for Consuelo Prieto Mariscal

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on May 3, 2018, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petition For Discretionary Review; and**
- **Certificate of Service.**

Counsel for Figueroa:	☐	U.S. Mail
Brian J. Anderson	☐	Hand Delivery
Ned Stratton	☐	Telefax
5861 W. Clearwater	☐	UPS
Avenue	☐	E-mail
Kennewick, WA 99336	☑	Appellate Court Efiling Site

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of May, 2018.

Valerie D Marsh

Valerie D. Marsh

APPENDIX A

FILED
APRIL 3, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

MONICA DIAZ BARRIGA FIGUEROA as parent and natural guardian of BRAYAN MARTINEZ, a minor,	)	No. 34671-4-III
Appellant,	)	
v.	)	PUBLISHED OPINION
CONSUELO PRIETO MARISCAL, individually and the marital property thereof, if any,	)	
Respondent.	)	

LAWRENCE-BERREY, C.J. — Monica Diaz, as parent and guardian for her son Brayan Martinez, appeals from a defense verdict finding Consuelo Prieto not negligent for driving over and fracturing Brayan's lower right leg. Ms. Diaz primarily argues that the trial court erred in admitting the personal injury protection (PIP) application to her insurer. She argues that the PIP application was hearsay and confidential work product.

We hold that the PIP application was not hearsay because it was an admission by a party opponent under ER 801(d)(2)(iv). However, we hold that the trial court erred when it failed to extend work product protection to the PIP application and that this error was

prejudicial. We therefore reverse the jury's verdict and grant Ms. Diaz a new trial.

FACTS

On October 30, 2013, Ms. Prieto was driving her minivan southbound on North Cedar Avenue in Pasco, Washington. Her teenage daughter, Melissa Guzman, was riding in the front passenger seat. There were vehicles, including an orange pickup, parked on the right side of the road. As Ms. Prieto passed the orange pickup, she heard a noise on the passenger side of her van and felt her van jump a little. She stopped, got out, and saw eight-year-old Brayan Martinez lying near the pickup and next to his bicycle. It was evident that Brayan's lower right leg had been run over by one of the minivan's tires. Melissa called 911. Brayan was taken to the hospital and treated for his injuries.

A police officer arrived at the scene to investigate and prepare a report. The officer spoke to a few people, including Ms. Prieto and her daughter. No one the officer spoke to actually *saw* what happened. Nevertheless, the officer's report indicated that Brayan had ridden his bike from between two parked cars and into the road.

Ms. Diaz, a monolingual Spanish speaker, contacted a law firm and sought its assistance in making a claim under her insurance policy to pay for medical expenses. On November 21, 2013, Ms. Diaz met with an employee of the law firm who spoke Spanish. Following this meeting, a legal assistant asked Ms. Diaz to sign a blank form that the

assistant later completed. The form was an application for PIP benefits. Although PIP benefits are available regardless of fault, the form had a line that required the applicant to provide a brief description of the accident. The legal assistant used a copy of the police report to complete the form. The legal assistant wrote:

> Vehicle was traveling on North Cedar when child on a bike rode into road. There were 2 parked cars on the road creating a blinde [sic] spot for the driver. Child was struck and had right leg ran over.

Ex. 101 at 1.

Ms. Diaz, on behalf of her son, brought suit against Ms. Prieto. Ms. Diaz hired an accident reconstruction expert to assist in establishing liability. The expert, Patrick Stadler, met with Brayan at the accident scene to determine how the accident happened.

Brayan explained that prior to the accident, he rode his bicycle from the sidewalk into the roadway in front of the orange pickup to make U-turn type maneuvers. Defense counsel later deposed Brayan. Brayan's statements during the deposition varied enough that Mr. Stadler determined he should meet with Brayan again. Brayan's second explanation to Mr. Stadler was that his shoelace became tangled in his bike chain and that the bike came to rest near the front of the orange pickup. He was stopped and leaning over his bike with his right leg extended out in the road when the minivan ran over his

leg. Brayan did not mention the shoelace becoming stuck during his initial interview with Mr. Stadler.

The case proceeded to trial. During opening statements, Ms. Prieto referred to the PIP application. After opening, Ms. Diaz orally requested that the PIP application be excluded:

> Your Honor, . . . in defendant's opening [defense counsel] brought up some piece of evidence that I think he might try to bring up again.
>
> [The] Personal Injury Protection application. The personal injury protection application is . . . .
>
> . . . a first-party application and privilege is not waived when you submit something to first-party insurance. And, in fact, first-party insurance is not supposed to share the PIP file with defense without permission of plaintiff.
>
> In this case, [defense counsel] somehow got a copy of the PIP application. This raises a number of concerns. . . .
>
> So even though [defense counsel] already referenced it in his opening, and I objected to it then, I would move to exclude any further reference to this Personal Injury Protection application.

RP at 119-21.

In response, defense counsel argued:

> First of all, this document is not privileged. . . .
>
> . . . .
>
> The PIP insurance coverage is, in essence, a no fault benefit provided on the insurance policy insuring Ms. Prieto. Okay?
>
> So it's her insurance company that's providing this benefit of medical coverage to Brayan.[1]

[1] We granted oral argument and asked questions to shed light on these statements

RP at 121-22.

The trial court then heard voir dire testimony from Ms. Diaz. Ms. Diaz explained that her attorney's legal assistant directed her to sign the blank PIP application. The trial court determined that the form was prepared by plaintiff's agent, constituted an admission against interest, and therefore denied Ms. Diaz's request to exclude it. The trial court stated that the document was not privileged but provided no analysis in making its conclusion.

During trial, Mr. Stadler opined that Brayan could not have been struck while riding his bike. His opinion was based on the fact that the frame of the bike was not damaged and that Brayan's injuries did not include any impact or sliding on the pavement. It was his opinion that Brayan had been stationary and adjacent to the orange pickup when Ms. Prieto's minivan ran over his extended right leg.

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by counsel. During oral argument, defense counsel admitted that he did not receive the PIP application through discovery, and that both parties had the same insurance company. Wash. Court of Appeals oral argument, *Barriga Figueroa v. Prieto Mariscal*, No. 34671-4-III (Jan. 31, 2018) at 23 min., 57 sec. to 24 min. 52 sec., https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showDateList&courtId=a03&archive=y. Because only Ms. Diaz and her insurer had the PIP application, and because Ms. Diaz did not provide the PIP application to defense counsel, we infer that defense counsel received the PIP application directly from the parties' shared insurance company.

Ms. Diaz asked one of her medical experts how Brayan had described the accident. On cross-examination, Ms. Prieto asked the expert about statements in the medical records that indicated Brayan had ridden his bike out into the road. Ms. Diaz objected on the basis of speculation and hearsay. The trial court noted that the expert had reviewed and relied on the medical record, and overruled the objection on the basis that Ms. Diaz had opened the door during her questions to her expert.

Defendant's accident reconstruction expert, Eric Hunter, testified that it would have taken Ms. Prieto 1.6 seconds or less to stop once she saw an object in the roadway. He also testified that accident reconstruction experts rely on police reports when forming opinions and that he relied on the police report for this accident. Ms. Prieto began reading the police report into evidence, and Ms. Diaz objected. The trial court overruled the objection but qualified its ruling by saying the jury would be instructed that the police report was admitted only for a limited purpose and could not be considered as substantive evidence. Ms. Prieto did not continue reading the police report. Rather, she then focused on the description of the accident contained in the PIP application.

After both sides presented their evidence and closing arguments, the case was submitted to the jury. The jury returned a verdict finding Ms. Prieto not negligent. Ms.

Diaz moved for judgment notwithstanding the verdict, and the trial court denied her motion. Ms. Diaz appeals.

ANALYSIS

THE PIP APPLICATION

Ms. Diaz argues that the trial court erred when it admitted the PIP application. She argues that the PIP application was hearsay and was confidential. We review these two claims independently.

1. The PIP application was not hearsay

The trial court's factual determination regarding whether a statement falls within a hearsay exception will not be disturbed absent an abuse of discretion. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992).

The unrefuted evidence established that a legal assistant for Ms. Diaz's attorney prepared the PIP application based on the police report, and the police report was not based on eye-witness evidence. Ms. Diaz argues that the PIP application has multiple levels of hearsay, is speculative and, for these reasons, the trial court erred in admitting it. We disagree.

ER 801(d) defines certain statements that are not hearsay. That rule provides in relevant part: "A statement is not hearsay if . . . [t]he statement is offered against a party

and is . . . a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party." ER 801(d)(2)(iv).

Ms. Diaz hired an attorney to assist her in making a PIP claim. A legal assistant for the attorney completed the PIP application. During oral argument, Ms. Diaz conceded that a legal assistant could speak for a law firm by virtue of being part of that firm.[2] This is dispositive. We conclude that the legal assistant was a speaking agent for Ms. Diaz and that the statement contained in the PIP application was made within the legal assistant's scope of authority.

Ms. Diaz implies that because the legal assistant's statement was derived from the police report instead of from Ms. Diaz, the statement was not admissible. She offers no authority for this.[3] ER 801(d)(2)(iv) does not explicitly require that the agent or servant have firsthand knowledge or direct knowledge from the party. Nor does the rule

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[2] Wash. Court of Appeals oral argument, *supra*, at 2 min. 37 sec. to 3 min. 17 sec.

[3] Ms. Diaz cites *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) for the proposition that the agent must have authority to speak for the principal. Here, Ms. Diaz's law firm had authority to speak for Ms. Diaz by completing the PIP application.

Ms. Diaz fails to cite *Lockwood* for the proposition that an agent's statement must not be based on speculation. *Lockwood* notes, "arguments for exclusion of evidence [under ER 801(d)(2)] have been based on the theory that statements of an agent without firsthand knowledge could too easily be based on rumor or speculation to be routinely admitted." *Id.* at 263. *Lockwood* did not accept the argument, but instead noted the argument did not apply because the agent's statement was based on scholarly papers. *Id.*

explicitly require the agent's statement to be nonspeculative. The vast majority of jurisdictions and the Federal Rules of Evidence do not require firsthand knowledge as a requirement for the admissibility of an admission. 2 MCCORMICK ON EVIDENCE § 255, at 139-40 (John W. Strong ed., 5th ed. 1999). Washington courts have relaxed the rules regarding personal knowledge with respect to admissions by an agent of a party because a strict rule totally excluding the admission would be worse than allowing the trier of fact to hear the admission. 5B KARL B. TEGLAND, WASH. PRACTICE: EVIDENCE LAW AND PRACTICE § 801.38, at 406-07 (6th ed. 2016). Here, the trial court properly found that the legal assistant was an agent of Ms. Diaz and that her statement was within the scope of her agency.[4] Accordingly, the trial court did not err in concluding that the PIP application was not hearsay.[5]

[4] Courts interpreting the parallel federal rule, FED. R. EVID. 801(d)(2)(D) have held that admissions are granted generous treatment when determining admissibility and guarantees of trustworthiness are not required. *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 761 (7th Cir. 2003) (citing FED. R. EVID. 801, Advisory Committee Note).

[5] The concern noted in *Lockwood* can be allayed in two ways. First, a trial court can exclude a speculative statement under ER 403 for a variety of reasons. Second, even if the trial court admits a speculative statement, the statement's opponent can present evidence that questions the statement's accuracy. Here, Ms. Diaz presented significant evidence that called into question the statement's accuracy.

2. The PIP application was confidential work product

Ms. Diaz argues that the trial court erred in admitting the PIP application because the application was confidential work product.[6] We agree.

Ms. Diaz cites *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004). There, Harris was injured when Drake rear-ended him. *Id.* at 484. Harris cooperated with his insurer's request to undergo an independent medical examination (IME) in conjunction with Harris's application for PIP benefits. *Id.*

Later, in litigation between Harris and Drake, Drake sought to have the PIP IME doctor testify about his earlier IME report. *Id.* Drake did not obtain the IME report through Harris or Harris's attorney. *Id.* Harris objected to the doctor testifying. *Id.* The trial court eventually agreed with Harris that the doctor could not testify. *Id.* at 485. Harris prevailed, and Drake appealed.

In affirming the trial court, the court noted that an insured was contractually required to cooperate with his insurer or risk losing coverage. *Id.* at 488. The court determined that this contractual obligation creates a reasonable expectation in the insured

[6] Ms. Diaz did not assign error to the trial court's ruling that the PIP application was not confidential work product. But she raised this argument in her opening brief, she cited relevant authority in support of it, and Ms. Prieto responded to it. The issue therefore is appropriately before us. *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); *see also Tham Thi Dang v. Ehredt*, 95 Wn. App. 670, 677, 977 P.2d 29

that his statements to his insurer would be kept confidential. *Id.* The court concluded that the trial court properly gave work product protections to the IME report and properly excluded the PIP IME doctor from testifying. *Id.* at 488-89.

Like *Harris*, in the present case, Ms. Diaz had a contractual obligation to cooperate with her insurer, which included an obligation to complete the PIP application. She therefore had a reasonable expectation that her PIP application would be kept confidential and not be shared with opposing counsel. It would work an injustice to permit Ms. Prieto to surreptitiously obtain Ms. Diaz's PIP application and use it against Ms. Diaz simply because the two shared the same insurance company. The injustice is more pronounced given that the description of the accident in the PIP application was taken from a police officer's speculation, unsupported by any eyewitness, and inconsistent with the physical evidence. We hold that the trial court erred when it declined to give work product protections to the PIP application.[7]

(1999); *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 915 P.2d 581 (1996).

[7] The dissent argues that excluding the PIP application interferes with the search for the truth. Dissenting opinion at 7-8. Although excluding work product sometimes interferes with the search for the truth, that is not the case here. Ms. Diaz signed a blank PIP application. That application was later completed by a legal assistant, who merely wrote down what a police officer had written in his accident report. The officer spoke to three people, none of whom saw what happened. Had the officer testified, his belief that Brayan rode his bike out into the road would have been stricken as hearsay and speculative.

3. The trial court's error in admitting confidential work product was prejudicial

An erroneous evidentiary ruling does not result in reversal unless the error was prejudicial. *Driggs v. Howlett*, 193 Wn. App. 875, 903, 371 P.3d 61, *review denied*, 186 Wn.2d 1007, 380 P.3d 450 (2016). Here, Ms. Prieto repeatedly claimed throughout trial that Brayan was hit after he rode his bicycle between two parked cars and into the road. She repeated this claim in her opening statement, during the examination of several witnesses, and throughout her closing argument. Her claim was based almost entirely on the PIP application.

An argument can be made that the error in admitting the PIP application was not prejudicial because the same evidence was admitted from the police report and at least one medical record. Had Ms. Prieto made this argument, we would have rejected it.

First, the trial court refused to admit the police report as substantive evidence. Second, the police report was not read into the record or admitted into evidence. Third, Ms. Prieto focused almost entirely on the PIP application, not the police report or the medical records. Viewing the evidence as a whole, we believe that the improper admission of the PIP application was prejudicial. Given our resolution of this issue, we need not consider Ms. Diaz's other claims of error.

No. 34671-4-III
Diaz v. Mariscal

Reversed.

Lawrence-Berrey, C.J.

I CONCUR:

Fearing, J.

No. 34671-4-III

KORSMO, J. (dissenting) — Although I agree with the majority's analysis of the hearsay issue and its conclusion that the personal injury protection (PIP) application was not hearsay, I disagree with the decision to consider and resolve a case on a theory barely raised by the appellant in the trial court and not argued on appeal. Moreover, it would perpetrate a fraud on the court to exclude the PIP application and allow the appellant to testify without fear of self-contradiction. The judgment should be affirmed.

As to the procedural matter, the majority clearly errs in making up its own theory that the PIP application constitutes privileged work product of the insured. The factual basis for that theory was not established in the trial court. Indeed, the majority makes its own fact-finding concerning the PIP application when it "infers" that the respondent received the document from the shared insurance company. Majority opinion at 4 n.1. Appellate courts have rejected appellate fact-finding since the Eisenhower administration. *See Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Having not attempted to establish the facts in the trial court, the appellant understandably did not pursue the issue in this court. There is simply no factual basis for the majority's speculative analysis that the document was privileged and was obtained in an improper manner.

There were plenty of opportunities to pursue this issue in the trial court. As noted by the majority, appellant raised a privilege objection and the respondent denied there was any privilege. Appellant did not attempt to explain further how the document ended up with the respondent or why it was privileged. Since the issue was not explored more thoroughly in the trial court—and since this court does not make factual determinations—there simply are not sufficient facts in the record to address this issue. In addition, the failure to develop the record at trial means that we also cannot decide who holds the privilege and whether it was waived.

Appellant also had plenty of opportunity to make that record. In addition to the original objection in the trial court, the plaintiff sought a new trial due to alleged violations of a pretrial ruling. The failure to exclude the supposedly privileged document was not raised in that motion. When the case was appealed to this court, the appellant likewise did not pursue the privilege argument. There was no assignment of error to the trial court's ruling on the privilege claim. Appellant did not brief or argue the issue.[1] That should have been the end of the matter in this court. *See State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) ("However, the Court of Appeals should not have reached

[1] Appellant mentions the privilege theory and its application to the PIP application in the briefing only in conjunction with her claim that the trial court wrongly found that a hearsay exception applied. *See* Br. of Appellant at 17-18. Appellant did not argue that the application form itself should have been excluded as an allegedly privileged document. Similarly, respondent did not (and had no reason to know that she should) address the argument.

any issue regarding this portion of Closson's testimony because no issue was raised in Powell's briefs to the Court of Appeals. RAP 10.3(a), (g).").

RAP 12.1(a) states the governing rule: "the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs."[2] Our case law is rife with examples of appellate courts applying that principle and recognizing that an issue is not properly before the court. *See, e.g., Matter of Rhem*, 188 Wn.2d 321, 328, 394 P.3d 367 (2017) (noting that appellate courts "should not be placed in a role of crafting issues for the parties"); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (declining to address a constitutional issue as neither party briefed the issue); *State v. Sims*, 1 Wn. App. 2d 472, 485 n.2, 406 P.3d 649 (2017) ("an appellate court will not decide a case on the basis of a theory not briefed by the parties."); *Washington Prof'l Real Estate LLC v. Young*, 163 Wn. App. 800, 818 n.3, 260 P.3d 991 (2011) ("We will not decide a case on the basis of issues that were not set forth in the parties' briefs."); *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006) ("A party abandons an issue by failing to pursue it on appeal by . . . failing to brief the issue."); *1515-1519 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp.*, 102 Wn. App. 599, 610, 9 P.3d 879 (2000), *rev'd*

[2] The only exception is recognized in RAP 12.1(b) that advises appellate courts to notify the parties and provide an opportunity to present written argument if the appellate court believes an issue should be considered. More typically, appellate courts simply recognize that an evidentiary issue is waived if not briefed in the appeal. *E.g., Powell*, 126 Wn.2d at 258.

in part and remanded, 146 Wn.2d 194, 43 P.3d 1233 (2002) ("An issue is not properly before an appellate court if not set forth in the party's brief, even if raised at oral argument.").

Accordingly, we should not be engaging in this discussion in the least. But having done so, the majority further compounds the error by awarding plaintiff a new trial on the theory that her original inconsistent statement to her insurance company was somehow a privileged document of her own that must be kept from the jury. On this record, I doubt that is the case. When a work product privilege is recognized, it typically exists because litigation is expected. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). The work product privilege is, after all, an *attorney* work product privilege. *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). It only extends to the work product of nonattorneys if the document was prepared for litigation. *Heidebrink*, 104 Wn.2d at 396. Privileges are disfavored because they obstruct the truth-seeking process and, for that reason, are narrowly construed. As observed in the context of the statutory attorney-client privilege:

> Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and thus may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. *Dietz v. Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997); *see also Baldrige v. Shapiro*, 455 U.S. 345, 360, 102 S. Ct. 1103, 71 L. Ed. 2d 199 (1982) (Statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.).

VersusLaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 332, 111 P.3d 866 (2005); *accord Lowy v. PeaceHealth*, 174 Wn.2d 769, 778, 280 P.3d 1078 (2012).

It is not conceivable to me that every claim made to one's own insurance company is made with litigation in mind, let alone that run-of-the-mill business records are privileged due to the subjective view of either the insured or the insurer that litigation might result. We have a hearsay exception for business records for a reason, and that exception even serves to waive the constitutional protection to confront witnesses guaranteed by the Sixth Amendment to the United States Constitution. *E.g.*, *State v. Ziegler*, 114 Wn.2d 533, 789 P.2d 79 (1990). A routine claim form such as this one ("please pay the emergency room for treating my son who was hit by a car") is processed in the normal course of business, not in anticipation of litigation.

Whether the privilege exists is dependent upon a review of the facts of the relationship between insurer and insured at the time of the statement and the expectations of the parties. *Heidebrink*, 104 Wn.2d at 400. In that case a privilege existed because the insured reasonably expected that the information provided would be passed on in confidence to the attorney who subsequently would be hired to defend him. *Id.* at 399-401 ("we hold that a statement made by an insured to an insurer following an automobile accident is protected from discovery."). Similarly, an independent medical examination required by a PIP claim was the work product of the *insurer* and was not discoverable by

a third party once the insurance company asserted the privilege.[3] *Harris v. Drake*, 152 Wn.2d 480, 492, 99 P.3d 872 (2004). An insured would reasonably believe her medical information would be kept confidential by her insurance company. *Id.* at 488.

Unlike these lead cases, the alleged privilege found in this case is being asserted by the insured, not the insurer, and involves a statement made for the purpose of showing the claim was within the scope of the PIP coverage in order to obtain medical benefits for Brayan. It was not necessarily a statement made in anticipation of litigation since the Diaz family was preparing to sue Ms. Mariscal rather than its own insurance company.

While the preceding are all factual and prudential concerns arising from the majority's decision to decide a factual question not presented in the briefing to this court, the real problem with going down this unbriefed road is that it focuses on the wrong aspect of the alleged privilege. The question is not whether counsel for Ms. Mariscal improperly[4] obtained the document, but whether the plaintiff is allowed to perpetrate a fraud on the court by excluding the inconsistent original statement from the jury's consideration. The very reasons that the majority believes this information was harmful

[3] This aspect of *Harris* hurts the majority's argument here. The privilege does not belong to appellant, but to appellant's insurance carrier, who arguably is free to decide whether it will or will not assert the privilege.

[4] If the plaintiff was damaged by some unlawful act, the remedy should be to sue the insurer for damages. Since the insurer was the privilege holder, however, I question whether anything untoward occurred here at all.

are the very reasons it should be admitted in order to advance the jury's truth-finding function.

Whatever the basis for the new privilege created by the majority here, it should give way for the greater public policy of preventing a fraud on the court. Even evidence suppressed due to a violation of the constitution is admissible at trial to counter a defendant's contrary testimony at trial. *E.g.*, *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) (citing *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)) (suppressed statements); *United States v. Havens*, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980) (physical evidence); *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) (same). As forcefully stated in *Walder*:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

Id. at 65. I would presume the civil justice system is at least as concerned with truth finding as the criminal justice system. I can think of no policy reason why the majority's new privilege should be stronger than the protections of our constitution.

Most privileges exist to promote honest reporting of facts. *Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984) (attorney client privilege). It is a perversion of that

purpose to authorize perjury by excluding a party's contrary report of events and let the jury hear only the current version. The privilege should be honored at the discovery level but, once the information has been disclosed, even if wrongly so, the purpose of the privilege is not furthered by allowing it to abuse the truth-seeking function of trial. Even assuming that the PIP application statement was privileged, it was properly admitted here to rebut the contrary version of events that plaintiff was asserting at trial. She was able to explain why that initial version was incorrect, and the jury was able to listen to the explanation and give the statement any weight it deserved. This issue was handled fairly for both sides.

Even if the issue is properly before us and even if the statement is privileged, the evidence was properly put before the jury to contradict the version of events presented at trial. I dissent from the decision to exclude the initial report and grant a new trial.

Korsmo, J.

BETTS, PATTERSON & MINES, P.S.

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