

Case No. 46467-5-II

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)

REPLY BRIEF OF APPELLANTS

LINDSAY HART, LLP
Michael J. Estok, WSBA #36471
1300 SW Fifth Avenue, Suite 3400
Portland, Oregon 97201-5640
PH: 503/226-7677
Fax: 503/226-7697
mestok@lindsayhart.com

*Attorneys for Defendants-
Appellants*

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I. INTRODUCTION

This appeal involves the critical issue of an adverse party being allowed to obtain the other party's confidential and private attorney-client communications and "work product." The trial court's disregard of these protections violated Washington's statutes, civil rules, and case law.

It also violated foundational rules of litigation, *i.e.*, that attorneys and clients may freely and privately engage in communications, and that an opponent does not get to review the other side's "work product" relating to litigation. Although there are limited exceptions to these privileges, none of them apply here. Rather, this straightforward matter involves an after-the-fact investigation report about an accident by an individual without personal knowledge of the accident, analyzing the situation for the company's attorneys. Allowing such reports to be available to the adverse party in litigation would have disastrous consequences throughout the State of Washington. It would result in a chilling effect in which no statements could be put in writing to a company's attorneys, let alone statements of a frank or candid nature.

In response, plaintiff argues that the trial court did not commit error in ordering the discovery, but plaintiff fails to distinguish or even address the case authority relied upon by defendants *or* by the Commissioner in concluding that the trial court had committed "probable error" in ordering part of the discovery. Plaintiff also pursues a number of

arguments that are irrelevant to the actual issues before this Court.

II. REPLY ARGUMENT

A. The Applicable Standard of Review Is *De Novo*.

As discussed in defendants' opening brief, a *de novo* standard of review applies in this matter both because it involves the interpretation of a privilege statute and also because the court relied upon only documentary evidence to decide whether the privilege applies. See Appellants Br. at 11-12 (citing, e.g., *Jane Doe v. Latter Day Saints*, 122 Wn. App. 556, 563, 90 P.3d 1147 (2004)).

In response, plaintiff does not address this authority or argue that it is inapplicable. Instead, plaintiff cites to the "abuse of discretion" standard that applies to discovery disputes that do *not* involve statutory privileges. See Appellee Br. at 7, citing *T.S. v. Boy Scouts of Am.*, 157 Wn. 2d 416, 423 & 431, 138 P.3d 1053 (2006) (reviewing discovery order under "abuse of discretion" standard where dispute did not involve any claim of privilege, let alone a claim of statutory privilege). Because the present case involves claims of privilege, it is not analogous to the *Boy Scouts* case.

Likewise, plaintiff argues against a finding of error by referencing the "very broad" scope of discovery under CR 26(b)(1) and the cases interpreting it. This argument is also misplaced given that the present appeal is about a claim of privilege, not a dispute about relevancy. See CR

26(b)(1) (authorizing discovery only on information that is “not privileged”). In other words, even highly-relevant discovery may not be had when the matter is privileged or protected.

In sum, because a *de novo* review applies to this appeal, the trial court’s order rejecting defendants’ claim of privilege should be given no deferential weight.

B. The Report Is a Privileged Attorney-Client Communication.

Plaintiff has ignored all of the authority set forth in the defendants’ opening brief supporting the application of the attorney-client privilege to communications involving company employees and the company’s in-house attorneys. As discussed, the communication in the present case is almost identical to the communication that was at issue in the seminal Supreme Court case involving privileged in-house counsel communications, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), a case that plaintiff neglects to even reference.

Plaintiff’s opposition seems to focus on four arguments against the privilege, as follows:

First, plaintiff complains that Clarno’s incident report “was prepared for her employer.” Appellee Br. at 8. This objection is not further explained or supported. Seemingly, such an objection could be raised in every instance of a communication involving in-house counsel, but the objection cannot hold in light of the well-established rule that in-

house counsel communications are also protected by the privilege. *See, e.g., Upjohn*, 449 U.S. at 395. As noted, the “client” of an in-house attorney is the company itself. Factual investigation performed by in-house counsel through communications from even low-level employees to “be in a position to give legal advice to the company” has routinely been held to be within the scope of privileged communications. *See, e.g., id.* at 394-95; *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 747, 174 P.3d 60 (2007); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973).

Second, plaintiff complains that “[n]o attorney is ever identified.” Appellee Br. at 8. This cryptic objection is stated but not explained. The involvement of defendant EmpRes’s in-house counsel regarding the Clarno report was established by undisputed facts in the record. *See, e.g., CP 59 & 70.*¹ To the extent that plaintiff is objecting that the record does not contain the personal names of any of the individuals in defendant EmpRes’s in-house legal department, that objection was not raised by the plaintiff below—or at any time prior to the plaintiff’s most recent brief on appeal. Of course those individuals have names, and defendant EmpRes would have placed the names of the involved in-house attorney and paralegal into the record had that objection been made at the time by

¹ Citations to the record both here and in defendants’ opening brief are based on the page numbers of the record as stated in the Transcript of Clerk’s Papers. The citations above are taken from the Declaration of Michael Estok (Clerk’s No. 56) and the Declaration of Health Clarno (Clerk’s No. 68), respectively.

plaintiff below.

Third, plaintiff objects that a party cannot create the privilege simply by turning over otherwise-unprivileged records to an attorney. Appellee Br. at 8, *citing Detention of Williams*, 147 Wn. 2d 476, 494, 55 P.3d 597 (2002) (holding that one “cannot create a privilege simply by giving the [non-privileged] records to his attorney”). But this objection misstates the defendants’ position on appeal. Defendants do *not* contend that the Clarno report is privileged simply because it is in the possession of an attorney; rather, defendants contend that the document *itself* is a privileged attorney-client communication. Indeed, as Clarno herself noted, “[t]he report was prepared for and provided to the risk management and legal departments of the management company in Vancouver.” CP 70.

Fourth and lastly, plaintiff objects to the alleged lack of evidence showing that Clarno “communicated directly with in-house counsel in order to obtain legal advice regarding this case.” Appellee Br. at 8. Once again, this objection is based on the false premise that Clarno is the “client” seeking legal advice, as discussed above. Plaintiff provides no authority whatsoever for the proposition that the communications needed to be “direct.” To the contrary, the privilege has been routinely affirmed despite the existence of an intermediary between the in-house attorney and the low-level attorney providing the written statement. *See, e.g., Upjohn*, 449 U.S. at 394 (noting that low-level employee writing statement was

acting “at the direction of corporate superiors in order to secure legal advice from counsel”); *Hasso*, 58 F.R.D. at 426 (noting that low-level employee was writing incident report “at the request of his branch manager, who was in turn acting at the request of defendant’s [in-]house counsel in Atlanta”).

In sum, the trial court committed error in ordering the production of a document that is a protected attorney-client communication.

C. The Report Contains Privileged “Opinion” Work Product.

As an alternate ground of reversal, defendants assert that the last sentence of the first paragraph of the Clarno report is strictly privileged as “opinion” work product under CR 26(b)(4). In response, plaintiff essentially makes three arguments in support of the requested discovery.

First, plaintiff suggests that defendants have exploited the work-product rule to transform ordinary business records into records prepared “in anticipation of litigation.” *See Appellee’s Br.* at 9-10. There is nothing in the record to support this assertion. This is *not* a situation where a party is trying to protect (for example) regularly-kept meeting minutes relating to a standing business function. Nor is it a situation where a party is trying to later re-characterize documents that had been created for some other purpose.

To the contrary, Ms. Clarno’s report would have *never been created* but for plaintiff’s accident. *Accord* Commissioner’s Ruling

Granting Review at pp. 12-13. Indeed, there is no evidence that Ms. Clarno had *ever* created such a record before.²

Second, plaintiff argues that the report could not truly have been created “in anticipation of litigation” based on plaintiff’s alleged subjective mental state that she was initially not planning on suing the defendants. *See* Appellee’s Br. at 11. That assertion is legally irrelevant and even misleading. The relevant question is whether *defendants* would reasonably anticipate possible litigation, not whether plaintiff had subjectively planned to file suit. As noted by the cases cited by defendants in their opening brief (*see* pp. 21-22), courts have broadly interpreted this requirement, noting the “ever-present” concern of litigation for companies following a known accident.

Regardless of what plaintiff was subjectively thinking at the time, the record provides compelling support for the Clarno report being created “in anticipation of litigation.” Firstly, defendant Evergreen Washington Healthcare Frontier, LLC, learned about plaintiff’s accident and claimed

² Plaintiff latches onto Clarno’s statement that she prepared the incident report consistent with her practices for investigating “anticipated workers’ compensation claims.” Although this experience trained Clarno as to how to conduct investigations, it is worth noting that plaintiff’s accident was *not* an “anticipated workers’ compensation claim,” given that plaintiff was not an employee (or even a resident) of defendant’s facility. Moreover, even if plaintiff had been an employee, the work product protection would still apply because an “anticipated workers’ compensation claim” is just that—a threatened claim—making such investigations plainly “in anticipation of litigation.”

injuries on the very night of the fall in February 2010. Secondly, defendant EmpRes Healthcare Management, LLC, involved its in-house legal department and risk manager shortly thereafter to analyze the incident, including plaintiff's demand for defendants to pay for her medical expenses relating to the fall. CP 59. Thirdly, Clarno's report was prepared as part of a post-incident investigation at the direction of EmpRes's in-house legal department. CP 59 & 70. Fourthly, plaintiff testified that she did not at first intend to file a lawsuit only because defendants had initially agreed to pay for her medical expenses. *See* CP 82.³ Needless to say, the fact that the defendants initially agreed to pay for the medical expenses of plaintiff—an individual who was neither an employee nor a customer—shows that defendants were taking action following the accident “in anticipation of litigation.”

Third and lastly, plaintiff argues that she has “substantial need” for the information contained in the Clarno report. *See* Appellee's Br. at 10-11. However, by the very terms of CR 26(b)(4), the “substantial need” exception does *not* apply to the “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.* As noted, the defendants expressly limited the scope of their arguments on this assignment of error to “opinion” work product, to avoid any need to analyze a “substantial need” argument for

³ This testimony was enclosed with the Declaration of Craig McReary (Clerk's No. 71).

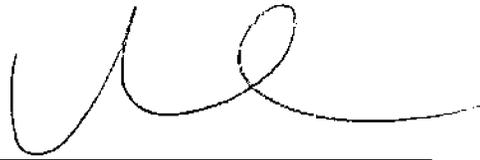
the discovery. With the appeal so framed, the question of plaintiff's "substantial need" is legally irrelevant and of no consequence.

III. 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 13th day of March, 2015.

LINDSAY HART, LLP



By: _____
Michael J. Estok, WSBA #36471
1300 SW Fifth Avenue, Suite 3400
Portland, Oregon 97201-5640
PH: 503/226-7677
Fax: 503/226-7697
mestok@lindsayhart.com

*Attorneys for Defendants-
Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2015, I caused to be served a copy of the **REPLY BRIEF OF APPELLANTS** on the following persons(s) in the manner indicated below at the following address(es):

Craig M. McReary, P.S.
Attorney at Law
1265 14th Avenue, #120
Box 2340
Longview, WA 98632
PH: 360/578-2000;
Fax: 360/578-2005
bfreynolds@qwestoffice.net

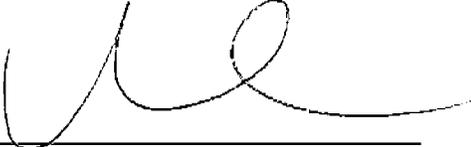
Attorney for Plaintiff

M. Jamie Imboden
Crandall, O'Neill, Imboden & Styve, PS
1447 Third Avenue, Suite A
P.O. Box 336
Longview, WA 98632-2226
PH: (360) 425-4470;
Fax: (360) 425-4477
mjimboden@longviewlaw.com

Attorneys for Third-Party Defendant
James Doehne

- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

LINDSAY HART, LLP

By: 
Michael J. Estok, WSBA #36471
1300 SW Fifth Avenue, Suite 3400
Portland, Oregon 97201-5640
PH: 503/226-7677
Fax: 503/226-7697
mestok@lindsayhart.com

*Attorneys for Defendants-
Appellants*

LINDSAY HART LLP

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