

Case No. 46467-5-11

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VALAREE DOEHNE,
Plaintiff-Respondent,

v.

EMPRES HEALTHCARE MANAGEMENT, LLC, a WA Limited
Liability Company d/b/a FRONTIER REHABILITATION and
EXTENDED CARE CENTER; EMPRES WASHINGTON
HEALTHCARE, LLC, a WA Limited Liability Company d/b/a
FRONTIER REHABILITATION and EXTENDED CARE CENTER;
FRONTIER REHABILITATION and EXTENDED CARE CENTER; and
EVERGREEN WASHINGTON HEALTHCARE FRONTIER, LLC, a
WA Limited Liability Company d/b/a FRONTIER REHABILITATION
and EXTENDED CARE CENTER,
Defendants-Appellants.

Appeal from Cowlitz County Superior Court,
Case No. 13-2-00167-6 (Judge Michael Evans)

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
INTRODUCTION.....	5
ASSIGNMENT OF ERROR.....	5
A. Assignment of Error No.1.....	5
B. Assignment of Error No. 2.....	5
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	5
STATEMENT OF THE CASE.....	6
A. Factual Background.....	6
B. Post-Incident Review.....	7
C. Procedural History.....	9
STANDARD OF REVIEW.....	11
ARGUMENT.....	13
A. First Assignment of Error: “The Clarno report is a privileged attorney-client communication”.....	13
B. Second Assignment of Error: “The Clarno report contains privileged opinion work product”.....	18
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Barry v. USAA</i>	
98 Wn. App. 199, 989 P.2d 1172 (2001).....	13
<i>Carver v. Allstate Ins. Co.</i>	
94 F.R.D. 131 (S.D. Ga. 1982).....	21
<i>Cedell v. Farmers Ins. of Wash.</i>	
157 Wn. App. 267, 237 P.3d 309 (2010).....	12
<i>Dakota, Minnesota & E.R.R. Corp. v. Acuity</i>	
771 N.W.2d 623 (S.D. 2009).....	12
<i>In re Derienzo</i>	
1998 Bankr. LEXIS 635 (M.D. Pa. Apr. 28, 1998).....	17
<i>In re Det'n Of West</i>	
171 Wn.2d 383, 256 P.3d 302 (2011).....	21
<i>Eoppolo v. Nat'l R.R. Passenger Corp.</i>	
108 F.R.D. 292 (E.D. Pa. 1985).....	20
<i>Fellows v. Moynihan</i>	
175 Wn. 2d 641, 285 P.3d 864 (2012).....	11
<i>Fontaine v. Sunflower Beef Carrier, Inc.</i>	
87 F.R.D. 89 (E.D. Mo. 1980).....	22
<i>Garvy v. Seyfarth Shaw LLP</i>	
966 N.E.2d 523 (Ill. App. 2012).....	12
<i>Harris v. Drake</i>	
152 Wn.2d 480, 99 P.3d 872 (2004).....	22
<i>Hasso v. Retail Credit Co.</i>	
58 F.R.D. 425 (E.D. Pa. 1973).....	16

<i>Heidebrink v. Moriwaki</i>	
104 Wn.2d 392, 706 P.2d 212 (1985).....	20, 21
<i>Hickman v. Taylor</i>	
329 U.S. 495 (1947).....	19
<i>Jane Doe v. Latter-Day Saints</i>	
122 Wn. App. 556, 90 P.3d 1147 (2004).....	12
<i>Limstrom v. Ladenberg</i>	
136 Wn.2d 595, 963 P.2d 869 (1998).....	19
<i>Overlake Fund v. City of Bellevue</i>	
70 Wn. App. 789, 855 P.2d 706 (1993).....	21
<i>Pappas v. Holloway</i>	
114 Wn.2d 198, 787 P.2d 30 (1990).....	13
<i>R.A. Hanson Co. v. Magnuson</i>	
79 Wn. App. 497, 903 P.2d 496 (1995).....	13
<i>Soter v. Cowles Publishing Co.</i>	
162 Wn.2d 716, 174 P.3d 60 (2007).....	14
<i>United States v Nobles</i>	
422 U.S. 225 (1975).....	20
<i>Upjohn Co. v. United States</i>	
449 U.S. 383 (1981).....	13, 16, 17
<i>West v. Dep't of Natural Resources</i>	
163 Wn. App. 235, 258 P.3d 78 (2011).....	15
<i>Westhelmeco, Ltd. v. New Hampshire Ins. Co.</i>	
82 F.R.D. 702 (S.D.N.Y. 1979).....	20
Statutes	
RCW 5.60.060.....	6, 13
RCW 5.60.060(3).....	12
Rules	
CR 26(b)(1).....	13

CR 26(b)(4).....6, 18, 19, 20
CR 59.....10
RAP 2.3(b)(2).....5, 11, 15

I. INTRODUCTION

Defendants-Appellants EmpRes Healthcare Management, LLC, EmpRes Washington Healthcare LLC, and Evergreen Washington Healthcare Frontier, LLC (collectively “Defendants” herein) seek reversal of a trial court discovery order that mandated the production of an internal incident report (the “Clarno report”) that is both privileged and protected.

This matter comes before this Court on appeal based on the Commissioner’s findings under RAP 2.3(b)(2) that in ordering the discovery, the trial court judge committed “probable error” that both substantially altered the status quo and limited Defendants’ freedom to act. Defendants ask that this Court similarly find that the trial court committed error in ordering that the privileged document be produced to the plaintiff.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1:

The trial court erred in ordering the production of the Clarno report, given that it is a privileged attorney-client communication.

B. Assignment of Error No. 2:

The trial court erred in ordering the production of the final sentence of the first paragraph of the Clarno report, given that the sentence is protected from discovery as a non-factual “opinion” work product made in anticipation of litigation.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the first paragraph of the “Clarno report” fall within

the category of communications involving a company's in-house counsel that is a privileged attorney-client communication under RCW 5.60.060?

2. Does the last sentence of the first paragraph of the "Clarno report" fall within the category of "opinion" or "mental impression" work product that is absolutely protected from discovery under CR 26(b)(4)?

IV. STATEMENT OF CASE

In addition to the statement provided below, a good summary of the relevant factual and procedural background can be found on pages 2 through 6 of the Commissioner's Ruling Granting Review, dated September 16, 2014. *See id.*

A. Factual Background

One of the named defendants—Evergreen Washington Healthcare Frontier, LLC ("Frontier" herein)—operates the Frontier Rehabilitation and Extended Care Center, a licensed long-term care facility located in Longview. According to the Amended Complaint, the plaintiff's husband was a resident at the Frontier facility during 2010. On the night of February 2, 2010, while leaving the Frontier facility after visiting her husband, plaintiff tripped and fell over a cement "wheel stop" in the Frontier parking lot, allegedly causing her injuries. After the fall, plaintiff went back into the Frontier facility for some treatment relating to the fall, and she was thereafter taken by ambulance to the local hospital.

Plaintiff subsequently commenced this lawsuit, asserting that Defendants had been negligent in failing to keep the Frontier parking lot safe, thereby causing plaintiff's fall and her injuries.

B. Post-Incident Review

Another of the named defendants—EmpRes Healthcare Management, LLC, f/k/a EHC Management, L.L.C. (“EmpRes” herein)—is a management company based out of Vancouver, Washington. CP 70. This management company provides management services by contract to a number of nursing facilities, including to the Frontier facility in Longview. *Id.*

In Vancouver, EmpRes employs attorneys in an in-house legal department. CP 59. In 2010, EmpRes also employed a Director of Risk Management (Dick Pflueger), whose purpose was to act as a conduit between the legal department and insurers regarding liability issues, including workers' compensation and third party liability, with the goal of avoiding litigation and minimizing liability. *Id.*

Subsequent to plaintiff's fall and alleged injuries, Mr. Pflueger performed a post-incident investigation on it for EmpRes at the direction of EmpRes's in-house legal department. *Id.* Mr. Pflueger maintained a paper file regarding this incident investigation. *Id.* This file included two incident reports (including one drafted by Heather Clarno), which Mr. Pflueger had requested to present to the in-house legal department as part of his analysis of this incident. *Id.* Mr. Pflueger's file also included

analysis about plaintiff's demand that Defendants pay for her medical expenses, as well as other documents analyzing the possibility of settling plaintiff's potential claims prior to her filing a lawsuit. *Id.* Mr. Pflueger's file also includes email correspondence about the incident with EmpRes's in-house attorneys and paralegals. *Id.*

At issue in the present appeal is the incident report prepared by Heather Clarno.¹ In 2010, Ms. Clarno was also employed by the management company (EmpRes), *not* by the company that operated the care facility (Frontier). CP 70. Her job title was administrative assistant to the Regional Operations Manager of the management company. *Id.*

Ms. Clarno was not present at the Frontier facility on February 2, 2010 when plaintiff sustained her alleged fall. *Id.* She has no direct personal knowledge about the circumstances of that fall. *Id.*

In the days following the incident, Ms. Clarno was tasked by Mr. Pflueger and by EmpRes's legal department to perform an investigation and to prepare a report regarding the incident. *Id.* These tasks were performed in anticipation of litigation. *Id.* (Ms. Clarno had performed such investigations in the past in anticipation of litigation in connection with employee worker's compensation claims. *Id.*) As

¹ The other incident report was prepared by a nurse employed by Frontier named Miriam Posch. Ms. Posch had been present and had interacted with the plaintiff immediately after her alleged fall on February 2, 2010. Ms. Posch's statement contained her recollections of the relevant events during her shift that night. As discussed below, the trial court also compelled production of Ms. Posch's statement, but Defendants did not seek discretionary review of that part of the holding, and so it is not part of this appeal.

Ms. Clarno has testified, her one-page report on this incident “was prepared for and provided to the risk management and legal departments of the management company in Vancouver.” *Id.*

C. Procedural History

On April 24, 2014, plaintiff filed a motion to compel discovery relating to several issues. In response, Defendants asserted that there had been inadequate conferral on some of these issues—or else that there was no real dispute between the parties—but agreed that the parties had a legitimate disagreement on whether the withheld Clarno report and Posch statement² were privileged or whether they were subject to discovery. *See* CP 58.

The motion came before Judge Evans of the Cowlitz County Superior Court for oral argument on May 5, 2014. On the issue of the incident reports, Judge Evans requested an *in camera* review of the withheld documents and the submission of any additional authority or evidence by the parties on whether the records were privileged.

Following additional submissions by the parties and an *in camera* review, the issue came back before Judge Evans one week later on May 12, 2014. Regarding the statement written by nurse Miriam Posch, the court held that it was not privileged and ordered its production. Regarding the incident report written by Ms. Clarno, Judge Evans made a

² Regarding the Posch statement, *see supra* footnote 1

two-part holding. First, he held that the first paragraph of the report was neither attorney-client privileged nor work product, and so needed to be produced to the plaintiff. Tr. 41:10-17. Second, he held that the remaining three paragraphs of the report were not discoverable because they were “work product” and “protected by the privilege.” Tr. 41:17-42:1.³

Within ten days of this verbal order, Defendants produced the Posch statement to plaintiff but filed a motion for reconsideration under CR 59 regarding the first paragraph of the Clarno report. CP 85-94. On that motion, Defendants again asserted that the entirety of that paragraph was privileged and protected. Additionally and alternatively, Defendants emphasized that the last sentence of that first paragraph was “opinion” work product not subject to discovery. On June 6, 2014, Judge Evans denied Defendants’ motion for reconsideration. CP 102-103

Defendants thereafter filed a timely motion for discretionary review. To aid in the determination of that motion, the Commissioner granted the Defendants’ motion to transmit the first paragraph of the Clarno report for his *in camera* review, which enabled the Commissioner to have the same information before him as the trial court had below.

³ At that same May 12 hearing, the court then signed an Order Compelling Discovery. See CP 83-84. However, this Order did not address or incorporate the court’s verbal rulings on the incident reports. See *id*. Those verbal rulings were not put into a written order until July 7, 2014. See CP 116-118.

without the contents of that document asserted to be privileged being disclosed to plaintiff.⁴

On September 16, 2014, the Commissioner issued a written opinion granting discretionary review. With regard to the asserted work product protection over the last sentence of the first paragraph of the Clarno report (i.e., the second assignment of error on this appeal), the Commissioner found that the trial court had committed “probable error” in ordering its discovery, thereby justifying discretionary review under RAP 2.3(b)(2).

With regard to the asserted attorney-client privilege over the entirety of the first paragraph (i.e., the first assignment of error on this appeal), the Commissioner declined to find “probable error” under RAP 2.3(b)(2), but nevertheless recognized the possibility of error on this contention and so allowed the Defendants to pursue both assignments of error on appeal. *See id.* at p. 13.

V. STANDARD OF REVIEW

Although appellate courts ordinarily review discovery rulings for abuse of discretion, a trial court’s interpretation of the privilege statute should be reviewed *de novo*. *See Fellows v. Moynihan*, 175 Wn. 2d 641,

⁴ Although the first paragraph of the Clarno report, submitted to the Commissioner for *in camera* review, was not filed with the clerk or made a part of the official record on appeal, Defendants understand that it will be made available to this Court in reviewing the merits of this appeal. If additional copies of the Clarno report are needed for this Court’s review, Defendants will promptly mail in those copies for *in camera* review upon request.

649, 285 P.3d 864 (2012) (so stating); *Cedell v. Farmers Ins. of Wash.*, 157 Wn. App. 267, 272, 237 P.3d 309 (2010) (so stating), *aff'd in part, rev'd in part*, 176 Wn.2d 686, 295 P.3d 239 (2013).⁵

By way of further example, in a case involving the application of privilege under RCW 5.60.060(3), the Court noted that “[i]ssues of statutory construction are questions of law, which we review *de novo*.” *Jane Doe v. Latter-Day Saints*, 122 Wn. App. 556, 563, 90 P.3d 1147 (2004). The Court also noted another basis on which to apply *de novo* review in that case:

When the trial court considers only documentary evidence to decide whether a privilege applies, we also review the evidence *de novo*.

Id.

The same *de novo* standard of review applies here. Considering that the trial court relied solely upon documentary evidence, and given that this Court has the identical documentary record and authority before it, no weight or deference should be given to the trial court’s discovery order, which Defendants assert was in error.

⁵ The rule that claims of statutory privilege are reviewed on a *de novo* basis by the reviewing court, discussed above, is also recognized by various other jurisdictions. *See, e.g., Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 534 (Ill. App. 2012) (“Discovery orders are generally subject to an abuse of discretion standard of review; however, we review the circuit court’s determination of whether a privilege applies *de novo*”); *Dakota, Minnesota & E.R.R. Corp v Acuity*, 771 N.W.2d 623, 636 (S.D. 2009) (“This court normally reviews a circuit court’s discovery orders under an abuse of discretion standard.... When we are asked to determine whether the circuit court’s order violated a statutory privilege, however, it raises a question of statutory interpretation requiring *de novo* review”) (internal quotation omitted).

VI. ARGUMENT

First Assignment of Error: “The Clarno report is a privileged attorney-client communication.”

“The attorney-client privilege, codified in RCW 5.60.060, protects confidential communications from discovery so clients will not hesitate to fully inform their attorneys of all relevant facts.” *Barry v. USAA*, 98 Wn. App. 199, 204, 989 P.2d 1172 (2001). “The purpose of the privilege is to allow a client to obtain proper legal advice.” *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 501-02, 903 P.2d 496 (1995). The privilege is necessary to encourage free and open communication by creating an assurance that the communications will not be disclosed to others. *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990).

Notably, the privilege applies both to outside counsel and to corporate in-house counsel. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Parties in litigation may conduct discovery only on those materials that are “not privileged.” CR 26(b)(1).

Here, Ms. Clarno’s testimony was clear and unambiguous regarding the nature of this statement; in her words, “[t]he report was prepared for and provided to the risk management and legal departments of the management company in Vancouver.” *See* CP 70. She further noted that her “investigation and report were performed in anticipation of litigation.” *Id.* Moreover, the report was created at the request of risk management and legal in conjunction with their analysis of possible

liability and settlement relating to this incident. *See* CP 59.

Thus, this document is an instance of a communication between a client and her attorney. The trial court's ruling reflects as much where it found the second through fourth paragraph to be "protected by the privilege" (*see* Tr. 41:17 – 42:1); there is therefore no principled basis to say that the first paragraph of that same report *is not*. The privilege applies here just as it would have applied had Ms. Clarno's statement been directed to outside counsel as part of an outside law firm's review of a potential claim for damages.

Washington's appellate courts have affirmed the privilege in similar situations. A good example can be found in *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007). In *Soter*, a nine-year-old had died after ingesting a peanut butter cookie negligently served to him by the school district on a field trip. *Id.* at 722. One issue discussed in the opinion was the discoverability of "notes prepared by the volunteer nurse chaperone who sat with [the decedent] on the bus, rode with him in the car, and administered the epinephrine" as well as "handwritten notes created by one of the teachers on the field trip." *Id.* at 747. The nurse's notes included one record prepared shortly after the incident, and another record prepared later "in response to another parent-volunteer's account of what had happened on the field trip." *Id.* The nurse and the teacher provided these notes to the school district's attorneys and investigator. *Id.* These individuals understood at the time that these notes "would be protected by attorney-client privilege." *Id.* Based on

these facts, the Washington Supreme Court held that these records “were created by clients, in anticipation of litigation, with the intention of communicating information to the attorneys. Therefore, we conclude that the school district has established that these documents are *protected from disclosure under the attorney client privilege.*” *Id.* (italics added).

Numerous other examples could be provided. *See, e.g., West v. Dep’t of Natural Resources*, 163 Wn. App. 235, 247, 258 P.3d 78 (2011) (noting that attorney-client privilege “applies to any information generated by a request for legal advice, including documents created by clients with the intention of communicating with their attorney”).

Defendants respectfully submit that these authorities are directly controlling, and that there is no basis to conclude that the Clarno report—including its first paragraph—was *not* a privileged attorney-client communication. As noted, the report was gathered from Ms. Clarno as part of the post-incident investigation performed by the then-Director of Risk Management for defendant EmpRes (not the facility defendant), at the direction of its in-house legal department, located in Vancouver, Washington. *See* CP 59 & 70.

In declining to find “probable error” on this assignment of error,⁶ the Commissioner relied upon two findings: (1) that “Clarno was acting as an agent of the legal department and not as a client seeking legal advice from

⁶ As noted above, although the Commissioner declined to find “probable error” as defined under RAP 2.3(b)(2), the Commissioner later noted the possibility of error on this contention and so invited the issue to be raised on appeal. *See* Ruling at p. 13.

counsel”; and (2) that no language on the face of the report stated that the document was privileged or an attorney-client communication. *See* Ruling at p. 9. But neither of these findings defeats the assertion of privilege here.

First, Ms. Clarno herself should not be considered the “client” in the privilege analysis. Rather, as recognized by *Upjohn*, the “client” of an in-house attorney is generally the “corporation” or company itself, despite it being an “artificial creature of the law, and not an individual.” *Id.*, 449 U.S. at 389-90. The Court in *Upjohn* then rejected the “control group test,” which would have limited the privilege to communications between in-house attorneys and top decision-making executives. *See id.* at 390. Such a narrow standard was rejected because communications with “middle-level—and indeed lower-level—employees” would often be necessary to “ascertain[] the factual background and sift[] through the facts with an eye to the legally relevant,” which properly falls within the scope of the privilege. *Id.* at 390-92; *see also Hasso v. Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973) (affirming attorney-client privilege over memorandum about incident with plaintiff written by low-level bank employee “at the request of his branch manager, who was in turn acting at the request of defendant’s [in-]house counsel in Atlanta,” adding that counsel had requested the memorandum to investigate facts and “thereby advise the company of its position in the matter”).

Indeed, the very communications at issue in *Upjohn* are highly analogous to communications here: they “were made by Upjohn employees

to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.” *Id.* at 394. Such information from low-level employees was necessary for Upjohn’s in-house attorneys to conduct a “factual investigation” and then to “be in a position to give legal advice to the company.” *Id.* (internal quotation omitted).

The Clarno report is similarly privileged. To paraphrase *Upjohn*, the report was made “to counsel for [EmpRes] acting as such, at the direction of [risk manager Dick Pflueger] in order to secure legal advice from counsel.” *See* CP 59. Indeed, according to the evidentiary record, Ms. Clarno was providing factual background to Mr. Pflueger and in-house counsel to allow them to “analyz[e] the possibility of settling plaintiff’s potential claims prior to her filing a lawsuit.” *Id.* Under *Upjohn*, such attorney-client communications are privileged.

Second, the fact that the Clarno report does not contain words like “privileged” or “confidential” on its face is neither dispositive nor even relevant to the analysis of whether the privilege applies. The Court should rely upon the substance and evidentiary context of the report, not the presence or absence of some self-serving “magic words” about the document itself. *See, e.g., In re Derienzo*, 1998 Bankr. LEXIS 635 at *17 (M.D. Pa. Apr. 28, 1998) (finding a stamped notation about privilege on withheld documents to have “relatively little impact upon the Court because those documents were reviewed for the substance of the communications rather than their form”).

In sum, undisputed facts in the record confirm that the Clarno report is a privileged corporate attorney-client communication, and the trial court therefore committed error in ordering any portion of this document to be produced in discovery.

**Second Assignment of Error: “The Clarno report contains
privileged opinion work product.”**

Additionally and alternatively, Defendants assert that the last sentence of the first paragraph of the Clarno report is materially different in nature from what comes before it in that paragraph, and that the last sentence is further not subject to discovery because it is work product that contains “opinions” and “mental impressions” that are absolutely protected from discovery, regardless of the requesting party’s need. *See* CR 26(b)(4).

Although Defendants cannot disclose the contents of this protected last sentence within this brief, Defendants direct the court to their *in camera* submission and note that the final sentence of the first paragraph is materially different in substance compared to what comes before it. (*Note:* the last sentence being referred to in this motion begins with the words “Upon review....”)

While the initial portion of that paragraph recites *facts* gathered by Ms. Clarno in connection with her investigation,⁷ the final sentence does not

⁷ Of course, even though they are statements of fact, Defendants assert that these statements are still privileged because they are part of attorney-client communications, as discussed above. However, Defendants have limited their assertion of work product for the purposes of this appeal only over “opinion” or “mental impression” work product, so that this Court would not need to entwine itself in the fact-intensive determination of

recite facts, but rather expresses an *opinion*. Such a statement of opinion therefore removes this sentence from the realm of an ordinary witness statement, and places it squarely in the domain of protected work product “in anticipation of litigation”, as well as a privileged communication to an attorney. It is also an example of a document “in anticipation of litigation” for which the “substantial need” exception *does not apply*:

In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of *mental impressions, conclusions, opinions, or legal theories* of an attorney or other representative of a party concerning the litigation.

CR 26(b)(4) (italics added).

Indeed, a person’s opinions or impressions formed in anticipation of litigation are “absolutely protected” from discovery, regardless of the requesting party’s need. *Limstrom v. Ladenberg*, 136 Wn.2d 595, 611, 963 P.2d 869 (1998). Such protected material “falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.” *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

Moreover, as CR 26(b)(4) itself indicates, the protection applies not only to attorneys but also to “other representative[s] of a party concerning the litigation.” *Id.* This extension was recognized by the United States

whether plaintiff in fact has a “substantial need” for defendants’ non-opinion work product, and whether plaintiff would face an “undue hardship” to obtain the substantial equivalent of the materials by other means.” CR 26(b)(4).

Supreme Court almost 40 years ago. *See United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (noting that the “practical” reality is that attorneys rely on other agents regarding possible litigation, and that it “is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself”). Simply put, the work product protection “makes no distinction between attorney and nonattorney work product.” *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). For example, in *Heidebrink*, the Washington Supreme Court held that statements made by the insured to the insurer’s investigator about a claim were protected pursuant to the work-product privilege. *See id.*

In fact, given the broad reach of the phrase “other representative[s] of a party” in CR 26(b)(4) and its federal counterpart, courts have routinely noted that the record need not have been created at the express direction of an attorney to be protected. *See, e.g., Westhelmeco, Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979) (noting that it was “irrelevant” whether the investigator who prepared the report “was retained by defendant’s attorneys” or “by defendant”; adding that “work product protection, if applicable here, lies in favor of the party, its lawyers and agents”); *see also Eoppolo v. Nat’l R.R. Passenger Corp.*, 108 F.R.D. 292, 295 (E.D. Pa. 1985) (finding meeting minutes regarding the plaintiff’s accident to be protected work product even though attorneys were not present at the meeting: “It is not necessary for an attorney to be involved in the proceeding to bar discovery”).

In light of this authority, Defendants assert that the last sentence of the first paragraph of the Clarno report is clearly an “opinion” and is therefore “absolutely protected” from discovery. *See also Carver v Allstate Ins. Co*, 94 F.R.D. 131, 133 (S.D. Ga. 1982) (holding that the mental impressions of the defendant’s investigator were protected from discovery; adding that it was “clear” that “the thoughts and mental impressions contained in the investigatory reports...are *immune from discovery*”) (italics added).

It must also be said that the Clarno report was made “in anticipation of litigation.” In considering whether documents were prepared in anticipation of litigation, the court should consider (1) the nature of the document, and (2) the factual situation in the case, to determine if it “can fairly be said to have been prepared” in anticipation of litigation. *In re: Det’n Of West*, 171 Wn.2d 383, 405, 256 P.3d 302 (2011) (internal quotation omitted). In one case, the court held that because documents were prepared to evaluate potential liability, they were considered to have been prepared “in anticipation of litigation.” *Overlake Fund v. City of Bellevue*, 70 Wn. App. 789, 794, 855 P.2d 706 (1993). There are numerous other cases affirming the work product protection where documents were created subsequent to an injury that triggered the concern of possible litigation. *See, e.g., Heidebrink*, 104 Wn.2d at 399 (report of investigator, who took statements shortly after an accident on behalf of insurer were considered prepared in anticipation of litigation in part because there is an “ever-

present” concern that an incident will lead to litigation); *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004) (holding that the PIP insurer’s IME was considered protected work product).

As a court in another jurisdiction wisely noted on this subject:

[T]he anticipation of the filing of a claim is undeniable once an accident has occurred and a person injured or property damaged. This is especially true in today’s litigious society. Documents prepared at that time, therefore, are clearly prepared ‘in anticipation of litigation’....

Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 92 (E.D. Mo. 1980).

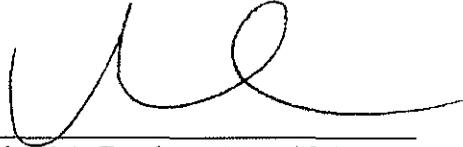
Thus, in addition to being an attorney-client communication, the first paragraph of the Clarno report is also protected work product prepared in anticipation of litigation. Ms. Clarno’s report would have *never been created* but for plaintiff’s accident. *Accord* Ruling Granting Review at p. 12 (finding that the “majority of the evidence before this court confirms that Clarno’s report was prepared in anticipation of litigation”). Moreover, because “the management company’s ordinary course of business does not entail litigation, this is not the case where all documents prepared by the company could easily fall under the ‘prepared in anticipation of litigation rule.’” *Id.* at pp. 12-13. Lastly, the final sentence of the first paragraph is “opinion” work product that is absolutely protected despite any possible showing of “substantial need” by the requesting party. Given these facts, the trial court committed error in ordering the production.

VII. CONCLUSION

Based on the foregoing, Defendants respectfully ask that this Court reverse the trial court's discovery orders, and hold that the entirety of the Clarno report is privileged and protected from discovery. Alternatively, Defendants ask that the last sentence of the first paragraph be found privileged, protected, and not subject to discovery.

Dated this 22nd day of January, 2015.

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I hereby certify that on January 22, 2015, I caused to be served a copy of the **BRIEF OF APPELLANTS** on the following persons(s) in the manner indicated below at the following address(es):

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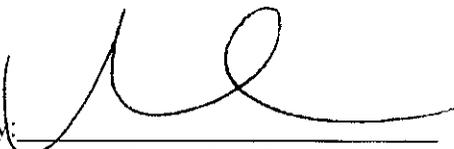
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