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 – Appellants,

v.

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

Defendant – Respondent

PETITION FOR REVIEW

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I. INTRODUCTION

The petitioners are Plaintiffs Scott Fontaine and his two companies, SAFE Acquisition, LLC, and Lucidy, LLC. They sued respondent, Defendant GF Protection, Inc. (GFP), for breach of two license agreements by failing to market Plaintiffs' patented safety products. The trial court granted GFP's motion to compel Plaintiffs to divulge their counsel's email communications with Mr. Fontaine's partners in SAFE and Lucidy, Brock Bullard and Mike Vasquez. On November 5, 2018, the Court of Appeals affirmed in part.

Plaintiffs ask this Court to take review under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with decisions of this court. It applied the wrong standard of review and presumed factual findings against the Plaintiffs that the trial court never made, depriving the Plaintiffs of any meaningful review.

Under the proper standards, the trial court's order should be reversed. First, the Court should clarify its decision in *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2015), which affirmed Washington's embrace of the "functional approach" to corporate attorney-client privilege founded on *Upjohn, Co. v. United States*, 449 U.S. 383 (1981), but held that the privilege generally did not apply to former employees. The Court should take review in this case to

confirm that counsel communications with "constituents and agents" of a corporation (whether employees or not) are privileged if made in the course of counsel's representation of the corporation. Second, because Bullard and Vasquez had financial interests in the Plaintiff companies, their communications with counsel should be privileged. And third, even if they were only witnesses, counsel's communications with them during the litigation about the litigation categorically qualify as work product.

II. ISSUES PRESENTED FOR REVIEW

1. What is the proper standard of review on the application of attorney-client privilege and the work product doctrine where there was no hearing and the court made no findings of fact?

2. When a trial court fails to make findings of fact in such a decision, should the appellate courts assume facts against the party seeking protection?

3. When a person with a financial interest in the corporate client speaks to its counsel about matters in litigation, are those communications privileged?

4. Under the "functional analysis" of corporate attorney-client privilege, are counsel's communications with individuals who are agents of the corporate client protected, whether they are paid employees or not?

5. Do email communications that litigation counsel has with witnesses about the matters in litigation categorically qualify as "documents prepared in anticipation of litigation" under CR 26(b)(4)?

III. STATEMENT OF THE CASE

Scott Fontaine is a carpenter who has invented several construction products, including a unique safety anchor for roofers called the

HitchClip. CP 2. In about 2009, he enlisted a friend who was a roofer, Mike Vasquez, to help him promote the HitchClip. CP 53. In 2013, Fontaine founded SAFE in order to license the HitchClip and other products to GFP, then the third largest distributor of safety equipment in the world.[1] He granted GFP the exclusive license to manufacture, market, and sell his products, in exchange for royalties. CP 4.

At that point, Vasquez "worked full time on behalf of SAFE as our Sales Manager." CP 208. Mr. Vasquez participated in management decisions, and "was our lead on everything that had to do with sales efforts." CP 208-09. Fontaine and Vasquez helped GFP promote the HitchClip, and in late 2013, GFP contracted with Vasquez to train and assist its sales team to promote the HitchClip. *See* CP 7, 372.

In 2014, another friend of Fontaine's, Brock Bullard, began working with him, serving as engineer and General Manager. CP 55, 209. Mr. Bullard is trained as an engineer, and did all of Plaintiffs' shop drawings and acted as liaison to GFP regarding manufacturing. CP 56, 209. When, after a year of slow sales, SAFE and GFP discussed amending the license agreements to let SAFE sell HitchClips directly, "Brock was the main person responsible for negotiations with [GFP] over [the]

[1] Six of the products relate to the HitchClip and five others relate to a pump-staging system he invented to allow workers to "stage" their equipment on scaffolding. CP 1. The latter were patented and licensed to GFP by Fontaine's other company, Lucidy. CP 2.

amendment." CP 209; *see also* CP 180-81 (privilege log showing Bullard's communications with Plaintiffs' counsel D. Ellenhorn about amendments). Mr. Bullard spoke on behalf of SAFE; Mr. Fontaine "was often not even directly involved with these negotiations." CP 209.

In 2014, GFP's owner asked Fontaine who were the "stockholders" of his companies, and Fontaine identified Bullard and Vasquez. CP 58. GFP relied heavily on both Bullard and Vasquez throughout the first 18 months of the parties' relationship, often communicating directly to one of them, not Fontaine, about critical issues. *See, e.g.*, CP 184-85 (negotiations over contract amendments with Bullard). GFP's owner referred to Bullard and Vasquez as Fontaine's "partners," and GFP's President considered Fontaine, Bullard, and Vasquez to be "the SAFE management team." CP 60, 62.

During this period, Fontaine was not able to pay Vasquez or Bullard for their work on behalf of SAFE, but promised them—verbally at first—that they would have a stake in his companies. CP 136-37. Mr. Bullard soon began to press Fontaine for specifics, and on July 21, 2014, he signed two letters confirming that each of them have 10% ownership in his companies. CP 209-10, 136-37, 152, 154; *see also* CP 124, 127.

By 2015, the relationship between SAFE and GFP was failing. GFP was not marketing or selling 11 of the 12 products it licensed from

Plaintiffs at all, and sales of the HitchClip were dismal. *See* CP 6-10. Plaintiffs attempted to terminate or modify the contracts but GFP refused. *See* CP 9-10. Plaintiffs filed this lawsuit in June 2016. CP 34.

Because of Bullard's and Vasquez's involvement, Plaintiffs' lawyers had to communicate with them in order to get information necessary to advise and represent the companies. *See e.g.* CP 180-81 (Bullard emails with attorney David Ellenhorn about amending license agreements). Once litigation commenced, Plaintiffs' litigation counsel communicated frequently with Bullard and Vasquez in order to advise and represent Plaintiffs. CP 120, 215. As Mr. Fontaine explained (CP 210):

> Because of Brock's and Mike's extensive involvement in operating and representing SAFE and Lucidy, when I have retained lawyers for SAFE and Lucidy, I have needed them to rely on Brock and Mike from time to time for information about what SAFE and Lucidy did and to advise Brock and Mike from time to time on what SAFE and Lucidy should do.

In discovery, the parties agreed that no privileged documents created on or after April 10, 2015 would have to be logged because that is the date Plaintiffs' counsel first threatened litigation. CP 46. In August 2016, GFP requested production of all "communications" between Plaintiffs and either Vasquez or Bullard regarding any of the products Plaintiffs licensed to GFP, including communications about this lawsuit. CP 18. Plaintiffs produced thousands of documents collected directly from

the personal computers of Bullard and Vasquez, including all communications, except with Plaintiffs' counsel. CP 18, 95-96.[2]

The dispute here began almost a year later, after Mr. Vasquez's deposition, about two months before the scheduled trial. Mr. Vasquez testified that he did not believe he had any ownership stake in Fontaine's companies because he had not yet received any money from them. CP 131. He recalled signing a document about future ownership, but did not think he had a current interest in Fontaine's companies. CP 133.[3]

Despite Fontaine's testimony to the contrary and its understanding that Bullard and Vasquez were Fontaine's partners, GFP moved to compel Plaintiffs' counsel's communications with them. CP 17. The trial court granted the motion in an order containing no factual findings, stating only that Plaintiffs had failed to prove the two were "speaking agents" or "within the zone of privilege." CP 107-08.

Plaintiffs moved for reconsideration, pointing out that "speaking agent" and "zone of privilege" were inappropriate tests for attorney-client privilege, and that the court had not considered Plaintiffs' work product

[2] This objection was not controversial; the parties had always understood Bullard and Vasquez were Fontaine's partners. When GFP listed possible witnesses, it listed Bullard and Vasquez, "c/o Breskin Johnson & Townsend," and it noted their depositions through notices to counsel, rather than subpoenas. *See* CP 64.

[3] This testimony surprised even defense counsel. *See* CP 131 ("Q: But you're an owner right? A: "I don't know if I would go that far as to say I'm an owner." Q: "Why do you say that?" A "Why do you say I'm an owner?" Q: "You're not?").

objection. CP 111. The court denied reconsideration with no analysis, and ordered all of the communications produced. CP 186.

The Court of Appeals affirmed in part. It held that the trial court's failure to make any factual findings regarding Bullard's and Vasquez's relationships with the Plaintiff companies should be construed against the Plaintiffs, that only abuse of discretion review applied, and that the trial court did not abuse its discretion with respect to privilege. Slip Op. at 6-8. It also held that the record was insufficient to determine whether counsel's communications with Bullard and Vasquez about the litigation qualified as work product, and remanded for further consideration. *Id.* at 9-12.

IV. ARGUMENT

A. The Court of Appeals Applied the Wrong Standards of Review.

The Court of Appeals committed three errors with respect to the standard of review. First, it erroneously reviewed the trial court's decision for "abuse of discretion" rather than de novo. Second, it held that when a trial court fails to make a finding of fact, the fact is found against the party with the burden of proof. *Id.* at 3, 6-8. Both of these errors are contrary to decisions of this Court. Additionally, even under an abuse of discretion standard, because the trial court misapplied the law, its order should have been reversed.

1. The standard of review is de novo.

This Court has held many times in disputes over the application of attorney-client privilege and the work product doctrine that where a trial court's order is based solely on a paper record, appellate review is de novo. *See Morgan v. City of Fed. Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009) (quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998)); *In re Firestorm*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996).[4]

The Court of Appeals attempted to distinguish these cases, saying de novo review applies "only where there is undisputed evidence or the material evidence is all contained in the documents in the record." Slip Op. at 7 & n. 19. Yet, none of the cases say this, and there is no logical reason for this distinction.[5] The standard of appellate review cannot depend on whether the evidence is "disputed" or "complete." *Id.* at 7-8. De novo review is appropriate on a purely paper record because the trial

[4] *See also United States v. Graf*, 610 F.3d 1148, 1157 (9th Cir. 2010) ("A district court's conclusion regarding whether statements are protected by an individual attorney-client privilege is a mixed question of law and fact which this court reviews **independently and without deference to the district court**. We also review de novo the district court's rulings on the scope of the attorney-client privilege. The district court's factual findings are reviewed for clear error." (emphasis added, internal quotations and citations omitted)); *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997) (same).

Even with respect to factual findings, deference is only possible when the trial court actually makes factual findings. Otherwise, "the appellate court [can] not exercise any degree of deference to a trial court's finding, as no such finding even exist[s]." *Bryant v. Joseph Tree*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992).

[5] In *Firestorm*, this Court expressly noted that the only evidence before it was in the form of affidavits, which were presumably disputed. 129 Wn.2d at 134.

court is in no better position than the appellate court to evaluate the evidence. *Limstrom,* 136 Wn.2d at 612.

2. When the trial court holds no hearing and makes no factual findings, the appellate court makes its own findings or remands for more evidence.

The Court of Appeals not only applied the wrong standard, it presumed factual findings to support the trial court's decision where none existed. Op. at p. 6-7. It did this based on a supposed "general rule" that the "absence of a finding of fact on an issue is 'presumptively a negative finding against the person with the burden of proof.'" Slip Op. at 6 (quoting *Morgan v. Briney*, 200 Wn. App. 380, 390-91, 403 P.3d 86 (2017); *Taplett v. Khela*, 60 Wn. App. 751, 759, 807 P.2d 885 (1991)).

Yet, this is not, in fact, a "general rule," but rather a "common law rule [that] must be selectively applied." *Douglas NW v. Bill O'Brien & Sons Constr.*, 64 Wn. App. 661, 682, 828 P. 2d 565 (1992). And it has only been applied where the trial court entered findings of fact and conclusions of law after a bench trial. *See Morgan,* 200 Wn. App. at 386; *Douglas NW*, 64 Wn. App. at 673; *Taplett*, 60 Wn. App. at 753-54; *see also Smith v. King,* 106 Wn.2d 443, 451, 722 P.2d 796 (1986). In that context, the trial court has heard evidence, assessed credibility, and entered factual findings, so the absence of a specific finding may be "unintentional" and the intended finding relatively easy to surmise. *See*

Slip Op. at 7 (citing *Douglas NW*, 64 Wn. App. at 682).[6] That is completely different than the situation here, where the trial court decided a matter by motion, without any hearing, and made no findings in support of its decision despite a clear factual dispute.

In this context, when an appellate court reviews a decision for which there are no factual findings, it has two options. It may "independently review the same evidence and make the required findings." *Firestorm*, 129 Wn.2d at 135; *Bryant*, 119 Wn.2d at 222. Alternatively, if the record is inadequate, it may remand the case so that additional evidence can be adduced. *Limstrom*, 136 Wn.2d at 612. Here, the Court of Appeals did neither. Slip Op. at 8.

The attorney-client privilege plays a critical role in our justice system; so critical that if counsel for one party improperly obtains privileged materials belonging to the other party, counsel may be subject to the "drastic remedy of disqualification." *In re Firestorm*, 129 Wn.2d at 140.[7] Yet here, the courts below have ordered one party to divulge such materials to the other, without even truly assessing the claim of privilege,

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[6] The Court of Appeals misunderstood *Douglas NW*; the court in that case said that a finding against the party with the burden of proof could be made when there was a lack of any evidence presented, not when the evidence was disputed.

[7] *See also Lowy v. PeaceHealth*, 174 Wash. 2d 769, 785, 280 P.3d 1078 (2012) ("communication in these relationships is so important that the law is willing to sacrifice its pursuit for the truth, the whole truth, and nothing but the truth")

factually or legally. This Court should take review, announce the correct standard of review and applicable law, and either determine the facts and decide the matter or remand for additional fact-finding.

3. The trial court abused its discretion by misapplying the law.

Even if the trial court's ruling in this case was entitled to some form of deference, it is axiomatic that a misapplication of the law is an abuse of discretion. *Dix v. ICT Grp., Inc.*, 160 Wash. 2d 826, 833, 161 P.3d 1016 (2007). The trial court's only rationale in ordering the documents produced were that Plaintiffs had not shown that Bullard and Vasquez "are speaking agents or within the zone of privilege." CP 107-08. The law is clear that the attorney-client privilege applies to more than "speaking agents" and there is no such thing as a "zone of privilege."[8] Thus, the only legal conclusions the trial court explicitly made in support of its ruling are wrong.

B. This Court Should Take Review to Clarify the Scope of Corporate Attorney-Client Privilege After *Newman*.

This case presents two issues of law regarding attorney-client

[8] This Court defined the term "speaking agent" in *Wright v. Group Health*, 103 Wn.2d 192, 200-01, 691 P.2d 564 (1984), which did not involve privileged communications; the Court held that only "speaking agents" are parties whom the company can prohibit from talking to opposing counsel *ex parte*. *Id.* at 195, 197, 201. And there has been no "zone of privilege" test since *Upjohn* rejected the "control group test" and instead adopted a functional approach that extends the privilege beyond managers to anyone with whom the company's attorneys must speak to in order to advise and represent the company. *Upjohn*, 449 U.S. at 395, 397.

privilege the Court should clarify. ***First***, while there may be a factual dispute about when Bullard and Vasquez had or would have an ownership stake in the Plaintiff companies, under a functional analysis, it should not matter. ***Second***, while this Court has embraced *Upjohn*'s functional analysis of privilege in the corporate context, GFP argues that this Court significantly narrowed that analysis in *Newman*. Neither of the lower courts addressed this, and this Court should clarify that anyone who acted as an agent for the corporate client with respect to the matters in litigation—whether they were paid or not and whether they were technically employees or not—may communicate confidentially with the corporation's attorneys about the matters in litigation.

1. Individuals with a financial interest in the corporate client should be able to communicate confidentially with its attorneys about the corporation's legal disputes.

The only factual dispute between the parties was whether Bullard and Vasquez were minority owners of the Plaintiff companies. Neither court below resolved this question. CP 107-08, 186-88; Slip Op. at 4-5, 7. GFP contends the letters Mr. Fontaine wrote to Bullard and Vasquez were mere "letters of intent" that created only "potential future interests." Respondent's Brief (RB) at 9, 15-16.

While Plaintiffs dispute this, and contend the evidence is clear that Mr. Fontaine granted ownership interests in his companies to Bullard and

Vasquez, neither the courts nor GFP has stated whether or why this distinction matters. Defendant never argued, and no court has found, that a person holding a "promissory note," or "letter of intent," or "future interest" in a company is not covered by the attorney-client privilege as much as one who holds a "present" or more formally-documented interest.[9] It would place form over substance to make such a distinction, which is contrary to the flexible, functional approach embraced in the context of attorney-client privilege. *See Upjohn*, discussed in detail *infra*.[10]

Whether Bullard and Vasquez had ownership shares in the Plaintiff companies or a promise of such shares when profitable, their communications with the companies' counsel about the companies' litigation should be covered by the privilege.

2. Under *Newman* and *Upjohn*, Bullard and Vasquez are constituents and agents of SAFE and covered by the attorney-client privilege.

Even if Bullard's and Vasquez's ownership interests in the

[9] There is no language suggesting that the agreements are merely "agreements to agree." *Compare to Keystone v. Xerox*, 152 Wn.2d 171, 179, 94 P.3d 945 (2004) (finding that agreements were merely non-binding "agreements to agree" because they contained clear language expressing an intent "not to be bound").

[10] This would seem especially so where Fontaine, the party to be bound by any promise of ownership in his companies, unequivocally confirmed that Bullard and Vasquez are 10 percent owners. CP 124, 127, 209. When a principal "exhibits conduct demonstrating an adoption and recognition of the contract as binding," that conduct "ratifies" the terms and makes them binding. *Smith v. Hansen, Hansen & Johnson*, 63 Wn. App. 355, 369, 818 P.2d 1127 (1991).

Plaintiff companies were not sufficient to protect their communications with the companies' counsel, their undisputed roles in the work of the companies places those communications within the attorney-client privilege because, as a functional matter, they were "constituents and agents" of the Plaintiff companies, *Newman*, 186 Wn.2d at 780, and the companies' lawyers had to communicate with them "to enable [them] to give sound and informed advice." *Upjohn*, 449 U.S. at 390; CP 120, 210.

There is no dispute about these facts, i.e., that Bullard and Vasquez acted as constituents and agents of SAFE. *See* CP 53, 55-56, 58, 62, 88, 180-81, 184, 208-09. It should not matter that they were not formally employed or paid by the Plaintiff companies.[11] There is a well-established body of law following the Supreme Court's decision in *Upjohn* applying a corporate attorney-client privilege not only to its employees but also to others who are the "functional equivalent of employees."[12] Vasquez and

[11] *See DE Techs., Inc. v. Dell*, 2006 U.S. Dist. LEXIS 62580, at *6-7 (W.D. Va. Sep. 1, 2006) (looking "beyond the existence of a formal employment relationship in those cases involving a small, fledgling company which is compelled by circumstance to rely on compensation in kind, or even prior friendships with consulting specialists, in obtaining information required by the company's attorney in order to provide legal services").

[12] *See United States v. Graf*, 610 F.3d 1148, 1158-59 (9th Cir. 2010) (adopting *In re Bieter*, 16 F.3d 929 (8th Cir. 1994), for the proposition that "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely."); *Cedar Grove Composting v. City of Marysville*, 188 Wn.2d 695, 719, 354 P.3d 249 (2015) (accepting trial court's finding that an independent contractor was the functional equivalent of a city employee for privilege purposes).

Bullard are the functional equivalent of employees.

GFP does not dispute this, but claims this Court in *Newman* adopted a "narrow approach" to the attorney-client privilege, rejecting the post-*Upjohn* cases regarding "functional" application. RB at 18, 20. In fact, *Newman* held that the attorney-client privilege does not "generally" extend to communications between corporate counsel and former, non-managerial employees. 186 Wn.2d at 780. It "embraced *Upjohn*'s flexible approach" and ruled only on the issue before it. *Id.* at 779.

Newman involved former "nonmanagerial" employees, while Bullard and Vasquez had managerial roles in SAFE. CP 58, 62, 184.[13] And as *Newman* explained, the reason it ruled as it did regarding former nonmanagerial employees was because they "categorically differ from current employees with respect to the concerns identified in *Upjohn* and *Youngs* [*v. PeaceHealth*, 179 Wn.2d 645, 664, 316 P.3d 1035 (2014)]." *Newman*, 186 Wn.2d at 780. Bullard and Vasquez do not differ from current employees with respect to those concerns.

Newman explained that companies and other organizations can only act through their "constituents and agents," and the reason for *Upjohn*'s functional approach is that even low-level employees may

[13] Further, there was no suggestion in *Newman* that corporate counsel interviewed the former employees there in order to advise the companies, as opposed to simply preparing them to testify at their depositions. *Newman*, 186 Wn.2d at 774-75.

possess facts and information needed by counsel to properly advise and represent the organization. *Id.* The Court noted that when employment ends, "this *generally* terminates the agency relationship" and thus the need for counsel to consult with the employees to advise the client. *Id.* (emphasis added). The Court even acknowledged that termination of employment may not *always* end the agency relationship. *Id.* at 780 n. 2 (acknowledging "that the attorney-client privilege could extend to former employees in those situations where a continuing agency duty exists.").[14]

Bullard and Vasquez are not at all like the typical, nonmanagerial former employee in this respect. They are ongoing "constituents and agents" of the Plaintiff companies and they have "direct knowledge of the event or events triggering the litigation," which Mr. Fontaine directed them to share with counsel. *Id.* at 780; *Youngs*, 179 Wn.2d at 664. CP 120, 210. This is precisely the kind of communication that is covered by the attorney-client privilege under the "functional" test set forth in *Upjohn* and embraced by this Court. This Court should take review and reverse.

C. The Court Should Confirm the Work Product Doctrine Applies to Communications Between Counsel and Witnesses.

The Court of Appeals declined to decide whether Plaintiffs'

[14] *See* Restatement (Third) of Agency § 101 (2006) (agency "arises when one person (a 'principal') manifests assent to another person (an 'agent') the agent shall act on the principal's behalf and subject to the principal's control.").

counsel's email communications with Bullard and Vasquez about the subjects of this litigation constitute work product. Slip Op. at 11-12. It concluded there was insufficient evidence about the contents of the documents, and remanded for further consideration. *Id.* at 9-12. Its conclusions were based on a fundamental misunderstanding of the law.

The work product privilege broadly applies to any materials "prepared in anticipation of litigation," CR 26(b)(4).

> An attorney's gathering of factual items and documents is protected from disclosure, under the work product rule set forth in CR 26(b)(4), unless the person requesting disclosure demonstrates substantial need and an inability, without undue hardship, to obtain the documents or items from another source.

Limstrom, 136 Wn.2d at 611-12.[15] GFP never claimed substantial need, so the only question is whether the emails were prepared in anticipation of litigation. And this has never been in doubt; they qualify as such by definition.

To recap: GFP requested production of all "communications" with Bullard and Vasquez regarding the subjects at issue in this lawsuit. *See* CP

[15] It is well established that work product protection applies to information an attorney gathers *from witnesses*. *See Gerber v. Down East Cmty. Hosp.*, 266 F.R.D. 29, 31 (D. Me. 2010) ("Protection of witness interviews has been one of the focuses of the attorney work-product privilege since its inception in American law.") (citing *Hickman v. Taylor*, 329 U.S. 495, 497, 510-11, 67 S.Ct. 385 (1947)). Under the seminal *Hickman* case, "a statement a lawyer or an investigator takes from a witness is *classic work product.*" *In re Convergent Technologies Second Half 1984 Sec. Litig.*, 122 F.R.D. 555, 559 (N.D. Cal. 1988) (emphasis added); *Cf. Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 736-37, 174 P.3d 60 (2007) (attorney notes regarding witness interviews are "highly protected opinion work product.").

18, 156. Plaintiffs produced all such communications except communications with their attorneys. *See id.,* CP 97, CP 374. With the exception of Bullard's emails with Mr. Ellenhorn, all of the documents withheld are email communications between litigation counsel and Bullard and/or Vasquez about the litigation, after litigation was contemplated.[16]

Such documents were self-evidently made "in anticipation of litigation," because, by definition, they were communications with litigation counsel, during the litigation, about the subjects at issue in the litigation. That meets Plaintiffs' burden, and protects the documents from disclosure unless GFP can show a "substantial need" for them, which it has nev even tried to do. *See Limstrom*, 136 Wn.2d at 611.

The Court of Appeals was under the mistaken belief that something else needed to be known about the emails at issue. It pointed to a number of cases in which the documents claimed to be work product were in the record or their contents were in evidence in some other way. Opp. at pp. 9-11. These cases do not hold that the contents of documents claimed to be work product must always be logged or disclosed. And none of them involved written communications with litigation counsel about the

[16] Per GFP's request, Plaintiffs logged all such communications that occurred before April 10, 2015, including communications between Bullard and Ellenhorn. *See* CP 16-17, 180-82, 291. There were no communications between any of Plaintiffs' lawyers and Mike Vasquez prior to April 10, 2015. CP 120.

litigation after the prospect of litigation arose.

Most of the cases involve some dispute about the timing of the communications, and whether litigation was truly "anticipated" at that time. *See Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1983); *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 22 (N.D. Cal. 1985); *see also Kittitas County v. Allphin*, 190 Wn.2d 691, 697, 701, 416 P.3d 1232 (2018) (emails between county and state employees prior to litigation found to be work product). Others involved documents created by non-attorneys, *In re Detention of West*, 171 Wn.2d 383, 256 P.3d 302 (2011) (sexually violent predator reports by testifying expert), or entire files containing a variety of types of documents from various sources. *Limstrom*, 136 Wn.2d at 614 (prosecutor's files containing police reports, sobriety test reports, alcohol and drug test reports, offer sheets, court documents, citations, etc.); *Leahy v. State Farm Mutual Auto Ins. Co.*, 3 Wn. App. 613, 622, 418 P.3d 175 (2018) (insurance claim file containing correspondence, evidence collected, notes, worksheets, etc.). None of these cases involved a single type of document that was self-evidently prepared in anticipation of litigation.[17]

As this Court has repeatedly observed, the work product rule

[17] *In re Detention of West* appears to be an exception, where the court held that SVP evaluations categorically qualify as work product. 171 Wn.2d at 406.

protects all types of documents created by or for a party in anticipation of litigation, and only one type—factual statements—may be ordered disclosed, and only on a showing of substantial need. *Kittitas County*, 190 Wn.2d at 704 (quoting *Limstrom*, 136 Wn.2d at 611-12). The Court of Appeals' opinion suggests that only emails that "might reveal litigation strategy" would qualify, and that a "privilege log" or an in camera review of counsel's emails with Bullard and Vasquez is necessary to assess that. Slip. Op. at 2. But that misconstrues the inquiry, because all of the emails between litigation counsel and Bullard and Vasquez during the litigation about the subjects of the litigation are by definition "documents prepared in anticipation of litigation," and GFP has never claimed a substantial need.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court accept review.

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DATED: December 5, 2018

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that this date I electronically filed the attached document with the Clerk of the Court and caused service of the on the following:

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

SAFE ACQUISITION, LLC, a Washington corporation, LUCIDY, LLC, a Washington corporation, and SCOTT FONTAINE, an individual, Appellant, v. GF PROTECTION INC., d/b/a Guardian Fall Protection, a Washington corporation, Respondent.	No. 77309-7-I UNPUBLISHED OPINION FILED: November 5, 2018

VERELLEN, J. — A party asserting an attorney-client privilege bears the burden of proving the existence of an attorney-client relationship. The absence of findings of fact that an attorney-client relationship existed is deemed an adverse finding to the party asserting the privilege. Here, the trial court concluded that appellant SAFE Acquisition, LLC did not meet its burden of establishing the attorney-client privilege applied to e-mails between its litigation counsel and the two individuals who acted on behalf of both SAFE and respondent GF Protection Inc. (GFP). In the absence of any findings that an attorney-client relationship existed between the litigation counsel for SAFE and two individuals, there is no reversible error.

A party asserting the work product rule bears the burden of establishing the documents or items in question were prepared in anticipation of litigation. SAFE failed to offer anything more than the conclusory statement that all communications between litigation counsel and the two individuals were "for the purpose of advising and representing" SAFE.[1] But the substance of the disputed e-mails is unknown. And it is conceivable that some portion of the e-mails might reveal litigation strategy or other information that constitutes an attorney's work product. Accordingly, we remand to the trial court to conduct in camera review or otherwise resolve whether any or all of the disputed e-mails are protected work product.

FACTS

Scott Fontaine founded SAFE to develop and market his patented safety inventions, including a safety device for roofers called the HitchClip. Starting in 2009, Fontaine asked his friend Mike Vasquez for help promoting the HitchClip. In August 2013, SAFE contracted with GFP to manufacture, sell, and distribute its patented inventions in exchange for a share of the proceeds. In March or April of 2014, Brock Bullard, another friend of Fontaine's, began working with SAFE. The venture between SAFE and GFP did not go well, however, and by April 10, 2015, SAFE's then-counsel threatened to sue GFP. Soon after, SAFE retained its present counsel and filed suit against GFP for breach of contract, misappropriation of trade secrets, and conversion.

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[1] Clerk's Papers (CP) at 120.

On August 23, 2016, GFP served SAFE with requests for production of all communications with Mike Vasquez and Brock Bullard "from December 2011 to present . . . including but not limited to, COMMUNICATIONS regarding the present lawsuit."[2] SAFE refused the requests as to communications with litigation counsel because they "ask[ed] for attorney-client communications and/or work product."[3]

Almost one year later, GFP filed a motion to compel. The court granted the motion and denied SAFE's motion for reconsideration. On September 15, 2017, the court granted GFP's motion for monetary sanctions after SAFE continued to resist production of the disputed materials.

On September 19, 2017, a commissioner of this court granted a temporary stay of the trial court's order levying sanctions pending a ruling on SAFE's motion for discretionary review. On October 25, 2017, the commissioner denied review and lifted the stay. A panel of this court granted SAFE's motion to modify the commissioner's ruling denying interlocutory appeal and ordered the temporary stay on sanctions continue pending appeal.

ANALYSIS

We review discovery orders for an abuse of discretion.[4]

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[2] CP at 18.

[3] Id.

[4] Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 694, 295 P.3d 239 (2013); see Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 355, 858 P.2d 1054 (1993) (holding that courts are "given wide latitude" in managing sanctions for discovery violations).

Civil Rule (CR) 26 governs discovery. The scope of discovery is broad.[5] But privileged matters are generally not subject to discovery.[6]

Attorney-Client Privilege

Attorney-client privilege is "'narrow'" and "'protects only communications and advice between attorney and client.'"[7] When a corporation or limited liability company is a client, the general rule is that the privilege may extend beyond the "control group" of upper management to include some non-managerial employees and other agents.[8]

Whether an attorney-client relationship exists is a question of fact.[9] The party invoking the privilege bears the burden of establishing an entitlement to it.[10]

Here, the court considered both parties' detailed arguments regarding attorney-client privilege and concluded that SAFE failed to carry its burden in invoking the privilege. The court did not enter any findings of fact resolving the conflicting facts regarding Bullard and Vasquez's relationships with SAFE and GFP.

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[5] Cedell, 176 Wn.2d at 695; see CR 26(b)(1) ("Parties may obtain discovery regarding any matter.").

[6] CR 26(b)(1).

[7] Newman v. Highland Sch. Dist. No. 203, 186 Wn.2d 769, 777, 381 P.3d 1188 (2016) (quoting Hangartner v. City of Seattle, 151 Wn.2d 439, 452, 90 P.3d 26 (2004)) (internal quotation marks omitted).

[8] Id. at 781 n.3 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. e); Youngs v. PeaceHealth, 179 Wn.2d 645, 650-51, 316 P.3d 1035 (2014).

[9] Dietz v. Doe, 131 Wn.2d 835, 844, 935 P.2d 611 (1997).

[10] Newman, 186 Wn.2d at 777; Dietz, 131 Wn.2d at 844.

SAFE relies on Fontaine's two identical "letters of intent"[11] to Bullard and Vasquez from July 21, 2014, to argue that Fontaine's friends are co-owners of SAFE. The 2014 letters vaguely discuss an ownership percentage in Fontaine's various companies:

> Thank you for the investment of your time this year with SAFE Acquisition, LLC. This letter will confirm the verbal agreement you and I made in early June. That agreement was in regards to ownership percentage.
>
> In order to address the ownership percentage amount we agreed upon was 10 [percent] of SAFE Acquisitions LLC, 10 [percent] of Lucidy LLC, 10 [percent] of Roofing Technologies LLC, and both patents associated with [the] LLC's.[12]

Neither letter states when either friend took, or will take, his 10 percent stake in Fontaine's companies.[13]

Deposition testimony from Fontaine, Bullard, and Vasquez confuses rather than clarifies. Vasquez testified he never was an owner, employee, or independent contractor for SAFE. But he understood his ownership interest in SAFE to be a future interest contingent on the company becoming profitable. Similarly, Bullard testified his agreement with SAFE involved "what ownership I *would* have in SAFE."[14] Fontaine testified that Lucidy, LLC, has no owners or investors other than himself.

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[11] CP at 316.

[12] CP at 152.

[13] In addition, SAFE does not contend, and nothing in the record reflects, that SAFE satisfied the statutory requirements in RCW 25.15.116(2) for admitting new members to a limited liability corporation.

[14] CP at 367 (emphasis added).

SAFE offers alternative theories of agency and independent contractor relationships. But it appears Vasquez and Bullard were working as paid consultants or independent contractors for GFP while arguably prospective co-owners, ostensible co-owners, or agents of SAFE. Vasquez testified that GFP paid him $5,000 per month as a product consultant beginning October 1, 2013 to train and support the sales staff. Fontaine, however, described Vasquez's role in SAFE, beginning around July or August of 2013, as a "product consultant and sales rep[resentative]."[15] SAFE never paid royalties or a salary to Vasquez. Bullard received over $1,000 in reimbursements from GFP in December 2014. And despite Fontaine's description of Bullard as SAFE's general manager, SAFE never paid royalties or a salary to Bullard.

The court concluded that SAFE "failed to carry [its] burden in justifying their assertion that documents to which [Bullard and Vasquez] are party may be withheld on a claim of attorney-client privilege."[16] The court did not make any findings about Vasquez or Bullard's legal relationships with SAFE.

The general rule is "absence of a finding of fact on an issue is 'presumptively a negative finding against the person with the burden of proof.'"[17] An exception to the negative finding rule applies where "there is ample

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[15] CP at 93.

[16] CP at 107.

[17] Morgan v. Briney, 200 Wn. App. 380, 390-91, 403 P.3d 86 (2017) (quoting Taplett v. Khela, 60 Wn. App. 751, 759, 807 P.2d 885 (1991)), review denied, 190 Wn.2d 1023 (2018).

evidence to support the missing finding, and the findings entered by the court, viewed as a whole, demonstrate that the absence of the specific finding was not intentional."[18]

In this case, it is appropriate to infer a negative finding against SAFE regarding attorney-client privilege. The record contains conflicting and confused evidence whether Vasquez and Bullard are co-owners, prospective co-owners, or agents of SAFE. In addition, the order's silence does not seem an inadvertent oversight to enter findings in support of an attorney-client relationship because the court expressly concluded that SAFE failed to carry its burden.

SAFE contends that the absence of findings of fact and the presence of documentary evidence means we should engage in de novo review of whether there was an attorney-client relationship. But the cases relied upon by SAFE apply only where there is undisputed evidence or the material evidence is all contained in documents in the record.[19] Because the evidence about Bullard and

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[18] Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc., 64 Wn. App. 661, 682, 828 P.2d 565 (1992).

[19] For example, SAFE relies on In re Firestorm 1991, 129 Wn.2d 130, 135, 916 P.2d 411 (1996), to contend that de novo review is appropriate when the only evidence consists of written documents and the trial court makes no specific factual findings. But in Firestorm and the supporting cases cited by SAFE, appellate de novo review of a fact question depends on the evidence actually being before the reviewing court. Morgan v. City of Federal Way, 166 Wn.2d 747, 755-57, 213 P.3d 596 (2009) (report sought in a Public Records Act request was in the court record with related documents); Firestorm, 129 Wn.2d at 153-54 (contents of witness interview at issue on appeal were known to the court) (Madsen, J. concurring); Bryant v. Joseph Tree, Inc, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) (legally dispositive documents were all in the court record).

Vasquez is disputed, includes deposition testimony, and the e-mails' contents are unknown, de novo review is not warranted or practical.

Because SAFE failed to satisfy its burden of establishing the existence of an attorney-client relationship that extends to Vasquez and Bullard, the trial court did not abuse its discretion.

Work Product

The court also concluded that the work product rule did not prevent discovery of Vasquez and Bullard's communications with SAFE's litigation counsel. Civil Rule 26(b)(4) excludes from discovery materials "prepared in anticipation of litigation or for trial."[20] Strong public policy also favors shielding genuine work product from discovery.[21] In Heidebrink v. Moriwaki, our Supreme Court defined the scope and purpose of the rule, concluding "[it] should provide protection when such protection comports with the underlying rationale of the rule to allow broad discovery, while maintaining certain restraints on bad faith, irrelevant and privileged inquiries in order to ensure just and fair resolutions of disputes."[22]

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[20] Harris v. Drake, 152 Wn.2d 480, 486, 99 P.3d 872 (2004).

[21] Upjohn Co. v. United States, 449 U.S. 383, 398, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981); see Soter v. Cowles Pub. Co., 162 Wn.2d 716, 741, 174 P.3d 60 (2007) ("Only in rare circumstances, for example, when the attorney's mental impressions are directly at issue, can an attorney or legal team member's notes reflecting oral communications be revealed.")

[22] 104 Wn.2d 392, 400, 706 P.2d 212 (1985). Heidebrink refers to CR 26(b)(3) when discussing work product because the rule was renumbered in 1990. Harris, 152 Wn.2d at 486 n.1.

Whether material should be shielded as work product by CR 26(b)(4) is a two-step mixed question of law and fact.[23] First, the court must consider whether the party opposing discovery established that the materials were prepared in anticipation of litigation and qualify as work product.[24] A court must "'examin[e] the specific parties and their expectations'" when determining whether one party prepared materials in anticipation of litigation.[25]

Second, if the party opposing discovery meets its burden of production, then the party seeking discovery bears the burden of persuading the court that it "has substantial need of the materials" and cannot obtain them without "undue hardship."[26]

The instant case presents unusual circumstances because the court had little evidence before it when examining the parties' expectations. Nothing before the court described the general or specific contents of the disputed e-mails or even the number of e-mails at issue. SAFE's only offering was a conclusory declaration from its litigation counsel stating, "All of my communications with [Vasquez and

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[23] Soter v. Cowles Publ'g Co., 131 Wn. App. 882, 891, 130 P.3d 840 (2006), aff'd, 162 Wn.2d 716 (2007); see Harris, 152 Wn.2d at 492 (applying abuse of discretion standard in affirming trial court's exclusion of evidence on the basis of work product protections).

[24] See CR 26(b)(4) (only materials "prepared in anticipation of litigation" are shielded by the rule).

[25] Kittitas County v. Allphin, 190 Wn.2d 691, 704, 416 P.3d 1232 (2018) (quoting Harris, 152 Wn.2d at 487).

[26] CR 26(b)(4).

Bullard] relating to the subject matter of this case have been for the purpose of advising and representing" SAFE.[27]

A court 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.[28] The party invoking the work product rule bears the burden of production and must provide more than a conclusory statement that the materials relate to litigation.[29] As in Kittitas County v. Allphin,[30] Leahy v. State Farm,[31] and In re Detention of West,[32] the usual course

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[27] CP at 120.

[28] Estate of Dempsey ex rel. Smith v. Spokane Wash. Hosp. Co. LLC, 1 Wn. App. 2d 628, 639, 406 P.3d 1162 (2017) ("An attorney's use of attorney work product terms and catchphrases in a letter to a testifying expert does not shield the letter from disclosure."), review denied, 190 Wn.2d 1012 (2018).

[29] See, e.g., Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1118 (7th Cir. 1983) ("It is axiomatic that in order to invoke the protection of the work product privilege, one must show that the materials sought to be protected were prepared 'in anticipation of litigation.'") (quoting Fed. R. Civ. P. 26(b)(3)); United States v. 22.80 Acres of Land, 107 F.R.D. 20, 22 (N.D. Cal. 1985) (finding that the work product rule did not apply to a statement by litigation counsel that was unsupported by "any citation of data, case law, or other authority" and "remains a bald, unsupported assertion"). We note that CR 26(b)(4) is "nearly identical" to Fed. R. Civ. P. 26(b)(3) and that analyses of the federal rule provide persuasive guidance about the comparable state rule. Soter, 162 Wn.2d at 739. Binks and 22.80 Acres of Land are helpful because they predate the 1993 amendment adding Fed. R. Civ. P. 26(b)(5)(A)(ii) to require that the party invoking any privilege "describe the nature of the documents" to "enable other parties to assess the claim," a provision not contained in the Washington rule. See Amendments to Federal Rules of Civil Procedure, Rule 26(b)(5) & comm. note, 146 F.R.D. 401, 617, 639-40 (1993).

[30] 190 Wn.2d at 699 (materials provided for in camera review).

[31] 3 Wn. App. 2d 613, 622, 418 P.3d 175 (2018) (defendant insurer raised work product rule and provided redacted materials and a privilege log of the materials sought).

would have had the party invoking the rule provide enough information to let the court evaluate the claim.

One means of providing adequate information is a privilege log.[33]

In camera review is also an appropriate option when a party invokes a privilege and the court does not know the nature or contents of the withheld documents. In Limstrom v. Ladenburg,[34] our Supreme Court considered whether the work product rule applied to the Public Records Act, chapter 42.17 RCW (PRA). After determining the work product rule could shield materials requested pursuant to the PRA, the court remanded for further consideration of the record request.[35] "[B]ecause the documents requested were not viewed by the trial court, and are not included in the record," the court was "unable to completely resolve the matter before" it.[36] The total lack of relevant documents in the record prevented the court from determining whether any documents were protected from

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[32] 171 Wn.2d 383, 393-96, 405-06, 256 P.3d 302 (2011) (affirming finding of work product when the court had several examples of materials sought).

[33] SAFE and GFP have argued extensively about whether the court's order compelling production required that SAFE provide a privilege log for all communications, including those at issue here. But GFP's motion to compel was imited to "a complete privilege log that includes all communications with counsel withheld on the basis of privilege *up until April 10, 2015*." CP at 28 (emphasis added). Although the eventual order, which was drafted by GFP's attorneys, recited that SAFE produce a privilege log "for all documents withheld in this case," CP at 108, it seems doubtful that the trial court intended to grant relief not requested by GFP. SAFE complied with the order by providing a privilege log of all withheld documents predating April 10, 2015.

[34] 136 Wn.2d 595, 963 P.2d 869 (1998).

[35] Id. at 612-13.

[36] Id. at 612.

disclosure in any way.[37] The court concluded that remand was appropriate because it was "conceivable" that materials sought could "show litigation strategy . . . that constitutes an attorney's work product."[38]

Consistent with our Supreme Court's holding in Limstrom, we conclude the best course is remand for the trial court to exercise its discretion in considering whether to conduct in camera review or another reasonable alternative.

Sanctions

Finally, SAFE contends it should not be subject to any sanctions accrued during the pendency of this appeal. The court found that SAFE "willfully refused to comply"[39] with past orders and imposed a fine of $200 per day payable to GFP, starting September 15, 2017, for each day SAFE did not comply. The court also awarded GFP fees and expenses for bringing the motion to compel.

Commissioner Kanazawa stayed the sanctions order on September 19, 2017, and later lifted that stay when she denied discretionary review on October 25, 2017. Commissioner Neel stayed the sanctions order again on December 27, 2017, and a panel of this court later continued that stay. Because 66 days elapsed while the trial court's sanctions order was not stayed, SAFE faces over $13,000 in sanctions payable to GFP and an undetermined amount for fees and expenses from litigating the motion to compel.

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[37] Id. at 615.

[38] Id.

[39] CP at 254.

Trial courts have "wide latitude" in imposing sanctions for discovery violations.[40] Accordingly, court orders sanctioning discovery violations are reviewed for abuse of discretion.[41] But, sanctions accrued during a good faith appeal of attorney-client privilege and work product issues should be vacated.[42]

We conclude that any sanctions accruing during this good faith appeal should be vacated.

GFP suggests that the issue is not properly before us on appeal because SAFE did not include the court's sanction order in its notice for discretionary review.

RAP 2.4(b) allows review of an order not designated in the notice for discretionary review when two requirements are met: "(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is

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[40] Fisons, 122 Wn.2d at 355.

[41] Amy v. Kmart of Wash. LLC, 153 Wn. App. 846, 855, 223 P.3d 1247 (2009) (citing id. at 338).

[42] State v. Rogers, 3 Wn. App. 2d 1, 10, 414 P.3d 1143 (2018) (citing Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 536-37, 688 P.2d 506 (1984) ("When an attorney makes a claim of privilege in good faith, the proper course is for the trial court to stay all sanctions for contempt pending appellate review of the issue.")), review denied, 190 Wn.2d 1032 (2018); see Dike v. Dike, 75 Wn.2d 1, 16, 448 P.2d 490 (1968) ("'An attorney is entitled to consideration of a claimed privilege not to disclose information which he honestly regards as confidential and should not stand in danger of imprisonment for asserting what he respectfully considers to be lawful rights.'" (quoting Appeal of the United States Sec. & Exch. Comm'n, 226 F.2d 501, 520 (6th Cir. 1955))); Seattle Nw. Sec. Corp. v. SDG Holding Co., Inc., 61 Wn. App. 725, 734, 812 P.2d 488 (1991) ("because of the importance of protecting attorney-client privilege and the difficulty in determining when it applies, . . . a contempt judgment and its related sanctions could be overturned" if the privilege were later ruled inapplicable).

entered . . . before the appellate court accepts review."

Because the order imposing daily sanctions would not have occurred but for the court's earlier order compelling discovery, the imposition of sanctions prejudicially affects the order compelling discovery.[43] And because the order imposing sanctions was entered after SAFE filed its notice of discretionary review, both requirements of RAP 2.4(b) are satisfied. This appeal properly extends to the sanctions incurred pending appeal.

Accordingly, we affirm the trial court's determination that SAFE did not meet its burden of proving the existence of an attorney-client relationship. As to the claim of work product, we remand for further proceedings consistent with this opinion. Sanctions pending appeal should be vacated.

WE CONCUR:

[43] Cox v. Kroger Co., 2 Wn. App. 2d 395, 407, 409 P.3d 1191 (2018) ("Our Supreme Court has interpreted the term 'prejudicially affects' to turn on whether the order designated in the notice of appeal would have occurred absent the other order.").

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