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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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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-Petitioners

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Respondent/Plaintiff Valaree Doehne (hereinafter "Mrs. Doehne") asks the court to deny Petitioners/Defendants' EmpRes Healthcare Management, LLC, EmpRes Washington Healthcare, LLC, and Evergreen Washington Healthcare Frontier, LLC's (hereinafter collectively "Frontier") appeal for reversal of Cowlitz County Superior Court Judge Michael Evan's ruling requiring the production of a discovery document referred to as the "Clarno report" or "Clarno statement".

Court commissioner Eric Schmidt granted discretionary review of this matter stating "the trial court probably erred in concluding that the last sentence of paragraph one Clarno's report was not protected from disclosure as work product".

II. ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

Appellant presents the following assignments of error:

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

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a document that is created in the ordinary course of business and forwarded to a risk management department that contains no identified attorneys protected from discovery under the attorney-client privilege?

(Assignment of Error No. 1)

2. Is a document that is created in the ordinary course of business and forwarded to a risk management department that contains no identified attorneys protected from discovery as a document that was prepared in anticipation of litigation? (Assignment of Error No. 2)

3. The Respondent is satisfied with Petitioner’s remaining statement of the issues.

III. STATEMENT OF THE CASE

A. Factual Background

Mrs. Dochne is a 75 year old widow whose husband was a resident of the Frontier Rehabilitation and Extended Care Center from December of 2009 until his death in May of 2010. Mrs. Dochne does not drive and has lived in a rural part of Longview for decades. She depends upon others to provide transportation.

Defendants Frontier manage/own or are otherwise in control of a nursing home commonly known as Frontier Rehabilitation and Extended Care located in Longview, Washington.

Prior to the fall giving rise to this lawsuit, Mrs. Doehne visited her husband daily at Frontier. She would usually get a ride to Frontier early in the day from a friend or family member and her son, James Doehne, would give her a ride home in the evening.

On or about February 2, 2010, Mrs. Doehne and her son James were leaving through the main front entrance of Frontier in the evening. It was dark outside and the lighting outside of the center was poor. While walking to the vehicle, Mrs. Doehne tripped over an unpainted concrete wheel stop in the parking lot and fell. When she fell, Mrs. Doehne landed on her face and her shoulder. She broke her glasses and nose, skinned her face and injured her shoulder.

James Doehne immediately came to his mother's assistance. He realized she needed help and took her inside to see a nurse. After receiving some attention from the staff at Frontier, Mrs. Doehne was taken to St John's emergency room by ambulance.

Several months prior to Mrs. Doehne's fall, Frontier was warned of the hazard by a witness who "stumbled" in the dark parking lot, but

Frontier did nothing to improve the visibility of the wheel stops until after Mrs. Doehne's fall and injury.

Mrs. Doehne welcomed the medical assistance for her injuries that was offered by Frontier. CP 71.

B. Procedural Background

Mrs. Doehne commenced this lawsuit on January 30, 2013, nearly three years after the date of the incident. A large volume of discovery has been exchanged, depositions have occurred, and a mediation has been conducted. In preparation for trial, a motion to compel responses to discovery was made on April 28, 2014. CP 49. Through the motion to compel, it was learned that Frontier was in possession of statements made by their employees in their investigation of Mrs. Doehne's fall. The statement relevant to this petition is referred to as the "Clarno statement". The declaration of Heather Clarno was submitted in opposition to the Motion to Compel. CP 68. Frontier took the position that Ms. Clarno's declaration supported the assertion of attorney-client privilege and work-product doctrine. Mrs. Doehne countered that Ms. Clarno admits that her statement was made as an administrative act and in the ordinary course of business. No attorney has been identified on record.

IV. ARGUMENT

Frontier has asserted the attorney-client privilege and work product doctrine in an effort to avoid disclosure of the "Clarno statement".

A. Standard of Review

A trial court's discovery ruling will be reversed "only 'on a clear showing' that the court's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" T. S. v. Boy Scouts of Am., 157 Wash.2d 416, 423, 138 P.3d 1053 (2006) (quoting State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). In the present case, the trial court reviewed all of the facts and law and made its decision. Frontier's petition for discretionary review is based upon its dislike of the trial court's factual determination regarding the "Clarno statement". An error regarding the facts cannot be found in this case.

An error regarding the law is also improbable. This is because the scope of discovery is very broad. Coburn v. Seda, 101 Wash.2d 270, 276, 677 P.2d 173 (1984). An opponent of disclosure bears a "heavy burden of showing why discovery should be denied". Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975).

B. Attorney-Client Privilege

The attorney-client privilege protects "communications and advice between attorney and client". Hangartner v. City of Seattle, 151 Wn.2d 439, 452, (2004). The Declaration of Heather Clarno does not support an assertion that the "Clarno statement" was either communication or advice between an attorney and client. Clarno admits that the "Clarno statement" was prepared for her employer. No attorney is ever identified.

Petitioner asserts that Defendant's corporation contains an in-house legal department, and has a Director of Risk Management (Dick Pflueger) who acts as a go-between for the in-house legal department and the rest of the corporation. It is the Petitioner's position that since Mr. Pflueger presented the Clarno statement to the in-house legal department as part of his analysis, that somehow the Clarno statement becomes privileged communication between a client and their attorney. Pursuant to Detention of Williams, 147 Wn.2d 476, 494, 55 P.3d 597 (2002), the act of simply passing information through an attorney's hands at some point does not create the attorney-client relationship needed to invoke the privilege. It has not been shown that the Clarno statement was created at the request of an attorney, or that Heather Clarno communicated directly with in-house counsel in order to obtain legal advice regarding this case.

Much of the following analysis of the work-product doctrine applies to the attorney-client privilege as well.

C. Work Product Doctrine

Since the Respondent does not know the contents of the Clarno statement, Respondent is at a distinct disadvantage. It is impossible for Respondent to comment on the substance of the statement and whether it contains opinion, other than to say that the trial court believed it was not opinion. CR 26(b)(4) instructs courts to protect against disclosure of opinions of representatives of a party "concerning the litigation". In this case there was no litigation, actual or reasonably anticipated, at the time the Clarno statement was produced.

Frontier has provided the Declaration of Heather Clarno to simply say that the Clarno statement was prepared in anticipation of litigation and for an attorney. Making a conclusory statement does not meet the Frontier's heavy burden on this issue. A company like Frontier could simply title an employee as the "anticipation of litigation manager" and all of that employee's work would suddenly be protected from disclosure. This is what Frontier is attempting to do in this case with Ms. Clarno and Mr. Pflueger. However, this issue has been addressed before in Soter v. Cowles Publ'g Co., 131 Wash. App. 882, 896, 130 P.3d 840 (2006). In Soter, the court states:

"the business records exception prevents parties from exploiting the work-product rule by adopting routine practices whereby all documents appear to be prepared 'in anticipation of litigation.'"

Ms. Clarno admits in her declaration that "I prepared this investigation and incident report consistent with how I generally perform these tasks for my employer on anticipated worker's compensation claims." CP 68. Based on Ms. Clarno's own testimony, the Clarno statement was prepared for her employer. This is certainly not attorney-client communication. Ms. Clarno also admits that she was acting how she "generally" does on worker's compensation claims. An employee acting in a manner that is generally consistent with an office procedure, is the essence of acting in the ordinary course of business. The factual determination regarding whether Ms. Clarno acted in the ordinary course of business is within the discretion of the trial court. Heidebrink v. Moriwaki, 104 Wn.2d 392, 400, 706 P.2d 212 (1985).

The declarations of Craig M. McReary set forth sufficient facts to support a substantial need for the information in the "Clarno statement". CP 49 and CP 71. Substantial discovery and depositions have already occurred and Mrs. Doehne has limited information about what Frontier knew or could have known about the dangers at the Frontier facility that are relevant to this case. Mrs. Doehne can only obtain this information from Frontier and such information is critical to proving knowledge and

awareness of the dangerous conditions at the Frontier facility. The discretion of the trial court also applies to the substantial need test. Heidebrink, supra. The trial court concluded that there were sufficient facts to meet the substantial need test.

Frontier asserts that litigation was anticipated from either the moment of Mrs. Doehne's fall or shortly thereafter. It is claimed that Mrs. Doehne suggested litigation was possible. No support for this suggestion is provided. To the contrary, Mrs. Doehne stated in her deposition that she did not have an intention to file any kind of claim. CP 71. Additionally, Mrs. Doehne stated in her deposition that it was the Frontier that offered to provide payment of her medical bills for treatment needed as a result of her injuries from her fall. CP 71. There was no specific litigation that Frontier could anticipate just because somebody fell at their facility. The complaint in this matter was filed almost three years after the incident.

To invoke the work-product exemption, the records claimed to be exempt must relate to completed, existing, or reasonably anticipated litigation. Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 732 (2007). Litigation in this case could not be reasonably anticipated after the incident given that Mrs. Doehne did not demand anything from the Defendant. In fact, the Frontier offered to care for Mrs. Doehne. CP 71.

V. CONCLUSION

Based on the foregoing, Plaintiff respectfully asks this court to uphold the trial court's ruling in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

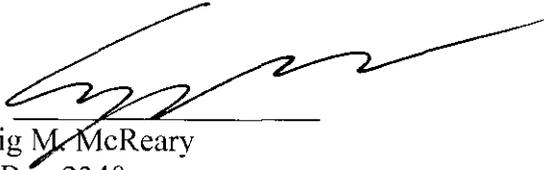
I hereby certify that on February 19, 2015, I caused to be served a copy of the BRIEF OF RESPONDENT on the following persons in the manner indicated below at the following addresses:

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