No. 96603-6

(Court of Appeals No. 77309-7)

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

SAFE ACQUISITION, LLC, a Washington corporation; LUCIDY, LLC, a Washington corporation; and SCOTT FONTAINE, an individual,
Plaintiffs - Petitioners,

v.

GF PROTECTION INC., d/b/a Guardian Fall Protection, a Washington corporation,
Defendant - Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent GF Protection Inc.[1] respectfully asks this Court to deny Appellants SAFE Acquisition, LLC ("SAFE"), Lucidy, LLC ("Lucidy"), and Scott Fontaine's Petition for Review because the Court of Appeals decision does not conflict with any decision of this Court. The Court of Appeals properly applied an abuse of discretion standard of review to the trial court's pre-trial discovery rulings concerning the attorney-client privilege and work product doctrine, properly applied the "narrow" approach to attorney-client privilege articulated in *Newman v. Highland School District*, 186 Wn.2d 769, 381 P.3d 1188 (2016), and correctly declined to categorically declare that a vast body of e-mails and other communications—the content of which are unknown—were protected by the work product doctrine.

II. ANSWER TO ISSUES PRESENTED

GFP does not seek review of any issue decided by the Court of Appeals, and answers the four issues presented in the Petition as follows:

1. The proper standard of review of a trial court's pre-trial discovery rulings concerning the attorney-client privilege and work product doctrine is abuse of discretion.

2. Under Washington law, the absence of a finding of fact on an issue is presumed to be a negative finding against the party with the burden of proof, unless there is ample evidence to support a missing finding and

[1] GF Protection Inc. recently changed its name to GF Transition Inc.

the evidence, when viewed as a whole, demonstrates that the absence of a specific finding was inadvertent.

3. The possibility that an individual might one day own a financial interest in a corporation is an insufficient basis upon which to conclude the individual's communications with corporate counsel are protected by the attorney-client privilege.

4. Under Washington law, the attorney-client privilege is narrow and the flexible approach articulated in *Upjohn Co. v. United States,* 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), is limited to attorney-client communications taking place within the corporate employment relationship.

5. Communications between litigation counsel and third-party witnesses about matters in litigation do not categorically qualify as work product documents prepared in anticipation of litigation under CR 26(b)(4), particularly when the contents of the communications are unknown.

III. STATEMENT OF THE CASE

This case concerns two licensing contracts for the manufacture and sale of fall protection and roofing products between GFP and Mr. Fontaine's two companies, SAFE and Lucidy. Appellants incorrectly contend that GFP failed to exercise commercially reasonable efforts with respect to the licensed products. Clerk's Papers ("CP") at 257-84.

A. SAFE and Lucidy misrepresented that Mr. Vasquez and Mr. Bullard were owners of SAFE and Lucidy.

At the outset of this case, GFP served Appellants with discovery requests that sought communications with two associates of Mr. Fontaine—Michael Vasquez and Brock Bullard. *Id.* at 305-06. In response, Appellants asserted the attorney-client privilege and work

product doctrine, instructed that all communications with Mr. Vasquez and Mr. Bullard be through counsel, and refused to produce responsive documents. *Id.* at 296, 305-06. Later, in their primary witness disclosures, Appellants again instructed that communications with Mr. Vasquez and Mr. Bullard should be through counsel. *Id.* at 379.

Appellants consistently represented that communications with Mr. Vasquez and Mr. Bullard were subject to the attorney-client privilege and work product doctrine because both were owners of SAFE and Lucidy. For example, when Mr. Vasquez attended the deposition of a GFP employee, Appellants' counsel claimed that Mr. Vasquez was at the deposition as a corporate representative for SAFE or Lucidy. *Id.* at 290. GFP had no reason to doubt Appellants and relied on their representations.

B. Depositions revealed that Mr. Vasquez and Mr. Bullard were never owners, employees, or independent contractors of SAFE or Lucidy.

Yet the depositions of Mr. Vasquez, Mr. Fontaine, and Mr. Bullard later revealed that Mr. Vasquez and Mr. Bullard were never owners of SAFE or Lucidy. In fact, Mr. Bullard and Mr. Vasquez were never even employees or independent contractors of SAFE or Lucidy. Instead, Mr. Vasquez and Mr. Bullard had only served as independent contractors for *GFP*.

i. Vasquez deposition.

Mr. Vasquez unequivocally testified that he was never an owner, employee, or independent contractor of SAFE or Lucidy. *Id.* at 397-401. Rather, Mr. Vasquez testified that Mr. Fontaine owned 100% of both SAFE and Lucidy. *Id.* at 397-98. Mr. Vasquez conceded that he could not legally bind either company and that he had to run all decisions by Mr. Fontaine. *Id.* at 403-04. Nonetheless, Appellants' counsel asserted in deposition that the basis of the attorney-client privilege with Mr. Vasquez was that he served as "a speaking agent." *Id.* at 404-05.

Mr. Vasquez further testified that Mr. Fontaine "made me no promises" about future ownership in SAFE or Lucidy. *Id.* at 396. Mr. Vasquez later recalled a vague acknowledgement of a *potential* future ownership interest and that he "did sign a piece of paper from Scott stating that I would have a percentage share once the company did start to make money." *Id.* at 402. However, he clarified that any potential ownership interest was "[i]n the future" and again confirmed he was never an owner of SAFE or Lucidy. *Id.* at 402-03. Mr. Vasquez also testified that Mr. Bullard was likewise never an employee of SAFE or Lucidy. *Id.* at 407. Mr. Vasquez confirmed that while he had never served as an independent contractor for Appellants SAFE or Lucidy, he had worked as an independent contractor for Respondent GFP. *Id.* at 401.

ii. Fontaine deposition.

Mr. Fontaine unequivocally testified that he was the sole owner of Lucidy. *Id.* at 318 ("Q: Are there any employees of Lucidy? A: No. Q: Are there any investors or owners in the company other than you? A: No."). Like Mr. Vasquez, Mr. Fontaine acknowledged that he had informal agreements with Mr. Vasquez and Mr. Bullard for future ownership interests in SAFE and Lucidy; however, the agreements were not formalized and were mere "letters of intent" that would be "drawn up again when this company starts being profitable . . . ." *Id.* at 316. Mr. Fontaine also testified that Mr. Vasquez and Mr. Bullard were never employees or independent contractors of SAFE or Lucidy, and despite SAFE's receipt of royalties, had never been paid. *Id.* at 316-17. Mr. Fontaine confirmed that Mr. Vasquez had worked as an independent contractor for GFP—not SAFE or Lucidy. *Id.* at 317.

iii. Bullard deposition.

Mr. Bullard confirmed that he was never an owner of SAFE or Lucidy, and that his informal agreement with Mr. Fontaine was also for a *potential* future ownership interest. *Id.* at 366-67. Mr. Bullard testified that he was never an employee or independent contractor of SAFE or Lucidy. *Id.* at 366. Mr. Bullard confirmed that, like Mr. Vasquez, he had worked as an independent contractor for Respondent GFP. *Id.* at 369.

C. Appellants submitted previously unproduced July 21, 2014 letters alleging they established an ownership interest.

GFP moved to compel production of the communications with Mr. Bullard and Mr. Vasquez that Appellants previously withheld on the basis of the attorney-client privilege and work product doctrine. *Id.* at 16. In opposition, Appellants submitted a single July 14, 2014 letter from Mr. Fontaine to Mr. Bullard as evidence of their purported ownership interest. *Id.* at 81. The document had never been produced in discovery, and referenced an alleged verbal discussion about Mr. Bullard's salary that "*would* be for an annual salary of $150,000." *Id.* (emphasis added). The letter to Mr. Bullard also stated "[t]he ownership percentage amount we discussed was 10% of SAFE Acquisitions and 10% of Lucidy Pump Jack. These percentage amounts will be include in discussion [sic] I have with Dave Ellenhorn, my attorney, who will be drafting the business contract for SAFE and Lucidy."[2] *Id.* Appellants did not make any claim to attorney work product protection in their opposition to GFP's Motion to Compel. *Id.* at 30-43.

[2] In deposition, Mr. Bullard testified that the same July 14, 2014 letter accompanying Appellants' opposition to GFP's Motion to Compel set forth merely a potential future ownership interest. *Id.* at 367. When asked if the potential ownership interest was ever finalized as the letter contemplates, Mr. Bullard testified that it had not been finalized, no other agreement existed, and that he had never received any salary or other payment from SAFE or Lucidy. *Id.* at 368 ("Q: You never received the retroactive salary, right? A: I did not.").

The trial court granted GFP's Motion to Compel, finding that "Plaintiffs have failed to carry their burden in justifying their assertion that documents to which Brock Bullard and Mike Vasquez are party may be withheld on a claim of attorney-client privilege or attorney work product." *Id.* at 107. The trial court found that "Plaintiffs have not shown that they are speaking agents or within the zone of privilege." *Id.* at 107-08.

Appellants moved for reconsideration and submitted two *additional* July 21, 2014 letters from Mr. Fontaine. The two additional July 21, 2014 letters also had never been produced in discovery and were similarly limited. *Id.* at 142, 144. Like the first July 21, 2014 letter from Mr. Fontaine to Mr. Bullard, the additional letters also addressed a *potential* future ownership interest in SAFE, Lucidy, and another company called Roofing Technologies L.L.C. *Id.* The letters merely state "the ownership percentage amount we agreed upon was 10% of SAFE Acquisitions LLC, 10% of Lucidy LLC, 10% of Roofing Technologies LLC, and both patents associated with LLC's."[3] *Id.*

Appellants failed to substantiate their claim that the communications GFP sought were protected by the work product doctrine. In fact, the *only* evidence in the record that even remotely suggests the

[3] In deposition three years later, Mr. Fontaine not only testified that he still owned 100% of Lucidy, but also described the letters as "letters of intent." *Id.* at 316. Like Mr. Bullard, Mr. Fontaine acknowledged the agreements for potential ownership had not actually been "drawn up." *Id.*

contents of the communications at issue is a single sentence in Appellants' counsel's declaration submitted with their motion for reconsideration. *Id.* at 120. Counsel simply states, "All of my communications with Mike Vasquez or Brock Bullard relating to the subject matter of this case have been for the purpose of advising and representing Plaintiffs Scott Fontaine, SAFE LLC, and/or Lucidy LLC." *Id.* Appellants did not request an *in camera* review or otherwise provide any additional information regarding the content of the withheld communications.

The trial court denied Appellants' motion for reconsideration and ordered that Appellants produce the previously withheld communications. *Id.* at 187. The trial court reasoned that "Plaintiffs failed to carry their burden in justifying their assertion that documents and communications to which Brock Bullard and Mike Vasquez are party may be withheld on a claim of attorney client privilege or attorney work product." *Id.* at 187-88.

D. The Court of Appeals decision.

The Court of Appeals applied an abuse of discretion standard and held that because Appellants failed to satisfy their burden of establishing an attorney-client privilege with Mr. Vasquez and Mr. Bullard, there was no reversible error. The court remanded the case to the trial court to conduct an *in camera* review or otherwise resolve whether any or all of the disputed communications were work product.

IV. ARGUMENT

The Court should deny Appellants' Petition for Review because Appellants cannot establish that the Court of Appeals' decision conflicts with a decision of this Court under RAP 13.4(b)(1)—the only basis upon which Appellants seek review.

A. The Court of Appeals applied the correct standard of review.

The Court of Appeals properly applied an abuse of discretion standard and construed the trial court's lack of specific findings against Appellants.

i. The correct standard of review for issues concerning the attorney-client privilege and work product doctrine is abuse of discretion.

The standard of review on a discovery order addressing production of allegedly privileged or protected communications is abuse of discretion. *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013). Whether an attorney-client relationship exists is a question of fact. *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997). The burden of persuasion is on the party seeking protection from disclosure. *Cedell*, 176 Wn.2d at 696. A trial court's factual findings should not be disturbed on appeal unless unsupported by the trial court record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). The Court of Appeals properly applied an abuse of discretion standard and

determined that "the [trial] court considered both parties' detailed arguments regarding attorney-client privilege and concluded that SAFE failed to carry its burden in invoking the privilege." *SAFE Acquisition, LLC v. GF Prot. Inc.*, No. 77309-7-I *4, 2018 WL 5806609 *2 (Wash. App. Nov. 5, 2018) (unpublished).

The Court of Appeals properly rejected Appellants' reliance on cases that applied a de novo standard of review because the standard of review is clear under *Cedell*. The cases Appellants relied on did not concern discovery matters like the one at issue here, and they also involved instances in which the evidence was undisputed and limited to written documents. For example, *In re Firestorm 1991* involved undisputed evidence that consisted solely of written documents in the record. 129 Wn.2d 130, 134-35, 916 P.2d 411 (1996). The *Firestorm* court acknowledged an appellate court may independently review and make findings, if necessary, where the evidence was limited to written documents before the court. *Id.* at 135. In this case, the posture is different because the evidence included not only deposition testimony, but also *e-mails and other communications that are not part of the court record at all*. Moreover, the *Firestorm* trial court did not make any conclusions of law and the question before the court was purely one of

law. Here, the trial court decided a question of fact. *Dietz*, 131 Wn.2d at 844.[4]

ii. The general rule is that the absence of an express finding at the trial court is presumed to be a negative finding against the party with the burden of proof.

The trial court expressly found that Appellants failed to establish an attorney-client relationship, a determination that was necessarily predicated on an underlying determination that Appellants were neither owners, employees, nor independent contractors of SAFE or Lucidy. The Court of Appeals properly construed the lack of express factual findings as a negative finding against Appellants because Appellants had the burden of proof, which the trial court unambiguously determined Appellants failed to meet. When there is not an express finding of fact, the general rule is to presume a negative finding against the party with the burden of proof. *See, e.g.*, *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); *Goldberg v. Sanglier*, 96 Wn.2d 874, 880, 639 P.2d 1347, (1982); *Morgan v. Briney*, 200 Wn. App. 380, 390-91, 403 P.3d 86 (2017), *review denied,* 190 Wn.2d 1023 (2018). This general rule applies where a trial court's finding is predicated on the determination of an underlying fact. *See*

[4] *See also Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) (evidence consisted solely of written documents and trial court failed to make any factual or legal finding). The Public Records Act cases Appellants rely on are likewise inapposite because this case involved review of a discovery order, and Washington law is clear that the standard of review on a discovery order addressing production of allegedly privileged or protected communications is abuse of discretion. *Cedell*, 176 Wn.2d at 694.

Goldberg, 96 Wn.2d at 880. While Appellants contend this rule applies only in cases following a bench trial, there is no support for this distinction.[5]

As the Court of Appeals acknowledged, a narrow exception to the general rule that presumes a negative finding against the party with the burden of proof exists only if there is ample evidence to support a *missing finding*, and the evidence, when viewed as a whole, demonstrates the lack of specific finding was inadvertent. *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992). Here, there was no missing finding and no evidence to suggest the lack of an express finding about Mr. Vasquez and Mr. Bullard's relationship to SAFE and Lucidy was inadvertent. The trial court determined Appellants failed to meet their burden in establishing that the attorney-client privilege applied, and necessarily rejected finding that both men were owners, employees, or independent contractors of SAFE or Lucidy.

B. The Court of Appeals properly applied *Newman*.

In order for this Court to take review, Appellants must demonstrate that the Court of Appeals misapplied the law. RAP 13.4(b)(1).

[5] Moreover, a contrary ruling would cause litigants to flood trial courts with proposed orders asking for detailed findings of fact and require trial courts to make detailed findings of fact on all discovery orders, which is neither practical nor necessary.

Appellants cannot meet this burden because the Court of Appeals properly applied *Newman*, 186 Wn.2d 769.

i. A potential future financial interest alone is an insufficient basis upon which to conclude an attorney-client relationship exists.

The mere possibility that an individual might one day acquire a financial interest in a corporation is not a sufficient basis upon which to conclude the individual's communications with corporate counsel are protected by the attorney-client privilege. Appellants advance this argument for the first time in their Petition, without any legal support and in deviation from established precedent.

This Court recently considered in *Newman* whether communications between corporate counsel and *former* employees should be covered by the attorney-client privilege, and concluded that "*Upjohn* does not justify applying the attorney-client privilege outside the employer-employee relationship." *Id.* at 776. Among the Court's reasons were the preservation of a predictable legal framework and recognition of the distinction between communications that occur during employment—which continue to be privileged after the agency relationship ends—and communications that occur outside the employment relationship, which are not privileged. *Id.* at 782-83. The same rationale applies here, with even more force, where Mr. Vasquez and Mr. Bullard were never

employees, owners, or independent contractors, and it is undisputed they do not hold any financial interest in the corporations.

ii. Under Washington law, the attorney-client privilege is narrow and the flexible approach articulated in *Upjohn* is limited to attorney-client communications taking place within the corporate employment relationship.

As an initial matter, the Court should not consider Appellants' argument that communications with Mr. Vasquez and Mr. Bullard are privileged based on a principal-agent theory because this theory was raised for the first time on appeal. *See* RAP 2.5(a); *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012) (courts generally do not consider arguments raised for the first time on appeal).

Notwithstanding Appellants' failure to raise this argument below, Washington law does not support Appellants' argument, and the Court of Appeals' application of *Newman* was correct. In Washington, "the attorney-client privilege does not automatically shield any conversation with any attorney." *Newman*, 186 Wn.2d at 777. Rather, it is "a narrow privilege and protects only communications and advice between attorney and client." *Id.* (internal quotations omitted). In 2016, this Court "conclude[d] *Upjohn* does not justify applying the attorney-client privilege outside the employer-employee relationship." *Id.* at 776. Yet Appellants now ask this Court to effectively reverse *Newman* by declaring that under

Upjohn, the attorney-client privilege extends to the "functional equivalent of employees," including those persons who were never employees, independent contractors, nor owners of the corporate client, and have no authority to bind the corporation. The Court should reject Appellants' invitation to reverse this Court's precedent.

First, *Upjohn* presupposes an employer-employee relationship and *Newman* expressly refused to extend *Upjohn* to communications beyond the employer-employee relationship.[6] There is no reason the Court should take review of this issue now, when the law is clearly articulated.

Next, the cases from outside jurisdictions Appellants cite in support of their "functional equivalent of employee" argument are inapposite because they contradict *Newman's* instruction that the attorney-client privilege is "a narrow privilege" and "does not automatically shield any conversation with any attorney." 186 Wn.2d at 777 (citation omitted). For example, *United States v. Graf*, 610 F.3d 1148, 1158-59 (9th Cir. 2010), is directly at odds with *Newman* because it adopted the reasoning of *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), because "too narrow" a

[6] "The flexible approach articulated in *Upjohn* presupposed attorney-client communications taking place within the corporate employment relationship. *Upjohn*, 440 U.S. at 389, 101 S. Ct. 677 (the purpose of the attorney-client privilege is 'to encourage full and frank communication between attorneys and their clients'). . . . We decline to expand the privilege to communications outside the employer-employee relationship because former employees categorically differ from current employees with respect to the concerns identified in *Upjohn*[.]" *Newman,* 186 Wn.2d at 780-81 (citations omitted).

definition of "client representative" would lead to attorneys not being able to confer confidentially with non-employees. *Newman* expressly rejects this reasoning by declining to extend the attorney-client privilege to non-employees. Plaintiffs' summary of *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 720, 354 P.3d 249 (2015), is misstated. *See* Petition at 14 n. 12. *Cedar Grove* did not hold that an independent contractor was the functional equivalent of a city employee for privilege purposes; rather, *Cedar Grove* found that documents in possession by a contractor were subject to Washington's Public Records Act.[7]

While Appellants argue communications with Mr. Vasquez and Mr. Bullard are subject to the attorney-client privilege because counsel was required to communicate with them in order to advise the companies, this too is contrary to Washington law. *Newman* considered and rejected that same argument, making clear that the privilege does not automatically extend to anyone with whom the company's attorneys must speak in order to advise the company. 186 Wn.2d at 782-83.

[7] The court reasoned that the city "cite[d] no authority to support its assertion that a government may claim that a contractor is the functional equivalent of an employee in order to assert attorney-client privilege, while simultaneously claiming that documents generated by these de facto employees in the scope of their de facto public employment are not public records for purposes of the PRA." *Id.* at 719. Moreover, it is undisputed that GFP—not SAFE or Lucidy—hired and paid Mr. Bullard and Mr. Vasquez as independent contractors.

Moreover, the record does not support an agency relationship between Appellants and either Mr. Bullard or Mr. Vasquez, and even if it did, such a relationship would not automatically give rise to an attorney-client relationship. Appellants incorrectly assert that *Newman* contemplates some situations in which the privilege would extend to former employees based on an agency theory. To the contrary, *Newman* recognized that the agency relationship generally terminates when the employer-employee relationship ends, the former employee loses the ability to bind the corporation, and no longer owes duties of loyalty, obedience, and confidentiality. *Id.* at 780. Mere involvement with a corporate entity, without an ability to legally bind the company, is insufficient. Nor can a corporation claim privilege as to an individual with no speaking authority to bind the corporation in an evidentiary sense. *Wright ex rel. Wright v. Group Health Hosp.*, 103 Wn.2d 192, 200, 691 P.2d 564 (1984). Neither Mr. Vasquez nor Mr. Bullard could bind SAFE or Lucidy, or otherwise act on their behalf given that they never served as owners, employees, or independent contractors. In fact, Mr. Vasquez expressly testified that he had no authority to bind the company.

"Refusing to extend the corporate attorney-client privilege articulated in *Upjohn* beyond the employer-employee relationship

preserves a predicable legal framework" and the Court of Appeals decision should not be disturbed. *Newman*, 186 Wn.2d at 782.

C. The Court of Appeals correctly declined to categorically declare an amorphous body of unknown communications as work product.

The Court of Appeals correctly applied the law when it determined that it could not make a categorical determination as to whether communications were protected by the work product doctrine when it lacked information about those communications in the record.[8]

The burden was on Appellants to "describe the nature of the documents, communications, or tangible things not produced or disclosed" to enable other parties and the court to assess the work product claim. *Gerber v. Down E. Cmty. Hosp.*, 266 F.R.D. 29, 32 (D. Me. 2010) (quoting Fed. R. Civ. P. 26(b)(5)(A)).[9] The record includes a single conclusory statement in the declaration of attorney Daniel Johnson that states "[a]ll of my communications with Mike Vasquez or Brock Bullard relating to the subject matter of this case have been for or the purpose of

[8] GFP contends that the Court of Appeals should have affirmed the trial court's determination that the communications were not protected by the work product doctrine; however, GFP is not seeking review of this issue. Should this Court take review, GFP reserves its rights to argue that the Court should affirm the trial court's determination on the work product issue as well.

[9] While Appellants argue GFP failed to establish substantial need, *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998), acknowledges that it is only once materials are determined to be covered by the work product doctrine that the party seeking disclosure must establish a substantial need. There was no requirement for GFP to establish substantial need because Appellants failed to meet their initial burden.

advising and representing Plaintiffs Scott Fontaine, SAFE LLC, and/or Lucidy LLC." CP at 120. The Court of Appeals correctly determined that it "must have more than mere recitations of the definition of work product or other 'work product terms and catchphrases' when determining whether materials were prepared in anticipation of litigation." No. 77309-7-I *10, 2018 WL 5806609 *4 (citing *Estate of Dempsey ex rel. Smith v. Spokane Wash. Hosp. Co.*, 1 Wn. App. 2d 628, 639, 406 P.3d 1162 (2017)).

Even if supported in the record, the mere fact that counsel e-mailed a third-party in the course of "advising" his client would not automatically shield those communications from disclosure. Appellants rely on *Gerber* for the general principle that e-mail correspondence with potential witnesses is work-product if created for litigation purposes, but fail to acknowledge that *Gerber* analyzed e-mail correspondence used to conduct interviews and obtain witness statements. 266 F.R.D. at 32-33. Likewise, *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007), addressed whether attorney *notes about witness interviews that contained opinions* were protected as work product. Appellants' argument would expand the protection to an attorney's conversations with friendly witnesses.

Appellants had to do more than present conclusory statements that counsels' e-mails were sent in the course of representing their client, and the Court of Appeals correctly relied on Washington precedent that the

usual course is for the party invoking the rule to provide enough information to evaluate the claim. *See, e.g.*, *Kittitas County v. Allphin*, 190 Wn.2d 691, 704, 416 P.3d 1232 (2018) (party invoking rule provided materials for *in camera* review); *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn. App. 2d 613, 622, 418 P.3d 175 (2018) (party raising work product provided redacted materials and privilege log); *Dempsey*, 1 Wn. App. 2d at 639 (party invoking rule provided examples of information sought). Appellants fail to distinguish the cases the Court of Appeals relied on for this premise. Absent any information about the contents of the communications at issue, Appellants were not entitled to a blanket presumption that the communications should be shielded from disclosure.

D. Request for fees.

GFP requests that its fees be awarded in responding to this Petition under CR 37(b) and the fee provision in the contracts at issue. GFP expressly requests, pursuant to CR 37(b), that both Appellants and its counsel be held joint and severally liable.

V. CONCLUSION

Appellants cannot establish that the Court of Appeals decision conflicts with a decision of this Court. The Court should deny Appellants' Petition for Review.

DATED this 4th day of February, 2019.

By: */s/ Krista L. Nelson*

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 4th day of February, 2019, I caused a true and correct copy of the foregoing document, "Answer to Petition for Review" to be e-mailed to the following counsel of record:

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