

ACC v. DOE et al.

Cases Cited in  
Discovery  
Motions and  
Responses

**BINDER 1**

**AR 013806**

**Airport Communities Coalition v. Department of Ecology et al.**

**PCHB No. 01-160**

**Table of Cases Cited in Discovery Motions and Responses**

**RECEIVED**  
JAN 18 2002  
ENVIRONMENTAL  
HEARINGS OFFICE

1.	<i>American Medical Systems, Inc. v. National Union Fire Insurance</i> , 1999 U.S. Dist. LEXIS 12037, *10 (E.D. La. 1999)
2.	<i>Belcher v. Bassett Furniture Industries, Inc.</i> 588 F. 2d 904 (4 <sup>th</sup> Cir., 1978)
3.	<i>Boring v. Keller</i> , 97 F.R.D. 404 (D. Colo. 1983)
4.	<i>Cabrera v. Cortis Corp.</i> 134 F.3d 1418, 1420 (9 <sup>th</sup> Cir., 1998)
5.	<i>In re Firestorm</i> , 129 Wn.2d 130, 916 P.2d 411 (1996)
6.	<i>Gammon v. Clark Equipment Co.</i> 38 Wn. App. 274, 686 P.2d 1102 (1984)
7.	<i>Green Construction Company v. Kansas Power &amp; Light Company, et al.</i> , 1988 U.S. Dist. LEXIS 18252 (D.C. Kan. 1988)
8.	<i>Heidebrink v. Moriwaki</i> , 104 Wn. 2d 392, 706 P.2d 212 1985)
9.	<i>In re Marriage of Parker</i> , 91 Wn. App. 219, 957 P.2d 256 (1998)
10.	<i>Penza, et al. v. Drexel Burnham Lambert, Inc.</i> , 1989 U.S. Dist. LEXIS 10193, *6-7 (E.D. Pa. 1989)
11.	<i>Service Liquor Distributors, Inc. v. Calvert Distillers Corp.</i> , 16 F.R.D. 346 (D.C.N.Y. 1954)
12.	<i>Sperberg v. Firestone Tire &amp; Rubber Co., et al.</i> , 61 F.R.D. 80 (N.D. Ohio 1973)
13.	<i>Teer v. Law Engineering and Environmental Services Inc.</i> , 176 F.R.D. 206, 207 (E.D. N.C. 1997)
14.	<i>Tobin v. WKRZ, Inc.</i> , 12 F.R.D. 200 (D.C. Pa. 1952)
15.	<i>Versatile Metals, Inc. v. The Union Corporation, et al.</i> , 1986 U.S. Dist. LEXIS 21801, (E.D. Pa. 1986)
16.	<i>Washington State Physicians Ins. Exchange &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P2d 1054 (1993)
17.	<i>William Penn Life Insurance Co. v. Brown Transfer and Storage Co.</i> , 141 F.R.D. 142 (W.D. Mo. 1990)

**AR 013807**



AMERICAN MEDICAL SYSTEMS, INC. VERSUS NATIONAL UNION FIREINSURANCE CO. OF  
PITTSBURGH, PA  
CIV. ACTION NO. 98-1788 SECTION "C"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1999 U.S. Dist. LEXIS 12037

July 30, 1999, Decided  
August 2, 1999, Filed; August 2, 1999, Entered

DISPOSITION: [\*1] National Union's Motion to  
Review Magistrate Judge's Order dated June 25, 1999  
DENIED.  
CASE SUMMARY

PROCEDURAL POSTURE: In plaintiff's suit against defendant, plaintiff's liability insurer, to recover sums spent by plaintiff in defending products liability lawsuits involving penile implant devices manufactured and sold by plaintiff, defendant moved for review of a magistrate's order that denied defendant's discovery requests pertaining to plaintiff's knowledge of risks and the relationships between plaintiff, its parent company.

OVERVIEW: In plaintiff's suit against defendant, its liability insurer, seeking to recover sums spent by plaintiff in defending products liability suits pertaining to penile implant devices manufactured and sold by plaintiff, defendant moved for review of a magistrate's order that denied certain of defendant's discovery requests. The court denied defendant's motion. Concerning defendant's request pertaining to plaintiff's knowledge of risks associated with the implants, the magistrate properly determined that the request was overly and broad and burdensome, and the magistrate was not clearly erroneous in requiring defendant first to procure relevant documents from the Food and Drug Administration, and then, if those documents supported defendant's expected or intended defense, to reurge the discovery request. Concerning defendant's request pertaining to the relationship between plaintiff, its parent company, and their self-insurance claims-handler, the magistrate was not clearly erroneous in denying that request because such relationship was irrelevant both to defendant's defenses and plaintiff's liabilities.

OUTCOME: The court denied defendant's motion to review a magistrate's order that denied defendant's discovery requests. Defendant's request for materials on plaintiff's knowledge of risks associated with its product

was overly broad and the request concerning the relationship between plaintiff and its parent company was irrelevant to defendant's defenses and to plaintiff's liabilities.

CORE TERMS: discovery, insured, implant, penile, occurrence, oral argument, coverage, trigger, insurer, discovery request, bodily injury, policy period, late notice, self-insurance, insurance policy, products liability, encompassed, malfunctions, custody, clearly erroneous, contamination, environmental, standpoint, obtainable, handled, site, requested information, liability insurance, insurance policies, documents relating

CORE CONCEPTS -

Civil Procedure: Appeals: Standards of Review: Clearly Erroneous Review

A district court reviews the decision of a magistrate judge regarding a nondispositive matter where it has been shown that the magistrate's order is clearly erroneous or contrary to law. *28 U.S.C.S. § 636(b)(1)(A)*.

Civil Procedure: Disclosure & Discovery: Relevance  
Civil Procedure: Disclosure & Discovery: Undue Burden  
Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P. 26(b)(1) (Rule 26). The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. While it is axiomatic that the scope of discovery under Rule 26 is broad and liberal, a court may limit discovery where the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. Rule 26(b)(2)(i). The court also may limit discovery if the burden or expense of the proposed discovery outweighs its likely benefit. Rule 26(b)(2)(iii).

AR 013809

Insurance Law: General Liability Insurance: Product Liability Coverage

Insurance Law: Claims & Contracts: Policy Interpretation

The Minnesota Supreme Court defines "expected" as used to define "occurrence" in a products liability insurance policy covering a manufacturer's goods as requiring "a certainty of harm on the part of the insured greater than general standards of foreseeability used to impose liability on the insured." The party raising the defense must prove that the insured actually expected certain consequences to result from its actions.

Insurance Law: Claims & Contracts: Policy Interpretation

The construction of an insurance policy is a question of law.

Insurance Law: General Liability Insurance: Coverage Trigger

The Minnesota Supreme Court has explained that the essence of the actual injury trigger theory is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period.

COUNSEL: For MED UROLOGICAL INC fka - American Medical Systems, Inc., plaintiff: Gustave A. Fritchie, III, Quentin F. Urquhart, Jr., Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA.

For MED UROLOGICAL INC fka - American Medical Systems, Inc., plaintiff: Sheila L. Birnbaum, Arthur F. Fama, Jr., Steven F. Napolitano, Skadden, Arps, Slate, Meagher & Flom, New York, NY.

For NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, defendant: Ralph Shelton Hubbard, III, June Anne Oswald, Lugenbuhl, Burke, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, defendant: Lynn K. Neuner, Simpson, Thacher & Bartlett, New York, NY.

For NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, defendant: Celeste D. Elliott, Lugenbuhl, Burke, et al, New Orleans, La.

For NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, third-party plaintiff: Ralph Shelton Hubbard, III, June Anne Oswald, Lugenbuhl, Burke, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, [\*2] PA, third-party plaintiff: Lynn K. Neuner, Simpson, Thacher & Bartlett, New York, NY.

For NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, third-party plaintiff: Celeste D. Elliott, Lugenbuhl, Burke, et al, New Orleans, La.

For YOSEMITE INSURANCE COMPANY, third-party defendant: Raymon G. Jones, Deutsch, Kerrigan & Stiles, New Orleans, LA.

For CENTURY INDEMNITY COMPANY fka California Union Insurance Company, third-party defendant: James M. Garner, Martha Y. Curtis, Sher Garner Cahill Richter, Klein McAlister & Hilbert, LLC, New Orleans, LA.

JUDGES: G. Berrigan.

OPINIONBY: G. Berrigan

OPINION: Before the Court is defendant National Union Fire Insurance Company of Pittsburgh, PA's ("National Union") Motion to Review the Magistrate Judge's Order dated June 25, 1999. The Magistrate Judge denied National Union's discovery requests related to two topics: plaintiff American Medical Systems, Inc.'s ("AMS") knowledge regarding the risks of injury posed by AMS's penile implants, and the relationship between AMS, its parent Pfizer, Inc. ("Pfizer"), and their self-insurance claims-handler, ESIS, Inc. ("ESIS"). Having reviewed the record, the memoranda of counsel, and the law, the motion[\*3] is denied.

#### A. BACKGROUND

AMS has sued its insurer, National Union, to recover millions of dollars spent defending against hundreds of products liability lawsuits involving penile implant devices that AMS manufactured and sold. AMS purchased liability insurance from National Union from April 1, 1980 to October 1, 1985. n1 Before purchasing insurance from National Union, AMS purchased insurance from at least four other insurers, two of which are third-party defendants in this law suit. n2 In June 1985, Pfizer, Inc. purchased AMS. Beginning in October 1985 and lasting for the next ten years, AMS became self-insured under Pfizer's self-insurance program. ESIS performed certain claims processing duties for Pfizer until the end of 1989.

n1 The first of the underlying lawsuits relevant to this action was filed in May 1994, but some of the injuries may have occurred during the period in which National Union's policies were in effect.

n2 The third-party defendants, Yosemite Insurance Company and Century Indemnity Company, provided coverage from June 1, 1973 to January 1, 1976, and from December 10, 1975 to December 10, 1976, respectively.

[\*4]

National Union's insurance policies with AMS included the duty "to defend any suit against the insured seeking damages on account of [a covered] bodily injury. . . ." In this case, National Union has raised several defenses to coverage. For purposes of this motion, the most relevant defenses are that: AMS expected or intended the bodily injury at issue; the bodily at issue was a known loss or loss in progress at the time the policies became effective; AMS provided late notice; the bodily injury did not occur during National Union's policy period; and the losses are covered by other applicable insurance including self-insurance.

On February 26, 1999, National Union served discovery requests seeking information related to these defenses. In particular, National Union requested information related to (a) AMS's knowledge of the risks of injury posed by the penile implants, and (b) AMS's and Pfizer's dealings with ESIS. Among other things, National Union requested information regarding AMS's knowledge of its penile implants' defects and malfunctions; AMS's research, development and marketing of its penile implants; AMS's submissions to the Food and Drug Administration ("FDA") regarding[\*5] penile implants; AMS's responses to consumer complaints about penile implants; and AMS's and Pfizer's communications with ESIS regarding the underlying claims.

National Union filed a Motion to Compel after AMS withheld certain documents. After oral argument on May 19, 1999 and June 23, 1999, the Magistrate Judge sustained AMS's objection to National Union's Request for Production No. 21. n3 While allowing National Union to obtain documents relating to claims, the Magistrate Judge denied National Union any documents relating to research and development. Minute Entry, Rec. Doc. 87 (6/25/99). Additionally, the Magistrate Judge sustained AMS's objection to National Union's Requests

For Production Nos. 15-16. n4 The Magistrate Judge held that AMS's relationship to ESIS is irrelevant to this case. Id. National Union objects to these two rulings of the Magistrate Judge.

n3 In Request for Production No. 21, National Union asked AMS to produce "all documents that refer or relate to possible defects or malfunctions of any penile prosthesis device marketed by AMS and/or the potential for any such device to cause Injury (sic) in the possession, custody or control of AMS and/or Pfizer." Rec. Doc. 53, Ex. C.

[\*6]

n4 These requests sought production of "all communications between AMS and/or Pfizer and ESIS, including without limitation communications pertaining to the appropriate date for identifying the injuries of any plaintiff involved in an Underlying Claim in the possession, custody or control of AMS and/or Pfizer" (No. 15), and "all contracts constituting, referring, or relating to the legal relationship between Pfizer and/or AMS and ESIS in the possession, custody or control of AMS and/or Pfizer" (No. 16). Rec. Doc. 53, Ex. C

## B. DISCUSSION

A district court reviews the decision of a magistrate judge regarding a nondispositive matter "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P. 26(b)(1). The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible[\*7] evidence. Id; *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991). While it is axiomatic that the scope of discovery under Rule 26 is broad and liberal, a court may limit discovery where "the discovery sought is . . . obtainable from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(i). The court also may limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(iii).

### 1. Discovery Related to Plaintiff's Knowledge of Health Risks

National Union argues that discovery relating to AMS's knowledge of health risks associated with the penile implant devices is relevant to its "Expected or Intended" defense, to its "Known Loss" and "Loss in Progress" defenses, and to its "Late Notice" defense. At oral argument, the Magistrate Judge indicated that the requested discovery is not relevant to an insurance dispute involving underlying product liability claims. The Court agrees with National Union that some of the information requested may lead to admissible evidence relevant to these defenses. For instance, the National Union policies provide coverage [\*8]for bodily injuries that are "neither expected nor intended from the standpoint of the insured." Definition Section, National Union Policy GLA 127-0107. National Union argues that it has reasonable grounds for believing that AMS expected the risks of injuries for which it now seeks coverage. National Union seeks to substantiate this through discovery. The Minnesota Supreme Court defines "expected" as used to define "occurrence" in this type of insurance policy n5 as requiring "a certainty of harm on the part of the insured greater than general standards of foreseeability used to impose liability on the insured." *Domtar Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 735 (Minn. 1997). The party raising the defense must prove that the insured actually expected certain consequences to result from its actions. *Id.* Information that AMS had actual knowledge or expectations of defects or malfunctions greater than what is generally foreseeable at the time it was insured by National Union would be relevant to National Union's defense. n6

n5 An "occurrence" based policy, which is the traditional form of a general liability insurance policy, covers any occurrence that happens within the policy period, regardless of when the insured submits the claims. See *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1389 n.4, citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 771, 113 S.Ct. 2891, 2896, 125 L. Ed. 2d 612 (1993). The National Union policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury neither expected nor intended from the standpoint of the insured." National Union Policy GLA 127-0107 (emphasis added).

[\*9]

n6 AMS contends that the doctrine of "expected or intended" harm does not apply in a products liability setting. It argues, "the very nature of products liability coverage is that some claims are expected; it is this risk of injury' . . . that leads to the purchase of

liability insurance." AMS's Mem., July 23, 1999, at 10. While perhaps compelling as a theory, the Court has not found a basis in law. AMS cites no case that supports, or even discusses, this argument. Nor does AMS explain why the burden is on National Union to produce a products liability case in which the "expected or intended" exclusion is applied, when Minnesota courts have applied the exclusion in a variety of settings without discussing whether it is limited to certain types of claims. See e.g. *Domtar, Inc.*, 563 N.W.2d at 729-30 (environmental contamination of plant site caused by coal-tar processing operations); *Gopher Oil Co. v. American Hardware Mutual Ins. Co.*, 588 N.W.2d 756, 761 (Minn. App. 1999) (environmental contamination of disposal sites caused by dumping of oil sludge); *Independent School District No. 197 v. Accident & Cas. Ins. Co. of Winterthur*, 525 N.W.2d 600, 605-06 (Minn. Ct. App. 1995) (finding issue of fact regarding whether asbestos manufacturer expected or intended injury).

[\*10]

The Court declines to overrule the Magistrate Judge's ruling, however. The transcript of oral argument on June 23, 1999 indicates that the Magistrate Judge denied National Union's discovery request because it is over broad, not simply because it seeks irrelevant materials. Indeed, the inquiry smacks of the proverbial "fishing expedition." The Magistrate Judge did not rule out the possibility of allowing this discovery to take place. She told National Union first to procure relevant documents from the FDA, and then, if these documents support National Union's "expected or intended" defense, to reurge the discovery request. This is evidenced by the following exchange at oral argument:

THE COURT: Did you go to the FDA to see what was submitted to them by AMS?

MS NEUNER (Counsel for National Union): No, Your Honor.

THE COURT: Go there first, and what you find, if you find something that tickles your fancy, if it looks like it could be substantial, come back. Before that I'm not giving you anything. . . . I think you're barking up a very broad tree, Counsel.

MS. NEUNER: And, Your Honor, I would submit that our defenses are being struck without the ability to do any[\*11] factual investigation --

AR 013811

THE COURT No, I told you to go to FDA. . . . You go get your [FOIA] request. You find something in the [FOIA] request that tickles your fancy. You brief the issue and I will reconsider it at that time. Based on what you're telling me now, the answer remains no.

Tr. of Oral Argument, June 23, 1999. at pp. 39, 41.

Recalling that the Magistrate Judge may limit discovery if she determines that the discovery sought is obtainable from a different source, Fed. R. Civ. P. 26(b)(2)(i), and given the potentially enormous amount of materials encompassed by National Union's request, the Magistrate Judge was not clearly erroneous to require National Union to attempt to obtain relevant materials from the FDA before requiring AMS to comply with its document request. The Magistrate Judge's order is affirmed in this respect.

## 2. Discovery Related to the Relationship Between AMS, Pfizer, and ESIS

National Union argues that discovery relating to the relationship between AMS, Pfizer and ESIS is relevant to issues of allocation, trigger and late notice. The Magistrate Judge denied this discovery request on the grounds that "AMS's relationship to ESIS[\*12] is irrelevant to this case." Minute Entry, Rec. Doc. 87 (6/25/99). Significantly, the Magistrate Judge did not rule that the defenses for which AMS seeks this discovery are irrelevant to the case. She held only that discovery of communications and contracts between AMS, Pfizer and ESIS is not necessary to back these defenses.

The Magistrate Judge's decision to deny National Union's discovery requests was not clearly erroneous for at least two reasons. First, National Union's alleged liability for AMS's defense costs is governed by the terms of the insurance policies. The construction of an insurance policy is a question of law. *St. Paul Fire & Marine Ins. Co. v. Lenzmeier*, 309 Minn. 134, 243 N.W.2d 153, 156 (Minn. 1976). Thus, the Court must look to the policies, not to individual claims or to the manner in which AMS, Pfizer and ESIS handled these claims, to determine whether, for instance, an implant or an explant triggers coverage. Documents like the letter from an ESIS representative to Pfizer, stating that the "date of loss" is the date of "fracture" and not "implementation," would be relevant to what "triggers" National Union's policies only if this were a question[\*13] of fact. n7 It is not.

n7 See Def's Mem., July 13, 1999, Ex. N (Letter from Susan Kirk, ESIS Claims Representative to Pfizer, Inc., Dec. 28, 1988).

Similarly, the details of AMS and Pfizer's purported self-insurance program are not relevant to the allocation of AMS's liabilities. National Union only is liable for occurrences covered by its own policies, irrespective of whether (or how) AMS handled non-covered claims. The Minnesota Supreme Court has explained that "the essence of the actual injury trigger theory is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period." *Northern States Power Co. v. Fidelity and Cas. Co. of New York*, 523 N.W.2d 657, 662 (Minn. 1994). To the extent that AMS (once owned by Pfizer) was not insured after September 1985, or chose to self-insure, it will be included in the allocation. See *id.* at 664 (holding insured responsible for its share[\*14] of property damage for which it effectively was self-insured); *Diocese of Winona*, 89 F.3d at 1396 (apportioning judgment against insured between insurers and, for period in which there was no coverage, the insured).

The second reason the Magistrate Judge's ruling is not clearly erroneous is that National Union can obtain the information necessary to raise issues of allocation, trigger and late notice from other sources, as it already has done. AMS has produced its litigation files for the underlying claims, and National Union conducted audits of AMS's records on at least two occasions. National Union should be able to ascertain when the implants occurred, when problems arose, and when claims were made against AMS from these sources. Even if it cannot, it is within the Magistrate Judge's discretion to require that National Union tailor its discovery request to avoid the potentially massive production that, as currently stated, compliance with the requests would entail. Fed. R. Civ. P. 26(b)(2)(i), (iii). Therefore, the Magistrate Judge's Order is also affirmed in this respect.

## C. CONCLUSION

It was not clearly erroneous of the Magistrate Judge to sustain[\*15] AMS's objection to Requests for Production Nos. 15, 16 and 21. Documents encompassed by Request No. 21 may be relevant, but it was within the Magistrate Judge's discretion to require that National Union attempt to obtain them from the FDA before compelling like production by AMS. Documents encompassed by Requests No. 15 and 16 are of questionable relevance, and the requests are unnecessarily broad to obtain what information may be relevant and is not already in AMS's possession.



Accordingly,

National Union's Motion to Review the Magistrate  
Judge's Order dated June 25, 1999 is DENIED.

G. Berrigan

**AR 013813**



Alease Belcher, Esther Britten, Willis T. Brown, George W. Conner, Joanna H. Conner, John R. France, Calvin M. Hairston, Lillie Mae Hairston, Vexter P. Hairston, Robert Hightower, Virginia W. Hightower, Vivian Hightower, Elizabeth Johnson, Charles Manns, Alma R. Martin, Blanche Menefee, Dorothy J. Moore, Genevive Neville, Frank E. Redd, Ben F. Shelton, Dora M. Swanson, Individually and on behalf of all persons similarly situated, Appellees, versus Bassett Furniture Industries, Inc., Bassett Chair Co., Bassett Furniture Co., J. D. Bassett Manufacturing Co., Bassett Superior Lines, Bassett Table Co., Appellants.

No. 77-1087

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

588 F.2d 904; 1978 U.S. App. LEXIS 7290; 18 Fair Empl. Prac. Cas. (BNA) 1078; 18 Empl. Prac. Dec. (CCH) P8705; 26 Fed. R. Serv. 2d(Callaghan) 546

May 5, 1978, Argued  
December 5, 1978, Decided

**PRIOR HISTORY:**

Appeal from the United States District Court for the Western District of Virginia, at Danville. James C. Turk, District Judge.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Defendant appealed an order of the United States District Court for the Western District of Virginia, granting plaintiffs' motion for discovery pursuant to Fed. R. Civ. P. 34 in a sex and race discrimination case.

**OVERVIEW:** Plaintiffs, a group of past and present employees of defendant company (company), filed a sex and racial discrimination action against company, alleging that blacks were relegated to lower paying and less attractive jobs. In a motion for discovery, plaintiffs sought inspection of five plants and sought to interrogate employees over a period of five days. In opposing the motion, company argued that the motion failed to specify the items to be inspected and that the inspection would be a burden upon its operations. The court reversed an order of the lower court granting plaintiffs' motion. The court held that the order did not specify any manner of discrimination or any department or job classifications in which such discrimination has occurred. It asserted that the anticipated benefit of the inspection was slight and the disadvantage to company was substantial. The court vacated the order and remanded to trial court.

**OUTCOME:** Order granting motion for discovery was vacated and remanded because it did not specify the

relevant premises to be inspected or employees to be interrogated. As such it would affect substantial rights of defendant inequitably.

**CORE TERMS:** inspection, discovery, plant, interrogation, questioning, deposition, specify, anticipated, good cause, particularity, inspected, patent infringement, production of documents, class action, certification, desirability, attractive, relevancy, relegated, paying, tour, Federal Rules, improvidently, improvident, insure, cattle, interlocutory appeal, class certification, moving party, large part

**CORE CONCEPTS -**

**Civil Procedure: Disclosure & Discovery: Undue Burden**  
Granting or denying a request under Fed. R. Civ. P. 34 is a matter within the trial court's discretion, and it will be reversed only if the action taken was improvident and affected substantial rights.

**Civil Procedure: Disclosure & Discovery: Relevance**  
The request for discovery must set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity.

**Civil Procedure: Disclosure & Discovery: Relevance**  
Neither Fed. R. Civ. P. 34 nor Fed. R. Civ. P. 26, the general discovery rule, permits blanket discovery upon bare skeletal request when confronted with an objection, as the plaintiffs seem to assume.

**Civil Procedure: Disclosure & Discovery: Undue Burden**

When the desired discovery concerns materials prepared in anticipation of trial, the moving party must show that he has substantial need of the materials, and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Fed. R. Civ. P. 26(b)(3).

COUNSEL: J. W. Alexander, Jr., Charlotte, N. C. (L. Dale McGhee, Bassett, Va., Blakeney, Alexander & Machen, Charlotte, N. C., on brief), for appellants.

John W. Douglas, Washington, D. C. (David J. Cynamon, Thomas S. Williamson, Jr., Covington & Burling, Richard T. Seymour, Lawyers' Committee for Civil Rights Under Law, Robert B. Wallace, Washington, D. C., Ruth L. Harvey, Danville, Va., on brief), for appellees.

JUDGES: Before HAYNSWORTH, Chief Judge, RUSSELL, Circuit Judge, and FIELD, Senior Circuit Judge.

OPINIONBY: RUSSELL

OPINION: [\*905]

The plaintiffs/appellees, a group of past and present employees of the defendant/appellant, have filed a discrimination action, both in their individual capacities and as class representatives, charging, in separate causes of action, both sex and racial discrimination. The allegations of discrimination [\*906] in both counts are stated in exactly the same "boiler-plate," standardized language, without any specification whatsoever of the individual claims of discrimination by any of the plaintiffs. n1 Without a hearing and acting entirely on the allegations of the complaint, the district court certified the action as a class action. It may not be amiss to state again what we have said in a number of recent cases that normally certification should not be granted perfunctorily on the basis of "boiler-plate" allegations such as we have here. n2 We have counseled that there should be some inquiry, often involving discovery, into the nature of the case both for the purpose of determining whether the case qualifies for certification and, if it does qualify, of identifying the class or classes certified. n3 Despite the fact that the district court has certified this as a class action without such an inquiry, there is no reason why it may not at any time reconsider that action and conduct an appropriate hearing on the propriety of the certification. This, however, is not the issue on which an interlocutory appeal was granted, and our statements are not to be taken as either approving or disapproving the class certification of the case.

n1. The complaint contains broad allegations concerning the hiring, assignment, transfer, and promotion of employees to certain desirable jobs. It alleges, in part, that the defendant has concentrated blacks and females in certain of the lowest paid and least desirable departments and job assignments while restricting certain of the highest paid and most desirable departments and job assignments to white male employees, yet it fails to identify any department, any assignment, or any employee specifically affected.

n2. *Shelton v. Pargo, Inc.* (4th Cir. 1978) 582 F.2d 1298, 1312; *Doctor v. Seaboard Coast Line R. Co.*, 4 Cir., 540 F.2d 699, 707; See *East Texas Motor Freight Sys., Inc. v. Rodriguez* (1977) 431 U.S. 395, 405, 97 S. Ct. 1891, 52 L. Ed. 2d 453. As noted recently by the fifth circuit, "(t)he propriety of class action suits can seldom be determined on the basis of pleadings alone, and, ordinarily, it is the duty of the trial court to hold an evidentiary hearing before deciding whether to grant or deny class certification." *King v. Gulf Oil Co.* (5th Cir. 1978) 581 F.2d 1184, 1186.

n3. *Doctor v. Seaboard Coast Line R. Co.*, *supra* at 708-709 (540 F.2d). Certainly it is incumbent upon the court to determine that the named plaintiffs are members of the class they seek to represent. "(A) class representative must be part of the class and "possess the same interest and suffer the same injury as the class members." *East Texas Motor Freight Sys., Inc. v. Rodriguez*, *supra*, 431 U.S. at 403, 97 S. Ct. at 1896; See *Tuft v. McDonnell Douglas Corp.* (8th Cir. 1978) 581 F.2d 1304, 1307-08 (unmarried recipient of hysterectomy was improper representative of either married or pregnant women); *Johnson v. American Credit Co. of Georgia* (5th Cir. 1978) 581 F.2d 526, 532. See generally *Goodman v. Schlesinger* (4th Cir. 1978) 584 F.2d 1325, 1333.

The issue presented for appeal is whether the district court abused its discretion in granting a motion for discovery pursuant to Rule 34 of the Fed.R.Civ.P. n4 The

plaintiffs' motion sought inspection of the five plants whose operations are in issue. The motion broadly states that the inspection is to be conducted over a five-day period by a designated expert. While the expert is identified, his special expertise is not described. Neither does the motion suggest the areas of inquiry to which his inspection is to be directed. The expert is to have the right to roam through the plants, to stop when he chooses, and to make such inquiries as he deems appropriate of any supervisors or employees in the plant. He is to be accompanied on his tour by a guide supplied by the defendant and an entourage consisting of an unspecified number of plaintiffs' attorneys, a paralegal, and two plaintiffs. One of defendant's attorneys, if defendant so desires, might be included in the party.

n4. The interlocutory appeal was certified pursuant to 28 U.S.C. § 1292(b) (1970). All rules cited are to the Federal Rules of Civil Procedure.

The district court, without awaiting any response to the motion by the defendant and without a hearing, initially granted the motion as requested by the plaintiffs. The defendant promptly moved for reconsideration and filed a response vigorously objecting to the inspection. The court granted the motion to reconsider and held a hearing at which the plaintiffs and the defendant, by their counsel, were heard.

[\*907] After rehearing, the district court granted the inspection on the plaintiffs' original terms, finding that the allegations of blacks being relegated to lower paying and less attractive jobs placed the defendant's physical premises in issue in this suit, and inspection might reveal "significant" evidence not discernable through a review of documents alone. What that "significant" evidence might be was unspecified. The court did, however, direct that questioning of employees be kept to a minimum, and that no questions concerning alleged discrimination be asked. Just what questions were deemed proper, however, was not specified.

The sole issue confronting us is whether the trial court's authority to order inspection was properly exercised. "Granting or denying a request under rule 34 is a matter within the trial court's discretion, and it will be reversed only if the action taken was improvident and affected substantial rights." *Tiedman v. American Pigment Corporation* (4th Cir. 1958) 253 F.2d 803, 808. Although rule 34 has since been amended to operate extrajudicially, its scope is defined by rule 26(b), and the standard of review expressed in *Tiedman* is applicable. See *McDougall v. Dunn* (4th Cir. 1972) 468 F.2d 468,

476. We believe the trial court acted improvidently in this case.

The motion which the plaintiffs submitted and which the court approved is, like their complaint, of a general nature. It fails to specify any reason or need for the inspection, relying simply on rule 34. The defendant raised numerous specific objections to the order, none of which, apparently, persuaded the district court. Defendant objects both on constitutional grounds n5 and on the language of the rule itself. Defendant maintains that an inspection such as the plaintiffs seek is entirely beyond the confines of rule 34, as that rule embraces only the inspection of property, not the interrogation of persons. Moreover, the defendant claims that the motion fails to specify the items to be inspected with the particularity required by rule 34. This argument is founded on the statement in rule 34(b):

n5. Inspection and production orders have long been considered constitutional, and we find no merit in this aspect of defendant's argument. See *Montana Co. v. St. Louis Mining etc. Co.* (1894) 152 U.S. 160, 168-69, 14 S. Ct. 506, 38 L. Ed. 398.

The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. n6

6. See, generally, 4A Moore's Federal Practice P 34.07, at 34-50 to 34-56 (2d ed. 1978).

The defendant directs, however, a large part of its argument against the order to the burden upon its operations and the alleged unfairness of the proposed inspection, as well as the absence of legal precedent for the inspection. It claims that inspections during working hours will consume considerable time at company expense, will interfere with plant operations, and will jeopardize the safety of those persons near dangerous machinery. This is particularly true, it says, of the request to interrogate employees at their work. Defendant conducts its operations on a conveyerized-type system, each step of production thereby being dependent upon the preceding steps. The defendant maintains that, under such a manufacturing procedure, a cessation of work by any given employee for purposes of interrogation will cause a production breakdown along the entire production line. Moreover, if the questioning of employees at work is to be conducted by a large group

unfamiliar with the plant, the defendant contends that a serious safety hazard arising from the proximity of such unfamiliar persons to the operating machinery will be created. The interrogation of the employees, conducted informally, would also be, in the opinion of the defendant, tantamount to a roving deposition, taken without notice, throughout the plants, of persons who were not sworn and whose testimony was not recorded, and without any right by the defendant to make any objection to the questions asked. Presumably, on the basis of such interrogations, the expert would base his testimony.

[\*908] Neither rule 34 nor rule 26, the general discovery rule, permits blanket discovery upon bare skeletal request when confronted with an objection, as the plaintiffs seem to assume. n7 Some degree of need must be shown. In most cases, this need is demonstrated by simply showing the relevancy of the desired discovery to the cause of action. n8 This, indeed, is the general policy as stated in rule 26(b)(1). But when the desired discovery concerns materials prepared in anticipation of trial, the moving party must show that he has substantial need of the materials, and that "he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3). n9

n7. Rule 34 contemplates extrajudicial discovery, but provides for determination of the issue when confronted with objections. The court may compel discovery under rule 37(a) and provide protective provision under rule 26(c).

n8. See, e. g., *Babcock & Wilcox Co. v. Public Serv. Co. of Indiana* (S.D.Ind.1976) 22 F.R.Serv.2d 340, 341; *Community Sav. & L. Ass'n. v. Federal Home Loan Bank Bd.* (E.D.Wis.1975) 68 F.R.D. 378, 381; *White v. Jaegerman* (S.D.N.Y.1970) 51 F.R.D. 161, 163.

n9. See *McDougall v. Dunn*, *supra*, at 473 (468 F.2d); *Guilford National Bank of Greensboro v. Southern Ry. Co.* (4th Cir. 1962) 297 F.2d 921, 923-24.

Rule 34, concerning the production of documents and tangible things as well as inspection of premises, is governed by the standards of rule 26(b). There is not, however a clear indication of which standard defined by 26(b) is to control the proposed inspections. The conflicts in the courts which led to the 1970 amendments centered almost entirely around the production of documents. Consequently, the realignment of rules 34 and 26, along with the advisory committee's notes, largely concerned documents. n10 Since entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for inspection would seem warranted. We therefore reject the plaintiffs' contention that the inspection in this case must necessarily be governed by the general relevancy standard of rule 26(b). Rule 26(c) expressly provides that "for good cause shown," the court may "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by either denying inspection or by appropriate restrictions on the inspection. n11 Under this subsection, the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection. n12

n10. Prior to 1970, a showing of "good cause" was a requirement for all discovery under rule 34. The advisory committee found that in actual practice, good cause was required only in trial preparation materials cases while mere relevancy was sufficient for production of other documents. The committee accordingly wrote the varying standards into rule 26 and dropped the good cause requirement from rule 34. In so doing, however, it gave no indication as to what standard would govern the second part of rule 34, I. e., inspection of a party's premises. See *Advisory Committee's Note*, 48 F.R.D. 487, 498 (1970); 8 Wright & Miller, *Federal Practice and Procedure* § 2205 at 596-597 (1970). Some recent commentators have suggested that upon contest of a rule 34 motion, traditional concepts of "good cause" once again become important. Hughes & Anderson, *Discovery: A Competition Between the Right of Privacy and the Right to Know*, 23 *U.Fla.L.Rev.* 289, 299 (1971).

n11. For a recent illustration of the use of such power, See *Gentron Corp. v. H. C. Johnson Agencies, Inc.* (E.D.Wis.1978) 79 F.R.D. 415, 418-419.

n12. See 8 Wright & Miller, *Federal Practice & Procedure* § 2040, at 286-287 (1970). As recognized by the commentators:

\* \* \* (i)t is clear that the right to discovery is a qualified right that does not extend to making unnecessary and unwarranted excursions onto the property of another under the guise of supportable litigative need. Public policy supports reasonable and necessary demands for information in the hands of the adversary, in order that the case may be well and truly tried. But any such invasion of a person's property rights must, in the language of our Supreme Court, "be judged with care . . . . Properly to balance these competing interests is a delicate and difficult task.'

Hughes & Anderson, *Supra*, at 291 (quoting *Hickman v. Taylor*, 329 U.S. 495, 497, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).

In the recent more liberalized trend of granting inspection orders, the courts have uniformly scrutinized the problems to insure that the anticipated benefits are real and necessary, and that the burdens will not be intolerable. See, e. g., *National Dairy Products Corp. v. L. D. Schreiber & Co., Inc.* (E.D.Wis.1973) 61 F.R.D. 581, 583 (patent infringement); *United States v. National Steel Corp.* (S.D.Tex.1960) 26 F.R.D. 603, 606-607 (antitrust).

[\*909] On balance, it can be seen that the order here indicates but small utility to be derived from the inspection. Neither the complaint, nor the motion for discovery, nor the court's order itself specifies any manner of discrimination or any department or job classifications in which such discrimination has occurred, despite the fact that each of defendant's plants is divided into several large departments, which in turn consist of several hundred job classifications. The district court's order simply states that the defendant's premises have been placed in issue by the allegation that black employees have been relegated to lower paying and less attractive jobs. The proposed inspection certainly cannot aid in determining pay scales any more easily than can interrogatories or a study of the defendant's records. n13 The inspection must, then, relate solely to the desirability of certain jobs. Yet the order specifies no jobs which are to be surveyed either for determination as less desirable or for preferences, and no departments which are suspect. Despite the objections raised by the defendant, the plaintiff has made no effort

to establish either the area of inquiry to which the inspection is to be directed or why, by the depositions of the plaintiffs or others in similar status, they cannot more easily and more reliably establish which jobs are less desirable or better paying than an expert witness could by roaming through the plants addressing random inquiries to employees he may encounter at work in the plants. Indeed, it would seem that an expert's testimony on the basis of sworn testimony of actual employees or former employees, given under oath at trial or by deposition, would be far more reliable and persuasive in fact, less open to objections for admissibility than the hearsay unrecorded statements of unidentified employees, about whose exact language there might be serious dispute. Under the circumstances, it is difficult to see how the proposed inspection can have any meaningful direction.

n13. Over a period of approximately three and one-half years, the plaintiffs have had virtually unlimited access to defendant's personnel data, and have copied some 60,000 records.

Notwithstanding their extensive discovery efforts so far, the plaintiffs have not sought to depose any employee engaged in the manufacturing process. Had they done so, they would be in a position to specify, with the particularity demanded by rule 34, the alleged discrimination that they seek to expose in the actual operations of the plant or in the activities of the several units of the defendant's operating procedure. Establishing such a predicate would go far toward fulfilling the purposes of discovery by doing what neither the plaintiffs' motion nor the order of the district court does, I. e., defining preliminarily the areas of inquiry.

The anticipated benefits of the inspection thus appearing slight, the disadvantages, particularly to the defendant, are substantial. The purpose of the inspection, according to the court's order, is to uncover evidence relating to the allegation that blacks have been relegated to less attractive jobs than have been whites. Both the plaintiffs' motion and the court's order indicate that the questioning will be directed to this end. Such questioning would necessarily touch on what appears to be one of the plaintiffs' possible claims of discrimination; n14 it would, therefore, violate the restriction placed by the court on the questioning. Yet, as we have observed, there is no provision whereby the defendant can be protected against such questioning, or whereby the answers can be substantiated. Any opinions gathered by the expert through such one-sided questioning, going

inescapably to one of the issues on discrimination, would consist in large part of unsubstantiated hearsay. While the presence of defendant's attorneys will give the interrogations the appearance of depositions, the safeguards of true depositions will be absent. The [\*910] employees will not be under oath, their answers will not be recorded, and they will not be subject to cross-examination. The plaintiffs' suggestion that defendant's attorneys could control the questioning, objecting to certain questions or instructing employees not to answer them, would, at the very least, lead to confusion and disruption in the assembly line setting. The very suggestion itself lends credence to the suspicion that the interrogations are intended as substitutes for depositions. The requirements and safeguards prescribed by the Federal Rules for deposing witnesses cannot be so easily circumvented.

n14. We say "possible" because the complaint does not specify, except in the most general terms, the discrimination.

We see no reason why the plaintiffs should not engage in normal methods of deposing witnesses prior to requesting the sweeping relief they seek here. Although the Federal Rules do not prescribe an order of preference for discovery techniques, n15 one method cannot arbitrarily be demanded over another simply because it is less burdensome to the moving party. Depositions do much to identify the items of discovery and to establish the rights of the parties under rule 34. n16 The information concerning job desirability, if that is to be the subject of the expert's inspection, can be obtained, as we have already observed, far more easily and reliably in the judicial atmosphere surrounding deposition than in the inspection atmosphere anticipated by the order. And if the testimony taken by depositions should prove unsatisfactory or if they could be profitably illuminated by testimony gleaned from a visual inspection, it would be time enough to consider an order for a simple inspection of the plants.

n15. See *Wright v. Patrolmen's Benev. Ass'n.* (S.D.N.Y.1976) 72 F.R.D. 161, 164.

n16. *Niks v. Marinette Paper Co.* (N.D.N.Y.1951), 11 F.R.D. 384, 386; Cf. *Public Administrator v. Rogers* (S.D.N.Y.1960) 26 F.R.D. 118, 119 (desirability of interrogatories in identifying specific documents).

Neither counsel's directions nor our own research has led us to compelling precedent for the type of inspection sought here. Most cases involving on-site inspections concern a given object on the premises which is the subject matter of the action, as, for example, a particular machine in a personal injury or patent infringement case. n17 An antitrust case may involve actual processes, but will not ordinarily permit or require random interrogation of employees in the course of inspection. n18 The only case we have found involving broad inspection powers coupled with interrogations is the recent case of *Morales v. Turman* (E.D.Tex.1972) 59 F.R.D. 157.

n17. See, e. g., *National Dairy Products Corp. v. L. D. Schreiber & Co.*, supra, 61 F.R.D. 581 (patent infringement); *Cox v. E. I. Du Pont de Nemours & Company* (D.C.S.C.1965) 38 F.R.D. 396 (wrongful death); Cf. *Martin v. Reynolds Metals Corporation* (9th Cir. 1961) 297 F.2d 49 (inspection of cattle, vegetation, water and soil where deaths of cattle were bases for anticipated tort action).

n18. See *United States v. National Steel Corp.* (S.D.Tex.1960) 26 F.R.D. 603.

*Morales* involved serious constitutional questions concerning the operations of various juvenile institutions operated by the Texas Youth Council. The inspection order allowed two experts to be placed in each of two institutions for a period of up to thirty days. They were to engage in all the activities of the juveniles, and could converse with the inmates and staff as they deemed necessary. While the order seemingly was quite broad, it was qualified by a substantial predicate, both by testimony and exhibits, of the activities to be inspected, along with identification of the experts and opportunity for the defendant to controvert them. The court considered the issue of inconvenience and found and this is the distinguishing feature of the case that since sizable groups of graduate students had been permitted to conduct studies of the same general character as that sought by the plaintiffs on the premises in the past, the defendant was in no position to make the claim authorized in Rule 26(c). n19 The unique order of *Morales* provides no basis for a similar order here.



n19. Id. at 158-159.

The plaintiffs seek to identify with Morales by asserting that the defendant permits groups of visitors to go through its plants. But these tours are carefully controlled. They involve no questioning of employees; they admit of no approach to the manufacturing chain both to avoid any hazard to the visitor and to prevent any disruption of work by the employees. We see no real similarity between such tours and the form of inspection requested by the plaintiffs. This fact clearly distinguishes this application for inspection from that in Morales.

[\*911] The Morales case, like most other inspection cases, does demonstrate the necessity of exercising

precision and care in the formulation of inspection orders. This care is altogether lacking in the present case as the order well demonstrates. It fails to identify the items to be inspected with any degree of particularity, fails to insure the reliability of the information to be gained, and provides inadequate protection for the defendant. We believe the proposed interrogations pose a risk of creating highly unreliable evidence. On the present showing, the plaintiffs were not entitled to the order as granted and we find its issuance improvident.

Finding the order to have been improvidently granted and affecting substantial rights of the defendant, we vacate it and remand the matter to the district court for further action not inconsistent with the principles stated here.

REVERSED and REMANDED WITH DIRECTIONS.

AR 013821



CAROL BORING, Plaintiff, v. BEN R. KELLER, JR., M.D., Defendant  
Case No. 81-K-1254

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

97 F.R.D. 404; 1983 U.S. Dist. LEXIS 19194; 35 Fed. R. Serv.2d (Callaghan) 1596; 12 Fed. R. Evid. Serv. (Callaghan)  
1213

February 16, 1983

CASE SUMMARY

**PROCEDURAL POSTURE:** Defendant doctor sought review of the magistrate court's order, which granted plaintiff patient's motion to compel production of documents pursuant to Fed. R. Civ. P. 26, 37.

**OVERVIEW:** The patient claimed that the doctor performed a total abdominal hysterectomy upon her without her informed consent. After the patient's counsel deposed two of the doctor's expert witnesses, the counsel for the doctor telephoned the patient's counsel and informed him that an unedited version of the patient's deposition summary had inadvertently been included with the documents supplied to the expert witnesses. The summary contained the doctor's counsel's impressions of the patient. In addition, both expert witnesses were provided with an "expert witness letter" that also contained the counsel's impressions. The doctor's counsel claimed that the information was privileged and refused to allow the patient to inspect a copy of the documents. The court affirmed the order by holding that the work product rule was not an exception to the discovery of the counsel's mental impressions because they were examined and reviewed by the expert witnesses and they used them to form their expert opinions. The facts known by the experts were discoverable so that the patient could prepare cross-examination and impeachment pursuant to Fed. R. Civ. P. 26(b)(4).

**OUTCOME:** The court affirmed the order that granted the patient's motion to compel production of documents because the documents that contained the doctor's counsel's impressions were discoverable, and the work product rule was not an exception to discovery of such information. The documents were examined and reviewed by the expert witnesses and used to form their expert opinions.

**CORE TERMS:** work product, discovery, expert witness, impressions, deposition, work product rule, discoverable, informed consent, cross-examination, impeachment, supplied, disclosure, waived, subject to discovery, prepare, marked, purposes of impeachment, work product privilege, unusual circumstances, undiscoverable, corroboration, immunized, medical malpractice, prospective witness, evidence presented, discovery process, adversely affect, present action, expert opinion, adverse party

**CORE CONCEPTS -**

**Civil Procedure: Disclosure & Discovery: Work Product**

Fed. R. Civ. P. 26(b)(3) codifies the work product doctrine and provides that a court shall protect against disclosure of the mental impressions, conclusions, opinion, or legal theories of an attorney. This is the definition of "opinion work product" as adopted by Fed. R. Civ. P. 26.

**Civil Procedure: Discovery Methods: Expert Witness Discovery**

Fed. R. Civ. P. 26(b)(4), provides that a party is entitled to discover facts made known to an adverse expert because a party should be allowed to prepare for cross-examination and impeachment of any prospective witness.

**Civil Procedure: Disclosure & Discovery: Work Product**

Opinion work product is normally afforded a very high degree of immunity, but it is also subject to discovery when the need for such information is at issue and compelling.

**AR 013823**

Civil Procedure: Disclosure & Discovery: Work Product

The protection which Fed. R. Civ. P. 26(b)(3), affords to opinion work product is not absolute, and it can be waived.

Civil Procedure: Discovery Methods: Expert Witness Discovery

Pursuant to Fed. R. Civ. P. 26(b)(1), a party may obtain discovery from an expert witness regarding any matter, including facts and opinions acquired or developed in anticipation of litigation or for trial and material prepared in other contexts.

Civil Procedure: Discovery Methods: Expert Witness Discovery

Fed. R. Civ. P. 26(b)(4), provides that a party may discover facts known and opinions held by experts, so that a party may prepare for cross-examination and impeachment of any prospective witness.

Civil Procedure: Disclosure & Discovery: Work Product

Under certain circumstances, discovery of written materials obtained or prepared by an adversary's counsel with an eye toward litigation is permissible. The circumstances in which the written documents might be subject to discovery are where production is essential to the preparation of one's case, and where they might be useful for purposes of impeachment and corroboration.

COUNSEL: [\*\*1]

Philip A. Harley, Esq., Cox & Wedgle, P.C., Denver, Colorado, for Plaintiff.

Peter W. Pryor, Esq., Pryor, Carney and Johnson, P.C., Englewood, Colorado, for Defendant.

JUDGES: Kane, J.

OPINIONBY: KANE

OPINION: [\*404] ORDER

KANE, J.

This is a medical malpractice action where the plaintiff claims that the defendant performed a total abdominal hysterectomy upon her without her informed consent.

Counsel for plaintiff deposed two of defendant's expert witnesses on July 26 and August 2, 1982. During the course of the first deposition with Dr. Richards, plaintiff's attorney asked the deponent to identify each document which he had inspected to prepare for the deposition and the rendering of his expert opinion. Counsel for the defendant suggested that the documents be assembled and marked as a single exhibit in order to save time. Plaintiff's counsel agreed to the procedure, and the exhibit was marked and attached to the deposition.

Shortly thereafter, defendant's attorney, Peter Pryor, telephoned plaintiff's attorney and informed him that an unedited version of plaintiff's deposition summary had inadvertently been included with the documents supplied to the expert witnesses. This unedited[\*\*2] summary contained Pryor's impressions and evaluations of Mrs.

Boring's appearance and demeanor as a witness, in addition to a summary of her substantive testimony. Also, it was discovered that the same document had been provided to and reviewed by Dr. Hutto, the defendant's second expert witness.

[\*405] In addition to Pryor's description and impressions of the parties, both expert witnesses were provided with an "expert witness letter." The letter contained general suggestions to experts for their deposition testimony, as well as counsel's impressions, thoughts and opinions regarding issues which are generally encountered in medical malpractice cases. Apparently, the letter did not discuss any specifics of the present action, nor did it suggest that the expert testify to any fact or set of facts.

Pryor requested permission to withdraw that portion of the exhibit which included his mental impressions on the ground that it was work product, and as such, was privileged. Plaintiff's counsel agreed to allow withdrawal of the exhibit, but refused to acknowledge that it was privileged. Defendant's attorney refused to allow the plaintiff to inspect a copy of the document, and the issue [\*\*3]was submitted to the magistrate for determination.

On January 4, 1983, the magistrate granted plaintiff's Motion to Compel Production of Documents Pursuant to Rules 26 and 37. The defendant was ordered to produce the summary of the deposition and the letter which had been provided to the defendant's expert witnesses. The magistrate noted that, "under the circumstances here presented, it is concluded that the documents in question will most probably have an influence on the evidence presented by testimony and, therefore, opportunity must be afforded to the plaintiff to evaluate the possible effect of this material and depose or cross-examine accordingly."

It is this order which the defendant moves the court to reconsider.

Generally, defendant alleges that the magistrate's order was erroneous and contrary to established law. In these circumstances, and especially in view of the sanctity of opinion work product which is recognized in F.R.Civ.P. 26(b)(3), he asserts that the Motion to Compel Discovery should be denied.

F.R.Civ.P. 26(b)(3) codifies the work product doctrine which was recognized in *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947), and provides[\*\*4] that "the Court shall protect against disclosure of the mental impressions, conclusions, opinion, or legal theories of an attorney. . . ." This is the definition of "opinion work product" as adopted by F.R.Civ.P. 26. Defendant claims that while it is not afforded absolute protection under Rule 26, it is discoverable only in unique and unusual circumstances, and upon a showing of compelling need. *In re Murphy*, 560 F.2d 326 (8th Cir. 1977). Opinion work product is therefore distinguished from ordinary work product, in which discovery is allowed upon a showing of substantial need and the inability to procure similar information from other sources.

Defendant also claims that disclosure of opinion work product materials to a third party does not constitute a waiver of the work product privilege. *U.S. v. A.T. & T. Co.*, 206 U.S. App. D.C. 317, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Therefore, defendant asserts that where the privilege is not waived, discovery of opinion work product is permissible only upon a showing of extreme and unusual circumstances. However, in support of this proposition, defendant relies upon a decision in which the witness was not an expert witness. *Al-Rowaishan* [\*\*5] *Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779 (S.D. N.Y. 1982). Nevertheless, defendant argues that the magistrate failed to distinguish between the two work product classifications and, as a result, he applied the incorrect standard for determining whether the materials were discoverable.

Finally, defendant claims that the documents in question reveal no exigent or unique circumstances which favor discovery of the documents. The edited deposition summary has been provided to plaintiff's counsel. Therefore, plaintiff will be able to challenge the expert witnesses' understanding of Mrs. Boring's testimony. Since plaintiff has not suggested that the documents were supplied to the experts for any improper or illegitimate purpose, discovery is not necessary.

The defendant argues that the magistrate erred in concluding that "the documents [\*406] in question will most probably have an influence on the evidence presented by testimony" of the defendant's experts. Based on the testimony of the expert witnesses, there is no factual basis for concluding that counsel's comments about the plaintiff had any effect on the witnesses' opinions or testimony. [\*\*6] Also, the expert witness letter did not contain any instructions to the witnesses on how or about what to testify, nor did it discuss any aspect of the present action. Accordingly, it is not subject to discovery or production under Rule 612.

Defendant claims that the magistrate failed to consider the actual effect which the disputed documents had on the witnesses' testimony, and he erroneously concluded that the documents had an influence on the testimony and were discoverable.

Should the Motion to Reconsider be denied, defendant requests restrictive orders to prevent the dissemination of the letter and to minimize the harm done to counsel by virtue of the production.

Generally, plaintiff contends that all facts known to an expert which are relevant to his opinion and which were known to him at the time he was forming his opinion are discoverable.

Rule 26(b)(4) provides that a party is entitled to discover facts made known to an adverse expert because a party should be allowed to prepare for cross-examination and impeachment of any prospective witness. Here, plaintiff seeks discovery of critical information which was shared with defendant's expert witnesses, but was not shared[\*\*7] with the plaintiff. Plaintiff asserts that this sharing of defense counsel's mental impressions and characterizations of a party to the case will affect the credibility of the parties in attempting to resolve whether Mrs. Boring gave her informed consent to the medical procedure. Here, plaintiff argues that Pryor's mental characterizations of both parties may adversely affect an expert's ultimate opinion of whether the defendant had in fact received an informed consent from his patient. Therefore, if plaintiff is prevented from examining the documents in question, there will be no opportunity to impeach the expert's opinion during cross-examination. Plaintiff will not be able to demonstrate that the witnesses were unfairly prejudiced by Pryor's views of the parties.

Plaintiff relies upon *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947), in which the Supreme Court stated that under certain circumstances, discovery of relevant and non-privileged facts which were prepared or obtained by an adversary's counsel may

be properly had. The court specifically stated that written statements and documents may "be useful for purposes of impeachment or corroboration." [\*\*8]

Therefore, plaintiff argues, defendant's reliance upon the opinion work product rule is inappropriate. Under these circumstances, Pryor's work product was given to an expert witness, and that work product could permeate the expert's opinion. Thus, plaintiff argues, Pryor's work product is now relevant and available to the discovery process. These documents would fulfill the purpose of discovery by allowing plaintiff to assist in the impeachment of the adverse party. It is alleged that the documents are not available from any other source, nor is the information which is contained within the documents.

Plaintiff also argues that an expert's opinion and the underlying facts supporting the opinion have traditionally constituted an exception to the work product rule. *U.S. v. McKay*, 372 F.2d 174 (5th Cir. 1967); *U.S. v. Meyer*, 398 F.2d 66 (9th Cir. 1960). Plaintiff relies upon the liberal construction generally applied to discovery rules, and asserts that the rule of liberal construction has led most authorities to conclude that all facts made known to an expert are subject to disclosure pursuant to a proper discovery request. Accordingly, the opinion work product rule is no exception[\*\*9] to discovery under circumstances where documents which contain mental impressions are examined and reviewed by expert witnesses before their expert opinions are formed. *In re IBM E.D.P. Devices Antitrust Litigation*, 77 F.R.D. 39 (N.D. Cal. 1977); *U.S. v. IBM Corp.*, 72 F.R.D. 78 (D.C. N.Y. 1976).

[\*407] In conclusion, plaintiff argues that a court may order the disclosure of an attorney's opinion work product when it has been supplied to an expert, and when the validity of an expert's opinion may be tested by challenging the facts which were supplied to him and were relied upon by him. Under the circumstances present in this case, defendant's reliance on the opinion work product rule is misplaced.

Plaintiff asserts that defendant's actions were responsible for the examination of the documents by the expert witnesses. Defendant's attorney voluntarily marked the documents as an exhibit to a deposition. The documents were voluntarily produced, and there is no rule which compels the withdrawal of the documents. In conclusion, defendant should be required to produce the documents which are sought.

Opinion work product is normally afforded a very high degree of immunity, but [\*\*10] it is also subject to discovery when the need for such information is at issue

and compelling. 10 Fed Proc. 1 Ed § 26:46. One situation in which opinion work product is not protected is where an expert witness utilizes counsel's opinion work product in order to formulate his or her opinion. There are two reasons for this.

First, the protection which F.R.Civ.P. 26(b)(3) affords to opinion work product is not absolute, and it can be waived. *U.S. v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975). What constitutes a waiver depends upon the circumstances, and in circumstances where an expert witness is involved, a waiver of the opinion work product privilege is possible.

The opinion at which an expert witness arrives, and the underlying facts and opinions supporting the opinion have traditionally constituted an exception to the work product rule. *U.S. v. McKay*, 372 F.2d 174 (5th Cir. 1967); *U.S. v. Meyer*, 398 F.2d 66 (9th Cir. 1960). The opinions, data and analyses upon which the expert opinion rests are "interdependent elements which together constitute the product of the . . . (expert witness') expertise. They do not become the work product of the attorneys[\*\*11] merely because the attorneys confer and counsel with the (expert witness); they are not immunized from discovery merely because the (expert witness) may have set them out in reports to counsel." *Meyer*, 398 F.2d at 74.

This exception standing by itself does not automatically waive the privilege in the situation where "opinion" work product is provided to an expert witness to consider, and discovery of that work product is desired. However, courts have extended the expert witness exception and have held that a waiver of the privilege exists where counsel has delivered work product to an expert to be "useful to the client," but then withholds the material from an adversary who seeks to exploit the fact of this assistance in cross-examining the witness. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D. N.Y. 1977); 10 Fed Proc. L. Ed § 26:48. In particular, the protection has been waived because immunized materials should not remain undiscoverable after they have been used to influence and shape testimony. *Id.* Therefore, there is a compelling rationale for concluding that in these circumstances, a waiver of the privilege exists, and that pursuant to F.R.Civ.P. [\*\*12] 26(b)(1), a party may obtain discovery from an expert witness regarding any matter, including "facts and opinions acquired or developed in anticipation of litigation or for trial and material prepared in other contexts." *In re IBM I.D.P. Devices Antitrust Litigation*, 77 F.R.D. 39 (N.D. Cal. 1977). Accordingly, the opinion work product rule is no exception to discovery under circumstances where documents which contain mental impressions are examined and reviewed by expert

witnesses before their expert opinions are formed. *Id.*; *U.S. v. IBM Corp.*, 72 F.R.D. 78 (D.C. N.Y. 1976).

The second reason which compels the discovery of work product information is that the purpose of F.R.Civ.P. 26 will be frustrated if these documents are held to be outside the scope of discovery. Rule 26(b)(4) provides that a party may discover "facts known and opinions held by experts," so that a party may prepare for cross-examination [\*408] and impeachment of any prospective witness. Generally, courts have construed discovery rules liberally. With respect to discovery of the work product of a lawyer, the U.S. Supreme Court has stated that under certain circumstances, discovery of "written materials[\*\*13] obtained or prepared by an adversary's counsel with an eye toward litigation" is permissible. The circumstances in which the written documents might be subject to discovery are where production is essential to the preparation of one's case, and where they might be useful for purposes of impeachment and corroboration. *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

Here, plaintiff seeks discovery of critical information which was shared with defendant's expert witnesses, but was not shared with plaintiff. The information which was shared will affect the credibility of the witnesses in determining the issue at hand. It may adversely affect an expert's ultimate opinion of whether the defendant had received an informed consent from the plaintiff. If plaintiff is prevented from examining the documents, plaintiff will not have the opportunity to impeach the expert witnesses at cross-examination. The documents will remain undiscoverable, and this will frustrate the purpose of F.R.Civ.P. 26(b)(4).

The better rationale seems to be that the documents are relevant to the case and are available to the discovery process. The production of the documents fulfills the purpose[\*\*14] of discovery by allowing the plaintiff to assist in the impeachment of the adverse party and witnesses. In this way, plaintiff will have an opportunity to demonstrate whether the witnesses were unfairly prejudiced by Pryor's opinion of the plaintiff.

IT IS ORDERED that the magistrate's ruling is affirmed.





LAURA CABRERA, Plaintiff-Appellant, v. CORDIS CORPORATION, Defendant-Appellee.  
No. 96-17017

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

134 F.3d 1418; 1998 U.S. App. LEXIS 1245; 48 Fed. R. Evid.Serv. (Callaghan) 874; CCH Prod. Liab. Rep. P15,157;  
98 Cal. Daily Op. Service 780; 98 Daily Journal DAR 1061

November 4, 1997, Argued, Submitted, San Francisco, California  
January 29, 1998, Filed

PRIOR HISTORY: [\*\*1] Appeal from the United States District Court for the District of Nevada. D.C. No. CV-94-00720-PMP. Philip M. Pro, District Judge, Presiding.

DISPOSITION: Affirmed.  
CASE SUMMARY

PROCEDURAL POSTURE: Appellant sought review of the decision of the United States District Court for the District of Nevada, which excluded the testimony of appellant's expert witnesses and granted summary judgment to appellee shunt manufacturer on appellant's claim that a brain shunt manufactured by appellee and implanted in her head was defectively designed and that the silicone components in the shunt made her ill.

OVERVIEW: Appellant sued appellee shunt manufacturer on the grounds that the brain shunt manufactured by appellee and implanted in her head was defectively designed and that its silicone components were making her ill. The district court excluded the testimony of all of appellant's expert witnesses and granted summary judgment to appellee. Appellant sought review, and the court affirmed, finding that the testimony of appellant's experts was properly excluded. The district court did not abuse its discretion by finding that the experts' testimony lacked relevancy and reliability. Each expert's testimony failed to provide relevant evidence that was not merely cumulative and followed the scientific method as practiced by at least a recognized minority of scientists in the expert's field. The district court properly granted summary judgment in favor of appellee because appellant could not prove causation or liability without the experts.

OUTCOME: The court affirmed the exclusion of the testimony of appellant's experts and the grant of

summary judgment in favor of appellee shunt manufacturer. The testimony of appellant's experts was not relevant. Some testimony was merely cumulative while other experts failed to follow the scientific method practiced by others in their field. Without experts to prove causation or liability, summary judgment was appropriate.

CORE TERMS: shunt, silicone, tested, expert testimony, foreign body, antibody, tissue, scientific method, excluding, summary judgment, scientific, autoimmune, particle, peer-reviewed, reliability, scientist's, brain, composition, slide, cell, dispositive, practiced, reliable, hydrocephalus, neurosurgeon, immunology, toxicity, catheter, keratin, disease

CORE CONCEPTS -

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

Evidence: Witnesses: Expert Testimony

An appellate court reviews rulings on the admissibility of expert testimony under Fed. R. Evid. 702 for an abuse of discretion.

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

Evidence: Witnesses: Expert Testimony

An appellate court gives the trial court the deference that is the hallmark of abuse of discretion review, even though the trial court's ruling on the admissibility of expert testimony was dispositive and determined the outcome of the case.

Civil Procedure: Appeals: Reviewability: Preservation for Review

Party who made no objections to the order of proof or the time allotted for questioning cannot complain on appeal.

Evidence: Witnesses: Expert Testimony

AR 013829

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Fed. R. Evid. 702.

Evidence: Witnesses: Expert Testimony

A district court may admit expert scientific opinion if it qualifies as "scientific knowledge," that is, if it has a grounding in the methods and procedures of science and is more than subjective belief or unsupported speculation. In order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method to establish a standard of evidentiary reliability.

Evidence: Witnesses: Expert Testimony

District court judges perform a "gate keeping role," and may apply four nonexclusive factors to determine whether proffered expert opinion is developed by the scientific method or is "junk science." District court judges are to consider not only whether the method has gained general acceptance in the relevant scientific community, but also whether the method has been peer-reviewed, whether the method can be and has been tested, and whether there is a known or potential rate of error.

Evidence: Witnesses: Expert Testimony

One very significant fact in determining whether proffered expert opinion is developed by the scientific method or is "junk science" is whether the expert has developed his opinions expressly for purposes of testifying, since a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.

Evidence: Witnesses: Expert Testimony

That the expert failed to subject his method to peer-review and to develop his opinion outside the litigation is not dispositive, but if these guarantees of reliability are not satisfied, the expert must explain precisely how he went about reaching his conclusions and point to some objective source to show that he has followed the scientific method, as it is practiced by at least a recognized minority of scientists in his field.

Evidence: Witnesses: Expert Testimony

The test of the admissibility of expert scientific opinion is not the correctness of the expert's conclusions but the soundness of his methodology.

Evidence: Relevance: Relevant Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

COUNSEL: Gerald I. Gillock, Gillock, Koning, Markley & Killebrew, Las Vegas, Nevada, for the plaintiff-appellant.

Kathlene Landgraf Kolts, (Argued) Kolts and Nawa, Pasadena, California, and Leann Sanders, Alverson, Taylor, Mortensen, Nelson & Sanders, Las Vegas, Nevada, for the defendant-appellee.

JUDGES: Before: Robert Boochever and Andrew J. Kleinfeld, Circuit Judges, and Stephen V. Wilson, District Judge. \* Opinion by Judge Boochever.

\* Honorable Stephen V. Wilson, United States District Judge for the Central District of California, sitting by designation.

OPINIONBY: ROBERT BOOCHEVER

OPINION: [\*1419] OPINION

BOOCHEVER, Circuit Judge:

Laura Cabrera sued Cordis Corporation, alleging that a brain shunt manufactured by Cordis and implanted in her head was defectively designed, and that the silicone components in the shunt made her ill. The district court excluded the testimony of Cabrera's expert witnesses under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and granted[\*\*2] summary judgment to Cordis. Cabrera appeals.

FACTS

In 1977, Laura Cabrera, who was then fifteen years old, was diagnosed with hydrocephalus, a condition in which excess cerebral spinal fluid collects in the brain. To drain the excess fluid, Cabrera's neurosurgeon implanted a hydrocephalus shunt (technically known as a ventriculoperitoneal shunt) manufactured by Cordis Corporation. The shunt had a fin tipped catheter and a valve system, both of which were constructed with silicone rubber.

In the 1980s, Cabrera began experiencing severe allergies, chronic fatigue, and autoimmune disorders. She consulted a neurosurgeon about having the shunt removed, and he told her she was "shunt dependent," that is, she could not live without the shunt.

In 1994, Cabrera filed a complaint in federal district court (based on diversity of citizenship), alleging that her medical problems were the result of silicone toxicity. She claimed that the toxicity was caused by her body's production of silicone antibodies in response to the inappropriate composition of silicone in the shunt's component parts. She also alleged that the shunt was defectively designed, in that removal or replacement of the fin<sup>[\*\*3]</sup> tipped catheter would require major surgery and removal of a portion of her brain tissue.

[\*1420] After discovery, Cordis filed a motion for summary judgment along with four motions in limine to exclude the testimony of Cabrera's four expert witnesses. The district court conducted a hearing to examine the experts and granted the motions in limine, excluding the testimony of all Cabrera's experts. The court then granted summary judgment in favor of Cordis, because without the expert witnesses, Cabrera had no evidence of causation, and there was no genuine issue as to any material fact on an essential element of the claim.

Cabrera appeals.

## DISCUSSION

This court reviews rulings on the admissibility of expert testimony under Fed. R. Evid. 702 for an abuse of discretion. *General Elec. Co. v. Joiner*, 139 L. Ed. 2d 508, 118 S. Ct. 512, 1997 WL 764563 (U.S. 1997); *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 596 (9th Cir. 1996). We "give the trial court the deference that is the hallmark of abuse of discretion review," even though the ruling on the admissibility of expert testimony was dispositive of the motion for summary judgment and determined the outcome of the case. *Joiner*, 1997 WL 764563 at<sup>[\*\*4]</sup> \*5; see *Lust*, 89 F.3d at 597.

### I. Hearing procedure

Cabrera argues that the district court followed the wrong procedure at the hearing when it allowed Cordis to cross-examine Cabrera's witnesses first and did not allow the experts to testify on several issues. Cabrera's counsel made no objections to the order of proof or the time he was allotted for questioning. Cabrera therefore cannot complain now. *Long v. Director, OWCP*, 767 F.2d 1578, 1583 (9th Cir. 1985) (party who failed to object at hearing cannot challenge on appeal failure to allow cross-examination); *Hawaiian Rock Prods. v. A.E. Lopez Ents.*, 74 F.3d 972, 976 (9th Cir. 1996) (arguments not made before district court are waived).

Cabrera contends that this rule does not apply to procedural objections. The reason for alerting a court to the grounds of objections so that they may be addressed applies equally to procedural and substantive objections, however, and we reject this distinction.

### II. Expert testimony

In *Daubert*, the Supreme Court held that the test for admitting scientific expert testimony under *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014 (9th Cir. 1923), which<sup>[\*\*5]</sup> required that a scientific technique be "generally accepted" as reliable in the scientific community, was superseded by the adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 587. Federal Rule of Evidence 702 provides:

#### Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under *Daubert*, a district court may admit expert scientific opinion if it qualifies as "scientific knowledge," that is, if it has a "grounding in the methods and procedures of science . . . [and is] more than subjective belief or unsupported speculation." 509 U.S. at 590. "In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. . . . [to] establish[ ] a standard of evidentiary reliability." *Id.*

District court judges perform a "gatekeeping role," 509 U.S. at 597, and may apply four nonexclusive factors to determine whether proffered expert opinion is <sup>[\*\*6]</sup> developed by the scientific method or is "junk science:"

District court judges are to consider not only (1) whether the method has gained general acceptance in the relevant scientific community, but also (2) whether the method has been peer-reviewed, (3) whether the method "can be (and has been) tested," and (4) whether there is a "known or potential rate of error." *Id.* at 594. . . . The *Daubert* inquiry is flexible . . . . "One very significant fact" is whether the expert has "developed [his] <sup>[\*1421]</sup> opinions expressly for purposes of testifying," since "a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office." *Daubert*, 43 F.3d 1311 at 1317. That the expert failed to subject his method to peer-review and to develop his opinion outside the litigation is not dispositive, but if these guarantees of reliability are not satisfied, the expert "must explain precisely how [he] went about reaching [his] conclusions

and point to some objective source . . . to show that [he has] followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in [his] field." *Id.*

*Lust*, 89 F.3d at 597<sup>[\*\*7]</sup> (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir.) ("Daubert II"), cert. denied, 516 U.S. 869, 116 S. Ct. 189, 133 L. Ed. 2d 126 (1995)). "The test under Daubert is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert II*, 43 F.3d at 1318.

Cabrera presented four expert witnesses, and the district court rejected the testimony of all four.

#### A. Saul Puszkin, Ph.D.

Saul Puszkin is a Ph.D. in neuroscience, and he has worked more than twenty years in the fields of pathology and immunology. Puszkin testified that he examined under a microscope two tissue slides from Cabrera. One showed no foreign bodies. The other, taken from a cyst on Cabrera's head, showed the presence of a giant cell reaction to a foreign particle that Puszkin could not identify. Puszkin could have tested the slide for the identity of the foreign particle, but did not because he was not asked to do the test, and because the test would have required taking the prepared slide apart. He thus testified that he "never talked about silicone at all in [his] report." On cross-examination, defense counsel asked Puszkin about the report<sup>[\*\*8]</sup> of Dr. Allan Anes, M.D., a pathologist who examined the tissue and found that the foreign body was not silicone but keratin, which occurs naturally in the human body. <sup>n1</sup> Puszkin was not aware of the test but conceded that he did not know whether keratin or silicone was present.

<sup>n1</sup> The district court's order incorrectly describes Dr. Anes as an expert for the defense. Dr. Anes was not an expert. His status as an expert is irrelevant, however, because he agrees with the one opinion to which Puszkin can testify (the presence of a foreign body reaction). Puszkin did not even perform the test that Dr. Anes performed, so there was no need to judge the weight of Dr. Anes' test results.

The district court concluded that because Puszkin could not identify the foreign body causing the giant cell reaction, his testimony was "simply irrelevant under F.R.E. 401 and is not, in and of itself, helpful to the trier of fact under F.R.E. 702."

On appeal, Cabrera argues that Puszkin's testimony was "highly relevant" because he<sup>[\*\*9]</sup> "testified that based upon his examination of the two tissues [sic] slides, Plaintiff was suffering from a foreign body reaction most likely caused by the shunt." Yet, at the Daubert hearing, plaintiff's counsel stated that Puszkin would testify to the location of the cells relative to the shunt, "but he's not going to testify that the shunt is the source of the . . . cells." Because he had never tested for the source of the reaction, Puszkin could not connect it to silicone or any other substance. Puszkin's only testimony thus would have been that the tissue from the cyst showed a foreign body reaction.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Cabrera argues that the testimony regarding the reaction was relevant as a "building block," and that other experts would establish the nature of the foreign particle. The existing evidence in this case, however, included a report from Dr. Anes, who had tested the same tissue and found the same foreign body reaction. Unlike Puszkin, however, Dr. <sup>[\*\*10]</sup> Anes had tested the foreign particle and identified it as keratin. There was thus evidence in the record of a foreign body reaction, and Puszkin's testimony to the same effect, without any statement that he had tested the foreign particle and determined its identity, would have been a "needless presentation of cumulative <sup>[\*1422]</sup> evidence." Fed. R. Evid. 403. Although Puszkin's evidence was relevant to Cabrera's claim, we conclude that the district court did not abuse its discretion in excluding it, because its probative value was outweighed by the waste of time that would be involved.

#### B. Aristo Vojdani, Ph.D.

Aristo Vojdani holds a Ph.D. in immunology. Cabrera wanted Vojdani to testify that he had tested a sample of her blood in August 1993, and found the presence of silicone antibodies. Those antibodies would support Cabrera's contention that she was undergoing an autoimmune response to silicone. Cordis opposed the admission of his testimony because Vojdani's test for silicone antibodies was not scientifically reliable as required by Daubert. The district court agreed that the test did not satisfy Daubert.

First, the court noted that only Vojdani used the test he had performed <sup>[\*\*11]</sup> on Cabrera's blood, and there is no generally accepted blood test for silicone antibodies. Cabrera counters that two other labs perform a similar test. At the hearing, however, the district judge sustained Cordis' objection to the introduction of test results from

another laboratory, and Vojdani testified only that several other laboratories perform silicone antibody tests, although he did not know if they performed the same test he uses. Vojdani also testified that his test had never been peer-reviewed. Vojdani had no documentation of even his own development of the test, as his records were destroyed in an earthquake. Further (although this is not dispositive), the Federal Drug Administration does not recognize any silicone antibody test at all.

The district court was within its discretion in excluding Vojdani's testimony. Vojdani provided no explanation of "precisely how [he] went about reaching his conclusions" regarding the accuracy of his testing measure, and could not "point to some objective source . . . to show that [he has] followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in [his] field." *Lust*, 89 F.3d at [\*\*12] 597 (quoting *Daubert II*, 43 F.3d 1311 at 1317). Although Cabrera argues that the test results should have been admitted because the test was conducted with no connection to the litigation, that argument does not substitute for the lack of foundation for the test itself. The district court properly considered the methodology Vojdani used, rather than the test results, and did not abuse its discretion by finding it lacking in reliability.

#### C. Nachman Brautbar, M.D.

Dr. Nachman Brautbar is a board-certified internist with a specialty in nephrology (the study of the kidney). Cabrera proffered Dr. Brautbar to testify that Cabrera had an "autoimmune disease with atrophy" caused by the silicone in the shunt. Dr. Brautbar had examined Cabrera and found her normal except for a rash on the skin, and a history of complaints about fatigue, joint pain suggesting arthritis, and muscle weakness. He did not take blood or urine samples. He did not know the silicone composition of the shunt in Cabrera's head, nor of any shunt on the market. Nevertheless, he testified that in his opinion Cabrera's "disease processes" were caused by silicone from the shunt.

Dr. Brautbar examined Cabrera in conjunction [\*\*13] with the litigation (he advertised his services on the World Wide Web as an expert for plaintiffs in silicone gel breast implant cases). He could not cite any research connecting Cabrera's symptoms with a shunt. Although he claimed that the body's reaction to hard silicone, such as in the shunt, is more intense than its reaction to the gel silicone used in breast implants, he could identify no articles documenting the difference in the reaction, or even the existence of any reaction at all.

"One very significant fact" about Dr. Brautbar's testimony is that he "developed [his] opinions expressly

for the purpose of testifying." *Daubert II*, 43 F.3d at 1317. Dr. Brautbar could not identify any peer-reviewed research justifying his conclusion about reaction to hard silicone. The sources discussed at the hearing involved hypersensitivity reactions to malfunctioning shunts and an article by Randall Goldblum, M.D. regarding localized inflammatory reactions to revised shunts. But hypersensitivity is not [\*1423] identical to a systemic autoimmune reaction, and Dr. Goldblum's article specifically declined to attribute even the localized inflammation to silicone antibodies. In an affidavit, Dr. Goldblum [\*\*14] further stated that Dr. Brautbar's conclusions were not supported by his research or any other known research.

The connection with the litigation and the lack of supporting research do not alone make Dr. Brautbar's opinion inadmissible, but because he cannot point to some peer-review articles or research supporting his conclusion, he "must explain precisely how [he] went about reaching [his] conclusions and point to some objective source . . . to show that [he has] followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in [his] field." *Id.* at 1319. Dr. Brautbar did not identify any such objective source, or demonstrate that he followed a scientific method embraced by at least some other experts in the field. His testimony therefore does not satisfy Daubert or Rule 702. See *Schudel v. General Elec. Co.*, 120 F.3d 991, 997 (9th Cir. 1997) (district court abused its discretion in admitting expert testimony when witness "could not testify to a specific cause and effect relationship between . . . exposure and health problems").

In the process of its discussion of Dr. Brautbar's testimony, the district court mentioned the [\*\*15] testimony of Joan Venes, M.D., Cordis's proposed expert neurosurgeon, who cited authority that there is no connection between silicone implants and autoimmune disease. Cabrera takes exception to the district court's comment regarding Dr. Venes's testimony because Dr. Venes was not an expert in immunology or pathology. In fact, the court never ruled on whether or to what extent Dr. Venes' expert testimony would be admissible, reserving that issue for trial.

The comment regarding Dr. Venes was in the form of an aside. The district court had already assessed Dr. Brautbar's testimony and found it lacked the reliability required by Daubert. We conclude that the district court did not abuse its discretion in excluding Dr. Brautbar's testimony.

#### D. Pierre Blais, Ph.D.

Pierre Blais holds a Ph.D. in physical chemistry. Cabrera named him as her design defect expert. He was to testify that the fin tipped catheter was defective because it eventually became entrapped in brain tissue, and that the shunt was defective because it contained an inappropriate composition of silicone. Yet Blais testified that he had never tested any shunts; that he had never published any articles on shunt composition[\*\*16] or design; that no peer-reviewed articles supported his views; that no research shows clinical problems resulting from silicone toxicity in a hydrocephalus shunt; and that no articles existed regarding degradation of the shunt. Blais stated that relevant "information was essentially left unpublished and unlearned. It was not conveyed to the medical community on average. It is what we call an aficionado's knowledge . . . it has simply been kept very closed to manufacturing circles and has not been shared with the medical community." By Blais's own characterization, he is relying on underground knowledge, untested and unknown to the scientific

community. An opinion based on such unsubstantiated and undocumented information is the antithesis of the scientifically reliable expert opinion admissible under Daubert and Rule 702. See *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997) ("Rule 702 demands that expert testimony relate to scientific, technical, or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs.")

The district court did not abuse its discretion in excluding Blais' testimony.

#### CONCLUSION

We affirm. [\*\*17] The district court did not abuse its discretion in excluding the scientific opinion expert testimony of Cabrera's experts. The grant of summary judgment was appropriate because without the experts, Cabrera could not prove causation or liability.



IN RE THE MATTER OF FIRESTORM 1991  
No. 62318-0

SUPREME COURT OF WASHINGTON

129 Wn.2d 130; 916 P.2d 411; 1996 Wash. LEXIS 327

November 15, 1995, Oral Argument  
May 16, 1996, Filed

PRIOR HISTORY: [\*\*\*1]

Appeal from Superior Court, Spokane (94-2-05256-4)  
County; Honorable Kathleen O'Connor, Judge. Judgment  
Date: 10-29-94.

DISPOSITION: Reversed and Remanded  
CASE SUMMARY

PROCEDURAL POSTURE: The trial court  
(Washington) disqualified trial counsel for plaintiff  
injured parties for violation of Wash. R. Civ. P. 26  
governing discovery. The trial counsel appealed.

OVERVIEW: The injured parties' trial counsel were  
contacted by a fire investigator for a potential defendant  
utility company as to the cause of the 1991 firestorm of  
over 90 wildfires. The investigator was concerned that  
his information and findings would be concealed or  
hidden by the utility companies. Trial counsel met with  
the investigator ex parte and obtained the investigator's  
statement. The day after the interview, trial counsel  
advised opposing counsel of the interview. The utility  
companies indicated that trial counsel had violated  
discovery and ethical rules in having had contact with a  
utility company expert even though the utility company  
was a non-party at the time. Nine months after the  
interview, the utility companies moved to disqualify trial  
counsel. The trial court did not conduct a hearing on the  
motion and did not issue findings of fact and conclusions  
of law. The court held that trial counsel had violated the  
rules of discovery, but disqualification of trial counsel  
was an excessive sanction for the discovery violation.  
There was no finding that any of the disclosed  
information was privileged or the trial strategy of  
opposing counsel. The interview was unsolicited.

OUTCOME: The court reversed the trial court's decision  
disqualifying the injured parties' trial counsel and

remanded to the trial court with an order to reinstate trial  
counsel and to determine appropriate sanctions for trial  
counsel's discovery violations.

CORE TERMS: discovery, work product,  
disqualification, discoverable, work product rule,  
anticipation of litigation, ex parte contact, interview,  
factual information, ex parte, opposing party, motion to  
disqualify, conversation, impression, disclosure, federal  
rule, work product doctrine, investigate, nontestifying,  
defense counsel, expert witness, investigating,  
preparation, consulting, privileged, hired, privileged  
information, disclose, sentence, opposing

CORE CONCEPTS -

Civil Procedure: Appeals: Standards of Review: De  
Novo Review  
Questions of law are reviewed de novo on appeal.

Civil Procedure: Appeals: Standards of Review: General  
Rules

When a trial court fails to make any factual findings to  
support its conclusion, and the only evidence considered  
consists of written documents, an appellate court may, if  
necessary, independently review the same evidence and  
make the required findings.

Civil Procedure: Disclosure & Discovery: Work Product  
Wash. R. Civ. P. 26(b)(4) provides that subject to the  
provisions of Wash. R. Civ. P. 26(b)(5), a party may  
obtain discovery of documents and tangible things  
otherwise discoverable under Wash. R. Civ. P. 26(b)(1)  
of this rule and prepared in anticipation of litigation or  
for trial by or for another party or by or for that other  
party's representative only upon a showing that the party  
seeking discovery has substantial need of the materials  
and that he is unable without undue hardship to obtain  
the substantial equivalent of the materials by other  
means. In ordering discovery the court shall protect  
against disclosure of the mental impressions,



conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Civil Procedure: Disclosure & Discovery: Work Product  
Wash. R. Civ. P. 26(b)(5) states that discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Wash. R. Civ. P. 26(b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion (ii) A party may depose each person whom any other party expects to call as an expert witness at trial.

Civil Procedure: Disclosure & Discovery  
Wash. R. Civ. P. 26(b)(5)(B) states that a party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in Wash. R. Civ. P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Civil Procedure: Disclosure & Discovery: Work Product  
Ex parte contact with an opposing party's expert witness is prohibited by Wash. R. Civ. P. 26.

Civil Procedure: Disclosure & Discovery: Work Product  
Expert witnesses retained by a nonparty are not protected by Wash. R. Civ. P. 26(b).

Civil Procedure: Disclosure & Discovery: Work Product  
When faced with an expert employed by opposing counsel, who may or may not technically be employed by an opposing party, counsel should always comply with Wash. R. Civ. P. 26(b)(5) in proceeding with any discovery or contacting that expert. After the procedures of Wash. R. Civ. P. 26(b)(5) have been initiated, the trial court may then fashion the proper form and scope of discovery, as required by the particular circumstances.

Civil Procedure: Sanctions: Discovery Misconduct  
Sanctions for violations of Wash. R. Civ. P. 26(b) are not specifically addressed in Wash. R. Civ. P. 26(g), Wash. R. Civ. P. 37, or Wash. R. Civ. P. 11. The trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation. The principles embodied in Wash. R. Civ. P. 11, 26(g), and 37, apply with equal force to sanctions decisions Wash. R. Civ. P. 26(b) violations.

Civil Procedure: Sanctions: Discovery Misconduct  
Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary.

Civil Procedure: Disclosure & Discovery  
Facts remain discoverable even though they may be embodied in a protected document or conversation.

Civil Procedure: Sanctions: Discovery Misconduct  
The principles trial courts are to follow in fashioning appropriate sanctions are that the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions. The purposes of sanctions orders are to deter, to punish, to compensate and to educate.

COUNSEL: AMICUS CURIAE FOR WASHINGTON  
DEFENSE TRIAL LAWYERS: Thorsrud, Cane & Paulich, Mr. Russell C. Love, Seattle, WA. Mr. Bryan P. Harnetiaux, Attorney at Law, Spokane, WA. Lane, Powell, Spears & Lubersky, Mr. Thomas W. Top, Mr. Michael Runyan, Seattle, WA.

INTERESTED PARTY: Lukins & Annis, Mr. Darrell W Scott, Ms. Erika Balazs, Spokane, WA.

For PETITIONER FORESTORM 1991: Mr. Charles C. Wiggins, Attorney at Law, Bainbridge Island, WA. Ms. Julie A. Twyford, Attorney at Law, Spokane, WA. Winston & Cashatt, Mr. Tim M. Higgins, Spokane, WA. Mr. Amos R. Hunter, Attorney at Law, Des Moines, WA. Edwards, Sieh, Hathaway, Smith & Goodfriend, Mr. Malcolm Edwards, Seattle, WA.

For RESPONDENT: Paine, Hamblen, Coffin & Brooke, Mr. John C. Riseborough, Mr. Donald G. Stone, Mr. Robert Neate, Spokane, WA. Mr. David A. Kulisch, Attorney at Law, Spokane, WA.

JUDGES: Johnson, J., Durham, C.J., Dolliver, Smith, J.J., Pekelis, J.P.T. (result only), Talmadge, J. (concurring by separate opinion), Madsen, J. (concurring by separate opinion), Alexander, [\*\*\*2] J., concurring. Sanders, J. (did not participate).

OPINIONBY: JOHNSON

OPINION: [\*132] [\*\*412] En Banc

JOHNSON, J. -- This case involves the review of a trial court decision disqualifying Plaintiffs' counsel for conducting an ex parte interview with an expert hired by counsel for the Defendants. The trial court concluded this ex parte interview violated CR 26 and disqualification was the appropriate sanction. Based on the facts of this case and the discussion herein, we reverse the order of disqualification, order reinstatement of counsel, and remand for further proceedings.

## FACTS

Shortly after filing suit in this case and after requesting, as reported in the media, for anyone with relevant information as to the cause of the fires to contact their office, Plaintiffs' counsel, Richard Eymann and Steve Jones, were contacted by Norman Buske. Buske told Jones that he had been hired by Paine, Hamblen, Coffin, Brooke & Miller (Paine Hamblen), counsel for several [\*\*413] area utility companies, n1 in investigating the 1991 firestorm, which consisted of over 90 wildfires. He told them he had important information on one of the fires, the Chattaroy fire, which was the fire relevant to this lawsuit. Buske told Jones he had [\*\*\*3] extreme concern that his information would be concealed or hidden by the utility company Defendants and their counsel.

n1 These utilities included Washington Water Power Company (Washington Water Power) and Inland Power & Light Company (Inland Power).

[\*133] At Buske's request, Jones met with Buske at Buske's home on Saturday, October 16, 1993. Buske identified himself as a consulting scientist employed by Paine Hamblen and Inland Power to investigate Inland Power's involvement in the firestorm fires. At the time of this interview, Inland Power was not a party to the Chattaroy fire lawsuit. Buske stated he had spoken with David Kulisch (a partner in Randall & Danskin, P.S., and former associate in Paine Hamblen) and Donald Stone (partner in Paine Hamblen), who had both informed him he was a consulting expert whose observations and opinions would be sealed. Buske said he felt he had an ethical and moral duty to make his information available to the Plaintiffs.

Jones told Buske he believed it was legal for Buske to [\*\*\*4] voluntarily disclose relevant factual information. Buske and Jones then went on to set some ground rules for a future statement by Buske about his

factual observations. Buske wanted to make his statement as quickly as possible, again expressing fear the information he possessed would be sealed or taken from his control.

The next day, Eymann and Jones interviewed Buske at their law office. In addition to the statements he made, Buske delivered copies of pictures and notes he had taken while investigating the Chattaroy fire and which he still possessed. A transcript of this interview, edited jointly by Eymann and Buske, was delivered to David Kulisch's law office the day following the interview. On October 19, 1993, Kulisch's client, Inland Power, sent a letter to Eymann and Jones objecting to their contact with Buske. The letter asserted Eymann and Jones violated discovery and ethical rules in having had contact with an expert retained by Inland Power.

The next month, Eymann and Jones associated Tim Higgins and M.D. Williams of the firm Winston & Cashatt as counsel in the firestorm cases. After associating as counsel, Higgins sought an independent legal opinion as to whether his firm [\*\*\*5] should review the Buske material. The attorney who reviewed the material opined he believed Eymann [\*134] and Jones had not violated any ethical or discovery rules and it would be proper for Higgins' law firm to review the Buske material.

On July 12, 1994, Paine Hamblen filed a motion to disqualify counsel, seeking to disqualify both the Eymann law firm and Winston & Cashatt, and also for return of privileged information and materials. This motion was filed approximately nine months after the ex parte interview. The motion was argued on August 19, 1994 in the Superior Court for Spokane County. Inland Power joined Washington Water Power in this motion on the day the motion was argued. The only evidence considered by the court was in the form of affidavits; no testimony was heard by the court.

After hearing argument, the trial court issued an oral decision disqualifying Eymann, Jones, and the Eymann law firm, but not Winston & Cashatt. The judge found that Eymann and Jones were on notice as to the unclear status of Buske and had clearly violated CR 26 by conducting the interview. In not disqualifying Winston & Cashatt, the court stated Higgins had behaved appropriately in seeking an independent [\*\*\*6] legal opinion before reviewing the materials, and had not violated the discovery rules. Without finding a violation of the rules, the court stated it would be illogical to disqualify Winston & Cashatt.

The court entered its written order of disqualification on September 29, 1994. The written order contained no

findings of fact or conclusions of law. Eymann filed a motion for reconsideration with additional briefs and [\*\*414] affidavits from both sides, which was denied. We granted direct review.

## ANALYSIS

### I

We first must determine the proper standard of review in this case. The trial court found a violation of CR 26 based on the numerous affidavits submitted by the parties [\*135] and the oral argument of counsel. No testimony was heard by the trial court. The trial court made no findings of fact and did not indicate which utility employed Buske as an expert. The court based its decision on its belief that Eymann and Jones should have been on notice as to the unclear status of Buske and the potential for the disclosure of privileged information. However, the court did not find any of the information disclosed was privileged.

Since this case involves the application of a court rule to a set of [\*\*\*7]particular facts, this is a question of law, and will be reviewed de novo on appeal. See *State v. Tatum*, 74 Wash. App. 81, 86, 871 P.2d 1123, review denied, 125 Wash. 2d 1002, 886 P.2d 1134 (1994). When a trial court fails to make any factual findings to support its conclusion, and the only evidence considered consists of written documents, an appellate court may, if necessary, independently review the same evidence and make the required findings. *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 222, 829 P.2d 1099 (1992).

### II

Our review of this case requires us to determine whether counsel violates CR 26 by conducting an ex parte interview with an expert previously employed by counsel for an opposing party.

The trial court based its disqualification order on its holding that Eymann and Jones clearly violated CR 26, but the court did not indicate which specific provision of CR 26 it felt Eymann and Jones had violated. In making its ruling, the trial court stressed the fact that under the discovery rules judicial oversight is critical to making proper determinations regarding discovery of experts and whether or not information is privileged. While this is correct, it does[\*\*\*8] not resolve the issue here: we must decide which rule applies, what it requires, and what, if any, sanctions might apply.

CR 26 is the court rule governing discovery practice in all civil matters. In general, the rule allows for discovery [\*136] of anything material to the litigation, except for

things protected by privilege. CR 26(b)(1). Respondents assert both CR 26(b)(4) and CR 26(b)(5) prohibited Eymann and Jones from contacting Buske ex parte and require their disqualification. CR 26(b)(4) is more commonly known as the work product rule. It provides in relevant part:

Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. . . only upon a showing that the party seeking discovery has substantial need of the materials. . . and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery. . . the court shall protect against disclosure of the mental impressions, [\*\*\*9]conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

CR 26(b)(4).

The other rule the Respondents claim was violated is CR 26(b)(5) which governs the discovery of experts.

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the [\*\*415]expert is expected to testify and a summary of the grounds for each opinion. . . . (ii) A party may. . . depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of [\*137] exceptional circumstances under which it is impracticable[\*\*\*10] for the party seeking discovery to obtain facts or opinions on the same subject by other means.

CR 26(b)(5). The initial question we are faced with is whether CR 26(b)(4), CR 26(b)(5), or both, apply.

The key to answering this question is found in the first sentence of CR 26(b)(4): "Subject to the provisions of

subsection (b)(5) of this rule. . . ." The very text of the rule tells us that CR 26(b)(4) does not apply to situations falling within CR 26(b)(5). Because neither party disputes the fact Buske was an expert who acquired facts and developed opinions in anticipation of litigation arising out of the 1991 firestorm, CR 26(b)(5) is the specific provision at issue here.

Having determined CR 26(b)(5) is the rule at issue, we must now determine whether ex parte contact with an expert retained by counsel for an opposing party is a violation of CR 26(b)(5). Washington courts have not addressed whether ex parte contact with an opposing party's expert witness is a violation of the discovery or ethical rules. n2 The plain language of CR 26(b)(5), however, indicates ex parte contact with the experts of an opposing party is not allowed. The rule states "discovery of facts known[\*\*\*11] and opinions held by experts. . . may be obtained only as follows. . . ." CR 26(b)(5) (emphasis added). The rule does not contemplate discovery of experts outside of its explicit requirements.

n2 No express ethical prohibition prohibits ex parte contact with an expert witness of an opposing party. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 378 (1993); Terry E. Nilles, *Ex Parte Contacts with Expert Witnesses*, *Wisconsin Lawyer*, Dec., at 18 (1994). The ABA opinion finds that Model Rule 3.4(c) (knowingly violating an obligation of a tribunal) may be violated by ex parte contact with an expert witness if the jurisdiction has a discovery rule based on Fed. R. Civ. P. 26(b)(4)(A). ABA Formal Op. 378.

Based on the plain language of the rule, we hold as a general principle ex parte contact with an opposing party's expert witness is prohibited by CR 26. See *Campbell Indus. v. M/V Gemini*, 619 F.2d 24 (9th Cir. 1980) (upholding [\*138]district court's sanction for flagrant violation of Fed. R. [\*\*\*12]Civ. P. 26(b)(4) n3 when attorney had ex parte contact with opposing party's expert witness). Discovery of expert witnesses retained by a party to the litigation may only be done within the strictures of CR 26.

n3 Fed. R. Civ. P. 26(b)(4) is substantially similar to Washington's CR 26(b)(5), however; the text of the rule is different.

The Petitioners argue Buske's status is critical in determining whether CR 26 applies to their conduct. Specifically, Petitioners assert if Buske was not employed by Washington Water Power, then he was not retained by a party to the Chattaroy fire litigation and CR 26(b)(5) does not apply. There is authority for the rule that expert witnesses retained by a nonparty are not protected by CR 26(b). See *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.*, 148 F.R.D. 552 (S.D. W.Va. 1993) (holding expert hired by company to investigate a fire was not protected by CR 26 in action between insurer and reinsurer); 8 Charles A. Wright et al., *Federal Practice* § 2024, at 354[\*\*\*13] (2d ed. 1994) (documents prepared by nonparty to present suit are not protected by CR 26(b)); *Johnson v. McCay*, 77 Wash. App. 603, 893 P.2d 641 (1995) (medical expert hired by insurance company who was not a party to the litigation is not prohibited by CR 26 from testifying for defendant).

At the time of the Buske interview, only Washington Water Power was a party to the Chattaroy fire lawsuit. n4 Plaintiffs argue Buske was an expert employed by Inland [\*\*416] Power to investigate its potential involvement in the firestorm fires. Portions of Buske's statements support this contention. The trial court, however, made no finding as to Buske's status. Additionally, the mere fact Buske was retained by Paine Hamblen was sufficient to put Eymann and Jones on notice as to the questionable status of Buske. Because we do not decide this case based on Buske's status, we need not resolve this issue, but point out that counsel should not generally make the determination unilaterally.

n4 Inland Power was added as a Defendant in the Chattaroy fire lawsuit sometime after the Buske interview, because of information gained from other sources.

[\*\*\*14]

[\*139] Because Eymann and Jones were on notice as to Buske's questionable status, and because Buske was employed by Paine Hamblen who, at the time, represented both Washington Water Power and Inland Power, we are satisfied the trial court was correct in finding Eymann and Jones violated CR 26(b)(5). When faced with an expert employed by opposing counsel, who may or may not technically be employed by an opposing party, counsel should always comply with CR 26(b)(5) in proceeding with any discovery or contacting that expert. After the procedures of CR 26(b)(5) have been initiated, the trial court may then fashion the proper form and scope of discovery, as required by the particular circumstances. In this case, the trial court was not

initially given this opportunity. By unilaterally determining CR 26(b)(5) did not apply or that these were exceptional circumstances, Eymann and Jones did not conform their conduct (conducting an ex parte interview of Buske) with the requirements of CR 26(b)(5).

### III

We are satisfied the trial court was correct in finding Eymann and Jones violated CR 26(b)(5); however, we conclude the trial court erred in imposing the sanction of disqualification. Sanctions for [\*\*\*15] violations of CR 26(b) are not specifically addressed in CR 26(g), CR 37, or CR 11. Nevertheless, the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation. The principles embodied in CR 11, CR 26(g), and CR 37, and discussed by this court in *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 336-56, 858 P.2d 1054 (1993), apply with equal force to sanctions decisions for CR 26(b) violations.

Two separate and distinct analyses support our holding reversing the order of disqualification: (1) the information disclosed by Buske was not privileged, and (2) disqualification as a sanction for a discovery rule violation does not adhere to the guidelines set forth in *Fisons*.

#### [\*140] A. Privilege

Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary. See *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 718 (D. Conn. 1991). One situation requiring the drastic remedy of disqualification arises when counsel has access to privileged information [\*\*\*16] of an opposing party. See *Kurbitz v. Kurbitz*, 77 Wash. 2d 943, 947, 468 P.2d 673 (1970). The issue of access to privileged information frequently arises in conflict of interest cases. See *First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wash. 2d 324, 337, 738 P.2d 263 (1987); *Teja v. Saran*, 68 Wash. App. 793, 798-99, 846 P.2d 1375, review denied, 122 Wash. 2d 1008, 859 P.2d 604 (1993). Requiring disqualification after counsel has had access to privileged information preserves the public's confidence in the legal profession. *Intercapital Corp. v. Intercapital Corp.*, 41 Wash. App. 9, 16, 700 P.2d 1213, review denied, 104 Wash. 2d 1015 (1985).

Despite the limited applicability of this sanction, Respondents assert disqualification is the sole adequate remedy for ex parte contact with an opposing party's expert witness, relying on numerous cases from foreign

jurisdictions for authority. See *Br. of Resp't (Washington Water Power)* at 37-40. In all of those cases, however, the person with whom counsel communicated ex parte was either a former integral employee of the opposing party or had access to litigation strategy; i.e., all involved counsel having access [\*\*\*17] to privileged information via a former integral employee. E.g., *County of Los Angeles v. Superior Court*, 222 Cal. App. 3d 647, [\*\*417] 271 Cal. Rptr. 698 (1990) (counsel disqualified after initiating contact with opposing expert physician and assuring expert he was at liberty to talk with opposing counsel), review denied, Oct. 11, 1990; *American Protection Ins. Co. v. MGM Grand Hotel--Las Vegas, Inc.*, 1986 WL 57464 (D. Nev.) (lawyer disqualified when ex-vice president for construction of opposing party [\*141] initiates negotiations to serve as expert in construction fraud case); *MMR/Wallace Power & Indus., Inc.*, 764 F. Supp. 712 (firm disqualified after hiring former employee of plaintiff corporation, who served as litigation liaison with plaintiff's counsel while employed as consulting expert in same litigation). Neither of those factors are present here to support a finding that Buske had access to privileged information. Buske was not an integral employee of Washington Water Power or Inland Power, nor was he privy to litigation strategy because no litigation was pending at the time of his association with Paine Hamblen. Additionally, in none of the above cited cases did the trial [\*\*\*18] court rely on a violation of CR 26(b)(5) (or its equivalent) in ordering disqualification of counsel.

Furthermore, the record in this case supports our conclusion that the information disclosed by Buske was not privileged. Buske disclosed facts and opinions as to the cause of the Chattaroy fire, facts about the structure and conduct of Paine Hamblen's investigation, and his opinion about that investigation. The trial court was primarily concerned with the disclosures relating to Paine Hamblen's investigation strategies. These strategies are neither work product nor subject to the attorney/client privilege. "Facts, as such, remain discoverable, even though they may be embodied in a protected document" or conversation. 4 Lewis H. Orland & Karl B. Tegland, *Wash. Prac., Rules Practice*, at 34 (4th ed. 1992). Accordingly, the following facts (disclosed by Buske during his interview) are subject to discovery and are not protected by any privilege or work product doctrine: (1) an investigation was performed; (2) the personnel who participated in the investigation; (3) the observations made by those participants; and (4) Buske's investigation of the origin of the Chattaroy fire was terminated [\*\*\*19] as soon as he found evidence implicating Washington Water Power. The only things which would be protected from disclosure are the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party

concerning the litigation." CR 26(b)(4). Buske disclosed [\*142] only one mental impression or conclusion of defense counsel--its opinion that his information constituted privileged work product. This conclusion is hardly confidential, considering Respondents have repeatedly asserted this in court.

The trial court's action regarding the firm of Winston & Cashatt lends additional support to the conclusion that Buske did not disclose privileged information. The disqualification of Eymann, Jones, and their law firm is inconsistent with the trial court's failure to disqualify their associated firm, Winston & Cashatt. Winston & Cashatt had reviewed the same information as Eymann and Jones. Thus, if the content of the Buske statement was what required disqualification then Winston & Cashatt should also have been disqualified. Alternatively, if the sanction was to punish Eymann and Jones (which is what the trial court stated) then the discussion of Fisons, [\*\*\*20] *infra*, explains why disqualification was inappropriate.

#### B. Fisons

In this case, disqualification as a sanction for violating CR 26(b)(5) is not in line with the guidelines set forth in Fisons. The Fisons decision clearly sets forth the principles trial courts are to follow in fashioning appropriate sanctions.

First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

The purposes of sanctions orders are to deter, to punish, to compensate and to educate.

[\*\*418] *Fisons*, 122 Wash. 2d at 355-56 (citations omitted). The goal [\*143] of these guidelines, and discovery sanctions in general, is to prevent attorney misconduct. To the extent possible, individual parties should not be penalized for their attorneys' misconduct in the discovery process. In light of these purposes and guidelines, [\*\*\*21] the trial court erred in disqualifying Eymann and Jones.

In ordering disqualification, the trial court failed to follow the guidelines set forth by this court in Fisons. The record does not reveal whether the trial judge considered any other sanction before ordering Eymann, Jones, and their law firm disqualified; in fact, the trial

court made no findings on this or any other issue. After considering the purpose of sanctions in light of the facts of this case, Eymann and Jones' intent and Paine Hamblen's conduct, we find disqualification was not the least severe sanction adequate to serve the purpose of sanctions in this case.

We begin by examining the facts of this case. While the particular facts of this case do not excuse counsel from following the strict requirements of the rule, several things are important in determining what, if anything, is the appropriate sanction. First, and most importantly, Buske represented himself as an expert for a nonparty and initially contacted Eymann and Jones. Buske felt compelled to act, in what he knew were difficult conditions, because of a perceived ethical and moral duty owed to the Plaintiffs. n5 This is not a case of plaintiff or defense [\*\*\*22] counsel trolling for experts or seeking to take advantage of opposing counsel by hiring their discarded or unused experts. Counsel who seek to hire or consult former experts of opponents or former integral employees of opponents can violate CR 26 as well as create possible grounds for [\*144] disciplinary action by the Bar. See, e.g., *American Protection Ins. Co.*, 1986 WL 57464 (D. Nev.). In this case, the record does not indicate Eymann and Jones ever engaged in a search for former experts of Paine Hamblen; rather, Buske simply presented himself. Finally, the record does not indicate that either Eymann and Jones or Buske ever discussed or brought up the possibility of compensating Buske for his information.

n5 Upon originally making his discoveries, at the time of the fires in 1991, the record reflects Buske said he urged the disclosure of his findings to the Department of Natural Resources (the state agency charged with investigating the fires). Evidently, no disclosure was made. Additionally, Buske also felt a duty based on his belief that he was an expert for Inland Power because some of the Plaintiffs and victims of the Chattaroy fire were Inland Power customers. The facts discovered by Buske implicated Washington Water Power; therefore, Buske felt that both he and Inland Power had a duty to disclose these facts to their customers.

[\*\*\*23]

Next, Buske told Eymann and Jones that this information would not have been made available absent his coming forward. The record shows Buske said counsel for Inland Power and Washington Water Power told him in 1993, immediately prior to his contact with Eymann and Jones, that his information would be suppressed or sealed, and this concerned him. Buske still

had possession of the original notes and pictures as, evidently, these had not been requested of him. The structure and conduct of Paine Hamblen's investigation into the fires created in Buske an ethical dilemma and the reasonable belief that material information would be suppressed.

In addition to these facts, consideration of Eymann and Jones' intent in interviewing Buske negates the imposition of disqualification. Eymann and Jones' motive in taking with Buske was not to create delay or confusion. They were presented with a unique situation and attempted to determine the proper course of action. Faced with the allegation of discovery abuses by the Defendants and the possible loss of relevant factual information, Eymann and Jones owed a duty to their clients to act quickly and preserve Buske's information; Eymann and Jones disclosed[\*\*\*24] the existence and substance of the interview to defense counsel the day after the interview.

On the other side, Paine Hamblen may have failed to mitigate the effects of this ex parte contact. Instead of immediately going to a judge, they waited nine months to bring this motion. The record reflects the delay in filing the motion to disqualify resulted in the Plaintiffs expending over 640 hours and incurring [\*\*419] corresponding expenses [\*145] during the period of the delay. Delay in filing the motion to disqualify is suggestive of its use for purely tactical purposes and could be the sole grounds for denying a motion to disqualify. *First Small Business Inv. Co. 108 Wash. 2d at 337*. While the record does not indicate why Paine Hamblen waited so long in bringing the motion to disqualify, the delay is evidence of Paine Hamblen's failure to mitigate in a timely manner.

Considering all the above mentioned factors, disqualification was not the least severe sanction adequate to serve the purpose of sanctions in this case. Disqualification is a severe sanction, often resulting in a penalty to the parties that is disproportionate to the rule violation. In cases not involving conflicts of interest or[\*\*\*25] breaches of privilege, disqualification should be imposed sparingly. Under the facts of this case as applied to the guidelines set forth in Fisons, disqualification is not required to remedy Eymann and Jones' violation of CR 26(b)(5).

The record in this case does not allow us to determine what other sanctions for the violation in this case would comport with Fisons. "What the sanctions should be and against whom they should be imposed is a question that cannot be fairly answered without further factual inquiry, and that is the trial court's function." *Fisons, 122 Wash. 2d at 355*.

## CONCLUSION

We find the Petitioners violated CR 26(b)(5) by conducting an ex parte interview with an expert investigator hired by counsel for an opposing party. Additionally, we find the sanction of disqualification of counsel is not required or in accord with the principles set forth in Fisons; therefore, we reverse the trial court's order of disqualification and order reinstatement of counsel. The factual record of this case on appeal does not allow us to determine whether further sanctions are appropriate. On remand, the trial court must fashion an appropriate remedy, consistent with [\*146] the[\*\*\*26] principles and guidelines set forth by this opinion and Fisons. We remand this case for further proceedings. n6

n6 Because this decision effectively restarts this case, Respondents' motion to proceed with trial court and appellate court actions is denied.

Johnson, J.

WE CONCUR:

Durham, C.J.

Dolliver, J.

Smith, J.

Pekelis, J.P.T.  
result only

CONCURBY: TALMADGE; Madsen

CONCUR: TALMADGE, J. (concurring)-- While I concur in the result of the majority opinion, I write separately to emphasize our strong policy on discovery abuse. The majority opinion does not adequately convey why Norman Buske felt compelled to contact attorneys Richard Eymann and Steve Jones. The factors which compelled Buske to contact Eymann and Jones may be relevant to the trial court's consideration, on remand, of their conduct.

The present case arises from firestorms in Northeastern Washington in October 1991. Over 90 wild fires ignited because of dry weather conditions and high winds. Washington Water Power Company (Water[\*\*\*27] Power), Inland Power & Light Company (Inland Power), and other utilities contacted the law firm of Paine, Hamblen, Coffin, Brooks & Miller (Paine Hamblen) to

direct their investigative efforts into the origin of the wild fires. Pursuant to a joint representation agreement, which is not of record, Paine Hamblen organized teams, consisting of at least one lawyer, utility representatives, and consulting experts, to investigate each utility's potential liability for the fires. Buske was one of the consulting experts retained by Paine Hamblen. n1

n1 The trial court did not make findings of fact on the conduct or intentions of the parties, and, in particular, Buske's allegations about Paine Hamblen. For purposes of this opinion only, I assume Buske's allegations about Paine Hamblen are true.

Buske was assigned to a team with a Paine Hamblen lawyer and Inland Power employees [\*\*420] to investigate fires near Inland Power facilities. On October 17, 1991, Buske's team flew by Inland Power helicopter to investigate an [\*147] Inland[\*\*\*28] Power line at the most upwind site of one of the fires, known as the Chattaroy fire, which was still burning. After his investigation, Buske determined Inland Power's line was not involved in the Chattaroy fire. However, Buske decided to investigate a nearby Water Power line which was directly over the most upwind spot from which the fire spread. Thinking he was employed by Inland Power, Buske believed an investigation of this line might be relevant to ruling out Inland Power's equipment as the cause of the Chattaroy fire. Buske's observations led him to conclude the Water Power line was the cause of the Chattaroy fire. He documented his findings in notes and took pictures of the Water Power equipment he believed was responsible for the fire.

Buske reported his findings to a Paine Hamblen lawyer who relayed the information by telephone to other unnamed parties. Paine Hamblen instructed Buske to stop looking at the Water Power line and the team left the location before Buske could locate any other physical evidence on the ground under the Water Power line. Nevertheless, Buske returned to the site on two other occasions, October 18, 1991, and November 1, 1991, to confirm his observations. [\*\*\*29] On each occasion, Paine Hamblen ordered Buske to cease investigating before he could locate any physical evidence. However, Buske took pictures and kept notes of his observations on each of these occasions.

On November 1, 1991, Buske noted the defective Water Power equipment had been replaced. When the investigative teams met, Buske presented his evidence relating to the origin of the Chattaroy fire and urged it be given to the Department of Natural Resources, which

was investigating the cause of the firestorm fires. Buske's information was never disclosed to the Department. No one asked Buske for his pictures or copies of his notes.

Some two years later, after lawsuits were filed for damages arising out of the 1991 fires, Buske heard press reports in which counsel for the plaintiffs asked for information regarding the origin of the Chattaroy fire. Buske [\*148] sought out his former Paine Hamblen contact and expressed his belief that he had an ethical obligation to provide the information to counsel for the plaintiffs. Buske was later advised by Paine Hamblen lawyers he could not speak with counsel for the plaintiffs or disclose any of the information he had discovered about the origin[\*\*\*30] of the Chattaroy fire. At this time, Inland Power had not been named as a defendant in the lawsuit by the plaintiffs.

It was only after this direction from counsel for Inland Power and Water Power that Buske sought out counsel for the plaintiffs in order to disclose the information in his possession.

#### ANALYSIS

The majority is correct in determining Eymann and Jones did not conform their conduct to the requirements Of CR 26(b)(5). They interviewed Buske ex parte, without notice to opposing counsel and without court sanction, and reviewed the transcripts of the interviews, and apparently edited them as well. Washington has a strong policy against ex parte contact between counsel and the experts of opposing parties. In *Loudon v. Mhyre*, 110 Wash. 2d 675, 677-78, 756 P.2d 138 (1988), we held ex parte interviews of treating physicians when the plaintiff has not waived the physician-patient privilege are prohibited as a matter of public policy.

Eymann and Jones had the option here of deposing Buske or examining him on the record before a superior court judge rather than taking matters into their own hands and interviewing Buske ex parte. They did not seek an advisory ruling with respect[\*\*\*31] to the ethics of contacting Buske, as did the attorneys at Winston & Cashatt. There is no indication in the record Eymann and Jones could not have immediately sought a ruling from the trial court on [\*149] Water Power's anticipated claims of privilege, allowing them to depose Buske. Their conduct violated CR 26(b)(5). n2

n2 This is not a traditional case of counsel contacting the opposing party's experts. Paine Hamblen did not make clear to Buske the party for whom Buske was a consulting witness. The dual or multiple representation of the utilities and meetings of the investigative teams also may have created



circumstances in which Buske's opinions and findings would be revealed to parties other than the one employing Buske. On this inadequate record and without the terms of Paine Hamblen's joint representation agreement before us, it is not possible to conclude whether confidentiality was preserved or lost. However, it was clear enough to Eymann and Jones the utilities would claim Buske was a defense expert and his information was privileged.

[\*\*32]

[\*\*421] However, the trial court's decision to disqualify Eymann and Jones was an excessive sanction. Alternative sanctions were not considered by the trial court, n3 and it is highly likely Buske's evidence would have been discoverable in any event. Additionally, defense counsel waited from October 1993 until July 12, 1994 to file a motion to disqualify counsel. In the meanwhile, counsel for the plaintiffs performed substantial work for the plaintiffs. The delay of defense counsel in seeking to file a motion to disqualify certainly waived any claim they were prejudiced by the actions of Eymann and Jones. Defense counsel had an affirmative obligation to seek a motion to disqualify immediately rather than waiting for a prolonged period of time to act. *First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wash. 2d 324, 337, 738 P.2d 263 (1987).

n3 The trial court did not make written findings of fact and conclusions of law on its rationale for the imposition of sanctions against Eymann and Jones.

The majority[\*\*33] correctly determines the sanction of disqualification was excessive, but does not reference the circumstances which caused Buske to seek out counsel for the plaintiffs. Buske had a real fear the important information in his possession would be suppressed. Paine Hamblen allegedly told Buske his observations and opinions would be sealed. Clerk's Papers at 96-97.

The Buske notes, pictures, and statements as to the origin of the Chattaroy fire appear highly relevant. The plaintiffs may be able to show this material and information would not be available through other means without [\*150] hardship. As a result, the Buske materials and opinions likely were discoverable under the rules relating to work product and facts and opinions held by nontestifying experts. See CR 26(b)(4), (5); 4 Lewis H. Orland and Karl B. Tegland, *Washington Practice: Rules Prac.* at 34-35, 40-41 (4th ed. 1992). As Orland and

Tegland point out, these rules do not bar discovery where the party seeking discovery could not send its own expert to an accident scene observed by the other party's nontestifying expert prior to physical changes or removal of defective equipment. *Id.* at 40-41; see *Hartford Fire Ins.* [\*\*34] *Co. Pure Air on the Lake Ltd.*, 154 F.R.D. 202 (N.D. Ind. 1993) (disallowing discovery sought by plaintiff where cave-in site "swarmed" with plaintiffs' own experts; contrasting situation where plaintiff's expert did not have access to site containing evidence of causation until physical conditions changed).

Washington has a long, clear tradition of condemning gamesmanship in civil discovery. In *Gammon v. Clark Equip. Co.*, 38 Wash. App. 274, 686 P.2d 1102 (1984), *aff'd* on other grounds, 104 Wash. 2d 613, 707 P.2d 685 (1985), then Chief Judge Durham wrote:

The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958). The availability of liberal discovery means that civil trials

no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

*Hickman v. Taylor*; 329 U.S. 495, 501, [\*\*35] 91 L. Ed. 451, 67 S. Ct. 385 (1947).

*Gammon*, 38 Wash. App. at 280. In *Gammon*, the Court of Appeals affirmed sanctions imposed against a party which failed to disclose pertinent information pertaining to the [\*151] safety record of a certain type of equipment. The court indicated a unilateral decision by a party on the relevance of data within the scope of a discovery request was inappropriate. *Gammon*, 38 Wash. App. at 281. The court [\*\*422] held a trial court sanction of \$2,500 against the defendant was insufficient, and ordered a new trial, stating:

An award of \$2,500 is cheap at twice the price in the context of a \$4.5 million wrongful death case. Approval of such a de minimis sanction in a case such as this would plainly undermine the purpose of discovery. Far from insuring that a wrongdoer not profit from his wrong, minimal terms would simply encourage litigants to embrace tactics of evasion and delay. This we cannot do.

*Gammon*, 38 Wash. App. at 282. See also *Taylor v. Cessna Aircraft Co.*, 39 Wash. App. 828, 836, 696 P.2d 28, review denied, 103 Wash. 2d 1040 (1985).

In *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wash. [\*\*\*36] 2d 299, 858 P.2d 1054 (1993), we reversed a trial court determination not to impose sanctions for discovery abuse. There, a medical malpractice case had been filed against a doctor and a negligence action against a drug company for injuries to a plaintiff. After the doctor settled the claim of the plaintiff, the attorney for the plaintiff provided to the doctor's lawyer a copy of a letter from an anonymous source indicating the drug company was aware of serious complications involving its drug. The drug company had not disclosed information concerning such complications to the doctor's counsel in the course of discovery. We held sanctions were appropriate because "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Id.* at 342. We further noted the conduct of counsel in discovery is measured "against the spirit and purpose of the rules, not against the standard of practice of the local bar." *Id.* at 345. We remanded the case to the trial court for a determination of appropriate sanctions to be imposed. In *Fisons*, we rejected a hypertechnical reading of the rules, noting the [\*152] drug company clearly[\*\*\*37] had a responsibility to produce the "smoking gun" evidence in its possession regarding its drug. See also *Staggs v. Subaru of Am., Inc.* (W.D. Wash. No. C93-5678); Alex Fryer, *Dismaying Discovery: Sanctioned Again, Bogle Says It's Taking Steps to Keep the Courts Satisfied*, PUGET SOUND BUSINESS JOURNAL, Nov. 17-23, 1995, at 1.

The policy of these cases is plain. Washington courts will not tolerate efforts by counsel to hide behind the letter of discovery rules while ignoring their spirit. The purpose of civil discovery is to disclose to the opposing party all information that is relevant, potentially relevant or reasonably calculated to lead to discovery of admissible evidence in the trial at hand. CR 26(b)(1). Counsel and parties may not unilaterally decide to withhold properly requested information on the ground it is not relevant or admissible. Nor should the courts sit back and wait for an incipient *Fisons* case to ripen. Where there is an indication a serious potential exists for abuse of civil discovery, the courts are obliged to act. But attorneys in the position of Eymann and Jones must still take their concern about alleged incipient *Fisons* situations to the [\*\*\*38]courts, rather than taking matters into their own hands.

We do not condone *ex parte* contact between counsel and expert witnesses of other parties or potential parties to litigation. Eymann and Jones should have brought their concern about Buske's evidence to the trial court, rather than engaging in self-help. But neither should the courts stand by and permit what might be plainly

relevant, and potentially extremely significant, evidence to be lost or hidden through intricate investigative plans, and a hypertechnical reading of discovery rules. The purpose of the discovery rules is to ensure trials are fair and the truth is not lost. We must continually affirm these principles, until litigation counsel get the unmistakable message we will apply these principles in discovery and we will sanction lawyers who do not take us at our word.

The end result of this extended controversy over Buske's [\*153] information has been an inexcusable delay in reaching the merits of the case. The fires which claimed the homes of many of the plaintiffs occurred nearly five years ago. On remand, the trial court should evaluate the conduct of all parties and their counsel, but the trial court should proceed to[\*\*\*39] the merits of this case as expeditiously as possible.

Talmadge, J.

[\*\*423] Madsen, J. (concurring)-- Mr. Buske was part of an extensive investigative group formed when the fires referred to in this case broke out. He was employed to gather and develop information in anticipation of litigation stemming from damage caused by those fires. He took photographs and made observations of the fire scenes. In addition, Mr. Buske was present and participated in meetings where defense counsel discussed ideas, thought processes, and strategies regarding the potential litigation and the investigation.

The petitioners in this case asked Mr. Buske numerous questions about all of these matters. For example, petitioners asked Mr. Buske how the fire investigations were coordinated by the defense team. He was asked about apparent attempts by defense counsel to avoid conflict among the clients and about concerns of counsel regarding development of information harmful to a client. He was asked to disclose discussions at the strategy planning sessions attended by defense attorneys, representatives of their clients, and their consulting experts. He was asked who was present at the planning sessions. He was asked [\*\*\*40]about the relationships of various defense counsel to each other. He was asked about the opinions of other consulting experts who were present at the planning meetings, who the client representatives were at the meetings, and what information the clients were aware of at the meetings. He was asked what the clients were told by their lead counsel at the strategy meetings. He was asked about any admonitions he was given regarding the other fires he investigated. In short, while Mr. Buske was questioned [\*154] about his own observations, he was also extensively questioned about strategy in investigating the fires in preparation for litigation, and about

conversations and instructions of counsel which revealed mental impressions and thought processes.

Thus, as a result of their questioning of Mr. Buske, petitioners obtained opinion work product from him. Moreover, they did so while completely aware that work product protection had been claimed by the utilities. Mr. Buske expressly told petitioners before he was questioned that respondents' counsel had advised him that his information and materials were work product of both Inland Empire and Washington Water Power. Mr. Buske thought, though, [\*\*\*41] that work product protection did not extend to the information he wanted to reveal and that respondents wrongfully sought to suppress that information. Rather than proceed in accord with CR 26, or turn to the trial court and ask for the court's assistance in determining what was discoverable from Mr. Buske, petitioners took it upon themselves to decide that they could engage in ex parte contact with him.

In my view, the trial judge correctly perceived the serious nature of petitioners' ex parte contact with Mr. Buske. The trial judge said:

If you read through [Mr. Buske's] statement, those facts [those available to counsel], or at least what I perceive to be the facts, take up really very little of the statement. . . and I'm talking now about the Sunday statements and its various forms, the edited and nonedited version, talks about Mr. Buske's concerns, about his reasons for coming forward, talks about the rather interesting investigation strategies which were done there. It talks about what counsel were doing during the process of the investigation of various fires. Factually there is only a small part of those statements which would be the independent observations. . . which [\*\*\*42] would be relevant and material for the plaintiffs to know in evaluating the liability issues

Counsel's Oral Argument on Def.'s Mot. For Disqualification [\*155] of Counsel and Ct.'s Oral Decision (Court's Oral Decision) at 91-92. The court also said:

The concern here in this particular case is not those pieces of factual information, frankly, that Mr. Buske provided with regard to what his perception of the origin of that particular fire and that particular place. Arguably those at some point may have been discoverable.

The serious issue is all of the other examination that was done of him which talked about essentially the strategies counsel were using to investigate the fires, the conversations between Mr. Buske and counsel -- and when I say, "counsel," I'm [\*\*424] talking about Mr.

Stone and Mr. Kulisch which were related primarily to Mr. Eymann -- and whatever conversations Mr. Buske may have had with Mr. Eymann and/or Mr. Jones which were not recorded and are not part of the record. That is a serious issue. . . .

Court's Oral Decision at 95. From the judge's oral comments, including those quoted above, it is apparent that the trial judge concluded that Mr. Buske's information [\*\*\*43] constituted work product, that much of the information is not discoverable, and that all of the information was improperly obtained by petitioners in their questioning of Mr. Buske in violation of CR 26. The rule, the case law, and the record bear out these conclusions.

Because the majority misreads CR 26 and misinterprets the work product rule, the majority erroneously concludes that material provided by Mr. Buske is not protected under the work product doctrine. The majority's mistaken view of CR 26, the work product rule, and the record in this case has also led it to the incorrect conclusion that petitioners' ex parte contact with respondents' expert was somehow justified because of a perceived need to act quickly to preserve factual information. As a result of these errors, the majority opinion implies that the violation of the discovery rules in this case is not a serious one, and suggests to the trial court on remand that a serious sanction is not warranted.

The majority's analysis of CR 26 and the work product [\*156] rule will have significant consequences in future cases, as well as significant impact when the action underlying this matter proceeds to trial. Because I believe the [\*\*\*44] majority fails to adequately address the serious violation of the discovery rules and the principles upon which litigation proceeds in our adversary system, I cannot sign the majority opinion.

#### WORK PRODUCT RULE AND CR 26(b)(4) AND (b)(5)

As an introductory matter, the work product rule in CR 26(b)(4) is the same as that in Fed. R. Civ. P. 26(b)(3), and this court has previously looked to cases applying the federal rule for guidance in construing the state rule. See, e.g., *Heidebrink v. Moriwaki*, 104 Wash. 2d 392, 706 P.2d 212 (1985); *Pappas v. Holloway*, 114 Wash. 2d 198, 210-11, 787 P.2d 30 (1990). Accordingly, I will refer to cases and secondary authority regarding the federal rule, as well as that regarding CR 26, in explaining my disagreement with the majority. n1

n1 CR 26 has undergone some changes over the years, which resulted in changes in subsectioning so that, for example, what was CR 26(b)(3) is now

(b)(4), and what CR 26(b)(4) is now (b)(5). In addition, CR 26's subsections are not identified the same as in the federal rule. Thus, CR 26(b)(4) corresponds to Fed. R. Civ. P. 26(b)(3), and CR 26(b)(5) corresponds to former Fed. R. Civ. P. 26(b)(4). Amendments made in 1993 to the federal rule significantly changed Fed. R. Civ. P. 26(b)(4), concerning discovery from experts, and added Fed. R. Civ. P. 26(a)(2), also relevant to discovery from experts. These changes have not been incorporated into this state's CR 26. Accordingly, with one exception, which is identified, only federal cases considering the rule prior to the 1993 amendments are cited in this opinion.

[\*\*\*45]

I

My disagreement with the majority begins with its premise that if CR 26(b)(5) (discovery of facts and opinions of experts) applies to the information in this case, then CR 26(b)(4) (discovery of work product) does not. Because the majority fails to understand the interplay between these two rules, it erroneously concludes that nearly all of Buske's evidence falls outside the protection of the work product rule.

[\*157] Contrary to the majority view, the rule's provision that the conditions of CR 26(b)(4) are "subject to the provisions" of CR 26 (b)(5) should not be read to mean that where an expert is involved, subsection (b)(4) does not apply. Neither the plain meaning of the term "subject to" nor well-reasoned cases accept the majority's view of CR 26(b)(4) and (b)(5) as "either/or" propositions. "Subject to" means in the context of the rule "governed or affected by." Black's Law Dictionary 1425 (6th ed. 1990) (other definitions listed do not fit the context of the rule, i.e., "liable, subordinate, subservient, inferior, obedient to;. . . provided that; provided; answerable for"). Thus, the rule does not [\*\*425] say that if subsection (b)(5), concerning experts, applies, subsection (b)(4) [\*\*\*46] cannot apply as well; instead the rule indicates that provisions in CR 26(b)(5) which are different from those in CR 26(b)(4) hold sway over CR 26(b)(4).

Where discovery from experts is sought, the work product rule of CR 26(b)(4) is "subject to" the provisions of CR 26(b)(5). This language reflects the rejection by the federal rule of the principle that expert information is by definition always work product. See 4 James W. Moore, Federal Practice § 26.01[18], at 26-41 (2d ed. 1995) (quoting Advisory Committee Note of 1970 to Amended Rule 26(b)). It does not, however, follow that a

party's expert never possesses information which may be protected under the work product doctrine.

A number of courts have recognized the interplay between the work product provision of Fed. R. Civ. P. 26(b)(3) and the provision governing discovery from experts involved in trial preparation, former Fed. R. Civ. P. 26(b)(4). E.g., *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995) n2; *Dominguez v. Syntex Lab., Inc.*, 149 F.R.D. 158, (S.D. Ind. 1993); *North Carolina Elec. [\*158] Membership Corp. v. Carolina Power [\*\*\*47] & Light Co.*, 108 F.R.D. 283 (M.D.N.C. 1985). The court in *Bogosian* explained:

The first paragraph of Rule 26(b)(3) consists of two sentences. . . . the first sentence requires a showing of "substantial need" before work product must be produced. The second sentence requires protection against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. The proviso introduces the first sentence of Rule 26(b)(3) ("Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents. . . prepared in anticipation of litigation or for trial . . .") and signifies that trial preparation material prepared by an expert is also subject to discovery, but only under the special requirements pertaining to expert discovery set forth in Rule 26(b)(4). The proviso does not limit the second sentence of Rule 26(b)(3) restricting disclosure of work product containing "mental impressions" and "legal theories". Thus, it does not support the . . . conclusion that Rule 26(b)(3), protecting this category of attorney's work product, "must give way" to Rule 26(b)(4), authorizing discovery[\*\*\*48] relating to expert witnesses.

*Bogosian*, 738 F.R.D. at 594. See also *Haworth*, 162 F.R.D. at 293 (the drafters of the federal rule "intended the terms 'subject to' to mean that subdivision (b)(3) applies unless there is a standard to the contrary in subdivision (b)(4)" and "there appears to be no differing standard for discovery of opinion work product").

n2 Although this case addresses the federal rule after the 1993 amendments, the court concluded that those amendments did not alter the principle that attorney's opinion work product is not discoverable from an expert.

I believe these cases provide sound guidance for applying CR 26 and recognizing that CR 26(b)(4) and

(b)(5) should both be considered where work product is claimed and discovery from an expert is sought. Accordingly, I disagree with the majority's conclusion that if CR 26(b)(5) applies, CR 26(b)(4) and the work product rule do not

## II

Next, I disagree with the majority when it states that factual material does not come within<sup>n3</sup> the protection of [\*159] the work product rule. Majority at 18-19. There are two types of attorney work product generally recognized, and CR 26(b)(4) addresses both. n3 The first sentence of the rule describes materials obtained or developed in anticipation of <sup>n3</sup> [\*426] litigation; the rule specifically refers to documents and tangible things. The second sentence refers to what is often termed "core" or "opinion" work product, i.e., work product containing those "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." CR 26(b)(4); see *Pappas*, 114 Wash. 2d at 210-11; Lewis H. Orland, Observations on the Work Product Rule, 29 Gonz. L. Rev. 281, 282-83 (1993-1994). Thus, the rule concerns both ordinary factual work product and opinion work product. The majority concludes, though, that the only kind of work product is "opinion work product," and that factual material does not come within the work product rule. Majority at 18-19. This conclusion completely misapprehends CR 26(b)(4) and the work product rule. CR 26(b)(4) does not even suggest that work product does not include factual material. The rule broadly encompasses<sup>n3</sup> material prepared in anticipation of litigation.

<sup>n3</sup> *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), the leading case on the work product rule, arguably created three categories of work product, i.e., ordinary factual work product, oral statement memoranda work product, and mental impressions work product. Lewis H. Orland, Observations on the Work Product Rule, 29 Gonz. L. Rev. 281, 294 (1993-1994) (but noting that the decision in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) might be read to combine the latter two categories). CR 26 recognizes two, essentially collapsing the latter two categories.

One of the authors of the treatise cited by the majority at 18 (4 Lewis H. Orland & Karl B. Teglund, Washington Practice, Rules Practice (4th ed. 1992) clearly explains in a recent article that under the rule's

work product provision "factual documents prepared in anticipation of litigation that do not contain or reflect an attorney's or<sup>n3</sup> other representative's mental impressions, conclusions, opinions, or legal theories are discoverable upon" the "substantial need" showing of the work product provision. Orland, Observations, supra at 291 (emphasis added). In *Hickman* [\*160] v. *Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 91 L. Ed. 451 (1947), upon which both Fed. R. Civ. P. 26(b)(3) and CR 26(b)(4) rest, the Court noted that relevant and nonprivileged facts hidden in an attorney's file may be discovered if production is "essential to the preparation of one's case."

Thus, under CR 26(b)(4), material concerning factual information prepared in anticipation of litigation by a party or that party's representative, including counsel, a consultant, or an agent, may be ordinary work product which is discoverable only where the showing is made that there is substantial need of the materials in the preparation of the case, and that the substantial equivalent of the materials cannot be otherwise obtained without undue hardship. Where such material is sought through discovery, the determination of whether the substantial need showing has been made is vested within the sound discretion of the trial judge, who makes that determination<sup>n3</sup> after considering all the facts and circumstances of the individual case. *Heidebrink*, 104 Wash. 2d at 401. To justify disclosure, the "party must show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent information from other sources if production is denied." *Id.* at 401.

The majority's belief that factual material does not fall within the work product rule seems to arise in part from a misunderstanding of the principle that factual material embodied in a protected document may be discoverable. Although discoverable facts remain discoverable even if embodied in a protected document under CR 26(b)(4), this does not mean that all factual material is always discoverable. Nor does the mere circumstance that facts may be discoverable lead to the conclusion that factual information is never work product; factual work product may be discoverable under the "substantial need showing" requirement of CR 26(b)(4).

## III

CR 26(b)(5) states that what may be discovered from an [\*161] expert generally depends upon whether the expert is expected to testify or not. If the expert is expected to testify, then under<sup>n3</sup> CR 26(b)(5)(A)(i) discovery of the substance of the facts and opinions to which the expert will testify and a summary of the grounds for the opinions is discoverable through interrogatories.

If the expert is not expected to testify (sometimes called a consulting expert), then CR 26(b)(5)(B) provides that facts known to or opinions of the expert are discoverable only as provided in CR 35(b) (which is not relevant here) or "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to [\*\*427] obtain facts or opinions on the same subject by other means." Thus, as is the case for work product under CR 26(b)(4), CR 26(b)(5) requires a high showing of need for information before discovery of a nontestifying expert's facts and opinions obtained and developed in anticipation of litigation is allowed. CR 26(b)(5)(B), like CR 26(b)(4), recognizes "that a trial is still an adversary proceeding and that, so conceived, fundamental fairness requires that 'discovery' not be utilized to defeat a litigant by probing for real or apparent weaknesses in his case which may have been revealed in his trial preparation." *Crenna v. Ford Motor Co.*, 12 Wash. App. [\*\*\*54] 824, 831, 532 P.2d 290 (discussing provision for discovery from nontestifying experts, then numbered CR 26(b)(4)(B)), review denied, 85 Wash. 2d 1011 (1975). The former federal rule comparable to CR 26(b)(5) has also been recognized as serving the purpose of guarding against the danger that one party will unfairly use another party's expert to prepare his or her own case, as well as the purpose of facilitating the presentation and clarification of issues at trial. *Vasquez v. Markin*, 46 Wash. App. 480, 492 n.5, 731 P.2d 510 (1986) (quoting Thomas R. Trenkner, Annot., Pretrial Discovery of Facts Known and Opinions Held by Opponent's Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure, 33 A.L.R. Fed. 403, 414 (1977)), review denied, 108 Wash. 2d 1021 (1987).

Where opinion work product is concerned, however, the [\*162] federal courts cited above have held that the information is protected under the work product doctrine even where discovery is sought from an expert who is expected to testify. Similarly, this court should recognize that discovery of opinion work product from an expert is generally foreclosed. See, e.g., *Bogosian* (applying federal rule); *Haworth*[\*\*\*55] (same). In this case, the bulk of the information disclosed by Mr. Buske falls within this category, as the trial judge recognized.

Opinion work product receives greater protection than ordinary work product. CR 26(b)(4) says only that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." While the provision does not directly identify what protection is afforded opinion work product, the question has been the subject of a great deal of attention. The United States Supreme Court has

described opinion work product "entitled to special protection," and said that such work product "cannot be disclosed simply" on a substantial need showing. *Upjohn Co. v. United States*, 449 U.S. 383, 401, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

This court addressed the required showing for opinion work product in *Pappas*. As the court noted there, the two prevailing views are that such work product is either absolutely immune from discovery, or that an exceptional showing of need for the information is required, a standard which is higher than the "substantial[\*\*\*56] need" standard applicable to ordinary work product. The court noted the disagreement among other jurisdictions, and adopted what it termed a "middle ground," i.e., "where the material sought to be discovered is central to a party's claim or defense, an exception to the strict rule created by CR 26(b)[4] should apply and discovery should be allowed." *Pappas*, 114 Wash. 2d at 212. Thus, while the court rejected a higher standard for showing necessity of such work product and rejected absolute protection for such work product in every instance, it substantially restricted the discoverability [\*163]of such work product depending upon whether the information is central to the case. *Pappas* involved a claim of attorney malpractice, and opinion work product was central to that claim. In practical effect, the holding in *Pappas* means that opinion work product will rarely be discoverable. n4

n4 The court's holding in *Pappas v. Holloway*, 114 Wash. 2d 198, 787 P.2d 30 (1990) accords with Professor Orland's recommendation in his recent article that "the mental impressions of the lawyer and other representatives of a party are absolutely protected, unless their mental impressions are directly at issue." Lewis H. Orland, *Observations on the Work Product Rule*, 29 *Gonz. L. Rev.* 281, 300 (1993-1994).

[\*\*\*57]

[\*\*428] Accordingly, discovery of opinion work product from an expert should rarely be permitted, and not in this case.

#### IV

Because the majority erroneously concludes that Mr. Buske's evidence is simply factual in nature and, thus, not work product, it fails to address another important issue concerning the work product rule which is debated by the parties in this matter. CR 26(b)(4) specifically refers to discovery of documents and tangible things, and petitioners claim that intangibles, such as Buske's

observations and discussions with others concerning defense of this case, are not covered by the work product rule. Leading federal commentators disagree, concluding that intangibles are also protected by the work product doctrine under Hickman:

Rule 26(b)(3) itself [like CR 26(b)(4)] provides protection only for documents and tangible things and . . . does not bar discovery of facts a party may have learned from documents that are not themselves discoverable. Nonetheless, *Hickman v. Taylor* continues to furnish protection for work product within its definition that is not embodied in tangible form, such as the attorney's recollection, in *Hickman v. Taylor*, of what the witnesses[\*\*\*58] told him. Indeed, since intangible work product includes thoughts and recollections of counsel, it is often eligible for the special protection accorded opinion work product

[\*164] 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 337-38 (2d ed. 1994); see also 4 James W. Moore, *Federal Practice*, P 26.15[1], at 26-291 to 294 (2d ed. 1995). Professor Orland also notes that some courts have given protection to intangible work product under the basic policies of Hickman. Lewis H. Orland, *Observations on the Work Product Rule*, 29 *Gonz. L. Rev.* 281, 284 (1993-1994). This court has recognized the key role of Hickman where work product is at issue. E.g., *Pappas*; *Heidebrink*.

The Hickman protection of intangible work product is of primary importance in this case. "Subject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved, rather than to the underlying evidence, is protected regardless of the discovery method employed." James W. Moore, *Federal Practice*, P 26.15[1], at 26-293 (2d ed. 1995) (emphasis[\*\*\*59] added). Two cases described in the treatise, at 26-293 to 26-294, serve as examples. In *Bercow v. Kidder, Peabody & Co.*, 39 *F.R.D.* 357 (S.D.N.Y. 1965), the court sustained defendant's refusal to answer questions representing an indirect attempt to determine the manner in which the other party was preparing for trial. The questions included inquiries about what preparation defendant had made for the deposition examination, who defendant had talked to about the deposition in preparing for it, and what documents defendant had looked at in preparing for the deposition. In *Shelton v. American Motors Corp.*, 805 *F.2d* 1323 (8th Cir. 1986), plaintiff's attempt to depose defendant's in-house counsel as to whether defendant was in possession of certain documents was barred because in light of the large numbers of documents available, the knowledge of the attorney as to certain documents would reveal the

attorney's strategy and judgment as to what was important in the [\*165] case. See also, e.g., *Haworth*, 162 *F.R.D.* at 295; n5 *Lott v. Seaboard Systems R.R., Inc.*, 109 *F.R.D.* 554 (S.D. Ga. 1985); *Ford v. Philips Elec. Instruments Co.*, 82 *F.R.D.* 359 (E.D. Pa. 1979); *Transmirra Prods. [\*\*\*60] Corp. v. Monsanto Chem. Co.*, 26 *F.R.D.* 572, 579 (S.D.N.Y. 1960) (there should be no difference between an exchange of written legal memoranda among attorneys and one of ideas and opinions developed through consultations or conferencing); Special Project, *The Work Product Doctrine*, 68 *Cornell L. Rev.* 760, 841 (1983).

n5 Although this case was decided based upon the federal rule after the 1993 amendments, it is sound for the proposition stated here.

Thus, intangible factual information concerning strategy in preparing to defend an anticipated action falls within the kind of [\*\*429] intangible work product protected under Hickman as described by the commentators and a number of courts, constitutes opinion work product which is rarely discoverable under *Pappas*, and is generally undiscoverable from a party's expert.

The majority opinion directly contravenes these principles when it says that all factual information is unprotected by the work product rule and that strategy and conversations in preparing for[\*\*\*61] anticipated litigation are unprotected.

V

The majority also errs when it concludes that because there was no litigation actually pending at the time Mr. Buske worked on the investigation, he could not have had access to "privileged" n6 information. Majority at 17-18. The work product rule protects material obtained or developed [\*166] in anticipation of litigation. The circumstances in the seminal case in this area, *Hickman*, are analogous to the facts in this case. There work product protection was applied to information gathered by defendant's counsel immediately after a tug sank with loss of lives but well before litigation commenced. Here, the investigation of the fires occurred after they broke out, but well in advance of litigation.

n6 The majority uses this term to refer to information and conversations protected under the attorney-client privilege and materials protected by the work product doctrine. The two are different in a number of respects, but relevant here is the notion that insofar as

work product is concerned, nomenclature is not dispositive. See 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2023, at 335 (2d ed. 1994) (work product materials not beyond the scope of discovery as "privileged" under Fed. R. Civ. P. 26(b)(1), but they have been referred to as subject to a "qualified privilege"; nomenclature not a matter of importance).

[\*\*62]

This court has also recognized that information may be protected by the work product rule in advance of litigation, and accordingly in advance of a defendant being named party to a lawsuit, during litigation, and after litigation has terminated. *Heidebrink*, 104 Wash. 2d at 400; *Pappas*, 114 Wash. 2d at 210; *Dawson v. Daly*, 120 Wash. 2d 782, 790, 845 P.2d 995 (1993); accord, e.g., *Martin v. Monfort, Inc.*, 150 F.R.D. 172, 173 (D. Colo. 1993) ("there is no requirement that litigation have actually commenced in order to assert work product"); *D'Amico v. Cox Creek Ref. Co.*, 126 F.R.D. 501, 506 (D. Md. 1989) ("not necessary that suit has been filed, so long as litigation is a reasonable contingency"); see also *F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 25, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983)

(Rule 26(b)(3) does not in so many words address the temporal scope of the work-product immunity, and a review of the Advisory Committee's comments reveals no express concern for that issue. Notes of Advisory Committee on 1970 Amendments, 28 U.S.C. App., pp. 441-442. But the literal language of the Rule protects materials prepared for any litigation or trial as long[\*\*63] as they were prepared by or for a party to the subsequent litigation. See 8 J. Wright & A. Miller, *Federal Practice and Procedure* § 2024, 201 (1970).

(dicta). "Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced." 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 343 (2d ed. 1994).

It is clear that the utilities in this case, through their attorneys, Paine-Hamblen, were anticipating the fallout [\*167] from the Chatteroy fires and hired Mr. Buske, among others, in an effort to prepare for litigation.

VI

Petitioners also claim they violated no rule because CR 26(b)(4) and (b)(5) do not apply to Mr. Buske. This is so, they argue, because Buske was Inland Power's expert and Inland Power was not a party to the litigation when the

ex parte contact with Mr. Buske occurred. The majority concludes that it is unnecessary to resolve the question of Mr. Buske's status. The majority also says, at 6 and 13, that the trial judge made no finding as to Mr. Buske's status. I disagree.

Contrary to the majority's statement, Buske's status must be determined as a [\*\*430] threshold matter in order[\*\*64] to decide whether CR 26(b)(4) and (b)(5) apply at all. Moreover, the trial judge did address Mr. Buske's status and found that he was not solely Inland Power's expert. She said "that issue, I believe it is fair to say, may still be somewhat murky. But I'm satisfied after looking at all of the evidence it's clear he was hired as a part of some type of effort involving more than one utility." Court's Oral Decision at 92. She also said that Mr. Buske communicated enough to petitioners to put them on notice that the court needed to resolve the question of Mr. Buske's status.

The trial court's finding that Mr. Buske was part of an investigation on behalf of more than one utility, i.e., more than just on Inland Power's behalf, is sound. He was hired by Paine-Hamblen as a consultant to investigate the origin of the fires, along with other consultants all working on behalf several client utilities simultaneously investigating the fires. He attended numerous meetings, at least one of which was at Washington Water Power offices, which were attended by counsel, utilities' representatives and other expert consultants. At the strategy planning sessions, he participated in the discussions conducted[\*\*65] among those present. In short, he was part of a team working for Paine-Hamblen on behalf of several clients including Inland Power and Washington Water Power.

[\*168] Nor was Mr. Buske's status unknown to petitioners. Although at some points he indicated to them that he investigated on behalf of Inland Power, he also sufficiently informed them of the joint investigation effort, and his own doubts about who his client was, to put them, at the very least, on notice that there might be a question about his status. Even more, prior to their questioning him he expressly told them that respondents' counsel had advised him that his information and materials were work product of both Inland Power and Washington Water Power. Under these circumstances, petitioners could not interview Mr. Buske without resorting to the court for clarification of his status or complying with CR 26.

#### APPLICATION OF CR 26 AND WORK PRODUCT RULE

Having explained my fundamental disagreement with the majority's brief but erroneous analysis of CR 26 and

AR 013852



the work product rule, I turn to application of the legal principles discussed above to this matter. In her conclusions, the trial judge said that factual information[\*\*\*66] concerning the origins of the fire is arguably discoverable. The judge also said that had discovery proceeded in accord with the rules, a judge "could have fashioned an Order which restricted information or questions of Mr. Buske or information he was to provide to a very, very narrow limited area where he had some facts which were available to counsel." Court's Oral Decision at 91.

If Mr. Buske is expected to testify, his factual observations and professional opinions as to the origin of the fire will be discoverable under CR 26(b)(5)(A)(i). If he is a nontestifying expert, it is still possible, as the trial judge said, that factual information about Mr. Buske's observations will be discoverable, under CR 26(b)(5)(B) and the "exceptional circumstances" standard, during proper discovery in this case. However, it must be noted that on this record we do not even know whether Mr. Buske is the only possible source of first hand observations of the fire scene.

[\*169] Other information in the hands of Mr. Buske includes photographs and related notes which he acquired and developed in anticipation of litigation. This type of material is often discoverable because the substantial equivalent cannot[\*\*\*67] later be obtained. 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024, at 367 (2d ed. 1994). Again, the record does not provide sufficient information to make this determination.

In order to secure Mr. Buske's professional opinions if he is a nontestifying expert, plaintiffs will also have to make the requisite showing of need for his opinions as to the cause of the fire as well as for his factual observations. See CR 26(b)(5)(B). It may be that based upon discoverable, objective facts, plaintiffs will be able to secure expert conclusions through their own experts rather [\*\*431] than through their opponents' nontestifying expert See *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954).

However, whatever discovery from Mr. Buske will ultimately be approved under CR 26, it must be emphasized that on the present record it is unknown whether Mr. Buske will be a nontestifying expert or a testifying expert and accordingly the extent to which facts known by him and his professional opinions concerning the fires will be ultimately discoverable under CR 26(b)(5). The ex parte contact occurred before respondents' counsel knew who had[\*\*\*68] been named as defendants in the suit, and thus well before any determination about whether Mr. Buske would be

expected to testify. Nonetheless, while it is unclear what discovery will eventually prove appropriate under CR 26(b)(5), it is clear that given the timing of the ex parte contact any attempt to justify, under CR 26(b)(5)(A)(i), the obtaining of information from Mr. Buske on the basis he was expected to testify must be rejected because any such discovery would have been premature. See *In re Shell Oil Refinery*, 132 F.R.D. 437, 440 (E.D. La.), opinion clarified, 134 F.R.D. 148 (E.D. La. 1990).

It also must be emphasized that whatever discovery is [\*170] ultimately approved, petitioners' ex parte contact occurred without any showing whatsoever of exceptional need under CR 26(b)(5)(B), and thus there was no compliance with that provision. Petitioners obtained both factual information about Mr. Buske's observations and his photographs, as well as his professional information as to the origin of the Chattaroy fire. Indeed, since Mr. Buske selected only some of his photographs, those illustrating and supporting his opinions, even the photographs were revealing as to his professional[\*\*\*69] opinion.

Finally, as to discovery of factual information, the parties have disputed whether Mr. Buske is, at least in some degree, a fact or occurrence witness whose information is readily discoverable without regard to CR 26(b)(4) or (5). He is not. Whether a person who happens to be an expert is a fact or occurrence witness whose information is freely discoverable depends upon whether the facts and opinions were obtained for the specific purpose of preparing for litigation. If not, CR 26(b)(5) does not apply. Conversely, if obtained in preparation for potential litigation, the professional's factual information is not that of a fact or occurrence witness, and the discovery provisions of CR 26(b)(4) and (5) must be complied with. See *Baird v. Larson*, 59 Wash. App. 715, 720, 801 P.2d 247 (1990) ("professionals who have acquired or developed facts and opinions not in anticipation of litigation but from involvement as an actor in a transaction" are not experts within the meaning of CR 26); *Peters v. Ballard*, 58 Wash. App. 921, 927, 795 P.2d 1158 (whether a person who happens to be an expert is an expert witness or a fact witness depends upon whether facts and opinions obtained[\*\*\*70] for the specific purpose of preparing for litigation), review denied, 115 Wash. 2d 1032, 803 P.2d 325 (1990); see also 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2033, at 457 (2d ed. 1994) (where information is acquired or developed in anticipation of litigation, ordinarily at the instance of counsel, it is discoverable from an expert only pursuant to Fed. R. Civ. P. 26(B)(4); if not, it is discoverable as with any other nonexpert witness); 4 Lewis H. Orland [\*171] & Karl B. Tegland, Washington Practice, Rules Practice, at 40 (4th ed. 1992) (if the

circumstances were perceived by the expert as an actor or observer, discovery is from a "fact" witness and not an expert, but if circumstances perceived in anticipation of litigation, CR 26(b) protection applies).

Mr. Buske was part of an investigation team hired by counsel for respondents and assembled to investigate the fires in anticipation of litigation, and he acquired his information in that capacity. Accordingly, if in the end he is a nontestifying expert, discovery of the factual information pertaining to his personal observations requires the requisite showing of need under[\*\*\*71] CR 26(b)(5), i.e., that exceptional circumstances exist under which it is impracticable for plaintiffs to obtain facts on the same subject by other means.

The trial judge also concluded that much of the information obtained from Mr. Buske involved nondiscoverable opinion work product, [\*\*432] because she noted that "as the rule indicates, the plaintiff is not entitled to trial strategies, the thought processes, the work product of counsel themselves in the course of asking [for] this information." Court's Oral Decision at 90. She said the serious issue is the examination of Mr. Buske about the strategy for investigating the fires and the conversations between Mr. Buske and counsel for the utilities.

The record supports the trial judge's conclusion that opinion work product was improperly obtained by petitioners in their questioning of Mr. Buske. Even if plaintiffs are ultimately entitled to discovery of facts and professional opinions of Mr. Buske concerning the origin of the fire, they are not entitled to opinion work product concerning the strategy in investigating the fires in anticipation of litigation or the conversations of counsel relating to preparation for litigation.

#### SANCTIONS[\*\*\*72]

Because the trial judge found a serious violation of CR [\*172] 26 in this case, she imposed the sanction of disqualification of petitioners as plaintiffs' counsel.

I agree with the majority that the analysis in *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 858 P.2d 1054 (1993) is generally applicable as to sanctions outside the context in that case, i.e., sanctions imposed under CR 26(g). Further, the appropriate sanction for a violation of the discovery rules lies in the sound discretion of the trial judge, and the standard of review is the abuse of discretion standard. *Id.*, at 338-39. "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Id.*, at 339. The

sanctions here were imposed under the inherent power of the trial court.

In my view the trial judge abused her discretion imposing the sanction of disqualification, and thus remand is necessary because on this record it cannot be determined whether the trial judge considered the factors in *Fisons* and imposed the least sanction which would serve the purposes of sanctions. The uncertainty is shown in part, for example, because the[\*\*\*73] trial judge disqualified petitioners but did not disqualify the firm of Winston Cashatt, whose attorneys were also in possession of Mr. Buske's statement.

However, while I agree with the majority that remand is necessary, I disagree with the majority that disqualification is not warranted because no work product was improperly obtained because, as explained above, plaintiffs did wrongly acquire information protected under the work product doctrine. On the other hand, it also seems that if the trial judge thought disqualification was warranted on the grounds that the statement disclosed work product which would taint further proceedings because of counsel's knowledge of that work product, then Winston Cashatt would have been disqualified as well. n7 In light of the [\*173]uncertainty about application of the *Fisons* analysis, remand for redetermination of sanctions is necessary.

n7 The trial judge referred to the possibility of unrecorded conversation between Mr. Buske and petitioners. This is a serious matter, as she said, but I am not convinced on this record that disqualification is justified as the least sanction appropriate based upon the mere possibility of improper unrecorded conversation between petitioners and Mr. Buske. The trial judge also said that Winston Cashatt did not violate the rules. While this might be a basis for some differing treatment, the uncertainty about whether the trial judge imposed the least severe sanction appropriate to the circumstances unfortunately remains.

I note that a footnote in the brief of amicus Washington State Trial Lawyers Ass'n states that Winston Cashatt voluntarily withdrew as counsel for plaintiffs following disqualification of petitioners. Br. of Amicus Curiae Washington State Trial Lawyers Ass'n at 1 n.1.

[\*\*\*74]

However, as to the *Fisons* considerations, I strongly disagree with the majority's apparent tolerance of

petitioners' conduct in light of Mr. Buske's good intentions when faced with an "ethical dilemma" and, as the majority puts it, petitioners' duty to act quickly in the face of possible loss of factual information. Regardless of Mr. Buske's sense of the utilities' investigation, his fears about the impending litigation and discovery proceedings, and even his wish to do the right thing, the fact is that the burden of compliance with the rules of discovery is on the attorneys, not on Mr. Buske, who is not [\*\*433] expected to understand the work product rule or to proceed to court to find out how it applies in a given case. Whether Mr. Buske intended that discovery rules be violated or not is irrelevant.

Moreover, the record simply does not support the conclusion that any factual matter which might be discoverable was in any real danger of being lost to plaintiffs. Mr. Buske still had all of his materials, and no request by respondents had been made for them. He had been advised he could not disclose them because they were work product, and petitioners clearly knew he had been so advised[\*\*\*75] because he told them so.

Further, if petitioners had fears that discoverable factual information would be lost, they could have appeared in court first thing Monday morning, October 18, 1993, rather than take an extensive and far-ranging statement from him just one day earlier, Sunday, October 17, [\*174] 1993. As the trial judge said with regard to the claim that an emergency situation existed requiring petitioners to act quickly: "The material could be destroyed. Clearly if that's the case, counsel has the duty to act. But how do they act? It was clear Mr. Buske was still in possession of his material, his notes, and his pictures. Again, counsel could have come to court on Monday morning" and asked the court for help in preserving the material. Court's Oral Decision at 93. The court added: "Again, that would be a reasonably simple process to do. It puts everything out on the table for the Court, then to make a rational, well-informed decision about what appropriate disclosure is." Court's Oral Decision at 93.

The majority also makes too light of petitioners' conduct by noting that Mr. Buske's statement was promptly made available to respondents' counsel the day after it was made. Whether[\*\*\*76] a day later or a year, the damage was already done and the rules already violated. Moreover, it was not petitioners who gave the statement to respondents' counsel; it was Mr. Buske.

Finally, respondents' delay, if any, in filing the motion for disqualification is a matter for consideration by the trial court on remand, but contrary to the majority's representations, the record indicates that at least some of the period of time which passed between the ex parte

contact and the motion to disqualify was due to attempts to resolve matters without recourse to a motion to disqualify. The trial court should, on remand, consider all of the circumstances surrounding the alleged delay. If respondents did, in fact, unjustifiably delay in filing the motion for disqualification, that is a factor the trial court must consider in determining appropriate sanctions.

It is crucial in this matter to keep in mind that the underlying suit had been filed just days before Mr. Buske was improperly interviewed. We will never know whether Mr. Buske's fears would have had any basis in fact. Mr. Buske himself told petitioners that defense counsel had advised him that he could not disclose his information [\*175] because[\*\*\*77] it was work product. The record indicates that Mr. Buske misunderstood the work product doctrine. But regardless of what Mr. Buske thought, it was incumbent upon petitioners to turn to the court if preservation of materials was thought necessary, and to refrain from setting themselves up as the arbiters of what was discoverable.

Moreover, while Mr. Buske obviously, and I believe sincerely, thought he had information establishing the cause of the Chattaroy fire, it is premature to draw any conclusions about the merits of the underlying action, particularly based solely on the limited information in this record, all attributable to Mr. Buske. The trier of fact has yet to decide, after hearing, no doubt, from experts representing both sides of the litigation.

I also must comment on the majority's implication, drawn from Mr. Buske's statement, that information about the fires had not been forwarded to the Department of Natural Resources as it should have been. Majority at 22 n.5. This record does not conclusively establish what DNR knew or whether information gathered by Mr. Buske or others was forwarded or not. As an appellate court reviewing this matter the majority does a disservice, [\*\*\*78] and far exceeds its appellate role, by accepting at this early stage what are basically one man's allegations [\*\*434] as to the truth and by acting as a fact-finder on incomplete evidence.

Finally, I briefly comment on petitioners' allegations that respondents are engaged in a cover-up involving impropriety in the investigation of the fires and a cover-up designed to hide the origin of the Chattaroy fire. First, this record is simply too limited to draw any valid conclusions based upon such allegations. The only source for the speculation is Mr. Buske, who, though apparently well-meaning, is just one person necessarily basing his opinion on limited information. Second, the allegations are not central to the matter before us, i.e., the propriety of petitioners' conduct. If impropriety on respondents' part [\*176] has occurred, it should not, of

course, be countenanced. That goes without saying. But the discovery rules are designed to allow discovery of factual information about the cause of the fires if plaintiffs are unable to obtain that information elsewhere. With that information, whether obtained through discovery from Mr. Buske or obtained independently of him, the truth or falsity of petitioners' [\*\*\*79] allegations about impropriety in investigation of the fires could be pursued. Regardless of the outcome of that inquiry, it is inappropriate for petitioners to rely on allegations about misconduct on the part of respondents to excuse petitioners' own serious violation of the discovery rules.

Also, as to the allegation of a cover-up designed to hide evidence concerning the origin of the fires, if respondents ever had an eye toward disregarding their obligations under the discovery rules, they are advised to review our recent decision in *Fisons*, where we signaled that we will simply not tolerate discovery abuse. However, this court should not assume future impropriety. It is plain that because of petitioners' interference with the proper course of discovery we will never know what respondents and respondents' counsel would have done. Aside from Mr. Buske's apparent misunderstanding of the work product rule and respondents' claim of work product protection, there is no basis in this record to conclude that respondents would have ignored their obligations under CR 26.

The majority's erroneous characterization of the information at issue in this case will doubtless affect the trial [\*\*\*80] by making it impossible for defendants to rely on any work product protection or other protection

afforded under CR 26. Further, the majority's characterization of the disclosed information will be binding when the trial court determines sanctions on remand, thus lending to the danger that insufficient sanctions will be imposed.

In my view the trial judge should have the freedom to determine the sanctions which befit the serious nature of the violation here, while remaining true to the principles [\*177] underlying CR 26(b)(5), the work product rule, and our adversary system. Thus, among other things, the trial court should be free to provide protection for trial purposes of information and materials wrongfully obtained by petitioners which proves to be undiscoverable, either because it is nondiscoverable work product, or because it consists of facts or opinions or both which are undiscoverable under CR 26(b)(5)(B). Specific rulings on the information and materials must await proper discovery proceedings and the determination whether Mr. Buske is expected to testify.

The majority so mischaracterizes the work product doctrine and application of CR 26 that its opinion is bound to cause mischief [\*\*\*81] in future cases, as well as in this case. Therefore, I cannot join in the majority's analysis.

I concur only in the result reached by the majority.

Madsen, J.

Alexander, J.



Judy L. Gammon, in her capacity as Personal Representative of the Estate of Richard G. Gammon, Deceased,  
and Judy L. Gammon, in her individual capacity, and Barry Duke Gammon, Appellants, v. Clark Equipment  
Co., a corporation; AA Rentals of Bothell, Inc., a Washington corporation Respondents, and Star Machinery Co.,  
Inc., a Washington corporation, Defendant  
No. 10754-2-I

COURT OF APPEALS OF WASHINGTON, Division One

38 Wn. App. 274; 686 P.2d 1102; 1984 Wash. App. LEXIS 3258

July 23, 1984, Filed

SUBSEQUENT HISTORY: [\*\*\*1]

Reconsideration Denied September 6, 1984.  
Remanded by Supreme Court to the Court of Appeals  
December 7, 1984.

PRIOR HISTORY:

Superior Court: The Superior Court for King County,  
No. 855392, Peter K. Steere, J., on August 18, 1981,  
entered a judgment on a verdict in favor of the  
defendants and imposed terms on the manufacturer for  
its noncompliance with a discovery order.

DISPOSITION: Holding that a new trial was the proper  
remedy for the discovery order violation but that the  
plaintiff's instructional and evidentiary contentions  
lacked merit, the court affirms the judgment as to the  
distributor and lessor, reverses the judgment as to the  
manufacturer, and remands the case for a new trial  
against the manufacturer.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant widow filed an  
action for wrongful death against respondents,  
manufacturer, distributor, and lessor of equipment,  
following the death of her husband. The Superior Court  
for King County (Washington) held that the lessor's  
negligence was not the cause of the injuries and that the  
other two parties were not negligent, and denied the  
widow's motion for a new trial or judgment  
notwithstanding the verdict.

OVERVIEW: A man was operating a loader in  
conjunction with a backhoe to clear a house foundation.  
The loader tipped over on its side and the operator was  
killed. In the widow's wrongful death action, the lower  
court found that the manufacturer and the distributor had  
supplied a reasonably safe product. The widow argued  
that the lower erred in the denial of her motion for a new

trial based upon the manufacturer's failure to comply  
with a pretrial discovery order to produce accident  
reports. The manufacturer had submitted five accident  
reports in response to the request. The widow received  
information that the manufacturer had not fully answered  
the question. Fifty accident reports were produced, and  
then two boxes of accident reports were produced. The  
wife argued that the reports had been deliberately  
withheld, and that a new trial was the only effective  
remedy. The court agreed and ordered a new trial with  
the manufacturer. The court held that there was willful  
noncompliance and that the manufacturer did not give a  
reason for its failure to respond to the interrogatory and  
to provide all the accident reports involving the  
equipment.

OUTCOME: The judgment was affirmed as to the  
distributor and the lessor, but was reversed as to the  
manufacturer. The case was remanded for a new trial  
against the manufacturer.

CORE TERMS: interrogatory, discovery, proposed  
instruction, new trial, assign, strict liability, seatbelt, tip-  
over, accident report, inadmissible, safe, motion in  
limine, seat belt, noncompliance, warnings, discovery  
order, decedent, machine, backhoe, notice, reasonably  
safe, instructional, manufactured, accurately, deposition,  
wrongdoer, answered, weekend, loader, boxes

CORE CONCEPTS -

Civil Procedure: Sanctions: Discovery Misconduct  
Wash. Super. Ct. Civ. R. 37(b)(2) authorizes the  
imposition of sanctions for unjustified or unexplained  
resistance to discovery as are just, including the striking  
of pleadings and the entry of a default judgment.  
Although the choice of sanctions is within the discretion  
of a trial court, the particular sanction imposed should at  
least insure that the wrongdoer does not profit from his  
wrong.

Civil Procedure: Sanctions: Discovery Misconduct  
Violation of a discovery order without a reasonable excuse constitutes a willful violation of the discovery rules.

Civil Procedure: Sanctions: Discovery Misconduct  
Wash. Super. Ct. Civ. R. 26(b)(1) provides that it is not ground for objection that discovery information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Civil Procedure: Jury Trials: Jury Instructions  
Each party to a lawsuit is entitled to have his theories presented to the jury by proper instructions if evidence to support them exists. When there is a request for an appropriate instruction that relates the principles of law involved to the specific factual issues of the case, it is not enough that the instructions set forth the law in a general way. Wash. Pattern Instructions 20.01.

Civil Procedure: Jury Trials: Jury Instructions  
Although it is generally true that instructions are sufficient if they allow a party to argue his theory of the case, accurately state the law and are not misleading, a party is entitled to an instruction as to the particular acts of negligence alleged if there is evidence to support them.

Civil Procedure: Trials: Motions In Limine  
Civil Procedure: Appeals: Standards of Review: Abuse of Discretion  
The granting or denial of a motion in limine is within the discretion of a trial court, subject only to review for abuse.

Civil Procedure: Trials: Motions In Limine  
A motion in limine should be granted if (1) it describes the evidence objected to with sufficient specificity to enable a trial court to determine that it is clearly inadmissible; (2) the evidence is so prejudicial that the movant should be spared the necessity of calling attention to it by objecting when it is offered; and (3) a trial court is given a memorandum of authorities showing that the evidence is inadmissible. If a trial court denies the motion and advises the losing party to reassert his objection once the evidence is offered, the losing party is not deemed to have a standing objection and must reassert it at trial.

COUNSEL: Mr. James D. Burns, Burns, Schneiderman & Davis, Mr. Douglass A. North, and Hennings, Maltman, Webert & Reed, Seattle, Washington, for appellants.

Mr. William R. Hickman, Mr. Robert C. Dickerson II, and Reed, McClure, Moceri & Thonn, Seattle, Washington, for respondent[\*\*\*2] Clark Equipment Co.

Mr. Philip A. Talmadge, Mr. Robert P. Piper, and Karr, Tuttle, Koch, Campbell, Mawer & Morrow, Seattle, Washington, for respondent AA Rentals.

JUDGES: Durham, C.J. Callow and Andersen, JJ., concur.

OPINIONBY: DURHAM

OPINION: [\*275] [\*\*1104] Judy L. Gammon appeals from the denial of her motion for a new trial or judgment notwithstanding the verdict in connection with this wrongful death action. She raises several instructional, procedural and evidentiary errors, and also alleges that the jury's answers to the special [\*276] interrogatories were inconsistent. We remand for a new trial as to respondent Clark Equipment Company only.

On October 13, 1978, Richard Gammon was killed when a Bobcat 720 loader, which he was using in conjunction with a backhoe to clear a house foundation, tipped over on its side. Although there were no witnesses to the accident, it appears that the backhoe lift arms were fully extended, rendering the Bobcat unstable. Two laborers heard a loud noise, ran to the other side of the house, and found Gammon impaled by the backhoe stabilizers. Gammon died on October 15.

The Bobcat and backhoe were manufactured by Clark Equipment[\*\*\*3] Company, distributed by Star Machinery Company, and leased by AA Rentals of Bothell. Gammon rented the Bobcat from AA Rentals on October 12, and was given instructions by an employee regarding the Bobcat's operation. Gammon was not, however, given a copy of the owner's manual.

In December 1978, Gammon's wife, Judy Gammon, brought this wrongful death action against Clark, Star Machinery and AA Rentals. By way of amended complaint, Gammon asserted causes of action based upon negligence, strict liability, and breach of implied warranties. The case was tried to a jury, which returned a verdict in the form of answers to interrogatories. n1 The jury found that Clark and Star Equipment were not negligent, and that they had supplied a product which was reasonably safe. The jury found that AA Rentals was negligent in failing to provide adequate warnings, but that such negligence was not the cause of Gammon's injuries. The jury also found that Gammon was 90 percent contributorially negligent, but failed to assign the other 10 percent.

n1 The implied warranty theory was not submitted to the jury.

(h) any and all paperwork concerning the notices or the resolution.

[\*\*\*4]

Gammon unsuccessfully moved for a new trial or for judgment notwithstanding the verdict, and this appeal followed.

[\*277] Violation of Discovery Order

Gammon first assigns error to the trial court's denial of her motion for a new trial based upon Clark's failure to comply with a [\*\*1105] pretrial discovery order to produce certain accident reports. Gammon contends that the trial court's sanction for the alleged discovery abuse - a \$2,500 award of terms against Clark -- was inadequate under the circumstances, and that a new trial at this point is the only effective remedy. We agree.

The circumstances surrounding Clark's refusal to turn over the accident reports are as follows. Gammon submitted her first set of interrogatories to Clark on May 9, 1979, over 2 years before trial. Interrogatory 20 asked Clark if it had notice of any personal injuries arising out of the use of "any similar or substantially similar products" which it manufactured, designed or distributed. n2 Clark answered by objecting to the scope of the interrogatory, and submitted five accident reports that described similar accidents involving similar equipment.

n2 Moreover, as to each such notice, the interrogatory required Clark to provide the following information:

- (a) The name and address of the injured party;
- (b) the date and character of the notice;
- (c) a description of the type of product involved;
- (d) a description of the claimed mechanical failures involved;
- (e) a description of the injuries sustained;
- (f) whether or not a lawsuit was filed indicating the court, document number, and the names and addresses of the parties, including the plaintiff's counsel;
- (g) the resolution of the litigation;

[\*\*\*5]

Nothing happened during the next 2 years, and Clark made no attempt to supplement its answers to the interrogatory or to provide additional accident reports. See CR 26(e). In early June 1981, however, during the depositions of Clark's design and safety engineers, Gammon received information suggesting that Clark had not fully answered interrogatory 20. It was ascertained that the Bobcat 720 had been manufactured since 1972, that the Bobcat line of loaders as a whole are similar in style and operation, and [\*278] that approximately five accidents per year had been reported to Clark. n3 Based upon the deposition testimony, Gammon moved on June 16, 1981 for an order compelling Clark to respond fully to interrogatory 20. On June 24, 1981, Judge Sullivan ordered Clark to produce "all accident reports and reports of accidents involving a tip over of any Bobcat machine ever produced by [Clark]." (Italics ours.) Clark was also ordered to "answer fully and completely Interrogatory No. 20". Clark produced about 50 additional accident reports in response to this order. Ninety-five percent of the documents produced were documents described as "accident summaries" [\*\*\*6] which were an abbreviated form of accident report containing minimal information about the accident involved. The rest of the documents were a more comprehensive accident report known as a "product accident report form."

n3 Apparently, Clark's counsel would not allow the deponents to respond to any of Gammon's inquiries regarding the accidents unless they involved identical pieces of equipment.

When trial began on July 6, 1981 and before the jury was empaneled, Gammon's counsel advised the trial judge that he still did not believe that Clark had turned over all of its accident reports involving the tipping over of a Bobcat or similar equipment. Counsel's suspicion was fueled when, purely by happenstance, a Mr. Reimers came to his office and informed him that he had also experienced a tip-over accident involving a Bobcat. Neither an accident summary nor a product accident report form for the Reimers accident was included in Clark's initial response to interrogatory 20. Gammon did, however, receive an accident[\*\*\*7] summary for the Reimers accident in response to Judge Sullivan's order. In addition, Gammon's counsel stated that because he had "called around the United States" he was aware of



accidents for which no reports had been produced. At this point, Clark's counsel did not deny that additional reports existed, but took the position that the reports were not relevant because they involved different equipment [\*279] being operated under different circumstances.

[\*\*1106] On July 7, Gammon's counsel raised anew the discovery issue, and complained about having received only the accident summary for the Reimers accident. He then informed the court that AA Rentals' counsel had shown him a more comprehensive product accident form for the Reimers accident. The report was turned over to Gammon's counsel, and the trial court noted that sanctions could be imposed later if bad faith became evident.

On July 8, following jury selection, Gammon's counsel again raised the issue of Clark's noncompliance. Counsel contrasted the skimpy Reimers accident summary with the product accident report form produced by AA Rentals, and asked the court to order Clark to turn over all accident reports. Counsel[\*\*\*8] also requested terms in the event of noncompliance. In order to resolve the issue, Clark's counsel offered to have the Clark employee who reviewed the reports testify as to how they were maintained. The employee indicated that Clark maintained two accident "books" in which both the accident summaries and product accident report forms were filed. The court ordered that both books be flown out immediately from Clark's headquarters in North Dakota. Gammon did not move for a continuance.

After examining the accident books over the weekend, Gammon's counsel complained that the indices to the accident books referred to accidents for which there were no accident reports, including an accident involving a Bobcat 720. Moreover, during a deposition taken over the weekend of Mr. Leroy Brooks, Clark's product safety manager, Gammon learned that two boxes of accident reports had been turned over to Clark's attorneys before the weekend. Clark's counsel indicated that he had the boxes of reports in the courtroom, and the trial court ordered Clark to allow Gammon's counsel to inspect or copy them. Gammon's counsel suggested that the reports had been deliberately withheld, and requested terms. [\*\*\*9] The court stated that it appeared that Clark was unilaterally determining what [\*280] reports were relevant, but reserved the matter of sanctions until after trial. Gammon's counsel did not object to this approach, but moved for a new trial following the jury verdict. The court denied the motion, and instead awarded \$2,500 terms against Clark.

The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of

blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958). The availability of liberal discovery means that civil trials

no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

*Hickman v. Taylor*, 329 U.S. 495, 501, 91 L. Ed. 451, 67 S. Ct. 385 (1947).

[1, 2] This system obviously cannot succeed without the full cooperation of the parties. Accordingly, the drafters wisely included a provision authorizing [\*\*\*10] the trial court to impose sanctions for unjustified or unexplained resistance to discovery. CR 37 authorizes the imposition of such sanctions "as are just," CR 37(b)(2), including the striking of pleadings and the entry of a default judgment. See *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 622 P.2d 1270 (1981). Although the choice of sanctions is within the discretion of the trial court, *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976), the particular sanction imposed should at least insure that the wrongdoer does not profit from his wrong. See *Tietjen v. Department of Labor & Indus.*, 13 Wn. App. 86, 93, 534 P.2d 151 (1975).

Violation of a discovery order without a reasonable excuse constitutes a willful violation of the discovery rules. See *Anderson v. Mohundro*, 24 Wn. App. 569, 574, 604 P.2d 181 (1979). Our review of the discovery process in this case leaves little doubt that there has been willful noncompliance on the part of either Clark or [\*\*1107] Clark's attorneys. No [\*281] reason was given for the failure to respond to interrogatory [\*\*\*11] 20 and to provide all accident reports involving Bobcat tip-overs.

As previously noted, although Clark received interrogatory 20 over 2 years before trial, the vast majority of accident reports that were ultimately produced were not produced until the trial was already underway. Clark's initial response to interrogatory 20 was to turn over only five accident reports. Clark obviously had not fully answered the interrogatory at that point, as it produced 50 more accident reports in response to Judge Sullivan's order. Moreover, Clark persisted in its dilatory conduct after trial began, when the existence of two boxes of additional reports was revealed only through Mr. Brooks' deposition.

Clark's unwillingness to turn over all accident reports involving Bobcat tip-overs was apparently a product of its insistence throughout the proceedings that it was required to produce only reports of accidents that occurred under identical circumstances and involved identical types of equipment. The trial judge himself noted that "it appears Clark made its own determination of what it thought was relevant." By any fair reading, interrogatory 20 required Clark to apprise Gammon of any reported[\*\*\*12] accidents involving similar products, even if the accidents did not involve tip-overs. Judge Sullivan's order required Clark to produce all accident reports involving a tip-over of any Bobcat machine and to fully answer interrogatory 20. It was not up to Clark to unilaterally determine what was relevant to Gammon's claim. Clark's remedy, if any, was to seek a protective order pursuant to CR 26(c). n4

n4 The fact that many of the accidents reported may have involved different circumstances -- i.e., forward tip-overs instead of side tip-overs, different terrain, etc. -- does not absolve Clark of its duty to afford complete discovery. CR 26(b)(1) provides in part that:

It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Italics ours.)

[\*282] It may very well be that timely answers to the interrogatories and production of the accident[\*\*\*13] reports would have made no difference. That is not for us to decide. It is precisely because we cannot know what impact full compliance would have had, that we must grant a new trial. As the Third Circuit stated in *Seboldt v. Pennsylvania R.R.*, 290 F.2d 296, 300 (3d Cir. 1961):

[I]t cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*, 1931, 283 U.S. 520, 521-522, 51 S.Ct. 501, 502, 75 L.Ed. 1243.

Accord, *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346, 50 A.L.R. Fed. 914 (5th Cir. 1978); *Rock Island Bank &*

*Trust Co. v. Ford Motor Co.*, 54 Mich. App. 278, 220 N.W.2d 799, 801 (1974).

An award of \$2,500 is cheap at twice the price in the context of a \$4.5 million wrongful death case. Approval of such a de minimis sanction in a case such as this would plainly undermine the[\*\*\*14] purpose of discovery. Far from insuring that a wrongdoer not profit from his wrong, minimal terms would simply encourage litigants to embrace tactics of evasion and delay. This we cannot do.

Clark contends that Gammon cannot now object to the trial court's choice of sanction because she did not request a continuance or move for a mistrial. This argument is meritless. It was Clark's responsibility to timely answer interrogatory 20 and produce the accident reports. Requiring Gammon to disrupt her trial presentation to accommodate Clark would reward noncompliance. See *Lampard v. Roth*, 38 Wn. App. 198, 684 P.2d 1353 (1984). A new trial is the only practical remedy at this stage.

[\*\*1108] Jury Instructions

Gammon next assigns error to several instructional matters. Because these issues may appear again on retrial, we [\*283] shall consider them here. Gammon assigns error to the court's refusal to give her proposed instruction 2 in addition to instruction 6, the burden of proof instruction. Instruction 6 reads, in part, as follows:

The plaintiff has the burden of proving each of the following propositions:

A. With respect to the plaintiff's claims[\*\*\*15] that defendants were negligent,

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, one or more of the defendants was negligent;

Second, that Mr. Gammon was injured and the injury resulted in pecuniary loss to the plaintiff; and

Third, that the negligence of one or more of the defendants was a proximate cause of the pecuniary loss to the plaintiff.

(Italics ours.)

Gammon excepted to this instruction on the basis that it did not individually set forth her theories of negligence; i.e., failure to give adequate directions for use of the machine, failure to warn of dangers, failure to

AR 013862

provide safe equipment, and failure to design safe equipment. Accordingly, Gammon contends that the trial court should have given her proposed instruction 2 because "it explains what the basis is for the 'plaintiff's claims that defendants were negligent.'"

[3] Each party to a lawsuit is entitled to have his theories presented to the jury by proper instructions if evidence to support them exists. *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). [\*\*\*16] When there is a request for an appropriate instruction that relates the principles of law involved to the specific factual issues of the case, it is not enough that the instructions set forth the law in a general way. See, e.g., *Dabroe v. Rhodes Co.*, 64 Wn.2d 431, 435, 392 P.2d 317 (1964); *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 480, 624 P.2d 215 (1981); *Kiemele v. Bryan*, 3 Wn. App. 449, 452, 476 P.2d 141 (1970); *Naranen v. Harders*, 1 Wn. App. 1014, 1021, 466 P.2d 521 (1970). Accord, [\*284] WPI 20.01, Comment at 120. As stated by Judge Wiehl:

In striving for simplicity of instruction on the issues, one point is apt to be overlooked. In instructing on the issues of a negligence case, the trial court should include reference to all specific acts of negligence relied upon by each party.

Wiehl, *Instructing a Jury in Washington*, 36 Wash. L. Rev. 378, 381 (1961). Thus, although it is generally true that instructions are sufficient if they allow a party to argue his theory of the case, accurately state the law and are not misleading, *Crossen v. Skagit Cy.*, 100 Wn.2d 355, 360, 669 P.2d 1244 (1983), [\*\*\*17] a party is entitled to an instruction as to the particular acts of negligence alleged if there is evidence to support them. *Woods v. Goodson*, 55 Wn.2d 687, 689-90, 349 P.2d 731 (1960).

Here, Gammon based her negligence claim upon several theories, principally the defendants' failure to provide adequate warnings and Clark's failure to design a safe machine. These acts also formed the basis for her cause of action in strict liability. While instruction 6 distinguished these theories for purposes of Gammon's products liability claim, it did not do so for purposes of her negligence claim. The instruction merely stated that Gammon had the burden of proof to show that the defendants were negligent "in one of the ways claimed by the plaintiff". Thus, Gammon was entitled to a more specific "issues" instruction.

[4] Nonetheless, the trial court did not err in refusing Gammon's proposed instruction 2, because it had no duty to accept an incorrect instruction. See *Crossen*, 100 Wn.2d at 360; *Jones v. Robert E. Bayley Constr. Co.*, 36

Wn. App. 357, 361, 647 P.2d 679 (1984). Gammon's theory for including proposed instruction [\*\*\*18] 2 is that the [\*\*1109] instructions as given did not separately set forth her theories of negligence. However, the proposed instruction itself does not indicate that the four acts listed constitute alternative bases for a finding of negligence. Indeed, when read as a whole, the instruction appears to relate to Gammon's products liability [\*285] theory. n5 Because the instruction fails to perform the function attributed to it by Gammon, the trial court did not err in refusing it.

n5 The relevant portion of proposed instruction 2 states:

The plaintiffs claim that the defendants caused the death of Richard Gammon by providing a product for Mr. Gammon's use that was not safe for his use.

In said claim, plaintiff makes the following allegations, any one of which, if proven, would be sufficient to sustain plaintiff's claim.

1. That defendants failed to give adequate directions to the decedent in the proper usage of the equipment.
2. That defendants failed to give adequate warnings to the decedent of the dangers of this equipment.
3. That defendants were negligent in not providing equipment that was safe for decedent's use.
4. That defendant, Clark Equipment, Inc. failed to design their equipment in a way that could have prevented the accident herein.

(Italics ours.)

The first sentence of this instruction indicates that Gammon premises the defendants' liability on providing a product "that was not safe". The next sentence then states that the listed theories of recovery are raised in support of "said claim". "[S]aid claim" obviously refers to Gammon's allegation that the defendants provided an unsafe product. Providing an unsafe or unreasonably dangerous product does not itself constitute negligence, but does give rise to a cause of action in strict products liability. Thus, in the context of this instruction, the specific acts listed appear to be alternative bases for Gammon's strict liability claim.

[\*\*\*19]

AR 013863

Gammon next assigns error to the court's refusal to give her proposed instruction 10, which reads:

You are instructed that a company that sells or supplies a product that is not reasonably safe in some manner for the user of said product, is subject to liability for harm thereby caused to the user. This law applies although the seller has exercised all possible care in the preparation and sale of the product.

Gammon argues that the instructions as given did not explain that liability could be based on providing an unreasonably dangerous product notwithstanding the defendants' exercise of reasonable care.

[5] Although proposed instruction 10 correctly identifies this major distinction between strict liability and negligence, the trial court did not err in refusing it. Taken together, the court's instructions accurately stated the law [\*286] of strict liability, and in no way suggested that recovery under a strict liability theory requires proof of negligence. Gammon was not precluded from emphasizing the distinction between strict liability and negligence to the jury. See *Braxton v. Rotec Indus., Inc.*, 30 Wn. App. 221, 228, 633 P.2d 897 (1981)[\*\*\*20] (where instructions as given do not place any burden on plaintiff to prove negligence in strict liability case, a specific instruction that negligence need not be shown is unnecessary). n6

n6 Gammon also argues that the alleged instructional errors are manifest in the jury's inconsistent answers to the special interrogatories. In light of our disposition of the case, we need not address this issue.

#### Seatbelt Evidence

Gammon next assigns error to the trial court's refusal to grant her motion in limine to exclude any evidence regarding the availability or use of a seatbelt in the Bobcat loader. Specifically, the motion encompassed

any evidence regarding a seat belt, including but not limited to, the decedent's failure to use a seat belt, the availability of a seat belt, instructions or warnings regarding use of a seat belt, and/or injuries or damages resulting from use or non-use of a seat belt.

The motion, argued extensively before trial, was based upon *Amend v. Bell*, 89 Wn.2d 124, 570 P.2d 138, 95 A.L.R.3d 225 (1977),[\*\*\*21] which held that evidence

regarding the plaintiff's use of a seatbelt in an automobile negligence case is inadmissible. [\*\*\*1110] The trial court denied the motion in part on the basis that it was not clear that Amend applies to accidents involving industrial equipment such as the Bobcat. Thus, Mr. James Bauer, a vice-president of Clark and chief designer of the Bobcat 720, was allowed to testify that Mr. Gammon would not have died had he been wearing his seatbelt.

[6] The granting or denial of a motion in limine is within the discretion of the trial court, subject only to review for abuse. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). The motion [\*287] should be granted if (1) it describes the evidence objected to with sufficient specificity to enable the trial court to determine that it is clearly inadmissible; (2) the evidence is so prejudicial that the movant should be spared the necessity of calling attention to it by objecting when it is offered; and (3) the trial court is given a memorandum of authorities showing that the evidence is inadmissible. n7 *Fenimore*, 87 Wn.2d at 91. If the[\*\*\*22] trial court denies the motion and advises the losing party to reassert his objection once the evidence is offered, the losing party is not deemed to have a standing objection and must reassert it at trial. *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984); *Fenimore*, 87 Wn.2d at 92. n8

n7 The motion itself states that a memorandum of authorities was filed with the court, although one does not appear in the record.

n8 Gammon does not assign error to the admission of Bauer's testimony, the evidence that was sought to be excluded by the motion in limine. Accordingly, we consider only the court's refusal to grant the motion in limine.

Here, the trial court did not abuse its discretion in denying the motion. As noted above, Gammon's motion sought to exclude "any evidence regarding a seatbelt". *Amend v. Bell*, *supra*, upon which the motion was based, held only that evidence that the plaintiff was not wearing a seatbelt should be excluded. [\*\*\*23] *Amend*, 89 Wn.2d at 134. Accordingly, even if Amend were deemed applicable outside the automobile negligence context, it is far from clear that Amend would render inadmissible evidence regarding the availability of a seatbelt, or regarding warnings to use a seatbelt. Obviously, such

evidence would be of crucial importance in determining if the Bobcat was reasonably safe. As it cannot be said that the evidence sought to be excluded by Gammon's motion was clearly inadmissible, the trial court did not abuse its discretion in denying the motion.

Finally, Gammon assigns error to the exclusion of a portion of a videotape showing the Bobcat being tested, and also to certain expert testimony. We find no error.

The judgment is reversed and the case is remanded for a [\*288] new trial as to respondent Clark. We affirm as to respondent AA Rentals.



GREEN CONSTRUCTION COMPANY, Plaintiff, v. KANSAS POWER & LIGHT COMPANY, Defendant  
and Third-Party Plaintiff, v. SEABOARD SURETYCOMPANY, Third-Party Defendant.  
CIVIL ACTION No. 87-2070-S

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1988 U.S. Dist. LEXIS 18252

December 29, 1988, Decided

December 29, 1988, Filed

CORE TERMS: reconstruction, dam, discovery, testing, inspection, site, protective order, consultant, demolition, depositions, work product, capability, soil, oral agreement, anticipation of litigation, prior order, depose, geotechnical, third-party, excavation, personnel, engineers, opposing, observe, conclusory, interfere, reasonably calculated to lead, written stipulation, counterclaim, attachment

COUNSEL: [\*1] John Ahlers/Dale R. Martin,  
BARBAKAS & MARTIN, 1422 Bellevue Avenue,  
Seattle, Washington 93122.

Patrick E. Hartigan, HARTIGAN & YANDA, P.C., 406  
Plaza Center Building, 800 West 47th Street, Kansas  
City, MO 64112.

Frank B.W. McCollum, SPENCER, FANE, BRITT &  
BROWN, 1400 Commerce Bank Building, 1000 Walnut  
Street, Kansas City, MO 64106-2140.

J. Nick Badgerow, SPENCER, FANE, BRITT &  
BROWN, 40 Corporate Woods, Suite 500, P.O. Box  
25407, Overland Park, KS 66225.

Bernard Balkin/Larry Lerner, 3130 Broadway, Third  
Floor, Kansas City, MO 64111.

Frank D. Menghini, McANANY, VAN CLEAVE &  
PHILLIPS, 400 Security National Bank, P.O. Box 1398,  
Kansas City, KS 66117.

Camille Bradford, Kansas Power & Light Company, 818  
Kansas Avenue, Topeka, KS 66612.

JUDGES: [SIGNATURE ILLEGIBLE]

OPINIONBY: [SIGNATURE SIGNATURE]

OPINION: MEMORANDUM AND ORDER

Under consideration are the following motions:

1. Counterclaim defendant Seaboard Surety  
Company's (hereinafter Seaboard) Motion to Compel  
Discovery (doc. 132);

2. Plaintiff Green Construction Company's Motion to  
Compel Discovery (doc. 141);

3. KPL's Motion for Protective Order (doc. 168); and

4. Green's Motion for Leave of Court to Depose KPL's  
Experts (doc. 174). [\*2]

In the first motion (doc. 132) third-party defendant  
Seaboard seeks an order permitting it to inspect, observe,  
photograph, and videotape as well as take soil samples  
from the demolition and reconstruction of the dam which  
is the subject of this action. Plaintiff Green joined in this  
motion (doc. 135). This court granted a temporary order  
permitting inspection (doc. 163) until the matter could be  
fully briefed. Defendant and third-party plaintiff Kansas  
Power & Light Company's (hereinafter KPL) opposing  
brief (doc. 137) and Seaboard and Green's reply thereto  
(doc. 145) have now been filed. The motion is ready for  
final ruling.

In opposing this motion KPL claims:

1. It has been reasonable in providing Green and  
Seaboard with unlimited opportunity for constant and  
continuous observation and testing under the July 20  
agreement. Attachment to doc. 137;

2. The information is readily and more properly  
available through a more appropriate and far less  
obtrusive and burdensome method of discovery such as  
Fed. R. Civ. P. 34 production requests;

3. Observance of the reconstruction project is irrelevant  
to the merits of this case;

AR 013867

4. Green and Seaboard personnel at the[\*3] dam have delayed the building process, obstructed the removal, increased hazards on the project site, and added additional costs to KPL's reconstruction efforts.

Van Riessen affidavit at p. 4.

With respect to Item 1 above, KPL claims it has allowed Green and Seaboard unlimited access in the past. However, this does not ipso facto mean access in the future should be restricted or expanded.

With respect to the Item 2 above, Green and Seaboard argue they need to conduct their own investigation and testing because Black & Veatch, the engineering firm currently conducting these tests, is an interested party. Black & Veatch designed the dam and investigated the adequacy of the foundation, both potential causes of the dam failure. A motion is pending to add Black & Veatch as a party. Further, the Logie affidavit (attachment to doc. 145) supports Green and Seaboard's claim that test results can be altered by the subjective judgments made by the tester. Such possibility in turn supports Green and Seaboard's argument that it is necessary for its experts to conduct their own test sampling. The court agrees in these circumstances that production requests by themselves would [\*4] be inadequate.

With respect to KPL's relevancy objection, Green and Seaboard contend it is necessary to show differences between the methods and specifications used in the reconstruction process and those involving the original construction. These differences would allegedly assist Green and Seaboard in establishing the existence of design defects, as opposed to construction defects. Such information would supposedly counter any contention that, because the reconstructed dam did not fail, the construction of the original dam must have been defective.

Differences in reconstruction are also relevant to a determination of whether Green is responsible for all costs incurred. The dam may be reconstructed by reference to standards higher than those required of Green. Green might not be liable for all costs, if it is liable for any of them.

A request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action. C. Wright and A. Miller, *Federal Practice and Procedure, Civil § 2008* (1970). The information sought need not be admissible at trial. It need only be reasonably calculated to lead to[\*5] the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). Requests for information regarding

changes or alterations in the reconstruction are reasonably calculated to lead to the discovery of relevant evidence in determining whether the original dam was defectively designed or constructed. The requests are also relevant to the question of damages.

In opposing this motion, KPL relies upon *Belcher v. Basset Furniture Industries*, 588 F.2d 904 (4th Cir. 1978). The court finds *Belcher* distinguishable. The inspection order in *Belcher* permitted "roving interrogatories" by plaintiff's attorneys at defendant's plant over a five-day period. Furthermore, other methods of discovery were adequate and less burdensome. There was no indication reliable evidence would be produced by inspection.

KPL also claims that Green and Seaboard personnel have added delay and expense to the reconstruction effort. However, the fact that an objecting party may have to spend considerable time, effort and expense to respond, or that it may interfere with business operations, is not alone a good reason for barring discovery. *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 251, 255 (N.D. Ill. 1978).[\*6] The court must balance the burden on the producing party against the benefit of the discovering party for the information. *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975). In this case, the benefit of discovery outweighs the burden. The discovery sought may be essential to Green and Seaboard's defense against the counterclaim. Defendant's claims of burden, moreover, are chiefly conclusory and conjectural.

Defendant KPL has not proposed alternative methods for this discovery other than a request for production of documents. As herein explained, the record does not persuasively show that a request for production would be adequate. In addition to activity permitted by the courts prior order (doc. 163), Green and Seaboard seek the following:

1. Observe the location where defendant's experts took soil samples from defendant's property during the remaining demolition and the entire reconstruction of the dam.
2. Photograph and videotape the soil sample locations and the construction activities on the property during the remaining demolition and the entire reconstruction of the dam.
3. Obtain copies of reports of KPL's quality control testing[\*7] being conducted during reconstruction of the dam.



4. Have two qualified geotechnical engineers present full time, on site, with the freedom to observe demolition/reconstruction process in its entirety and any on site testing conducted for KPL, to collect samples and to perform in-place, moisture-density testing as they deem appropriate.

5. Have survey crew capability to give the geotechnical engineers timely location and elevation data of the test locations. This survey capability could be provided by KPL with their cooperation, Green Construction Company employees, or by a locally hired survey crew (two persons).

6. Be permitted one vehicle per man, with necessary sampling and density equipment to perform their tasks.

7. Have limited equipment excavation capability to dig test pits and to prepare testing locations (generally a shallow depression less than one foot deep) to expose fresh, undisturbed surface. This capability could take the form of a small bulldozer, tracked loader, or a small backhoe with operator. The equipment and operator could be provided by KPL with their cooperation, Green Construction Company, or by a locally hired contractor.

8. The following personnel[\*8] be permitted to visit the dam from time to time for a general site inspection when the conditions at the site in the opinion of the Dames and Moore geotechnical engineers warrant such a visit:

Charles Logie, Dames and Moore

Michael Stobbe, Dames and Moore

Demetrious Koutsaftas, Dames and Moore

Raymond Rice, Dames and Moore

James Mahan, Consultant

Ralph Peck, Consultant

Verne Dow, Consultant

Anwar Wissa, Consultant

Joseph Trio, Green Construction Company

Items 1, 2, 4, 5, 6 and 8 appear to be activities permitted by the court's prior order and by the parties' agreement of July 20, 1988 (exhibit A to doc. 137). As stated herein, the court believes access under these terms should continue through the reconstruction phase. The

burdens appear minimal. The need for such inspection is substantial. Item 3 above was not requested in accordance with the Federal Rules of Civil Procedure. At least no production request has been submitted with this motion as required by D.Kan. Rule 210(f). The court declines to compel production of documents responsive to Item 3 above.

Green and Seaboard acknowledge Item 7 above would be intrusive. A similar provision was included in the[\*9] parties' July 20 agreement. The court must balance the benefit of the inspection against the burden. *Belcher v. Basset Furniture Industries*, 588 F.2d 904 (1978). This excavation is necessary to extract soil samples for testing. As stated, this testing is necessary because the testing of Black & Veatch may be biased. Moreover, the claim of burden is conclusory. The court grants Green and Seaboard's motion to have excavation equipment on site.

In performing any of the discovery thus allowed, plaintiff and third-party defendant shall exercise all reasonable caution, and shall not interrupt or interfere with the reconstruction activity of the defendant.

In summary, the court grants in part and denies in part Green and Seaboard's Motion to Compel Discovery (doc. 132) as herein set forth. Access to the dam site should be in accordance with the court's order (doc. 163), as herein modified. The circumstances do not warrant the imposition of sanctions in connection with this motion.

The court next considers Green Construction Company's Motion to Compel Discovery (doc. 141). Plaintiff Green seeks to compel defendant Kansas Power and Light Company to produce all[\*10] documents and things which pertain to demolition and reconstruction efforts at the dam. KPL claims information concerning test analysis, observation and opinions by experts employed by attorneys for KPL are work product.

In order to qualify as work product three tests must be satisfied. Fed. R. Civ. P. 26(b)(3) requires the materials be:

1. Documents or tangible things;
2. Prepared by or for another party or by or for that other party's representatives;
3. In anticipation of litigation or for trial.

The only question here is whether the documents were prepared in anticipation of litigation or for trial. KPL says the information was developed and prepared during

the actual course of litigation at the direction of attorneys for KPL expressly for trial purposes. KPL cites *Diversified Industries, Inc. v. Meredeth*, 572 F.2d 596, 603 (8th Cir. 1977) and *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019 (S.D.N.Y. 1980) for the proposition that consultant and engineering reports prepared in anticipation of litigation are work product.

Green has not filed a reply to KPL's memorandum as permitted by D.Kan. Rule 206(b). The court[\*11] finds nothing else of record to refute KPL's representation that the documents were prepared under direction of counsel for trial purposes. The court therefore finds that KPL has met its burden in establishing the documents are work product.

Work product material is nevertheless discoverable, if the party seeking disclosure establishes both of the following facts: 1) It has a substantial need for the materials sought. 2) It is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Fed. R. Civ. P. 26(b)(3). Green has alleged it needs the documents. It has not explained why observation and testing by its experts are inadequate. Thus it has failed to show it cannot obtain the substantial equivalent by other means. Green's Motion to Compel (doc. 141) is denied. The circumstances do not warrant the imposition of sanctions in connection with this motion.

The court next considers KPL's Motion for Protective Order (doc. 168), pursuant to Fed. R. Civ. P. 26. KPL seeks to prohibit Green from deposing KPL's trial experts. Ordinarily, leave of court is required by Fed. R. Civ. P. 26(b)(4)(A)(ii) to depose the opponent's experts. *Schackelford v. Vermeer Mfg. Co.*, 93 F.R.D. 512 (W.D. Tex. 1982).[\*12] Green claims it does not need leave of court to conduct these depositions, because KPL has agreed to produce these experts. Green produced the affidavits of Patrick Hartigan and Dale Martin, showing the parties orally agreed to produce their experts for depositions. KPL claims the oral agreement required the parties, prior to the depositions, to produce the documents on which the opinions of the experts are based. KPL contends Green has not complied with this portion of the agreement.

Fed. R. Civ. P. 29 permits the parties to modify the procedures provided by the federal rules by written stipulation. The requirement of a written stipulation is apparently to avoid the kind of disputes in which plaintiff and defendant have engaged. It appears the terms of the alleged oral agreement are vague at best. The court declines to arbitrate such an agreement, when the parties have failed to comply with Fed. R. Civ. P. 29.

In its response Green has also requested leave of court to conduct these depositions. KPL, on the other hand, argues any further discovery, relating to its experts and their opinions, should be stayed, pending reciprocal production of experts' opinions and supporting[\*13] documents by plaintiff Green. Permitting Green to depose KPL's experts at this time would be inequitable, according to KPL, because it has had no opportunity to review any documents supporting the opinions of those experts.

KPL has apparently produced to Green thousands of pages of reports which support its experts' opinions in accordance with the oral agreement. Thus when Green's experts are deposed they would have the benefit of their opponent's opinions. KPL seeks this protective order to prevent Green from gaining a tactical advantage by its allegedly dilatory tactics.

Apparently Green has produced only expert information in accordance with Fed. R. Civ. P. 26(b)(4)(A)(i). Although the disparity in information may place KPL at a disadvantage, it is not sufficient to grant the protective order. If KPL desires additional information, it may pursue its own discovery or other available procedures to limit the testimony.

The court grants Green leave to depose KPL's expert. The courts routinely permit experts to be deposed in cases such as these where their testimony is critical to the case. *Dennis v. BASF Wyandotte Corp.*, 101 F.R.D. 301, 303 (E.D. Pa. 1983).[\*14]

The circumstances do not warrant imposition of sanctions in connection with this motion.

The following summarizes the court's order:

1. Green and Seaboard's Motion to Compel Discovery (doc. 132) is granted in part and overruled in part, in accordance with the terms of this court's prior order (doc. 163), as herein modified
2. Plaintiff Green Construction Company's Motion to Compel Discovery (doc. 141) is denied.
3. KPL's Motion for Protective Order (doc. 168) is denied.
4. Green's Motion for Leave of Court to Depose KPL's Experts (doc. 174) is granted.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 29th day of December, 1988.

[ILLEGIBLE SIGNATURE] UNITED STATES  
MAGISTRATE

**AR 013871**



Carol R. Heidebrink and Gary T. Heidebrink, husband and wife, Respondents, v. Nobuo Moriwaki and "Jane Doe" Moriwaki, husband and wife, and the marital community composed thereof, Petitioners  
No. 51017-2

SUPREME COURT OF WASHINGTON

104 Wn.2d 392; 706 P.2d 212; 1985 Wash. LEXIS 1265

September 5, 1985

SUBSEQUENT HISTORY: [\*\*\*1]

As Amended by Order of the Supreme Court November 1, 1985.

PRIOR HISTORY:

Superior Court: The Superior Court for Grant County, No. 82-2-00465-7, James D. Kendall, J., on May 20, 1983, denied discovery of a statement made by the defendant to his insurer.

Court of Appeals: Holding that the statement was not a work product and not protected from discovery, the court reversed the denial of discovery at *38 Wn. App. 388*.

DISPOSITION: Holding that the statement was a work product and that no substantial need for discovery was shown, the court reverses the Court of Appeals and reinstates the denial of the trial court.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent husband and wife, plaintiffs in the underlying negligence action, sought to discover a statement made by petitioner insured to his insurance company following an accident. The trial court ruled that the statement was not discoverable because it was protected by the attorney-client privilege or the work product immunity rule. The Court of Appeals (Washington) reversed and ordered production of the statement.

OVERVIEW: A wife were injured in a multiple car accident allegedly caused by the insured's negligence. After the husband and wife filed a personal injury action against the insured, they moved for an order compelling production of a statement made by the insured to his insurance adjuster two days after the accident. The trial court denied the order, but the court of appeals reversed. The court ruled that the insured's statement to his insurance carrier was work product protected from discovery by Wash. Super. Ct. Civ. R. 26(b)(3). The test

for determining whether such work product, under Fed. R. Civ. P. 34 and Fed. R. Civ. P. 26(b)(3), was discoverable was whether the documents were prepared in anticipation of litigation and, if so, whether the party who sought discovery showed substantial need. The court saw no error in the trial court's discretionary determination that the husband and wife did not have "substantial need" for the insured's statement, because even though the statement was taken two days after the accident, the passage of time alone was insufficient, the insured who made the statement was available, and no other extenuating circumstances justifying disclosure were shown.

OUTCOME: The court reversed the order of the court of appeals to compel production of the insured's statement to his insurance adjuster and reinstated the denial of the discovery order by the trial court, because the court found that the statement was a protected work product and no substantial need for its discovery was shown.

CORE TERMS: insured, discovery, anticipation of litigation, insurer, attorney-client, work product, discoverable, privileged, insurance carrier, assured, course of business, immunity rule, good cause, carrier, disclosure, preparation, deposition, collision, full disclosure, consulting, insurance contract, potential claim, legal advice, investigator, nonattorney, nonparty, automobile accident, obtain discovery, claims adjuster, federal rule

CORE CONCEPTS -

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

Civil Procedure: Disclosure & Discovery: Work Product Pursuant to Fed. R. Civ. P. 26(b)(1) and Wash. Super. Ct. Civ. R. 26(b)(1), a party may obtain discovery of any matter which is relevant to the subject matter involved in the pending action and not privileged. The scope of such discovery, however, is limited by Fed. R. Civ. P. 26(b)(3) and Wash. Super. Ct. Civ. R. 26(b)(3) which provide in part: Subject to the provisions of Fed. R. Civ.

AR 013873

P. 26(b)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under Fed. R. Civ. P. 26(b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

Civil Procedure: Disclosure & Discovery: Work Product Under both the federal and Washington rules regarding the work-product doctrine, Fed. R. Civ. P. 34, Fed. R. Civ. P. 26(b)(3) and Wash. Super. Ct. Civ. R. 26(b)(3), there is no distinction between attorney and non-attorney work product. The test for determining whether such work product is discoverable is whether the documents were prepared in anticipation of litigation and, if so, whether the party seeking discovery can show substantial need.

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

Civil Procedure: Disclosure & Discovery: Work Product An insured who is a party to a lawsuit is contractually obligated to cooperate with the insurance company, which creates a reasonable expectation that the contents of statements made by the insured will not be revealed to the opposing party. In essence, the insurance company has been retained to provide an attorney and the expectation is that statements made by the insured will be held in confidence. A statement made by an insured to an insurer following an automobile accident is protected by Wash. Super. Ct. Civ. R. 26(b)(3). The question then remains whether the party seeking discovery has shown substantial need.

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

Civil Procedure: Disclosure & Discovery: Work Product The determination of whether the party seeking discovery has shown substantial need is vested in the sound discretion of the trial judge, who should look at the facts and circumstances of each case in arriving at an ultimate conclusion.

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

Civil Procedure: Disclosure & Discovery: Work Product To justify disclosure under Fed. R. Civ. P. 26(b)(3), a party must show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent information

from other sources if production is denied. The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party. The substantial need standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions. In general, there is no justification for discovery of the statement of a person contained in work product materials when the person is available for deposition. Whether a statement is contemporaneous and unique is a question of fact.

COUNSEL: Layman, Loft, Smythe & Arpin, by Mr. Gregory J. Arpin, Mr. Ross P. White, Spokane, Washington, for petitioners.

Dano, Cone, Fraser & Gilreath, by Mr. Theodore G. Lucas[\*\*\*3] and Mr. Harrison K. Dano, Moses Lake, Washington, for respondents.

Mr. William J. Leedom and Mr. William H. Robertson, Seattle, Washington, on behalf of Washington Association of Defense Counsel and Mr. John B. Crosby, Des Plaines, Illinois, on behalf of National Association of Independent Insurers, amici curiae for petitioners. Mr. Daniel E. Huntington, Richter, Wimberley, Ericson & Woods, P.S., Mr. Bryan P. Harnetiaux, Attorney at Law, and Mr. Gary N. Bloom, Harbaugh & Bloom, Spokane, Washington, on behalf of Washington Trial Lawyers Association, amici curiae for respondents.

JUDGES: En Banc. Pearson, J. Dolliver, C.J., and Utter, Andersen, Callow, and Durham, JJ., concur. Goodloe, Brachtenbach, and Dore, JJ., dissent by separate opinion.

OPINIONBY: PEARSON

OPINION: [\*393] [\*\*213] The issue presented by this case is whether the statement of an insured to his or her insurance company is protected by the attorney-client privilege or the work product immunity rule. The trial court ruled the statement was not discoverable. The Court of Appeals reversed and ordered production of the statement. We now reverse the decision of the Court of Appeals on the basis[\*\*\*4] that the statement is protected by the work product immunity rule codified in CR 26(b)(3).

I

This lawsuit arose from a multiple car collision on a state highway near Moses Lake, Washington, on March 15, 1982. Respondents allege that Mrs. Heidebrink was

traveling west on this highway when suddenly her car was surrounded by a dense cloud of smoke, causing her to collide with the car ahead of her. Several cars were involved in a chain collision and other motorists, in addition to Mrs. [\*394] Heidebrink, were injured. Respondents claim that the cloud of smoke and the ensuing collisions were caused by Mr. Moriwaki's negligence in burning grain stubble in an adjacent field.

At the time of the incident Mr. Moriwaki carried a liability insurance policy issued by Continental Insurance Company. Under the terms of this policy, Continental was contractually obligated to defend Mr. Moriwaki against all insured claims. This contractual duty allowed Continental to select and retain an attorney to represent the insured and required the insured to cooperate in his defense.

On March 17, 1982, two days after the accident, Tim Dahmen, an investigator and adjuster for Continental, contacted[\*\*\*5] Mr. Moriwaki and tape-recorded his statement relating to the accident. The tape was subsequently transcribed. Several months later the Heidebrinks filed a personal injury action against the Moriwakis. Thereafter Mr. Moriwaki's deposition was taken at which time he testified about the existence of the statement.

Counsel for respondents requested a copy of the transcript of Mr. Moriwaki's statement. Defense counsel objected on grounds of work product and attorney-client privilege. Respondents subsequently moved for an order compelling production. The trial court denied the order. The Court of Appeals reversed. *Heidebrink v. Moriwaki*, 38 Wn. App. 388, 685 P.2d 1109 (1984).

## II

Pursuant to Fed. R. Civ. P. 26(b)(1) and CR 26(b)(1), in their current form, a party may [\*\*214] obtain discovery of any matter which is relevant to the subject matter involved in the pending action and not privileged. The scope of such discovery, however, is limited by Fed. R. Civ. P. 26(b)(3) and CR 26(b)(3) which provide in relevant part:

Subject to the provisions of subsection [subdivision in Fed. R. Civ. P.] (b)(4) of this rule, a party may obtain discovery of documents and tangible [\*\*\*6]things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for [\*395] another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and

that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3) and CR 26(b)(3) embody the policies set forth by the United States Supreme Court over three decades ago in the now famous decision of *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947). In fact, more recently the Supreme Court explicitly stated that rule 26(b)(3) codifies the principles of the "work product doctrine" first established in *Hickman. Upjohn Co. v. United States*, 449 U.S. 383, 401, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981).

In *Hickman* the plaintiff had attempted to discover the statements of witnesses and any other relevant information the attorney for the defendants had prepared with an "eye" toward[\*\*\*7] litigation. *Hickman*, at 498-99. While examining the scope of discovery question, the Supreme Court explained that the discovery rules were to be accorded broad and liberal treatment. Trials were no longer to be carried on in the dark; instead, the goal of discovery was to ensure mutual knowledge of all relevant facts. *Hickman*, at 501, 507. However, the Court stressed that it was necessary to maintain certain restraints on bad faith, irrelevant, and privileged inquiries in order to ensure the just and fair resolution of disputes. Hence, the Court held that an attorney's "work product", although relevant and not privileged, is discoverable only upon a showing of good cause. *Hickman*, at 512.

In its original form, Fed. R. Civ. P. 26(b)(3) protected only those writings prepared by an attorney in preparation for trial. However, Fed. R. Civ. P. 34 contained a "good cause" requirement which prevented discovery of other materials if the party seeking discovery did not show good cause for such discovery. The rule in this state as originally [\*396] adopted was different than the federal rule. It provided in part:

The court need not order the production or[\*\*\*8] inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor or agent in anticipation of litigation or in preparation for trial.

CR 26(b), 71 Wn.2d lxvii (1967). Although never interpreted by this court, this rule apparently placed the matter of discovery within the discretion of the court and required a showing of good cause before allowing such discovery.

As history shows us, problems arose over the proper scope of Fed. R. Civ. P. 26(b)(3). The rule did not specifically address the extent to which a party could discover materials prepared for trial by nonattorneys nor did it indicate exactly what was meant by "good cause". See Note, Work Product Discovery: A Multifactor

Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3), 66 *Iowa L. Rev.* 1277 (1981). To remedy these deficiencies the federal rules were amended in 1970. The requirement of good cause was deleted from Fed. R. Civ. P. 34 and Fed. R. Civ. P. 26(b)(3) was changed to read as previously provided herein. Whether this State would have confronted similar problems with CR 26(b)(3) as originally adopted is of little consequence[\*\*\*9] since in 1972 it was amended to conform with the federal rule. CR 26(b)(3), 80 *Wn.2d* 1189 (1972). Thus, under both the federal and Washington rules, [\*\*215] there is no distinction between attorney and nonattorney work product. The test for determining whether such work product is discoverable is whether the documents were prepared in anticipation of litigation and, if so, whether the party seeking discovery can show substantial need.

Many federal courts and other state courts have struggled over the proper interpretation of CR 26(b)(3). The Court of Appeals found the analysis in *Hawkins v. District Court*, 638 *P.2d* 1372 (Colo. 1982) and *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 *F.R.D.* 367 (N.D. Ill. 1972) very persuasive.

[\*397] *Hawkins* involved an action by an insured against his insurance carrier for bad faith. Plaintiff sought discovery of notes and reports of defendant's adjuster regarding his interviews with several witnesses. In ruling that the documents were discoverable, the court concluded:

Because a substantial part of an insurance company's business is to investigate claims made by an insured against the company or by some other [\*\*\*10] party against an insured, it must be presumed that such investigations are part of the normal business activity of the company and that reports and witness' statements compiled by or on behalf of the insurer in the course of such investigations are ordinary business records as distinguished from trial preparation materials.

*Hawkins*, at 1378.

*Thomas Organ Co.* involved a defendant's request for production of two documents written by a marine surveyor hired by plaintiff's insured. In deciding that the documents were discoverable, the court asserted that unless the documents are requested by or prepared for an attorney, or otherwise reflect the employment of an attorney's legal expertise, they are conclusively presumed to have been made in the ordinary course of business. *Thomas Organ Co.*, at 372.

In addition to the two cases already mentioned, respondents set forth several more for the proposition

that an insured's statement to his insurer is discoverable. Several of these cases can be set aside immediately as not on point since they were decided prior to CR 26(b)(3) being amended. See *Jackson v. Kroblin Refrigerated Xpress, Inc.*, 49 *F.R.D.* 134 (N.D. W. Va. [\*\*\*11] 1970); *Southern Ry. v. Campbell*, 309 *F.2d* 569 (5th Cir. 1962); *Rucker v. Wabash R.R.*, 418 *F.2d* 146 (7th Cir. 1969); *Gottlieb v. Bresler*, 24 *F.R.D.* 371 (D.C. 1959); *Alseike v. Miller*, 196 *Kan.* 547, 412 *P.2d* 1007 (1966).

Several other cases cited by respondents are likewise not directly on point since, as in the *Hawkins* and *Thomas Organ Co.* cases, they concern reports and statements of nonparty witnesses rather than statements of an insured. [\*398] See *Martin v. N.V. Nederlandsche Amerikaansche Stoomvaart Maatschappij*, 8 *F.R.D.* 363 (S.D.N.Y. 1948) (report made by consulting engineers for insurance carrier); *Khoudary v. Home Ins. Co.*, 77 *Misc.2d* 864, 355 *N.Y.S.2d* 291 (1974) (first report of an adjusting firm furnished to defendant insurance company concerning a fire loss covered by defendant's policy); *Hopkins v. Chesapeake Utils. Corp.*, 300 *A.2d* 12 (Del. 1972) (reports of marine surveyors and investigators to insurance company); *Garfinkle v. Arcata Nat'l Corp.*, 64 *F.R.D.* 688 (S.D.N.Y. 1974) (notes and memoranda prepared by attorneys for an opinion letter to client).

Respondents do, however, cite one case which is very similar to the one [\*\*\*12] at hand. In *Henry Enters., Inc. v. Smith*, 225 *Kan.* 615, 592 *P.2d* 915 (1979) plaintiff sought discovery of a statement made by the defendant corporation's principal officer to the corporation's insurance carrier. The issue, as framed by the court, was whether statements of witnesses taken routinely by adjusters or investigators for insurance carriers upon receipt of claims or knowledge of claims under the policy are discoverable. *Henry Enters.*, at 615. In concluding they were discoverable, the court stated:

It is apparent to us, and we hold, that the initial investigation of a potential claim, made by an insurance company [\*\*216] prior to the commencement of litigation, and not requested by or made under the guidance of counsel, is made in the ordinary course of business of the insurance company, and not "in anticipation of litigation or for trial" . . .

*Henry Enters.*, at 623.

On the other side of the struggle are cases cited by petitioners. Several of petitioners' cases are also not directly on point since they are broader than the instant case in that they involved statements from nonparty witnesses. See *Garfinkle v. Arcata Nat'l Corp.*, *supra*; [\*\*\*13] *Burlington Indus. v. Exxon Corp.*, 65 *F.R.D.* 26



(D. Md. 1974); *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426 (D. Mass. 1972); *Arney v. Geo. A. Hormel & Co.*, 53 F.R.D. 179 (D. [\*399]Minn. 1971); *Almaguer v. Chicago, R.I. & Pac. R.R.*, 55 F.R.D. 147 (D. Neb. 1972); *Ashmead v. Harris*, 336 N.W.2d 197 (Iowa 1983).

One case is, however, very similar to this one. *Fireman's Fund Ins. Co. v. McAlpine*, 120 R.I. 744, 391 A.2d 84 (1978) involved four cases, one of which concerned a 5-car chain collision. Shortly after the collision an investigator for two of the defendants took written statements from the insureds. In concluding that such statements were prepared in anticipation of litigation, the court stated:

In our litigious society, when an insured reports to his insurer that he has been involved in an incident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party. The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin to prepare his case. Although a claim may be settled short of the instigation of legal action, there is an ever-present [\*\*\*14]possibility of a claim's ending in litigation. The recognition of this possibility provides, in any given case, the impetus for the insurer to garner information regarding the circumstances of a claim.

(Citation omitted.) *Fireman's Fund*, at 753-54.

Despite the fact that petitioners and respondents present cases on point from other jurisdictions addressing the issue at hand, we believe it inappropriate to subscribe entirely to the rationale of either set of cases. The specific issue at hand is whether an insured's statement to his insurance carrier is protected from discovery by CR 26(b)(3). It is difficult in this context to determine whether a document was prepared in anticipation of litigation since an insurance company's ordinary course of business entails litigation. The requirement of having an attorney involved in the case before documents prepared by an insurance carrier are protected is a rather conclusory determination of the issue and is contrary to the plain language of the rule. On the other hand, broad protection for all investigations conducted by an insurer as suggested by several cases cited by respondents is likewise an unsatisfactory answer to the [\*\*\*15][\*400] problem. Should such a rule of thumb approach become the general rule, it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared in "anticipation of litigation". We believe the better approach to the problem is to look to the specific parties involved and the expectations of those parties. With these parties in mind, the scope of CR 26(b)(3) 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.

This case involves statements by a defendant. There are important distinctions between nonparty witness statements and defendant statements. To begin with, nonparty witnesses have no contractual agreement with the party interviewing them. An insured is contractually obligated to cooperate with the insurance company. Such an obligation clearly creates a reasonable expectation that the contents of statements made by the insured will not be revealed to the opposing party. The insurer [\*\*217] on the[\*\*\*16] other hand has a contractual obligation to act as the insured's agent and secure an attorney. The insured cannot choose the attorney but can expect the agent to transmit the statement to the attorney so selected. Without an expectation of confidentiality, an insured may be hesitant to disclose everything known. Such nondisclosure could hinder representation by the selected attorney. In essence, the insurance company has been retained to provide an attorney and the expectation is that statements made by the insured will be held in confidence. Without such protection, the insured would bear many of the burdens of the insurance contract without reaping the benefits. Under these circumstances, we believe the statements are protected by CR 26(b)(3). If the statement were made directly to the selected attorney, it would obviously have been made in anticipation of litigation. The contractual obligation between insured and insurer mandates extension of this protection to statements made by an [\*401]insured to his insurance company. Such an extension comports with the policy of maintaining certain restraints on bad faith, irrelevant and privileged inquiries and helps to ensure[\*\*\*17] the just and fair resolution of disputes. Therefore, we hold that a statement made by an insured to an insurer following an automobile accident is protected from discovery under CR 26(b)(3). The question then remains whether respondents have shown substantial need.

Most courts agree that the determination of this issue is vested in the sound discretion of the trial judge, who should look at the facts and circumstances of each case in arriving at an ultimate conclusion. *Fireman's Fund*, at 90; *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *Tiedman v. American Pigment Corp.*, 253 F.2d 803 (4th Cir. 1958); *Thomas v. Harrison*, 634 P.2d 328 (Wyo. 1981). We likewise agree that the determination of this issue is vested within the sound discretion of the trial judge. However, because this is a case of first impression, it is imperative that we look to other cases

for standards to guide the trial judge in making this determination.

Cases interpreting Fed. R. Civ. P. 26(b)(3) have generally held that to justify disclosure, a party must show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially[\*\*\*18] equivalent information from other sources if production is denied. *In re Int'l Sys. & Controls Corp. Sec. Litigation*, 693 F.2d 1235 (5th Cir. 1982); 4 J. Moore, *Federal Practice* para. 26.64 (1984). The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party. See *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577 (7th Cir. 1981). On the other hand, cases interpreting the federal rule indicate that the substantial need standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions. *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967); *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950). In addition, although several courts [\*402] have held that statements contemporaneous with the occurrence may in some instances be unique and cannot be duplicated by later interviews or depositions, *McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972), in general there is no justification for discovery of the statement of a person contained in work product materials when the person is available[\*\*\*19] for deposition. *Gay v. P.K. Lindsay Co.*, 666 F.2d 710 (1st Cir. 1981); see also 8 C. Wright & A. Miller, *Federal Practice* § 2025, 215 n.72 (1970). Whether a statement is contemporaneous and unique is a question of fact.

In light of all these considerations, we are unable to see any error in the trial court's determination that respondents did not have "substantial need" of petitioner's statement. Although the statement was taken 2 days after the accident, the passage of time alone is insufficient to allow discovery. Respondents have failed to show any other extenuating circumstances [\*\*218] justifying disclosure. Hence, the passage of time in the instant case fails to carry the day. Rather, the more important fact is that the statement in question is that of the defendant. He is not unavailable; in fact, it was in his deposition that the conflict arose. There is no claim that he has no present recollection of the events in question. The primary reason for acquiring the statement, as we see it, is impeachment. If the possibility of impeachment alone were sufficient to show substantial need, the work product immunity rule, CR 26(b)(3), would be meaningless[\*\*\*20] as "[a]ny effort at discovery would be said to have a possible impeachment purpose." *Thomas v. Harrison*, 634 P.2d at 333. Hence, we hold that in the instant case respondents have failed to show a

substantial need for the statement. Hence, we reverse the Court of Appeals and reinstate the ruling of the trial court.

DISSENTBY: GOODLOE

DISSENT: Goodloe, J. (dissenting)

I would affirm the Court of Appeals decision finding the statement of the insured to his [\*403] insurance company is not protected by either the attorney-client privilege, *RCW 5.60.060(2)*, or the work product immunity rule, CR 26(b)(3). The majority does not address the attorney-client privilege issue, limiting its discussion to the work product immunity rule issue. Because of my determination that neither applies, it is necessary to address both issues.

#### Attorney-Client Privilege

The attorney-client privilege provides:

An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

*RCW 5.60.060(2)*.

Petitioner Moriwaki urges this court to extend the attorney-client[\*\*\*21] privilege to statements made by the insured to the insurance company when the insurance policy requires the insurance company to defend and retain counsel and requires the insured to cooperate. Respondent Heidebrink argues that the privilege should not be extended and is not applicable.

This issue is one of first impression in the state. I reject Moriwaki's position that the ruling of *Cully v. Northern Pac. Ry.*, 35 Wash. 241, 77 P. 202 (1904) should apply here. In *Cully*, the court held that accident reports made by defendant's employees to defendant company were not obtainable by the plaintiff. No insurer was involved. The court's rationale that "[c]ommunications to any person whose intervention is necessary to secure and facilitate the communication between attorney and client are privileged", *Cully*, at 247, is no longer persuasive in light of the evolution of the attorney-client privilege and the current rules for broad pretrial discovery. See *Bushman v. New Holland Div. of Sperry Rand Corp.*, 83 Wn.2d 429, 434, 518 P.2d 1078 (1974).

Although no attorney-client privilege case involving statements made by an insured exists in Washington, the [\*404] [\*\*\*22] court has outlined the general parameters

of the attorney-client privilege. The court recently stated that "the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists." *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). "Like most privileges, the attorney-client privilege has its basis in the confidential nature of the communication and seeks to foster a relationship deemed socially desirable." *Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984).

The "central purpose" of the privilege "is to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly disclosed to others." *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983); see *Coburn*, at 274. However, because the privilege excludes otherwise material and relevant evidence, contrary to [\*\*219] the philosophy of full disclosure, the privilege is not absolute but "must be strictly limited to the purpose for which it exists." *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968); see *Chervenell*, at 316.

Courts in other jurisdictions have addressed application[\*\*\*23] of the attorney-client privilege to statements made by the insured to his insurance company. The courts are split in their characterization of the purpose of the statements, and their characterization determines whether the statement is held privileged or not privileged. The Court of Appeals decision gives a balanced presentation of the two opposing views. *Heidebrink v. Moriwaki*, 38 Wn. App. 388, 390-94, 685 P.2d 1109 (1984).

Jurisdictions holding the insured's statement is privileged take the position that because the insured through his insurance contract delegated the conduct of the defense to the insurance company and because the insured is not represented by counsel of his own choosing at the time the statement is made or later during the litigation, "the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the [\*405] interests of the insured." *People v. Ryan*, 30 Ill. 2d 456, 461, 197 N.E.2d 15 (1964); *Bellman v. District Court*, 187 Colo. 350, 352, 531 P.2d 632 (1975). *Bellman* was subsequently modified by *Kay Laboratories, Inc. v. District [\*\*\*24] Court*, 653 P.2d 721, 723 (Colo. 1982), which requires before the privilege will attach a relationship between the attorney and the insurer to specific claims having already arisen. Some jurisdictions provide protection to the insured's statement based solely on the insurance policy's provisions, without requiring an existing attorney-client relationship. *Hollien v. Kaye*, 194 Misc. 821, 825, 87 N.Y.S.2d 782 (1949); *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 56 (Mo. 1976) (and cases cited therein).

These jurisdictions that view the statement as privileged recognize the insurance company as a necessary intermediary between the insured and the attorney retained later or as an agent of the attorney retained later. As explained in *Hollien*,

in case of accident, the owner of a motor vehicle is bound by the terms of his contract, to make a full and prompt report to his carrier. The assured should be encouraged to, rather than discouraged from, making a full and complete disclosure to his insurance carrier. Let us suppose that an assured does so and furnishes his statement to a lay representative of his carrier, before its general counsel has ever heard of the[\*\*\*25] case and could not yet be said to be the attorney for the assured; or before some other attorney is engaged to represent the assured, and that hence, it might be held that the statement may not come either within the letter or the spirit of section 353 of the Civil Practice Act. Let us suppose further that the statement thus given by the assured to his carrier, in compliance with his contract, and on the assumption that he is furnishing the statement to the agency which he has paid to protect him, reveals the commission of acts which constitute the crime of culpable negligence. Should the assured be prevented from unbosoming himself of the true facts concerning an accident to the very entity, which, either through voluntary choice or under legal compulsion, he has paid to protect his interests in the event of an accident, through fear that his statement could be reached [\*406]by the person who will instigate against him either civil or criminal proceedings or both? Or should fear of self-incrimination or fear of a recovery beyond policy limits subjugate the assured to the point of concealing the true facts to the very one whom he has paid in advance to protect him in just [\*\*\*26]such a contingency.

It seems to this court that it would be contrary to sound public policy to permit the discovery and inspection of statements of a defendant or a prospective defendant made to his own insurance carrier, whether made before or after suit is instituted or to its lay representatives, [\*\*220] either before or after an attorney has been formally selected by the carrier to represent its assured.

*Hollien*, at 825; see *Barker*, at 56-57.

Jurisdictions holding the insured's statement is not privileged take the position that because the insurance company may use the statement to the insured's disadvantage then the statement is not the same as one made between attorney and client.

The insurance carrier is more than a mere agent transmitting the policyholder's statement to the attorney hired to defend the insured.

The insurance carrier has the right to review and consider the statement submitted by the insured for any legitimate purpose connected with the business of the company. Coverage, cooperation, and renewal are a few of the matters, in addition to consideration of the potential claim, for which the insurer may use the statement of the insured. [\*\*\*27] The use of the statement for a purpose adverse to the interest of the insured is certainly inconsistent with the claim of privilege upon his behalf.

*Butler v. Doyle*, 112 Ariz. 522, 525, 544 P.2d 204 (1975); see *Jacobi v. Podelvels*, 23 Wis. 2d 152, 156, 127 N.W.2d 73 (1964).

These jurisdictions are also influenced by the need for full disclosure of the truth. As explained by the Jacobi court:

One of the fundamental policies of our law, and one which dominates in the absence of a special policy arising in particular types of situations, is that the judicial system and rules of procedure should provide litigants with [\*407]full access to all reasonable means of determining the truth. Secrecy of communication between one person and his attorney is one of the exceptions. It is based upon recognition of the value of legal advice and assistance based upon full information of the facts and the corollary that full disclosure to counsel will often be unlikely if there is fear that others will be able to compel a breach of the confidence.

Dean Wigmore has written:

"Nevertheless, the privilege [attorney-client] remains an exception to the general duty to[\*\*\*28] disclose. . . . It is worth preserving for the sake of a general policy, but is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." <4>

<4>8 Wigmore, Evidence (McNaughton rev. 1961), p. 554, sec. 2291.

Jacobi, at 156-57.

Consistent with Dean Wigmore's evaluation is this court's determination that the attorney-client privilege must be strictly limited to the purpose for which it exists because the privilege is contrary to the philosophy of full

disclosure of material and relevant evidence. Dike, at 11.

Because of the rationale for and limitations on the applicability of the attorney-client privilege, I believe the Court of Appeals reached the proper balance by not adopting in its entirety either position of the other jurisdictions, but rather focusing on "the intent of the client at the time the communication is made." Heidebrink, at 394. For the attorney-client privilege to apply, the client must believe that he is consulting a lawyer, either directly or through an agent, in his legal capacity and is seeking professional legal advice. [\*\*\*29] *State v. Dorman*, 30 Wn. App. 351, 359, 633 P.2d 1340 (1981), citing *E. Cleary, McCormick on Evidence* § 88 (2d ed. 1972).

Applying this criterion to the facts presented, I would hold that Moriwaki did not have this intent. Nothing in the record indicates that Moriwaki believed he was consulting an attorney or an attorney's agent for the purpose of [\*408] obtaining legal advice. Moriwaki merely spoke to a claims adjuster on the phone when the claims adjuster called him. Moriwaki had not initiated the contact and no litigation was pending. Also, at the time the statement was taken, the insurance company conceivably had interests other than protecting the [\*\*221] rights of Moriwaki. The statement which was taken could be used by the insurance company for any business purpose, including a purpose that would have been adverse to Moriwaki's interests.

The attorney-client privilege should not be extended summarily to statements made by an insured to his insurance company. If the insured makes the statement with the intent that he is consulting a lawyer for legal advice and his statement cannot be used against his interests by the insurance company (because the company[\*\*\*30] is only acting as an agent for the retained attorney), then the attorney-client privilege could be properly invoked. However, that situation is not presented in this case. I would affirm the Court of Appeals determination that Moriwaki's statement to the claims adjuster was not privileged.

Work Product Immunity Rule

CR 26(b) provides, in pertinent part:

(b) . . . Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . .

(3) Trial Preparation: Materials . . . [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against[\*\*\*31] disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney [\*409] or other representative of a party concerning the litigation.

The threshold question that must be addressed to determine whether a statement made by the insured to the insurance company is protected by the rule is whether the document was "prepared in anticipation of litigation". CR 26(b)(3). If not prepared in anticipation of litigation, then the document is discoverable. If prepared in anticipation of litigation, then the document is not discoverable, unless the party seeking it can show substantial need and no substantial equivalent for the document.

Moriwaki argued and the trial court found that Moriwaki's statement was taken in anticipation of litigation and that there had not been a showing of substantial need and no substantial equivalent. Heidebrink argued and the Court of Appeals found that the statement was not taken in the anticipation of litigation but rather it was taken in the ordinary course of business. Thus, the Court of Appeals held the statement was discoverable. The majority reverses the Court of Appeals finding the statement is not discoverable. [\*\*\*32]

I agree with the majority that there is no distinction between attorney and nonattorney work product. Majority opinion, at 396. A statement taken by an insurer is explicitly covered by the rule, subject to the requirement that the statement is being taken in anticipation of litigation. I also agree with the majority's decision to find inapplicable those cases determined before the amendment to CR 26(b)(3) and those cases involving statements or reports from persons other than the insured. Majority opinion, at 396-99. I agree with the majority that two cases from other jurisdictions are on point.

In *Fireman's Fund Ins. Co. v. McAlpine*, 120 R.I. 744, 391 A.2d 84 (1978), the court found statements by insureds to their insurance companies were prepared in

"anticipation of litigation" by adopting the following rationale:

In our litigious society, when an insured reports to his insurer that he has been involved in an incident involving [\*410] another person, the insurer can reasonably anticipate that some action will be taken by [\*\*222] the other party. The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin[\*\*\*33] to prepare his case. Although a claim may be settled short of the instigation of legal action, there is an ever-present possibility of a claim's ending in litigation. The recognition of this possibility provides, in any given case, the impetus for the insurer to garner information regarding the circumstances of a claim.

(Citation omitted.) *Fireman's Fund*, at 753-54.

The opposite conclusion was reached in *Henry Enters., Inc. v. Smith*, 225 Kan. 615, 592 P.2d 915 (1979), where the court found a statement by an insured to his insurance company was not prepared in anticipation of litigation and therefore was discoverable. The court stated:

We are not unmindful that, insofar as insurance companies, and particularly those in the casualty field, are concerned, litigation is a very real potential; it is ever on the horizon. But the fact remains that the investigation of potential claims is an integral part of the insurer's business. Investigations are made regularly and in the ordinary course of business. They are necessary if the companies are to make intelligent dispositions of claims. They are necessary also if a carrier is to perform adequately the duties and[\*\*\*34] obligations towards its insureds which are imposed upon it by law. Also, most claims are settled, one way or another, without resort to the courts.

It is apparent to us, and we hold, that the initial investigation of a potential claim, made by an insurance company prior to the commencement of litigation, and not requested by or made under the guidance of counsel, is made in the ordinary course of business of the insurance company, and not "in anticipation of litigation or for trial" . . .

*Henry Enters.*, at 623.

The majority states its belief that it is inappropriate to subscribe to either rationale entirely but then it does subscribe to one rationale. It finds that because of the insurance contract requirement for representation, the statements of the insured to the insurance company are [\*411] protected by CR 26(b)(3). Majority opinion, at 400. The majority then makes a very broad holding that

"a statement made by an insured to an insurer following an automobile accident is protected from discovery under CR 26(b)(3)." Majority opinion, at 401. The majority to reach these conclusions has, without acknowledging it, adopted the rationale of the Fireman's Fund[\*\*\*35] case.

It is incorrect to state that "[i]f the statement were made directly to the selected attorney, it would obviously have been made in anticipation of litigation." Majority opinion, at 400. The determination of whether a statement is made in anticipation of litigation involves more than the mere question of who is the recipient.

I believe it is incorrect to hold that the initial inquiry or involvement by an insurance company regarding the possibility of a potential claim involving one of its insureds is made in anticipation of litigation. The initial inquiry is a gathering of facts from which the insurance company determines whether there may be a claim and if so whether the claim is covered by the insurance contract. I would hold the initial inquiry is always made in the ordinary course of the insurer's business. Only after the initial discussion of the claim can the insured

and the insurance company determine whether the incident is covered and whether litigation can be anticipated. If litigation is anticipated, subsequent statements made by the insured would be protected. This determination accords broad and liberal treatment to the discovery rules and achieves their[\*\*\*36] goal of ensuring mutual knowledge of all relevant facts. *Hickman v. Taylor*, 329 U.S. 495, 501, 507, 91 L. Ed. 451, 67 S. Ct. 385 (1947).

Because of my determination that the involved statement made by Moriwaki to his insurance company could not have been made in anticipation of litigation, I do not reach the issue of whether Heidebrink has [\*\*223] made the requisite showing of substantial need and no substantial equivalent for the information.

#### [\*412] Conclusion

I would hold that the statement by the insured to his insurance company in this case is not protected by either the attorney-client privilege or the work product immunity rule. I would order disclosure of the statement.



In re the Marriage of: DELMAS GLENN PARKER, Appellant, and SANDRA K. PARKER, Respondent.  
NO. 38624-7-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

91 Wn. App. 219; 957 P.2d 256; 1998 Wash. App. LEXIS 782

May 26, 1998, Filed

PRIOR HISTORY: [\*\*\*1] Appeal from Superior Court of King County. Docket No: 92-3-07670-9. Date filed: 04/08/96. Judge signing: Hon. Charles V. Johnson.

DISPOSITION: Vacated and remanded.

CORE TERMS: plethysmograph, sexual, deviancy, sexual abuse, reliable, penile, liberty interest, Constitutional Law, relevant scientific community, sexual arousal, visitation, parenting, individual rights, process of law, reasonableness, seizures, testing, physiological, dissolution, reliability, convicted, indicator, weighing, stimuli, male, Fourth Amendment, unsupervised visitation, child custody dispute, constitutional right, guardian ad litem

COUNSEL: For Appellant: Delmas G. Parker (Appearing Pro Se), P.O. Box 998, 7605 SE 27th St., # 207, Mercer Island, WA 98040.

For Respondent: Howard E. Richmond Jr., Attorney At Law, 22530 SE 64th Pl., Suite 210, Issaquah, WA 98027.

JUDGES: Authored by Mary K. Becker. Concurring: Faye C. Kennedy, Ronald E. Cox.

OPINIONBY: Mary K. Becker

OPINION: [\*221] [\*\*257] BECKER, J. -- A father who has never been convicted of a sex offense appeals from an order that he undergo a sexual deviancy evaluation that includes the use of a penile plethysmograph. The trial court, in the process of developing a parenting plan, issued the order in response to unresolved allegations that the father had sexually abused his son. Because there has been no demonstration that a plethysmograph is a reliable indicator of deviancy, we vacate the order. Due process requires a showing of reliability before the court may condition the father's exercise of his parental rights upon submission to an invasive and degrading procedure.

Delmas and Sandra Parker married in October, 1988. [\*\*\*2] The couple immediately began having marital problems. They separated two months later. Their only child, Z, was born on September 17, 1989.

In May, 1992, Sandra and her parents reported to Child Protective Services (CPS) that, based on Z's statements, they suspected Delmas had sexually abused Z. When he learned of these allegations Delmas confronted Sandra and struck her. This led to his conviction for a misdemeanor assault. The record before us contains no evidence of any other convictions. CPS referred Z to Eastside Sexual Assault Center for Children in July, 1992, and the Center recommended that Delmas' visitations with Z be supervised. It does not appear that Delmas was charged with child abuse.

Delmas filed for dissolution in September, 1992. His effort to have his petition dismissed was the subject of a prior appeal, in which this court ruled that the dissolution [\*222] could not be dismissed without Sandra's consent. n1 After this decision, Sandra continued to pursue the dissolution. Z's visitations with Delmas have continued to be supervised.

n1 *In re Marriage of Parker*, 78 Wash. App. 405, 897 P.2d 402 (1995).

[\*\*\*3]

In May, 1995, the trial court appointed a new guardian ad litem for Z. The guardian ad litem recommended that Delmas complete a sexual deviancy evaluation by Dr. Robert Wheeler. He based the recommendation on Delmas' "history of violence" and the "largely unexplored possibility of sexual boundary issues." The court ordered the evaluation.

Dr. Wheeler told Delmas the evaluation would include the use of a penile plethysmograph. A plethysmograph measures sexual [\*\*258] arousal by means of an electronic recording device attached to the penis of the person being tested. The recording device monitors the

AR 013884



subject's responses to the viewing of slides of naked women and children of various ages involved in various types of sexual activity. n2 Delmas made a motion and declaration for temporary order, asking the court, among other things, to prohibit the use of the plethysmograph. The trial court denied the motion.

n2 *In re Mark C.*, 7 Cal. App. 4th 433, 437, 8 Cal. Rptr. 2d 856 (1992).

Delmas refused to submit to[\*\*\*4] the evaluation by Dr. Wheeler. His appeal challenges the trial court's authority to require him to submit to a penile plethysmograph in connection with a dispute over a parenting plan. He contends expert testimony interpreting a plethysmograph is not admissible under ER 702 because the procedure is not generally accepted in the mental health community as a reliable indicator of sexual deviancy. Delmas' argument is supported in the record by his psychologist, whose declaration states his opinion that the procedure is non-professional and scientifically unfounded.

As yet, no expert testimony has been offered and the trial court has made no determination as to admissibility of the plethysmography results. For this reason Sandra argues that the appeal should be dismissed as premature. However, [\*223] Delmas also contends that his substantive due process rights are violated by the requirement that he submit to a plethysmograph. Although the order appealed from is not a final order, a commissioner of this court determined that the issue warrants review before Delmas is compelled either to undergo the procedure, or subject himself to contempt and continued restrictions on his visitation[\*\*\*5] rights.

The Due Process Clause of the United States Constitution protects persons from deprivation of life, liberty, or property without due process of law. n3 Relying on *Rochin v. People of California*, n4 Parker contends the court's insistence on the use of a penile plethysmograph is conduct that violates his substantive due process rights because it "shocks the conscience". The criminal defendant in *Rochin* was observed to swallow some capsules upon being approached by the police. The police directed a hospital to pump his stomach, and the resulting evidence was used to convict him of narcotics possession. Reversing, the United States Supreme Court held that the conviction offended the Due Process Clause because the evidence had been obtained by methods "too close to the rack and the screw." n5 Substantive due process claims are most often analyzed by weighing the individual rights asserted against the

government's interest in intruding upon them. n6 Because we find this inquiry satisfactorily disposes of the present case, we need not consider whether, under *Rochin*, the order at issue "shocks the conscience."

n3 U.S. Const. amends. 5, 14.

[\*\*\*6]

n4 *Rochin v. People of California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

n5 *Rochin v. People of California*, 342 U.S. at 172.

n6 See, e.g., *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 531 (1st Cir. 1995).

Delmas asserts a substantive due process right to avoid having the intimate parts of his body restrained and [\*224] monitored while his mind is exposed to pornographic imagery. This is a substantial claim. Freedom from bodily restraint is at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. n7 Also, the court-ordered plethysmograph test implicates the Fourth Amendment right to be free from unwarranted searches or seizures. n8 Finally, the order, which effectively makes submission to the test a precondition to unsupervised visitation, affects Delmas' fundamental liberty interest in the care and custody of his son. n9

[\*\*259] Weighed against the individual rights of Delmas is the court's obligation to consider a child's risk of physical, [\*\*\*7] mental, or emotional harm in connection with the creation of a parenting plan. n10 A trial judge, faced with allegations of sexual abuse against one of the parties in a parenting dispute, must evaluate the allegations and has a legitimate need for information that will be of assistance in that task.

n7 *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1992).

n8 *Harrington v. Almy*, 977 F.2d 37, 43 (1st Cir. 1992).

n9 *Zakrzewski v. Fox*, 87 F.3d 1011, 1013 (8th Cir. 1996).

n10 See RCW 26.09.002; RCW 26.09.184.

The First Circuit undertook a similar task of weighing the intrusiveness of the plethysmograph against the government's need for information in *Harrington v. Almy*. n11 In that case, a child accused many people of sexual abuse, eventually naming a police officer as one of the alleged perpetrators. Though no charges were brought against the officer, the officer's employer insisted that he submit to a psychological evaluation including a penile plethysmograph. [\*\*\*8] His refusal to do so led to a demotion. He brought a civil rights suit alleging a substantive due process violation. The trial court dismissed his claim on summary judgment and the officer appealed.

n11 *Harrington v. Almy*, 977 F.2d at 37.

The appellate court described the relevant inquiry as one of reasonableness: "Once it is established that, as [\*225] here, the State is entitled to the information the bodily intrusion is designed to obtain, the means used will be measured by its reasonableness in light of the need to obtain the evidence in this way." n12 The court remanded the case for trial, holding that a reasonable trier of fact could find it was a violation of the officer's substantive due process rights to require a plethysmograph as a means of obtaining information about his sexual profile:

The procedure involves bodily manipulation of the most intimate sort. There has been no showing regarding the procedure's reliability and, in light of other psychological evaluative tools available, there has[\*\*\*9] been no demonstration that other less intrusive means of obtaining the relevant information are not sufficient. n13

n12 *Harrington v. Almy*, 977 F.2d at 44.

n13 *Harrington v. Almy*, 977 F.2d at 45. Cf. *Berthiaume v. Caron*, 142 F.3d 12, 1998 U.S. App. LEXIS 8043 (1st Cir. April 21, 1998) (plethysmograph test of professional licensee was not, under the circumstances, so unreasonable as to establish a violation of "clearly established" law for purposes of piercing qualified immunity in a civil rights suit.)

The same considerations arise in this case. If the penile plethysmograph is not a reliable indicator of sexual deviancy, it cannot serve the court's interest in determining whether unsupervised visitations with Delmas place his son at risk of sexual abuse.

The weight of authority from other jurisdictions overwhelmingly holds that the plethysmograph does not produce[\*\*\*10] information on which a court can rely to decide that an individual is or is not sexually deviant. n14 This court has affirmed orders compelling plethysmograph testing for the purpose of monitoring compliance by convicted sex offenders with the conditions of their community placement. n15 But using a plethysmograph to monitor compliance with [\*226] conditions of treatment or community placement is different from using it to determine sexual deviancy. And because convicted sex offenders are a population of individuals whose liberty interests have already been severely limited based on their proven criminal conduct, authority allowing courts to order the procedure in that context does not compel affirmance of an order directed to a person who has no history of committing sexual crimes.

n14 See, e.g., *Gentry v. State*, 213 Ga. App. 24, 443 S.E.2d 667 (1994); *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995); and *United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995).

n15 *State v. Riles*, 86 Wash. App. 10, 15, 936 P.2d 11 (1997), petition for review granted, 133 Wash. 2d 1009, 946 P.2d 402 (1997); see also WAC 246-930-310.

[\*\*\*11]

Unless the proponent of the penile plethysmograph can demonstrate on remand that the testing is generally accepted in the relevant scientific community as a reliable measure of sexual deviancy, n16 the court may not [\*\*260] order Delmas Parker to submit to the procedure. On remand, the proponent of plethysmograph testing may request a Frye hearing, and assume the burden of proving reliability.

n16 See *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923); *State v. Copeland*, 130 Wash. 2d 244, 261, 922 P.2d 1304 (1996); *State v.*

*Hayden*, Wash. App., 90 Wash. App. 100, 950 P.2d 1024, 1026 (1998).

The order is vacated and the case remanded for further proceedings.

WE CONCUR:

Faye C. Kennedy

Ronald E. Cox

**AR 013887**



UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1989 U.S. Dist. LEXIS 10193

August 28, 1989, Decided and Filed

CORE TERMS: interrogatory, discovery, burdensome, supplemental, overly broad, oppressive, harassing, unduly, production of documents, failure to answer, motion to compel, party served, responsive, overbroad, conclusion of law, time period, ascertaining, ascertained, incomplete, deriving, specify, broker, defendants objected, subject matter, resisting, furnish, duty, motion to compel discovery, relevancy, objectionable

COUNSEL: [\*1]

Alexander D. Bono, Esq., BLANK ROME COMISKY  
McCLAULEY, Philadelphia, Pennsylvania for Plaintiffs.

Ann D. White, Philadelphia, Pennsylvania, for  
Defendants, Daniel J. Dugan, Esq., Philadelphia,  
Pennsylvania for THIRD PARTY DEFTS.

OPINION BY: NAYTHONS, Magistrate

OPINION: MEMORANDUM AND ORDER

EDWIN E. NAYTHONS, UNITED STATES  
MAGISTRATE

On October 26, 1988, plaintiff, Pinto Brothers Pension Trust, served interrogatories upon defendants, Drexel Burnham Lambert, Inc., and Anthony Tedeschi. Defendants forwarded answers to plaintiff's interrogatories and a response to plaintiff's request for production of documents on December 15, 1988. Plaintiff's asserted that the answers given were incomplete and thereby filed a motion to compel discovery on February 16, 1989. After this motion was filed, counsel attempted to reach a compromise agreement. The response time was extended on four occasions, while the negotiations were taking place. The parties reached an agreement and the Pension Trust thereafter withdrew its motion to compel without prejudice to reinstate it at a later time on May 18, 1989.

Plaintiff's motion to compel discovery was reinstated on July 11, 1989 n1. The plaintiff seeks full and complete answers [\*2] and asserts that defendants failed to abide by their agreement. Specifically, the plaintiff seeks full, complete, and responsive answers to interrogatory nos. 3, 4, 10, 12, 15, 16, 19, 20, 21, 24, 26-40; as well as a full and complete response to its request

for production of documents. For the sake of clarity, each category of interrogatories will be treated separately according to the manner presented in the plaintiff's motion.

n1 Plaintiff failed to attach the defendants' supplemental responses to plaintiff's first set of interrogatories to their reinstated motion to compel in accordance with local rule 24, nevertheless, this Court will consider plaintiff's motion on the merits.

Interrogatory nos. 26, 27, and 34-38, pertain to, inter alia, (1) whether Drexel made any investigations concerning Tedeschi or his customers accounts; (2) whether Tedeschi or any other person associated with the Pension Trust's accounts was ever reprimanded by Drexel; (3) whether there have been any government agency investigations of Tedeschi arising out of his activities as a securities or commodities salesman or broker. (4) whether Tedeschi has ever been a party to a suit arising out of his[\*3] activities as a broker.

In response to interrogatory nos. 26, 27, 34, and 35, defendant states:

Pursuant to Fed.R.Civ.P. 33(c), defendants have produced responsive documents to plaintiffs. The burden to deriving or ascertaining the answer is substantially the same for plaintiffs as defendants.

It is this Court's conclusion that with respect to interrogatory nos. 26, 27, 34, and 35, defendants' response amounts to a failure to answer. Rule 33(c) provides in pertinent part:

[w]here the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served . . . and the burden of deriving or ascertaining the answer is

substantially the same for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived . . . A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Defendants state that the answers to interrogatory nos. 26, 27, 34, and 35, can be found in the documents provided to the plaintiff, yet the defendants [\*4]do not give the slightest indication of where that information can be located. Clearly, the defendants' responses to interrogatory nos. 26, 27, 34 and 35, do not meet the requirements of Rule 33(c) since they do not provide sufficient detail to aid the plaintiff in locating the records from which the answer may be ascertained.

In *Willemijn Houdstermaatschaap BV v. Apollo Computer*, 707 F.Supp. 1429, 1440 (D.Del. 1989), the court ruled that under Fed.R.Civ.P. 33(c) "the party served has a duty to specify the category and location of those records which contain the responses to the interrogatory." *Id.* at 1440. In that case, the defendant stated in its response that the requested documents "have been produced pursuant to Fed.R.Civ.P. 33(c)," however, the defendant did not give the category or location of that information. In *Willemijn Houdstermaatschaap BV*, the defendant's responses were held to be "equivalent to a failure to answer." *Id.* at 1440. See also *Holben v. Coopervision, Inc.*, 120 F.R.D. 32, 34 (E.D. Pa. 1988); *Avramidis v. Atlantic Richfield Company*, 120 F.R.D. 450, 452 (D. Mass 1988); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 823[\*5] (3d Cir. 1982). This Court finds that the defendants have failed to meet their burden of specifically indicating where the information sought by interrogatory nos. 26, 27, 34, and 35, may be found. n2 Thus, this Court has determined that defendants' incomplete answer will be treated as a failure to answer pursuant to Fed.R.Civ.P. 37(a)(3), n3 and therefore, defendants shall furnish full and complete responses to these interrogatories.

n2 Note that this supplemental response does not cure the failure of defendant's original response to these interrogatories to support a claim that the interrogatories are overbroad, unduly burdensome, harassing, irrelevant and not likely to lead to the discovery of admissible evidence. It is well noted that merely to state that an interrogatory is "overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection to an interrogatory. On the contrary, the party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive." *Josephs v.*

*Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) quoting *Roseberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980);

[\*6]

n3 Fed.R.Civ.P. 37(a)(3) states in relevant part: For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

In response to interrogatory nos. 36, 37, and 38, defendants state that the only lawsuit concerning Eastern Airlines, Texas Air, Continental Airlines or Fruhauf Corporation to which Tedeschi or Drexel has ever been a party is *Procacci, et al. v. Drexel Burnham Lambert Incorporated, et al.*, (Civil Action No. 89-0555). Defendants contend that the plaintiff can easily obtain the pleadings in the *Procacci* case. Fed.R.Civ.P. 26(b)(1)(i) provides in relevant part:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

It is well established that "[u]ltimately, the question of what constitutes satisfactory responses rests within the sound discretion of the Court and includes the consideration of undue burden to the parties". *Martin v. Easton Publishing Company*, 85[\*7] F.R.D. 312, 316 (E.D. Pa. 1980). Defendants have provided the plaintiff with the case name and docket number of the case at issue in interrogatory nos. 36, 37, and 38. These documents are a part of the public record, therefore plaintiff may easily obtain the information in question. Accordingly, this Court finds defendants' answer adequately responds to interrogatory nos. 36, 37, and 38, and therefore, plaintiff's motion with respect to those interrogatories shall be denied.

II.

Interrogatory nos. 4, 16, 19, 20, 21, 24, and 28, pertain to, inter alia, (1) Drexel's procedures relating to supervision of its brokers; and (2) the identities of persons with knowledge of these procedures.

In response to interrogatory no. 4, defendants state:

Pursuant to Fed.R.Civ.P. 33(c), defendants have produced responsive documents to plaintiffs. The burden of deriving or ascertaining the answers is substantially the same for plaintiffs as defendants.

It is this Court's conclusion that with respect to interrogatory no. 4, defendants' answer is completely insufficient. Defendants are asked for the names and duties of Drexel's managers and supervisors. Defendants' response, as stated above, clearly[\*8] does not meet the requirements of Rule 33(c) (See *infra*. p. 2), since it does not provide sufficient detail to aid plaintiff in locating the records from which the answer may be ascertained. *Willemijn Houdstermaatschaap BV*, 707 F.Supp. 1429 (D.Del. 1989). Defendants are hereby ordered to provide the plaintiff with a full and complete response to interrogatory no. 4.

Interrogatory no. 16, asks whether defendants have investigated or analyzed the Pension Trust's financial situation and investment needs at the time the Pension Trust's account was opened or any time thereafter. Defendants answer this interrogatory in the affirmative. Specifically, defendants state that the account was monitored through a daily review of the buy and sell transaction tickets, a review of the daily blotter, a monthly review of the account statements, and an annual review prepared by defendant, Tedeschi, and presented to the plaintiff. This Court finds that defendants' answer adequately responds to interrogatory no. 16, and therefore, plaintiff's motion with respect to that interrogatory shall be denied.

In response to interrogatory nos. 19 and 20, defendants once again recite the response that [\*9] they have produced responsive documents pursuant to Fed.R.Civ.P. 33(c). Once again, this Court is required to conclude that defendants' response is blatantly insufficient. As noted several times previously, under Fed.R. Civ.P. 33(c) "the party served has a duty to specify the category and location of those records which contain the responses to the interrogatory." *Willemijn Houdstermaatschaap BV*, 707 F.Supp 1429, 1440 (D.Del. 1989).

Interrogatory nos. 19, 20, and 21 concern the methods used by Drexel for insuring that investments and trades made on a clients behalf are suitable. Discovery of such data is clearly relevant since the information sought goes directly to the issue of Drexel's oversight of Tedeschi. Fed.R.Civ.P. 26b(1) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . ." (emphasis added). In construing the

scope of Rule 26(b)(1), the court in *Marher v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 124 (M.D.N.C. 1989) stated that:

[\*10] Relevancy is to be broadly construed for discovery purposes and is not limited to the precise issues set out in the pleadings or to the merits of the case. Rather, discovery requests may be deemed relevant if there is any possibility that the information may be relevant to the general subject matter of the action. As a result, discovery rules are to be accorded broad and liberal construction.

It is clear that the information sought by interrogatory nos. 19 and 20 is properly within the permissible scope of discovery as defined by Fed.R.Civ.P. 26. Defendant is hereby Ordered to provide a full and complete answer to interrogatory No. 20.

In defendants' response to plaintiff's first set of Interrogatories, they stated that interrogatory numbers 19 and 21 called for a conclusion of law. Defendants have incorporated these original objections in their supplemental response to the plaintiff's first set of Interrogatories, therefore, that objection will be dealt with here. It is the opinion of this Court that interrogatory nos. 19 and 21, do not call for conclusions of law. Interrogatory nos. 19 and 21 merely ask what Drexel's procedures were for monitoring its accounts. It is difficult[\*11] to see how such a question requires a conclusion of law. Furthermore, even if the court were to conclude that interrogatory nos. 19 and 21 did call for a legal conclusion, that does not immediately excuse the defendants from answering. Fed.R.Civ.P. 33(b) provides in pertinent part:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact.

The 1970 amendment to Fed.R.Civ.P. 33 has made it clear that "an interrogatory is not necessarily objectionable because it involves an opinion or contention that relates to the application of law to fact." Fed.R.Civ.P. 33(b). Inquiries which in some measure call for legal conclusions can be useful in sharpening the issues. *Donovan v. Porter*, 584 F.Supp. 202, 209-210 (D.Md. 1984) (quoting *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3, 4 (D.Md. 1984)).

Additionally, defendants objected to interrogatory nos. 19 and 21, as overbroad, unduly burdensome, and harassing. This Court is not persuaded by defendants' assertion that providing answers to plaintiff's interrogatories would cause[\*12] defendants undue

burden and oppression. In *Roseberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980), the Honorable E. Mac Troutman ruled that the burden fell upon the party resisting discovery "to clarify and explain its objections and to provide support therefor." *Roseberg, supra* at 296-97. In that case, the defendant objected to an interrogatory as being "overly broad, burdensome, oppressive and irrelevant." Id. Judge Troutman opined:

To voice a successful objection to an interrogatory, [the defendant] cannot simply intone this familiar litany. Rather, [the defendant] must show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each . . . question is overly broad, burdensome or oppressive, . . . by submitting affidavits or offering evidence revealing the nature of the burden. [cites omitted.]

See also, *Josephs v. Harris Corporation*, 677 F.2d 985, 992 (3d Cir. 1982); *Chubb Integrated Systems v. National Bank of Washington*, 103 F.R.D. 52, 59-60 (D.D.C. 1984); *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Company*, 105 F.R.D. 16, 42-43 (S.D.N.Y. 1984). Accordingly, this [\*13]Magistrate finds that defendants have failed to meet their burden in proving that interrogatory nos. 19 and 21, are oppressive, onerous and burdensome, and therefore, defendants shall furnish full and complete responses to these interrogatories.

In response to interrogatory nos. 24 and 28, defendants assert that "[p]ursuant to Fed.R.Civ.P. 33(c), defendants have produced responsive documents to plaintiff. The burden of deriving or ascertaining the answers is substantially the same for plaintiff as defendants." This Court must again reiterate the established principle that the party served must specify the location of documents which contain the information sought by the interrogatory. *Willemijn Houdstermaatschaap BV*, 707 F.Supp. 1429, 1440 (D.Del. 1989)

In response to plaintiff's first set of Interrogatories, defendants objected to interrogatory nos. 24 and 28 on the grounds that they were unduly burdensome, harassing and repetitive. As noted, the burden is on the objecting party to demonstrate how a given interrogatory is unduly burdensome or harassing. In the present case, defendants have not met their burden. Accordingly, plaintiff's motion to compel a more specific answer[\*14] is granted with respect to interrogatory nos. 24, and 28, and defendants shall furnish plaintiff with a full and complete answer.

### III.

With respect to interrogatory nos. 3, 10, 12, 29, 30, 31, 32, and 33, plaintiff is seeking: (1) the identity of the parties involved; and (2) whether Drexel or Tedeschi ever discussed the suitability of investments or management of the Pension Trust accounts with the Pension Trust.

Interrogatory no. 3, requests a list of all Drexel employees for the relevant time period. Defendants have responded by providing its telephone directory for plaintiff's inspection. Plaintiff states that since numerous employees have left Drexel during the relevant time period their last known address was not provided and therefore defendants' response to interrogatory no. 3 is incomplete. Defendants object to this on the ground that the interrogatory merely requests the name and address of Drexel's former employees and not the last known address of former employees. It is the opinion of this Court that when the plaintiff asks for the name and address of persons employed by Drexel during the relevant time period, it is referring to their current address.

Defendants further[\*15] object to this interrogatory on the grounds that it is overly broad. This Court agrees with defendants. Defendants need not provide the name and address of each and every employee including secretaries and receptionists for the relevant time period. It is the opinion of this Court that discovery of the names and addresses of Drexel employees shall be limited to those with knowledge of the facts of the case. "[T]he scope of discovery is not without limits and is committed to the sound discretion of the trial court." *McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53, 57 (E.D.Pa. 1979). It has been noted that the "test of relevancy is the subject matter of the action." Id.; see also *Miller v. Doctor's General Hospital*, 76 F.R.D. 135 (D.C. Okl. 1977) (Discovery should be allowed under relevancy unless it is clear the information sought can have no possible bearing upon the subject matter of the action). In the present case, it is difficult to see how the names and addresses of secretaries and other clerical employees are relevant to the plaintiff's case.

Interrogatory nos. 10 and 12 ask whether the investment needs of the Pension Trust were ever discussed by the parties. In defendants' [\*16] supplemental response to plaintiff's first set of Interrogatories, defendants state that the answer to interrogatory no. 10, is yes. This answer is clearly inadequate. Defendants have not provided a response to interrogatory no. 12, in their supplemental response. In defendants' original response to plaintiff's first set of Interrogatories, defendants objected to interrogatory nos. 10 and 12, on the ground that they call for a conclusion of law. It is difficult to see how a question asking if any



communications took place between the parties concerning the suitability of investments of the Pension Trust's accounts requires a conclusion of law. It is well established that "[a]n interrogatory is not objectionable merely because it involves an opinion, contention or legal conclusion." *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3, 4 (D.Md. 1967). Thus, defendants are not excused from answering interrogatory nos. 10 and 12, merely because they call for an opinion.

Interrogatory nos. 29 and 30 request the names and addresses of persons who prepared reports concerning the United States airlines industry and the automotive supply business respectively. In defendants' supplemental[\*17] response to plaintiff's first set of Interrogatories, defendants responded to interrogatory no. 29, by claiming that documents have been supplied to the plaintiff pursuant to rule 33(c). Once again, this Court must repeat that the responding party must indicate specifically where the relevant information can be found. Defendants originally objected to interrogatory no. 29, on the grounds that it was overbroad, unduly burdensome and harassing. As noted earlier, the party resisting discovery has the burden to clarify and explain its objections and to provide factual support therefor. See, *Roseberg, supra* at 297. In response to interrogatory no. 30, defendants have not provided any response either in its original or supplemental answer. Defendants' failure to answer is inexcusable. Defendants shall provide the plaintiff with full and complete answers to interrogatory nos. 29 and 30.

Interrogatory nos. 31 and 32 request the names and addresses of all persons employed by Drexel who worked on any aspect of the business affairs of Texas Air, Continental Airlines or Eastern Airlines. In response to these interrogatories defendants reiterate the same response that they have given for virtually[\*18] every other interrogatory in question. Specifically, defendants state that they have produced responsive documents pursuant to Fed.R.Civ.P. 33(c). As noted, such a response is not adequate.

In defendants' original response to interrogatory no. 31, it objects on the grounds that the question is overbroad, and calls for confidential information. Defendants have not alleged any facts demonstrating that the information sought by interrogatory no. 31 is confidential. Therefore, the defendants have not met their burden of proving that the information sought is privileged. It is well noted that "[t]he defendant, as the party objecting to discovery, must raise the objection in the first instance and has the burden of establishing the existence of the privilege." *Miller v. Doctor's General Hospital*, 76 F.R.D. 136, 139 (W.D. Okl. 1977); See also *Buffington v. Gillette Company*, 101 F.R.D. 400, 401 (W.D. Okl. 1980). This

Court is not persuaded that the information sought by interrogatory no. 31 is confidential, therefore, defendants are ordered to provide a full and complete response.

Interrogatory no. 33 asks whether Freuhauf Corporation has been a client of Drexel. Defendants respond[\*19] in the negative. It is unclear why the plaintiff finds this response inadequate. Whether Freuhauf Corporation was a client of Drexel seems to require a simple yes or no answer. Accordingly, plaintiff's motion with respect to interrogatory no. 33 is denied.

#### IV.

Plaintiff next seeks to discover information which relates to defendants' self interest. Interrogatory no. 15 asks whether Drexel has ever received any income or bonuses with respect to the Pension Trust's accounts. Defendants claim that they have answered interrogatory no. 15 by providing the plaintiff with documents pursuant to Fed.R.C.P. 33(c). As discussed earlier, this answer is inadequate, therefore, defendants must provide the plaintiff with a full and complete response.

#### V.

Interrogatory nos. 39 and 40 seek to determine whether Drexel ever directed its sales staff to recommend investment or to invest client money in the Freuhauf Corporation or Eastern Airlines. In response to interrogatory no. 39, defendants once again claim that they have provided documents pursuant to Fed.R.Civ.P. 33(c). As noted, this is not an adequate answer. This Court hereby orders defendants to provide a full and complete response to interrogatory [\*20]no. 39. In defendants' supplemental response to interrogatory no. 40, defendants claim that "Drexel's Research Department never directed or encouraged Drexel or Drexel's sales staff or brokers to recommend investments and trades in the Fruehauf Corporation. This Court finds that defendants' answer adequately responds to interrogatory no. 40, and therefore, plaintiff's motion with respect to that interrogatory shall be denied.

#### VI.

The plaintiff contends in its memorandum in support of Pinto Brothers Pension Trust's Motion to Compel that the defendants have failed to abide by the agreement reached by the parties. Defendants, on the other hand, state in the appendix to their supplemental response that all existing documents have been produced. This Court is not capable of determining whether all documents have actually been produced. Accordingly, plaintiff's motion

for production of documents must be denied without prejudice.

## VII

Plaintiffs have requested that the Court order defendants to pay plaintiff attorney fees pursuant to Fed.R.Civ.P. 37.

Federal Rule of Civil Procedure 37(d) states, in pertinent part, the following:

If a party . . . fails (2) to serve answers or objections [\*21] to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fee caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Contrary to plaintiff's assertion, defendants have provided answers to a number of interrogatories as well as furnishing plaintiff with numerous documents. This Court does not view the circumstances herein as a total and flagrant abuse of the discovery rules and complete failure to provide documents and answers to interrogatories and, accordingly, will deny the motion for sanctions. Each party shall bear its own costs.

## CONCLUSION

For the reasons [\*22] outlined above, plaintiff's motion to compel more specific answers to interrogatories and request for production of documents shall be denied in part and granted in part.

An appropriate Order follows.

ORDER

EDWIN E. NAYTHONS

UNITED STATES MAGISTRATE

NOW, this 28th day of August, 1989, after the holding of a discovery conference with counsel for the parties, on Monday August 28th, 1989, regarding plaintiff's motion to compel discovery, it is hereby ORDERED that:

(1) Defendants must provide full, and unevasive answers to Interrogatory nos. 4, 10, 12, 15, 19, 20, 21, 24, 26, 27, 29-32, 34, 35, and 39.

(2) Plaintiff's motion to compel an answer to interrogatory no. 3 is GRANTED in part and defendants shall provide plaintiff with the names and addresses of the Drexel employees who have knowledge of the facts of the case.

(3) Plaintiff's motion with respect to interrogatory nos. 16, 33, 36, 37, 38, and 40 is DENIED.

(4) Plaintiff's request for production of documents is DENIED without prejudice.

(5) Plaintiff's request for sanctions pursuant to Fed.R.Civ.P. 37 is DENIED.



SERVICE LIQUOR DISTRIBUTORS, Inc., Plaintiff, v. CALVERTDISTILLERS CORPORATION, Seagram Distillers Corporation, Calvert Distilling Company, Joseph E. Seagram and Sons, Inc., Ramapo Wine & Liquor Corporation, Charles Merinoff, Tubie Resnick, Victor A. Fischel, Harry Levinthal, Samuel Greenstein and Moe Sheinig, Defendants  
Civ. 72-94.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

16 F.R.D. 344; 1954 U.S. Dist. LEXIS 4116; 1954 Trade Cas.(CCH) P67,885

November 5, 1954

CORE TERMS: good cause, lawsuit, notice of motion, wholesale, Rules of Civil Procedure, distributor, competitor, custody, causes of action, distilled, relevant evidence, evidence relating, moving party, income tax, liquor, incorporation, particularity, deposition, inspection, retailers, appoint, ledgers, plant

COUNSEL: [\*\*1]

Lord, Day & Lord, New York City, for plaintiff.

Van Buren, Schreiber & Kaplan, New York City, for defendants Moe Sheinig and Charles Merinoff.

White & Case, New York City, for defendants Calvert Distillers Corp., Seagram Distillers Corp., Calvert Distilling Co., Joseph E. Seagram and Sons, Inc., Tubie Resnick and Victor A. Fischel.

Lexow & Jenkins, Suffern, N. Y., for defendants Ramapo Wine & Liquor Corp. and Samuel Greenstein.

M. Leonard Shapero, Syracuse, N. Y., for defendant Harry Levinthal.

OPINION BY: DAWSON

OPINION: [\*345]

The issue in this matter is whether the plaintiff has shown 'good cause' under Rule 34 of the Federal Rules of [\*346] Civil Procedure, 28 U.S.C.A. for an order to compel defendants Ramapo Wine & Liquor Corporation and Samuel Greenstein to produce and permit plaintiff to inspect and copy certain documents.

This is a triple damage action under the Clayton and Sherman Acts, 15 U.S.C.A. §§ 1-7, 15 note, 12 et seq., which alleges, in substance, that the defendants conspired to destroy plaintiff's business because plaintiff refused to become a party to a conspiracy to fix wholesale prices and eliminate competition in the sale of

distilled liquors [\*\*2] at wholesale in New York. There are four causes of action. The first cause of action is against all of the defendants. The other three causes of action are against defendant Calvert only.

Plaintiff alleges:

(1) That in or about March, 1949, plaintiff reduced the price at which it sold to retailers distilled spirits manufactured by Calvert, and that defendants threatened plaintiff with destruction of its business if it continued selling at a discount;

(2) In June, 1949, Calvert falsely promised that it would appoint plaintiff its exclusive distributor of distilled products manufactured by Calvert in the Albany-Hudson Valley area as soon as plaintiff established a distributing plant at Poughkeepsie; that plaintiff established such plant but Calvert continued to refuse to appoint plaintiff its distributor or to sell it its products, and instead, appointed Ramapo its exclusive distributor and agent in that market;

(3) That the acts of Calvert were done with intent to ruin the business of plaintiff and were taken at the request and in combination with the other defendants, including Ramapo and Greenstein.

Plaintiff has now served a notice of motion for the production of 'all documents' [\*\*3] in the possession, custody, or control of Ramapo or Greenstein relating 'directly or indirectly' to 24 items. The final item in the notice of motion would require production of 'all documents in the possession, custody, or control of defendants Ramapo and Samuel Greenstein that are relevant or material to the issues in this action.'

AR 013896

Rule 34 of the Rules of Civil Procedure provides that a court may order a party to produce and permit the inspection and copying of designated documents, books, and papers 'upon motion of any party showing good cause therefor'. The documents to be produced must, under the language of the Rule, 'constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)'. The question which is here presented is whether the moving party has shown 'good cause' for the production of the voluminous papers sought by it, and has described the items with sufficient particularity.

Although the Rules of Civil Procedure are to be liberally construed, it was never intended to so revolutionize the practice as to allow 'fishing excursions'. *Thomas French & Sons v. Carleton Venetian Blind Co.*, D.C.E.D.N.Y. 1939, 30[\*\*4] F.Supp. 903. If the Rule were construed as conferring a right upon a litigant to demand an inspection of documents which might be immaterial to the issues of the lawsuit, it would probably be an invalid Rule. See *United States v. Aluminum Co. of America*, D.C.S.D.N.Y. 1939, 26 F.Supp. 711. It is undoubtedly in the light of these facts that Rule 34 'is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents.' See *Hickman v. Taylor*, 329 U.S. 495, at page 512, 67 S.Ct. 385, at page 394, 91 L.Ed. 451. The moving party must set forth in his affidavit the facts which will show that each of the classes of items sought by him is relevant to some issue in the action. See Form 24, Appendix of Forms to the Rules of Civil Procedure.

'Good cause' depends, of course, upon the nature of the case, the nature of the items requested, and the [\*347] reasons given for showing that a demand for the production of the documents is proper. A showing of 'good cause' requires considerably more than a conclusory statement that a plaintiff may possibly be able to get some relevant evidence or some leads to relevant evidence[\*\*5] from the documents. Moore's 'Federal Practice', 2d Ed., Vol. 4, p. 2451.

In the instant case, plaintiff and defendant Ramapo are competitors. A court must be particularly alert to prevent the liberal Federal procedure from being used for purposes other than those intended by the framers of the Rules. The plaintiff apparently has had an extensive examination of the parties to the action. It has been stated in the answering affidavit that the testimony taken on oral deposition runs to over 2,500 pages and that over 80 exhibits were marked for identification.

It is in the light of these facts that we must consider the documents, the production of which is demanded in

the notice of motion. The plaintiff seeks, for example, 'the stock record books of Ramapo from the time of its incorporation through the year 1950'. It seeks the minutes of all meetings of the Board of Directors and of Executive Committee and other committees of Ramapo from the time of its incorporation through the year 1950. It seeks the financial records of Ramapo, including 'income statements, balance sheets, Federal income tax returns, journals, ledgers, or other books of original entry' concerning the sale[\*\*6] of spirituous liquor at wholesale to retailers in the Albany-Hudson Valley area during the period 1946 through 1951. It seeks all financial records of Ramapo, including journals, ledgers, books, income tax returns, etc. concerning the purchase of spirituous liquors from Calvert by Ramapo during the period 1946 through 1951. Certain items from those documents may be relevant, but this is no reason for giving the plaintiff a roving commission to get not merely those items but also all the details of a business that may have no relevancy to the lawsuit, but which would be delectable nuggets of information for a competitor.

To allow a plaintiff the sweeping investigation into all of the business affairs of its competitor on no more than an unsupported assertion that the plaintiff might find useful evidence in the documents would be a perversion of justice. While it may be true that, in the language of the vernacular, a party involved in a lawsuit under the present Federal Rules may be required, when entering Court, to 'put all his cards upon the table', this is no basis for assuming that he must also put all his clothes upon the table. A litigant is entitled to some privacy on matters[\*\*7] not directly relevant to the lawsuit.

Plaintiff may, by depositions or interrogatories, ascertain the existence and description of the particular documents which it believes to contain evidence relating to any of the matters within the scope of an examination permitted by Rule 26(b). In its notice of motion and affidavit, it should describe the particular types of documents which it seeks with a certain degree of particularity and show sufficient facts to justify a court in requiring their production. This has not been done in this case.

Items A(1), (4), (10), (11), and (13) are allowed. All other items are denied.

Herbert Greenstein, Vice President of Ramapo, states in an affidavit that certain documents, the production of which I have allowed, do not exist. One cannot be expected to produce that which does not exist. If any items, the production of which is ordered, do not exist, or are not in the possession, custody, or control of the defendants Ramapo and Samuel Greenstein, an affidavit

from each of them attesting to that effect shall be delivered at the time of the production of the other documents as required by the order to be entered hereon.

Settle order on two days' [\*\*8] notice.



Lawrence R. SPERBERG, Plaintiff, v. The FIRESTONE TIRE & RUBBER COMPANY et al., Defendants  
Civ. No. C72-1067

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

61 F.R.D. 80; 1973 U.S. Dist. LEXIS 13768; 18 Fed. R. Serv.2d (Callaghan) 1057

May 4, 1973

CORE TERMS: tire, testing, variation, termed, radial, designated, inspection, analyses, select, patent, interparty, infringing, suitable, assigned, devised, speed, axle, load, garments, protective order, correlation, coefficients, regression, deviations, rotation, measured, outdoor, custody, inspect, tested

JUDGES: [\*\*1]

Krupansky, District Judge.

OPINIONBY: KRUPANSKY

OPINION: [\*80] MEMORANDUM AND ORDER

KRUPANSKY, District Judge.

Lawrence R. Sperberg brought this action on October 5, 1972 against Firestone Tire and Rubber Company (hereafter termed "Firestone"), General Tire and Rubber Company (hereafter termed "General"), B.F. Goodrich Tire Company (hereafter termed "Goodrich"), Goodyear Tire and Rubber Company (hereafter termed "Goodyear"), and Uniroyal Tire Company (hereafter termed "Uniroyal"), each on behalf of itself and as representatives of others similarly situated. The complaint alleges that Sperberg is the owner of Patent No. 3,563,088 (hereafter termed '088), issued on February 16, 1971 and entitled "Nondestructive Method of Determining Tire Life." The complaint further alleges that the five representative defendants are infringing patent '088, and that there exists a class whose [\*81] members are infringing patent '088 without leave or license from plaintiff.

Sperberg has filed a motion pursuant to Rule 37, Fed.R.Civ.P. to order General, Goodrich and Goodyear to conduct an interparty test pursuant to Rule 34, Fed.R.Civ.P. The requested test is identical, or almost identical, as [\*\*2] to each party. The first paragraph of the request reads as follows (General is hereafter designated, but the request applies equally to Goodrich and Goodyear):

Plaintiff, pursuant to Rule 34 F.R.C.P., requests The General Tire & Rubber Company (hereinafter General) ". . . to test, or sample . . ." tires in accordance with the tire test set forth below; to permit the entry of plaintiff and his representatives upon the land or property of General where such testing is to be performed to observe the selection of the tires and such testing; and to produce for inspection and copying all data, information and the like accumulated in the preparation for and the carrying out of such testing.

Thereafter the requested interparty test is set out in detail, covering approximately four and one-half pages, in paragraphs consecutively numbered from 1 through 8.

In paragraph numbered 1 of the test General is to, "Select a minimum of three (3) passenger tires from a large population of like tires . . ." and then defines selection criteria. Paragraph 2 states in part that General, Goodrich and Goodyear are to, "Identify each selected tire by a number code which includes the measured[\*\*3] radial and lateral force variations." Paragraph 2 subsequently states, "Further, suitably expanded chart tracings of the force variations are to be made and keyed to the individual selected tires by the number code." Paragraph 3 states in part that General is to "Select at least one (1) tire from each radial force category as defined in paragraph (1) above for subsequent indoor

**AR 013900**



wheel endurance testing. . . ." General is to subject the tires to a standard indoor wheel durability performance test "as performed daily by General," and then is to, "Record the miles to failure, hours to failure, speed at failure, and load at failure, individually and collectively, as required at which each tire fails and in the manner conventional to General, describe the failure and locate the failure. . . ." Paragraph 4 states in part that General is to "Perform standard regression analyses using a suitable and identifiable equation for the analyses wherein the radial force variation is identified as the governing factor and the miles to failure, hours to failure, speed at failure, or load at failure as the factors being governed." Paragraph 4 concludes "Determine the correlation coefficients and the[\*\*4] standard deviations of variations."

The test then continues in paragraph 5 to state that the tests defined in paragraphs 1, 2, 3 and 4 are "to be performed at General's facilities and at General's expense, or at General's option by plaintiff at a suitable location at plaintiff's expense. If plaintiff is selected by General to perform the test and General also performs a similar test, the results of both tests and the analyses shall be made of record."

The test continues in paragraph 6 to state that General is to select at least two tires from "each radial force category as identified in paragraph (1) above, for outdoor performance testing . . ." Paragraph 6 then takes nearly an entire page to go into fairly specific detail concerning what General is to do in its outdoor performance testing. The testing is to be conducted under standard conditions of load, speed, inflation, tire rotation, and test route, "as would normally be tendered to an evaluation when twenty (20) tires are being compared, with the further proviso that one (1) tire of each radial force category" is to be assigned at any time to the front axle while the remaining tire is [\*82] assigned to the rear axle, [\*\*5] with one tire being assigned to the left side of the vehicle and the other tire to the right side of the vehicle. On the other hand, if all tires "are run on a convoy" the test procedure shall call for rotation of tires between test vehicles, but the tires may or may not be rotated through front and rear axles "at the discretion of the tester." The test further requires that the tires be inspected and measured for tread loss and weight loss. In addition the tires are to be "road tested to failure or bald. The failed or bald test tires and all data developed shall be retained for the record." Furthermore, "Suitable regression analyses shall be performed wherein the radial force variation shall be considered the governing thing. . . ." In addition "Correlation coefficients and standard deviations of variation shall be determined. . . ." Paragraph 7 then repeats paragraph 5 except that it refers to paragraph 6.

Paragraph 8 then gives an option to General with reference to the categories identified in paragraph 1, stating that the tires "may be processed by a tire uniformity optimizer machine, restricting the optimizing operation according to General's current practice, such current[\*\*6] practice shall be made of record." Paragraph 8 states that the option set forth in paragraph 8 "is in addition to the tests outlined above in paragraphs (1) through (7) and is not in replacement thereof."

Sperberg's request can be divided into two distinct parts: (1) the primary request, pursuant to the opening paragraph, and paragraphs 5 and 7, is that General, Goodrich and Goodyear are to perform various described tests; (2) alternately, pursuant to paragraphs 5 and 7, plaintiff shall perform the described tests, but only if requested to do so by the defendants.

The defendants have stated that they have no objection to a proper interparty test pursuant to Rule 34(a), with an appropriate protective order, but they contend that plaintiff's request goes beyond Rule 34 in that it compels them to carry out a test procedure devised by plaintiff, rather than to carry out their normal daily operations.

Rule 34(a), Fed.R.Civ.P., states:

Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, [\*\*7] phono-records, and other data compilations from which information can be obtained, translated, if necessary by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession, custody or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Sperberg cites *Dow Chemical Co. v. Monsanto Co.*, 256 F. Supp. 315 (S.D. Ohio 1966); *Paul v. Sinnott*, 217 F. Supp. 84 (W.D. Pa. 1963); and *Peelers Co. v. Kaakinen*, 126 U.S.P.Q. 42 (W.D. Wash. 1960). In each of these cases the Court compelled the defendant in a patent infringement case to permit the plaintiff to make a visual inspection of an alleged infringing apparatus or process on defendant's property.

There is one critical difference between the above cited[\*\*8] cases and the request of Sperberg. In each of the cited authorities the plaintiff was permitted [\*83] to enter upon the property of the defendant and make any and all necessary observations and inspections of defendant's operations; however, the defendant was not required to conduct any special testing operations devised by plaintiff.

In *Sladen v. Girtown, Inc.*, 425 F.2d 24 (7th Cir. 1970) the District Court ordered plaintiff to conduct flammability tests on garments, allegedly manufactured by defendant, which had caught fire and burned the plaintiff. On the basis of the tests the Court granted summary judgment for the defendant. The Appellate Court reversed, noting in part (p. 25):

Rule 34 gives authority for the court to have objects produced on a showing of good cause in order that the moving party may have it tested. While here plaintiffs sought to test the garments first, their failure to do so would have permitted the court to order them produced for testing by the defendant but did not justify the court's ordering of a test by the plaintiff.

Although there are numerous factual distinctions between Sladen and this case, the same principle is applicable. [\*\*9] As in Sladen, Sperberg is seeking to have the other party ordered to conduct tests devised by Sperberg. Rule 34 clearly does not justify such a procedure, thus Sperberg's primary request will be denied.

Sperberg alternatively proposes to perform the tests himself, but only if so requested by General, Goodrich and Goodyear. Sperberg is free to conduct the described tests, or any other tests, and present the results thereof at trial. The defendants possess the same right. Each party, through discovery, can demand a detailed description of the test procedures employed by the other to determine whether the test results can be discredited or distinguished. See *Congoleum Industries, Inc. v. Armstrong Cork Co.*, 319 F. Supp. 714 (E.D. Pa. 1970).

In essence, each party is free to prepare and perform tests in the manner he deems best, but he cannot compel another party to perform the same tests, and he cannot make evidentiary use of the party's refusal to perform the same tests.

The motion will be denied, without prejudice to request a proper inspection pursuant to Rule 34(a). Defendants' motion for a protective order will also be denied, it being deemed unnecessary at this time. [\*\*10]

It is so ordered.



M. PAGE TEER and JERE FREEMAN, III, Plaintiffs, v. LAWENGINEERING AND ENVIRONMENTAL SERVICES, INC., Defendant  
NO. 7:96-CV-140-BR(2)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SOUTHERN DIVISION

176 F.R.D. 206; 1997 U.S. Dist. LEXIS 14250

April 22, 1997, Decided  
April 22, 1997, Filed

DISPOSITION: [\*\*1] Defendant's Motion to Compel DENIED.

CORE TERMS: observe, contamination, inspection, discovery, subject property, designated, chemical, testing, assess

COUNSEL: For M. PAGE TEER, JERE FREEMAN, III, plaintiffs: Susan J. McDaniel, Wilmington, NC.

For M. PAGE TEER, plaintiff: Kenneth A. Shanklin, Wilmington, NC.

For LAW ENGINEERING AND ENVIRONMENTAL SERVICES, INC., defendant: I. Clark Wright, Jr., Ward & Smith, New Bern, NC.

For LAW ENGINEERING AND ENVIRONMENTAL SERVICES, INC., defendant: Donalt J. Eglinton, Ward & Smith, Wilmington, NC.

For LAW ENGINEERING AND ENVIRONMENTAL SERVICES, INC., counter-claimant: I. Clark Wright, Jr., Ward & Smith, New Bern, NC.

For LAW ENGINEERING AND ENVIRONMENTAL SERVICES, INC., counter-claimant: Donalt J. Eglinton, Ward & Smith, Wilmington, NC.

For M. PAGE TEER, JERE FREEMAN, III, counter-defendants: Susan J. McDaniel, Kenneth A. Shanklin, Wilmington, NC.

For LAW ENGINEERING AND ENVIRONMENTAL SERVICES, INC., third-party plaintiff: I. Clark Wright, Jr., Ward & Smith, New Bern, NC.

For LAW ENGINEERING AND ENVIRONMENTAL SERVICES, INC., third-party plaintiff: Donalt J. Eglinton, Ward & Smith, Wilmington, NC.

JUDGES: Alexander B. Denson, United States Magistrate Judge.

OPINIONBY: Alexander B. Denson

OPINION: [\*206] ORDER

THIS CAUSE is now before the court[\*\*2] on the Defendant's First Motion to Compel, filed January 16, 1997. Memoranda in support of and in opposition to the motion have been filed and it is ripe for ruling.

The complaint alleges that Plaintiffs purchased shares in Becker Builders Supply [\*207] Company in reliance on Defendant's environmental site assessment of the company's real property located in Castle Hayne, N. C. and that subsequent to the purchase chemical pollutants were discovered on the land that were not disclosed in Defendant's report. Plaintiffs have been directed by the North Carolina Department of Environment, Health and Natural Resources to assess the cause and extent of the contamination, eliminate its source, and implement an approved plan to neutralize or remove it.

This motion is made pursuant to Rules 34(a)(2) Fed.R.Civ.P. for an order compelling Plaintiffs to give the Defendant advance notice of any testing, assessment, or corrective actions on the subject property and to permit Defendant to attend, observe, and record what is done. Plaintiffs contend that the Defendant seeks to do more than the rule permits. The court agrees.

Rule 34(a)(2) states:

Any party may serve on any other party a request[\*\*3] . . . to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

AR 013904

The plain language of this rule would permit Defendant to gain access to the property to take soil and water samples or do other things necessary to evaluate the extent of the pollution. It does not, however, authorize Defendant's experts to observe Plaintiffs' experts as they do their work to assess the contamination or take steps to correct it. Neither of the cases cited by Defendant is authority for its position. Defendant cites *Morales v. Turman*, 59 F.R.D. 157, 158 (E.D.Tex. 1972) for the proposition that entry on land for a variety of discovery purposes under Rule 34 is not unusual. *Morales* is a District Court ruling allowing a party's experts to go inside a youth facility for a period of time to make observations relating to living conditions there. It did not allow a party to observe another's tests. In fact, that court noted that relevant matters<sup>[\*\*4]</sup> are generally discoverable ". . . unless privileged or prepared in anticipation of litigation or unless they reveal facts known and opinions held by experts." *Id.* Defendant cites *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4th Cir. 1978) for its conclusion that decisions as to whether to permit entry on land involve a balancing of the degree to which the proposed inspection will aid in the search for truth against the burdens and dangers

created by the inspection. But *Belcher* held that the District Court abused its discretion in allowing the entry under the facts of that case. Again, it is no authority for permitting a party to observe the actions taken by another party's agents or experts to test and correct the situation that gave rise to the action.

In short, Defendant seeks, under authority of Rule 34, to observe Plaintiffs' experts as they conduct tests and take steps to reduce or eliminate the alleged chemical contamination on the subject property. The things they seek to observe may well be protected from discovery by the attorney work product rule; however, it is not necessary for the court to decide this. It is quite sufficient to note that Defendants<sup>[\*\*5]</sup> have not cited one case from any court that ever has permitted such a thing.

Accordingly, the Motion to Compel IS DENIED because it exceeds any reasonable reading of Rule 34.

SO ORDERED, this the 22nd day of April, 1997.

Alexander B. Denson

United States Magistrate Judge



TOBIN v. WKRZ, Inc.  
Civ. No. 9682

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

12 F.R.D. 200; 1952 U.S. Dist. LEXIS 3615

January 31, 1952

CORE TERMS: motion to produce, custody, Fair Labor Standards Act, wage, course of business, oral argument, regulations, presumed, definite, fishing expedition, wages paid, stub

COUNSEL: [\*\*1] William S. Tyson, Sol., Washington, D.C., Ernest N. Votaw, Regional Atty., Philadelphia, Pa., for plaintiff. Kenneth E. Rennekamp, Pittsburgh, Pa., for defendant.

OPINION BY: STEWART

OPINION: [\*201]

Plaintiff brought this action to enjoin the defendant from violating various provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. The case is before the Court on plaintiff's motion to produce certain business records, pursuant to Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C. following § 723c, and on defendant's motion for a more definite statement, pursuant to Rule 12(e). At the oral argument of the motions, counsel for plaintiff stated that he was willing to give the defendant the additional information requested by defendant in the motion for a more definite statement provided his motion to produce was granted. In view of this statement by counsel for plaintiff, we shall first consider the motion to produce.

Plaintiff requests the Court to issue an order requiring the defendant to produce for inspection and copying each of the following documents:

(a) Records kept by the defendant of hours worked by defendant's employees from February 23, 1949[\*\*2] to September 29, 1951.

(b) Records kept by defendant of wages paid defendant's employees from February 23, 1949 to September 29, 1951.

(c) Check stub records of wages paid to defendant's employees from February 23, 1949 to September 29, 1951.

The only substantial objections of defendant are to the effect that some of these records are not in existence, and that this motion constitutes a mere fishing expedition by plaintiff.

In *William A. Meier Glass Co. v. Anchor Hocking Glass Corp.*, D.C.W.D.Pa.1951, 11 F.R.D. 487, 489, this Court reviewed several cases decided under Rule 34 and discussed the requirements of the Rule as set forth in the Rule itself and as developed in several cases decided thereunder. Here, we need consider only one of these requirements since it is apparent that the others are met.

The only substantial objections asserted by defendant against plaintiff's motion to produce relate to the requirement that the requested items be within the possession, custody or control of the party upon whom demand is made. Although the cases have not indicated precisely what constitutes a sufficient showing of possession, custody or control, it seems to us that any showing is [\*\*3]sufficient which, on the record, satisfies the Court that the items requested are within the possession, custody or control of the party to whom the request to produce is directed. *William A. Meier Glass Co. v. Anchor Hocking Glass Corp.*, supra. In this regard, it should also be noted that while 'fishing expeditions' may be conducted under Rules 26 to 33 by the use of depositions and interrogatories, Rule 34 was not intended for such purpose. *Stewart-Warner Corp. v. Staley*, D.C.W.D.Pa.1945, 4 F.R.D. 333. The purpose of Rule 34 is not to discover what exists but to force the production of item that do exist. *William A. Meier Glass Co. v. Anchor Hocking Glass Corp.*, supra. An order to produce may not be made until the existence of the documents is established. *Condry v. Buckeye S. S. Co.*, D.C.W.D.Pa. 1945, 4 F.R.D. 310. Records kept in [\*202] the ordinary course of business as required by various government regulations may be presumed to be in existence for the purposes of this rule and may be regarded as in defendant's possession or under its control.

AR 013907

In this case, the records requested by plaintiff are records which would be kept in the ordinary course of business. Furthermore, [\*\*4] items (a) and (b) are records which the defendant is required to keep under Federal Regulations issued pursuant to the Fair Labor Standards Act of 1938. Counsel differ in opinion with respect to the length of time that the Regulations require defendant to retain these records. However, this is unimportant here since there is no suggestion that the records have been lost or destroyed.

Counsel for plaintiff has filed an affidavit, attached to the motion, and the portion relating to the matter now under discussion is as follows:

'Ernest N. Votaw, being first duly affirmed, says:

'1. That the time and wage payment records, production of which is requested by the above motion, are records required to be kept by the defendant by Regulations Part 516, promulgated by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Fair Labor Standards

Act of 1938; that said wage payments were made by check and the defendant therefore has in its possession check stubs for such payments.'

Defendant filed no counter-affidavit, but merely stated at the oral argument that some of the records requested[\*\*5] were not in existence. The proper method to rebut the plaintiff's affidavit is to file an affidavit denying or limiting such statements. *William A. Meier Glass Co. v. Anchor Hocking Glass Corp.*, *supra*.

We are satisfied for the reasons stated that the records requested are within the possession, custody or control of defendant and that plaintiff's motion does not constitute a 'fishing expedition' to determine what records exist but is an attempt to force the production of records that do exist, or at least, may be presumed to exist. Therefore, plaintiff's motion to produce will be granted.

Since we have granted plaintiff's motion to produce, defendant's motion need not be considered since counsel for the plaintiff is willing to comply without the order of this Court.





VERSATILE METALS, INC., AND VERSATILE OXIDE, INC., v. THE UNION CORPORATION AND THE  
METAL BANK OF AMERICA, INC.  
Civil Action No. 85-4085

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1986 U.S. Dist. LEXIS 21801

August 7, 1986, Decided; August 8, 1986, Filed

CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff property purchasers filed a motion to compel defendant property sellers and the bank to comply with the property purchasers' request under Fed. R. Civ. P. 34(b) for the taking of soil samples from the property at issue.

**OVERVIEW:** The property purchasers filed an action alleging that the property they intended to purchase from defendants was contaminated with hazardous waste before the property purchasers took possession. Defendants filed a counterclaim alleging breach of the lease purchase agreement and alleging that the property purchasers were responsible for the contamination. The property purchasers filed a motion to compel defendants to allow the property purchasers to take soil samples from the subject property. The court granted the property purchasers' motion. The court held that the property purchasers' request was directly relevant to the litigation and was permissible under the broad scope of discovery defined under Fed. R. Civ. P. 26(b). The court ordered that precautions needed to be taken when the sampling was conducted to preclude release of the underground hazardous material into the environment, including notice to the appropriate federal, state, and local environmental agencies.

**OUTCOME:** The court granted the property purchasers' motion to compel defendants to comply with the property purchasers' entry upon the land for inspection and sampling. The court ordered that defendants and the federal, state, and local environmental agencies needed to be provided with notice of the testing. The property purchasers' motion for counsel fees, costs, and expenses arising from the motion was denied.

**CORE TERMS:** drilling, testing, discovery, cattle, subject property, contamination, inspection, counterclaim, consultant, sampling, soil, photographing, designated, aluminum, raisers, plant, urine, dead, Federal Rules of Civil Procedure, particular case, required to pay, period of time, written notice, environmental, contaminated, consulting, precautions, spreading, indemnify, site

**CORE CONCEPTS -**

**Civil Procedure: Discovery Methods: Requests for Production & Inspection**

Fed. R. Civ. P. 34 provides, inter alia that: any party may serve on any other party a request to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Fed. R. Civ. P. 26(b).

**Civil Procedure: Disclosure & Discovery: Relevance**

**Civil Procedure: Discovery Methods: Requests for Production & Inspection**

Fed. R. Civ. P. 34 is designed to permit the broadest sweep of access. The scope of discovery under Rule 34 is defined in Fed. R. Civ. P. 26(b). Discovery is not limited to matters that would be admissible at trial. Generally, matters are discoverable if relevant to the subject matter involved unless privileged or prepared in anticipation of litigation, or unless they reveal facts known and opinions held by experts, or unless such discovery would cause undue annoyance, embarrassment, oppression or expense. Entry upon land for a variety of discovery purposes under Fed. R. Civ. P. 34 is not unusual.

**AR 013910**

COUNSEL: [\*1]

Thomas W. Murrell, III, Esq., Phila., PA, Michael W. Ford, Esq., Chicago, IL, Attorneys for Plaintiffs

THE UNION CORPORATION & THE METAL BANK OF AMERICA, INC., by: John Mattioni, Esq., Phila., PA, Attorneys for Defendants

OPINIONBY: NAYTHONS

OPINION: MEMORANDUM AND ORDER

EDWIN E. NAYTHONS, UNITED STATES MAGISTRATE

The plaintiffs have moved to compel defendants to comply with plaintiffs' Rule 34(b) request to take soil samples located at 6401 State Road in Philadelphia.

The present lawsuit arises from claims made by the plaintiffs against defendants after substantial levels of PCB contamination were found at the subject property approximately five months after plaintiffs' obtained possession of the property from the defendants. Among other things, plaintiffs allege that defendants had contaminated the property prior to the time defendants delivered possession to plaintiffs and that defendants knew or should have known of the contamination prior to the transaction. Defendants are denying these allegations and contend that contamination occurred during the period of time that plaintiffs were in possession of the property and that plaintiffs should be held liable for breach of a Lease/Purchase [\*2] Agreement of the subject property and to indemnify defendants for costs of their purported clean-up of the PCB contamination.

Count III of the counterclaim seeks in excess of One Million Six Hundred Thousand Dollars in damages based on allegations that plaintiffs breached the Lease/Purchase Agreement by terminating the agreement and failing to pay rent. Count V of the counterclaim seeks contribution and indemnification for response or remedial costs allegedly required of defendants as a consequence of releases or threats of releases of PCBs and other hazardous substances from the premises.

On April 22, 1986, plaintiffs served defendants with plaintiffs' request to enter upon land for inspection and other purposes. Plaintiffs requested the taking of soil samples at the subject property including an area specifically set forth in the Request. Since the Request was served, discovery has disclosed other areas of the subject property that may still be contaminated.

DISCUSSION

Rule 34 of the Federal Rules of Civil Procedure provides, inter alia that:

Any party may serve on any other party a request . . . to permit entry upon designated land or other property in the possession[\*3] or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

This rule is designed to permit "the broadest sweep of access." Wright & Miller, Federal Practice and Procedure § 2206 at 607 (1970). As the portion of the rule quoted above indicates, the scope of discovery is defined in Rule 26(b). Thus discovery is not limited to matters that would be admissible at trial. Generally, matters are discoverable if relevant to the subject matter involved unless privileged or prepared in anticipation of litigation, or unless they reveal facts known and opinions held by experts, or unless such discovery would cause undue annoyance, embarrassment, oppression or expense. Although counsel for both sides are presumably unaware of any precedent for this request, entry upon land for a variety of discovery purposes under Rule 34 is not unusual. See the collection of cases in Wright & Miller, supra, at 610-12. In *Martin v. Reynolds Metals Corp.*, 297 F.2d 49 (9th Cir. 1961) the Court in affirming the court order of[\*4] the district court found that the Federal Rules of Civil Procedure pertaining to discovery in production of documents and things for inspection, copying or photographing, authorized the district court to permit an aluminum plant operator, who feared action by cattle raisers based on alleged damage to cattle from fluorides discharged from the aluminum plant, to examine, confine, photograph raisers' cattle, take urine samples from them and make post mortems on dead cattle. At 57 the court succinctly stated:

What we have said also disposes of the claim that the court could not permit examining, confining or photographing the cattle, or taking urine samples from them. The order specifically requires that Reynolds compensate appellants for any damage done. If the physical examination of a party properly includes taking a blood sample . . . physical inspection of cattle includes the making of such tests, and the taking of such samples from them, as the particular case may require. This also applies to post-mortems on dead cattle.

As can be seen, the variety of factual situations that may come before the courts approaches the infinite, as does the variety of things that may be evidence[\*5] in a case. Of necessity, then, there must be a wide discretion lodged in the trial judge in making orders such as that

now before me. *Benning v. Phelps*, 249 F.2d 47 (2nd Cir. 1957); *Mosseller v. United States*, 158 F.2d 380, 382 (2nd Cir. 1946).

Moreover, it is clear that plaintiffs' request to take soil samples is directly relevant to defendants' counterclaim seeking recovery of rentals for the remaining term of the lease purchase agreement between the parties. If there is substantial contamination by PCBs at the property which would preclude, or interfere with the continued use of the property by plaintiffs, that fact would bear directly upon the liability and damage issues raised by that counterclaim. If pervasive contamination of the subject property precludes its use in the manner contemplated by the Lease/Purchase Agreement, and defendants were unable to establish that such contamination was caused by the plaintiffs, that fact would obviously support plaintiffs' defense with respect to that counterclaim.

There is, however, one disturbing aspect to this motion. Defendants contend that plaintiffs' request is burdensome because of the potential for releasing PCBs into the[\*6] environment during the drilling and sampling activities. Plaintiffs indicate that they are willing to employ reasonable safety precautions to prevent any such discharge. Dr. Kleppinger, defendants' consultant expert, has submitted an affidavit which substantiates that absent rigorous safeguards, if PCBs are in fact present below the surface, it is likely that PCBs will be released into the environment from the drilling and sampling activities and their spreading over the site and exposure to persons in contradiction of the aforementioned purpose of capping the site in the first place. This potential for release and spreading of PCBs into the environment and the accompanying endangerment to the public health in the environment could, according to the defendant, far outweigh any minimal discovery value that the sampling may have. Plaintiffs must give consideration to this eventuality and consequently this Court will make adequate provision for safety precautions. The Court will thus order that before any testing or drilling occurs that plaintiffs give adequate and proper notice to following three public agencies: The U. S. Environmental Protection Agency, The Pennsylvania Department[\*7] of Environmental Resources and the City of Philadelphia. Should these agencies desire to monitor the entire drilling operation and tests to be made, they should be afforded that opportunity. Likewise, Dr. Kleppinger or any other expert that defendants choose to be present will be given the opportunity to observe and make certain that plaintiffs do not exceed the scope of their motion. It should be noted however, that the costs and expenses relating to Dr. Kleppinger's presence during the taking of soil samples clearly falls within the defendants' agreement to indemnify and hold plaintiffs harmless from any and all costs, damages, liabilities and expenses

resulting from hazardous waste that might exist in the subject property. Additionally, since defendants intend to use Dr. Kleppinger as an expert witness in the case defendant should be required to pay his fees and expenses just as plaintiffs will be required to pay the fees and expenses of their consulting experts.

This request for discovery is perhaps extraordinary; yet this is an extraordinary case. When important rights affecting not only the property rights of the plaintiff but environmental rights of the public in this district[\*8] are affected in complex litigation of widespread concern, a court must make every effort to enhance the fact-finding process available to counsel for both sides. This Court's discretion must be guided by considerations of policy and of necessity, propriety and expediency in the particular case at hand.

Accordingly, the Court enters the following Order.

ORDER - August 8, 1986

NOW, this 8th day of August, 1986, it is hereby ORDERED that:

1. Plaintiffs' Motion to Compel Defendants to Comply with Plaintiffs' Request for Entry Upon Land for Inspection and Other Purposes is hereby GRANTED subject to the following conditions.
2. That the defendants must be provided written notice of the date and time for initiation of the testings and drillings at least five (5) days prior to the first day of testing.
3. Prior to plaintiffs or their designees entering upon the land, plaintiffs shall give written notice with an affidavit of service to the U. S. Environmental Protection - Agency as well as the Department of Environmental Resources for the Commonwealth of Pennsylvania and the City of Philadelphia with adequate notice to the Office of the City Solicitor.
4. That the testings, samples[\*9] or drillings shall be conducted for a consecutive period of time not to exceed thirty (30) days and that the testings shall be completed within sixty (60) days from the date of this Order.
5. That Dr. Kleppinger, defendants' consultant and any experts from the three environmental agencies designated heretofore and attorneys for plaintiffs and defendants shall be permitted to visit the subject property during the period of the testings of the samples and drillings for the purpose of consulting with the participants in the study.

6. That the participants in the testings of the samples and drillings including all experts and consultants and plaintiffs' attorneys must not disclose outside any proceeding before this Court in the above entitled and numbered civil action the observable data or conclusions based thereon gained from the studies pending further Order of this Court.

7. That throughout the course of the participants' study, testings and drillings, the participants must conduct themselves in such a manner as to disrupt as little as possible the programs of the facilities at 6801 State Road, Philadelphia, and must comply with all reasonable

safety precautions recommended by defendants[\*10] and/or their experts or consultants.

8. That defendants must make every effort consistent with the goals of the inspections and studies to assure the physical safety of the participants at all times and that the costs arising from all testings of samples, drillings and from all studies made, must be borne by the plaintiffs.

9. Plaintiffs' motion for counsel fees, costs and expenses is hereby DENIED. Each party shall bear its own costs in arising from the motions and responses filed in the instant matter.



SUPREME COURT OF WASHINGTON

122 Wn.2d 299; 858 P.2d 1054; 1993 Wash. LEXIS 241; CCHProd. Liab. Rep. P13,675

September 16, 1993, Decided  
September 16, 1993, Filed

**PRIOR HISTORY:** [\*\*\*1]

Superior Court: The Superior Court for Snohomish County, No. 86-2-06254-6, Stuart C. French, J., on August 31, 1990, entered a judgment, including attorney fees, on a verdict in favor of the physician on its product liability and Consumer Protection Act claims. The jury found in favor of the drug company on the plaintiffs' fraud claims. The trial court reduced the damages awarded for loss of professional consultations and denied the physician's motion for sanctions for discovery rule violations.

**DISPOSITION:** Holding that the physician had standing to bring the Consumer Protection Act claim; that there was sufficient evidence of the elements of that claim; that the trial court did not err in excluding testimony of a representative of the drug company, denying a motion for a new trial, and calculating the attorney fee award under the Consumer Protection Act; that the physician's claims were not preempted by guidelines of the Federal Food and Drug Administration; and that the damage award was within the range of the evidence except for the damages awarded for loss of professional consultations, for which no damages were recoverable; but that the physician had no right to recover for his own [\*\*\*2] pain and suffering under either the Consumer Protection Act or product liability claims; that the physician had no independent right of action for negligence; that the insurer had no right of action under the Consumer Protection Act; and that the trial court abused its discretion in not sanctioning the drug company and/or its attorneys for discovery abuse, the court affirms the judgment except for the denial of sanctions for discovery abuse and the damages awarded for loss of professional consultations and the physician's pain and suffering, which are reversed, and remands the case for imposition of sanctions for discovery abuse and determination of attorney fees on appeal.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant sought review of the judgment of the Superior Court for Snohomish County (Washington), awarding respondents damages plus attorney fees under Wash. Rev. Code § 19.86 and § 7.72, but not on other claims; and respondents' appealed denial of their motion for sanctions against appellant for discovery violations.

**OVERVIEW:** Respondent alleged that his reputation was tarnished when a drug he properly prescribed left a 2-year-old girl brain-damaged. Appellant raised several issues concerning the damage award. The court held that respondent had standing to bring the Consumer Protection Act claim, and there was sufficient evidence of the elements of that claim; that the trial court did not err in calculating the attorney fee award; that the physician's claims were not preempted by guidelines of the Federal Food and Drug Administration. However, the court found that respondent had no right to recover for his own pain and suffering under either the Consumer Protection Act or product liability claims; that respondent physician had no independent right of action for negligence; that respondent insurer had no right of action under the Consumer Protection Act; and that the trial court abused its discretion in not sanctioning appellant and its attorneys for discovery abuse.

**OUTCOME:** The judgment of the court was affirmed on respondents' product liability and consumer protection claims; reversed concerning award of damages for loss of professional consultation and pain and suffering; and remanded to the trial court for imposition of sanctions for the discovery violations.

**CORE TERMS:** discovery, theophylline, Consumer Protection Act, doctor, claimant, product liability, patient, pain and suffering, manufacturer, cause of action, state law, warning, reputation, habit, settlement, interrogatory, regulation, compensable, smoking, gun, discovery abuse, consumer protection, proximate cause, recoverable, lodestar, italics, toxicity, preempt, failure to warn, consumer

## CORE CONCEPTS -

Antitrust & Trade Law: Consumer Protection: Deceptive Sales Practices

Antitrust & Trade Law: Private Actions: Standing  
Under the Consumer Protection Act, Wash. Rev. Code § 19.86, a physician whose reputation is injured has standing to sue a drug company, which engaged in an unfair or deceptive trade practice by failing to warn the physician of the dangers of its drug about which it had knowledge.

Antitrust & Trade Law: Unfair Competition

Antitrust & Trade Law: Consumer Protection: Deceptive Sales Practices  
See Wash. Rev. Code § 19.86.020.

Antitrust & Trade Law: Private Actions: Standing

Antitrust & Trade Law: Private Actions: Costs & Attorney Fees  
See Wash. Rev. Code § 19.86.090.

Antitrust & Trade Law: Unfair Competition

Antitrust & Trade Law: Consumer Protection: Deceptive Sales Practices

The elements of a private consumer protection act claim are: (1) an unfair or deceptive act or practice; (2) which occurs in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) which injury is causally linked to the unfair or deceptive act.

Torts: Causation: Proximate Cause

With regard to the causation element of the consumer protection act, a causal link must exist between the deceptive act and the injury suffered.

Civil Procedure: Trials: Factual Findings by the Court

The existence of factual causation is a question for the jury.

Antitrust & Trade Law: Private Actions: Injury & Damages

Damage to business reputation and loss of goodwill are compensable damages under the Consumer Protection Act, Wash. Rev. Code § 19.86.

Antitrust & Trade Law: Private Actions: Injury & Damages

Personal injuries are not compensable damages under the Consumer Protection Act, Wash. Rev. Code § 19.86.

Antitrust & Trade Law: Private Actions: Injury & Damages

Mental and consequential physical pain and suffering damages are not compensable under the Consumer Protection Act, Wash. Rev. Code § 19.86.

Antitrust & Trade Law: Private Actions: Injury & Damages

Torts: Damages: Pain & Suffering

Torts: Damages: Compensatory Damages

A physician may be able to recover pecuniary damages for damages to reputation; however, the physician's emotional pain and suffering are not recoverable under either the Consumer Protection Act, Wash. Rev. Code § 19.86 or the Product Liability Act, § 7.72.

Torts: Products Liability: Negligence

The Product Liability Act, Wash. Rev. Code § 7.72 preempts traditional common law remedies for product-related harms. A claim previously based on negligence is within the definition of a product liability claim.

Civil Procedure: Relief From Judgment: Discharge, Release & Satisfaction

See Wash. Rev. Code § 4.22.060(2).

Evidence: Relevance: Routine Practices

Determination of admissibility of habit evidence is within the trial court's discretion.

Governments: Legislation: Construction & Interpretation

Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.

Evidence: Procedural Considerations: Burdens of Proof, Presumptions & Inferences

Governments: Legislation: Construction & Interpretation  
There is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption. The presumption against preemption is even stronger with state regulation regarding matters of health and safety. State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.

Governments: Legislation: Construction & Interpretation

Federal Food & Drug Administration regulations do not have a preemptive effect on state laws.

Civil Procedure: Appeals: Standards of Review:

Substantial Evidence Rule

Civil Procedure: Jury Trials: Province of Court & Jury



The determination of the amount of damages is primarily and peculiarly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made.

Civil Procedure: Appeals: Standards of Review: Substantial Evidence Rule

An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.

Torts: Business & Employment Torts: Interference With Prospective Advantage

Damages for loss of professional reputation are not the type of damages that can be proved with mathematical certainty and are usually best left as a question of fact for the jury.

Civil Procedure: Jury Trials: Jury Instructions

Civil Procedure: Appeals: Reviewability: Preservation for Review

Even when portions of closing argument are improper or inaccurate, failure to make contemporaneous objections usually waives any error unless the argument was so flagrant and prejudicial as not to be subject to a curative instruction. This is especially true when the trial court instructs the jury that arguments are not evidence and that argument not supported by evidence is to be disregarded.

Civil Procedure: Costs & Attorney Fees: Attorney Fees  
Attorneys' fees available to a successful Consumer Protection Act plaintiff under Wash. Rev. Code § 19.86.090 are calculated as follows: (1) establishing a "lodestar" fee by multiplying a reasonable hourly rate by the number of hours reasonably expended on theories necessary to establish the elements of a Consumer Protection Act cause of action; and (2) adjusting that lodestar up or down based upon the contingent nature of success and, in exceptional circumstances, based also on the quality of work performed. The burden of justifying any deviation from the lodestar rests on the party proposing such an alteration.

Civil Procedure: Costs & Attorney Fees: Attorney Fees  
Attorneys seeking fees must provide reasonable documentation of work performed to calculate the number of hours and when attorneys have "an established rate for billing clients", that rate will likely be considered as reasonable.

Civil Procedure: Costs & Attorney Fees: Attorney Fees

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

A trial court's fee award will not be overturned absent an abuse of discretion.

Civil Procedure: Costs & Attorney Fees: Attorney Fees

Whether attorneys' fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys' fees.

Civil Procedure: Costs & Attorney Fees: Attorney Fees

Quality can be a valid enhancer when the representation is unusually good, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the "lodestar."

Civil Procedure: Costs & Attorney Fees: Attorney Fees

The court seldom sanctions a multiplier for "quality" because quality of a lawyer's work is usually reflected in the establishment of the lawyer's hourly rate.

Antitrust & Trade Law: Private Actions: Costs & Attorney Fees

Civil Procedure: Costs & Attorney Fees: Attorney Fees  
Attorneys' fees on appeal are recoverable under the Consumer Protection Act, Wash. Rev. Code § 19.86.

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

The proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard.

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds, or if it based its ruling on an erroneous view of the law.

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

See Wash. R. Civ. P. 26(g).

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

Civil Procedure: Sanctions: Discovery Misconduct  
Wash. R. Civ. P. 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case,

the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

Civil Procedure: Disclosure & Discovery: Mandatory Disclosure

Civil Procedure: Sanctions: Discovery Misconduct  
Whether an attorney has made a reasonable inquiry for the purposes of Wash. R. Civ. P. 26(g) is to be judged by an objective standard. Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules.

Civil Procedure: Sanctions: Discovery Misconduct  
In determining whether an attorney has complied with Wash. R. Civ. P. 26(g), the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request.

Civil Procedure: Sanctions: Discovery Misconduct  
Legal Ethics: Sanctions: Determinations  
Legal Ethics: Sanctions: Disciplinary Proceedings:  
Appeals

Legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony. It is the responsibility of the court deciding a sanction motion to interpret and apply the law.

Civil Procedure: Sanctions: Discovery Misconduct  
Fair and reasoned resistance to discovery is not sanctionable.

Civil Procedure: Sanctions: Discovery Misconduct  
In determining what sanctions are appropriate, the trial court is given wide latitude. However certain principles guide the trial court's consideration of sanctions. First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

COUNSEL: Bogle & Gates, Ronald E. McKinstry, Ronald T. Schaps, Guy P. Michelson, Kevin C. Baumgardner, Karen McGaffey, and William Helsell, for appellant.

Williams, Kastner & Gibbs, by Mary H. Spillane and Margaret A. Sundberg; Carney Badley Smith &

Spellman, P.S., by James E. Lobsenz and Stephen A. Saltzburg, for respondents.

Laurie Kohli, Constance Gould, and Russell C. Love on behalf of Washington Defense Trial Lawyers, amicus curiae.

Halleck H. Hodgins, Mary Ellen Gaffney-Brown, Gary N. Bloom, and Bryan P. Harnetiaux on behalf of Washington State Trial Lawyers Association, amicus curiae for respondents.

JUDGES: En Banc. Andersen, C.J. Dolliver, Smith, and Guy, JJ., concur. Brachtenbach, Utter, and Johnson, JJ., dissent in part by separate opinion; Durham and Madsen, JJ., did not participate in the disposition of this case.

OPINIONBY: ANDERSEN

OPINION: [\*306] [\*\*1058] Facts of Case

We are asked in this case to decide whether a physician has a cause of action against a drug company for personal and professional injuries which he suffered when his patient had an adverse reaction to a drug he had prescribed. The physician claimed the drug[\*\*\*15] company failed to warn him of the risks associated with the drug. If such action is legally [\*307] cognizable, we are then asked to determine whether damages awarded by the jury were excessive and whether attorneys' fees were properly awarded by the trial court. We are also asked to rule that the trial court erred in denying sanctions against the drug company for certain abuses in the discovery process.

The physician's action began as part of a malpractice and product liability suit brought on behalf of a child who was the physician's patient. On January 18, 1986, 2-year-old Jennifer Pollock suffered seizures which resulted in severe and permanent brain damage. It was determined that the seizures were caused by an excessive amount of theophylline in her system. The Pollocks sued Dr. James Klicpera (Jennifer's pediatrician), who had prescribed the drug, as well as Fisons Corporation (the drug manufacturer and hereafter drug company) which produced Somophyllin Oral Liquid, the theophylline-based medication prescribed for Jennifer.

Dr. Klicpera cross-claimed against the drug company both for contribution and for damages and attorneys' fees under the Consumer Protection Act [\*\*\*16] as well as for damages for emotional distress.

In January 1989, after nearly 3 years of discovery, Dr. Klicpera, his partner and the Everett Clinic settled with the Pollocks. The settlement agreement essentially

**AR 013918**

provided that the doctors' insurer, Washington State Physicians Insurance Exchange & Association (WSPIE), would loan \$500,000 to the Pollocks which would be contributed in the event of a settlement between the Pollocks and the drug company. The Pollocks were guaranteed a minimum total recovery of \$1 million, and in the event of trial Dr. Klicpera agreed to remain as a party and to pay a maximum of \$1 million. The settlement between the Pollocks and Dr. Klicpera was determined by the trial court to be reasonable pursuant to RCW 4.22.060.

More than 1 year after this settlement, an attorney for the Pollocks provided Dr. Klicpera's attorney a copy of a letter received from an anonymous source. The letter, dated [\*308] June 30, 1981, indicated that the drug company was aware in 1981 of "life-threatening theophylline toxicity "in children who received the drug while suffering from viral infections. The letter was sent from the drug company to only a small number of what[\*\*\*17] the company considered influential physicians. The letter stated that physicians needed to understand that theophylline can be a "capricious drug".

The Pollocks and Dr. Klicpera contended that their discovery requests should have produced the June 1981 letter and they moved for sanctions against the drug company. The request for sanctions was initially heard by a special discovery master, who denied sanctions, but who required the [\*\*1059] drug company to deliver all documents requested which related to theophylline. Documents that the drug company and its counsel had immediately available were to be produced by the day following the hearing before the special master. The remainder of the documents were to be produced within 2 weeks. The trial court subsequently denied Dr. Klicpera's request to reverse the discovery master's denial of sanctions and at the close of trial denied a renewed motion for sanctions.

The day after the hearing on sanctions, the drug company delivered approximately 10,000 documents to Dr. Klicpera's and Pollocks' attorneys. Among the documents provided was a July 10, 1985 memorandum from Cedric Grigg, director of medical communications for the drug company, to[\*\*\*18] Bruce Simpson, vice president of sales and marketing for the company.

This 1985 memorandum referred to a dramatic increase in reports of serious toxicity to theophylline in early 1985 and also referred to the current recommended dosage as a significant "mistake" or "poor clinical judgment". The memo alluded to the "sinister aspect" that the physician who was the "pope" of theophylline dosage recommendation was a consultant to the pharmaceutical company that was the leading

manufacturer of the drug and that this consultant was "heavily into [that company's] stocks". The memo also noted that the toxicity reports were not reported in the journal [\*309] read by those who most often prescribed the drug and concluded that those physicians may not be aware of the "alarming increase in adverse reactions such as seizures, permanent brain damage and death". The memo concluded that the "epidemic of theophylline toxicity provides strong justification for our corporate decision to cease promotional activities with our theophylline line of products." The record at trial showed that the drug company continued to promote and sell theophylline after the date of this memo.

On April 27, 1990, [\*\*\*19] shortly after the 1985 memo was revealed, the drug company settled with the Pollocks for \$6.9 million. The trial court determined that settlement to be reasonable, dismissed the Pollocks' claims, extinguished Dr. Klicpera's contribution/indemnity claims against Fisons pursuant to RCW 4.22.060 and reserved determination of what claims remained for trial. The trial court then ordered the lawsuit recaptioned, essentially as Dr. James Klicpera, plaintiff v. Fisons Corporation, defendant.

After a month-long jury trial, the court instructed the jury on Dr. Klicpera's claims which were based on the Consumer Protection Act, RCW 19.86, the product liability act, RCW 7.72, and common law fraud. The jury was also instructed on WSPIE's fraud claim seeking to recover the \$500,000 paid in settlement to the Pollocks. The trial court ruled that WSPIE could not maintain a Consumer Protection Act cause of action against the drug company.

On a special verdict form, the jury concluded that Dr. Klicpera was entitled to recover against the drug company under his Consumer Protection Act claim and under his product liability claim, but not under the fraud claim. The jury awarded Dr. Klicpera \$150,000[\*\*\*20] for loss of professional consultations, \$1,085,000 for injury to professional reputation, and \$2,137,500 for physical and mental pain and suffering. The jury further found Dr. Klicpera to be 3.3 percent contributorily negligent. The jury found that WSPIE was not entitled to recover under its fraud claim against the drug company the \$500,000 settlement paid to the Pollocks.

[\*310] The trial court denied the drug company's motion for judgment n.o.v. and for a new trial. On a motion for reduction of the jury award, the trial court reduced the amount awarded for loss of professional consultations from \$150,000 to \$2,250 but refused to reduce the awards for loss of reputation and for pain and suffering. The trial court also denied WSPIE's motion for

judgment n.o.v. or a new trial based on the dismissal of WSPIE's Consumer Protection Act claim.

The trial court awarded \$449,568.18 to Dr. Klicpera as attorneys' fees under the Consumer Protection Act finding that 50 percent of the attorneys' time in the lawsuit [\*\*1060] was attributable to the Consumer Protection Act cause of action. The court denied Dr. Klicpera's request for further attorneys' fees based upon a theory of equitable[\*\*\*21] indemnification.

Pursuant to the injunctive relief section of the Consumer Protection Act, the court ordered the drug company to send the June 30, 1981 letter regarding the dangers of theophylline poisoning to the Washington State Medical Association.

The drug company sought direct review by this court and we accepted review. Dr. Klicpera and his insurer (WSPIE) cross-appeal from the trial court's refusal to award discovery sanctions for the alleged discovery violations. WSPIE also appeals the trial court's dismissal of its Consumer Protection Act claim against the drug company.

The parties' 63 assignments of error raise 9 principal issues.

#### Issues

Issue One. Under the Consumer Protection Act, RCW 19.86, does a physician whose reputation is injured because the physician misprescribed a medication have standing to sue a drug company which engaged in unfair or deceptive trade practices?

Issue Two. Does a physician who prescribes a drug which injures a patient have a cause of action to recover from a drug company for the physician's own mental pain and suffering, and attendant physical pain, under the product liability act (RCW 7.72), based on the company's failure to warn? [\*\*\*22]

[\*311] Issue Three. If the facts of this case fail to support a product liability claim, should this physician be allowed to bring a common law negligence cause of action based on the drug company's failure to warn about the risks of the drug?

Issue Four. Did the trial court err in refusing to allow the physician's insurer's Consumer Protection Act claim to go to the jury?

Issue Five. Did the trial court err in excluding the testimony of the drug company's sales representative based upon Rule of Evidence 406?

Issue Six. Were the physician's state law claims preempted by federal law?

Issue Seven. Should the trial court have granted a new trial or reduced the jury award based on the argument that the damages awarded were excessive?

Issue Eight. Did the trial court err in calculating the amount of attorneys' fees awarded for the Consumer Protection Act claim?

Issue Nine. Did the trial court err in refusing to sanction the drug company and its attorneys for discovery abuse?

#### Decision

The general question in this case is whether damages may be awarded to a prescribing physician who is allegedly injured by a drug company's failure to give proper warning of the dangers of [\*\*\*23] a drug which the physician prescribes to a patient and, if so, under what legal theory or theories and for what kind of damages.

#### Issue One.

Conclusion. Under the Consumer Protection Act (RCW 19.86), a physician whose reputation is injured has standing to sue a drug company which engaged in an unfair or deceptive trade practice by failing to warn the physician of the dangers of its drug about which it had knowledge.

The Washington Consumer Protection Act (CPA), RCW 19.86.020, provides:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[\*312] RCW 19.86.090 creates a private right of action by providing:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action . . . to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the [\*\*1061] costs of the suit, including a reasonable attorney's fee . . .

(Italics ours.)

[1] The elements of a private CPA claim are: (1) an unfair or deceptive act or practice; (2) which occurs in trade or commerce; (3) that impacts [\*\*\*24] the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) which injury is causally linked to the unfair or deceptive act. n1

n1 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780, 719 P.2d 531 (1986); *Mason v. Mortgage Am., Inc.*, 114 Wash. 2d 842, 852, 792 P.2d 142 (1990).

[2] The drug company argues that Dr. Klicpera did not have standing to bring a CPA claim and relies upon *Bowe v. Eaton*, 17 Wash. App. 840, 846, 565 P.2d 826 (1977) for the proposition that the CPA only applies to unfair acts where there is a consumer transaction involving the sale of goods and services. Although *Bowe* does so provide, its holding has been eroded by later cases. In *Salois v. Mutual of Omaha Ins. Co.*, 90 Wash. 2d 355, 359, 581 P.2d 1349 (1978), we held that the CPA includes [\*\*\*25] sales but encompasses "more than just sales". In *Escalante v. Sentry Ins. Co.*, 49 Wash. App. 375, 387, 743 P.2d 832 (1987), review denied, 109 Wash. 2d 1025 (1988), the court held that a passenger in an auto accident had standing to bring a CPA claim against an insurance company based upon the insurer's bad faith handling of a claim even though the injured party was not a party to the insurance contract, did not pay premiums and had no consumer relationship with the company.

The leading CPA case of *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 719 P.2d 531 (1986) does not include a requirement that a CPA claimant be a direct consumer or user of goods or in a direct [\*313] contractual relationship with the defendant. Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services. n2

n2 RCW 19.86.090; Note, New York Creates a Private Right of Action To Combat Consumer Fraud: Caveat Venditor, 48 *Brooklyn L. Rev.* 509, 528 (1981-1982). See *Nordstrom, Inc. v. Tampourlos*, 107 Wash. 2d 735, 733 P.2d 208 (1987); *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash. 2d 148, 167, 795 P.2d 1143 (1990).

[\*\*\*26]

[3] Additionally, in examining the nature of the relationship between a drug manufacturer, a prescribing physician and a patient, it is the physician who compares different products, selects the particular drug for the ultimate consumer and uses it as a tool of his or her professional trade. Under the learned intermediary doctrine, a drug company fulfills its duty by giving warnings regarding prescription drugs to the physician rather than to the patient. n3 This unique relationship results in the physician being comparable to the ordinary consumer in other settings. Some cases have concluded that it is the physician who stands in the shoes of the "ordinary consumer" of the drug. n4 Because of this unique relationship, the drug company targets its marketing efforts toward the physician, not toward the patient. The physician, therefore, is a logical person to be the "private attorney general" n5 under RCW 19.86.090. We therefore conclude that Dr. Klicpera did have standing to bring a CPA claim, and that the trial court did not err in submitting this claim to the jury.

n3 *Terhune v. A.H. Robins Co.*, 90 Wash. 2d 9, 13, 577 P.2d 975 (1978).

[\*\*\*27]

n4 *Phelps v. Sherwood Med. Indus.*, 836 F.2d 296, 302 (7th Cir. 1987); *Carmichael v. Reitz*, 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381, 401 (1971).

n5 *Anhold v. Daniels*, 94 Wash. 2d 40, 45, 614 P.2d 184 (1980); *Hangman Ridge*, 105 Wash. 2d at 778, 788.

At trial, the jury was properly instructed on the Hangman Ridge elements of a CPA cause of action. The jury found that the drug company engaged in unfair or deceptive acts or practices. This determination is not challenged.

[\*314] The drug company repeatedly stipulated to both the public interest element and to the trade or commerce requirement.

[\*\*1062] With regard to the causation element of the CPA, a causal link must exist between the deceptive act and the injury suffered. n6 Here, the jury was properly instructed that it had to find "that Fisons Corporation's

unfair or deceptive act or practice was a proximate cause of the injury to plaintiff Dr. Klicpera's business or property, [\*\*\*28] n7 and it so found.

n6 *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash. 2d at 167; *Hangman Ridge*, 105 Wash. 2d at 793.

n7 Instruction 10, Clerk's Papers, at 125.

[4] The drug company argues that the trial court erred in failing to dismiss the physician's claims on the basis that there was insufficient evidence of proximate cause because only the physician testified how he would have acted differently if he had been adequately warned. This argument addresses factual proximate cause rather than legal proximate cause, and the existence of factual causation is generally a question for the jury. n8

n8 *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 753-56, 818 P.2d 1337 (1991); *Baughn v. Honda Motor Co.*, 107 Wash. 2d 127, 142, 727 P.2d 655 (1986); *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wash. App. 432, 441, 739 P.2d 1177, review denied, 109 Wash. 2d 1006 (1987).

[\*\*\*29]

In the present case the physician, in answer to a question regarding what he would have done if he had known of the information in the 1981 letter or in the 1985 memo, replied:

With that information I would have not used that drug on Jennifer Pollock. And if Dr. Redding [the asthma specialist] had wanted that drug used, I would have let him prescribe and monitor it.

Report of Proceedings, at 1968. This is similar to the evidence in *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 753-56, 818 P.2d 1337 (1991), which we found was sufficient evidence to support a finding of probable cause. The parents of the injured child in *Ayers* testified [\*315] that if they had known of the risks of the product, they would have treated it more carefully. We concluded there that whether cause in fact existed was a jury question.

There is also corroborative testimony which supports the cause-in-fact element. Dr. Dorsey testified that had Dr. Klicpera known of the syndrome (reduced clearance of the drug during viral infections) he was certain Dr. Klicpera would have conducted the laboratory testing differently. Another [\*\*\*30] physician, Dr. Koran, testified essentially that if proper warnings regarding viral infections had been given and followed, Jennifer Pollock would not have suffered seizures. Another doctor, Dr. Redding, also testified that if proper warning had been given, and followed, that Jennifer's seizures would not in all probability have occurred.

[5] The drug company also argues that since there was evidence that the physician had been warned from other sources that further warning would not have made a difference. The jury heard extensive evidence on this issue. While it is generally true that a drug manufacturer's failure to warn a prescribing physician cannot be the proximate cause of the patient's injury if the physician was already aware of the risk involved in the use of the drug, n9 that is not the evidence in this case. There was testimony from Dr. Klicpera from which a jury could conclude that although he had some knowledge of a correlation between viral infections and reduced clearance of theophylline, he did not know the alteration in clearance could be as dramatic or as rapid as the undisclosed Fisons memos and letter indicated.

n9 3 American Law of Products Liability § 32:61 (3d ed. 1993).

[\*\*\*31]

One of the key disputed facts addressed throughout the trial is what Dr. Klicpera knew, or should have known, about theophylline from sources aside from the drug company's warning. The extent of the physician's knowledge was a jury question, n10 and the jury heard all of the evidence. [\*\*1063] We conclude that there was sufficient evidence to justify the proximate cause issue being submitted to the jury.

n10 See *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 818 P.2d 1337 (1991); *Baughn v. Honda Motor Co.*, 107 Wash. 2d 127, 727 P.2d 655 (1986).

[\*316] [6] With regard to the injury element, we have held that damage to business reputation and loss of goodwill are compensable damages under the CPA. n11 The trial court's instructions properly allowed the jury to

consider damage to professional reputation in regard to the CPA cause of action.

n11 *Nordstrom*, 107 Wash. 2d at 740-41; see also *Mason v. Mortgage Am. Inc.*, 114 Wash. 2d at 854; *Rasor v. Retail Credit Co.*, 87 Wash. 2d 516, 530, 554 P.2d 1041 (1976) (holding that injury to reputation was included in the Fair Credit Reporting Act statutory term "actual damages").

[\*\*32]

The drug company argues that the trial court erred because it allowed Dr. Klicpera to recover for "litigation related" damages. To the extent the drug company is arguing that direct "litigation related" damages were awarded, that is not supported by the record. The trial court ruled that Dr. Klicpera's "so-called litigation expense", including time loss due to attendance at deposition, preparation for trial, and at trial was not recoverable under any of the legal theories advanced. n12 No error was assigned to this ruling. No recovery was allowed to Dr. Klicpera based on any settlement made with the Pollocks or any loss of the physician's time during litigation.

n12 Report of Proceedings, at 3925-26.

The drug company also argues that Dr. Klicpera was suing based solely on his having been sued for malpractice by the Pollocks and that because he was determined to be 3.3 percent negligent n13 he would have been sued anyway, hence his cause of action should have been barred. This argument ignores the fact that[\*\*33] the doctor's recovery was based upon an [\*317] independent claim under the Consumer Protection Act. The claim brought by the physician was an independent action; it was not an indemnity claim based on the Pollocks' lawsuit. The Pollocks' malpractice lawsuit was not even a prerequisite of the doctor's claims against the drug company. As the Oregon Supreme Court pointed out in *Oksenholt v. Lederle Labs.*, 294 Ore. 213, 217, 656 P.2d 293, 296 (1982), even if the patient had not sued the physician who prescribed the dangerous drug, knowledge of a physician's misprescription among patients and other physicians could harm the physician's reputation and cause economic loss.

n13 Apparently, for tactical reasons, each side argued counter to what would be expected on the issue of reduction of Consumer Protection Act damages

based upon contributory negligence. Dr. Klicpera's attorney asked the court to reduce both the Consumer Protection Act and the product liability act awards by the 3.3 percent attributable to the doctor's contributory negligence, because one of the doctor's attorneys had previously made such a representation to the court. Report of Proceedings, at 4131-32. Fisons, however, asked the court not to reduce the Consumer Protection Act award based on contributory negligence. Report of Proceedings, at 4206, 4163. The trial court reduced damages awarded under the product liability act claim but not those awarded under the Consumer Protection Act. Report of Proceedings, at 4207. Whether contributory negligence should reduce a Consumer Protection Act award is not raised as an issue on appeal.

[\*\*34]

Accordingly, we conclude that the jury's determination that Dr. Klicpera was 3.3 percent contributorily negligent does not bar his Consumer Protection Act cause of action which was based on the drug company's unfair or deceptive acts or practices.

In summary, given the liberal construction that is mandated by the CPA, n14 and the fact that the act does not require that the person injured be the actual consumer of goods or services, we perceive no legal justification to foreclosing a CPA action under the circumstances here presented.

n14 RCW 19.86.920.

The remaining question on this issue is whether damages for pain and suffering may be awarded under the CPA. n15 The damages which are recoverable under [\*\*1064] the CPA are injuries to plaintiff's "business or property". n16 We have not previously decided whether personal injuries are recoverable under a CPA claim. n17 In *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wash. App. 366, 369, 773 P.2d 871 (1989), the court looked to federal[\*\*35] law as directed in RCW 19.86.920 and quoted *Reiter v. [\*318] Sonotone Corp.*, 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979), which considered the phrase "injured in his business or property". As Reiter explained,

The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered.

n15 Although such damages were apparently awarded at trial under the product liability act (PLA) cause of action rather than the CPA cause of action, it is necessary for us to address this issue because of our subsequent conclusions regarding the PLA issue.

n16 RCW 19.86.090.

n17 See *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash. 2d 148, 168, 795 P.2d 1143 (1990) (declining to decide if emotional damages are available under the CPA).

[7] The Stevens court, 54 Wash. App. at 370, concluded that[\*\*\*36] had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her "business or property". n18 We agree. Personal injuries are not compensable damages under the CPA. See also *Keyes v. Bollinger*, 31 Wash. App. 286, 295, 640 P.2d 1077 (1982), where it is noted that if a plaintiff suffers injury other than to "business or property", the injury is not compensable under the act. In fact, in this case, Dr. Klicpera's attorney conceded to the trial court that mental (and consequential physical) pain and suffering damages were not compensable under the Consumer Protection Act.

n18 See, e.g., *Moore v. Eli Lilly & Co.*, 626 F. Supp. 365, 367 (D. Mass. 1986); *Hamman v. United States*, 267 F. Supp. 420, 432 (D. Mont. 1967).

We therefore conclude that the damages the jury awarded for loss of reputation are compensable [\*\*\*37] under the Consumer Protection Act claim, so long as the damages are supported by the evidence. However, the damages awarded for the physician's mental "pain and suffering" (and its objective physical manifestations) are not compensable under the CPA.

As the trial court and the litigants correctly recognized, such pain and suffering damages would only be

compensable if a product liability action is cognizable under the facts of this case. This then brings us to the issue of whether the product liability cause of action was properly submitted to the jury.

Issue Two.

Conclusion. We conclude that a physician who prescribes a drug which injures a patient does not have a cause of [\*319] action to recover from the drug company for his or her own emotional pain and suffering n19 under the product liability act (RCW 7.72).

n19 Although the doctor testified he had developed stomach problems and taken antacid medication as a result of the stress of the lawsuit, the evidence regarding his pain and suffering was essentially relating to mental and emotional pain and suffering regarding his patient's injuries and the ensuing litigation.

[\*\*\*38]

The manufacturer's liability section of the product liability act, RCW 7.72.030(1), provides as follows:

A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

In this case we are faced with the unusual situation of a plaintiff (who is not a relative of the injured party) seeking to recover pain and suffering damages as a result of the physical injury suffered by another. Because the Consumer Protection Act (which is a viable cause of action under these facts) does not allow this type of damages, we must determine whether under the facts presented the Legislature intended to allow such damages under the product liability act (PLA) (RCW 7.72).

Although the drug company asks us to disallow a products liability cause of action because the physician is not a proper [\*\*1065] "claimant" under the meaning of the PLA, or because these attenuated damages are not the proximate cause of the breach, we choose to resolve this case on narrower grounds. We perceive[\*\*\*39] the most precise inquiry here to be whether these pain and suffering damages are the type of "harm" contemplated as recoverable by the Legislature under the PLA.

AR 013924



The PLA, RCW 7.72.010(6), defines "harm" as follows:

"Harm" includes any damages recognized by the courts of this state: PROVIDED, That the term "harm" does not include direct or consequential economic loss . . .

(Italics ours.)

Although most of the definitional section of the Washington PLA was based upon the Model Uniform Product Liability [\*320] Act, n20 the Senate Report n21 explains that the Select Committee on Tort and Product Liability Reform chose not to use the definition of "harm" contained in the uniform act and instead adopted a definition allowing for the continued development of the concept through case law. We must, therefore, look to Washington law to define "harm" for purposes of the PLA. n22

n20 Model Uniform Product Liability Act (UPLA), 44 FR 62,713 (1979); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 763, 818 P.2d 1337 (1991).

\*\*\*40]

n21 Senate Select Comm. on Tort & Product Liability Reform, Final Report 32 (Jan. 1981); see also Senate Journal, 47th Legislature (1981), at 630.

n22 Talmadge, Washington's Product Liability Act, 5 U. Puget Sound L. Rev. 1, 10 (1981-1982).

[8] In this case, the product (the drug) harmed the child which in turn caused emotional distress to the prescribing physician for which he seeks to recover mental, and claimed physical, pain and suffering damages. We find no directly applicable product liability case law in this state. In prior Washington cases brought under the PLA, the "harm" involved has been for injury caused directly by the product to the person or the property of the claimant. n23 In this case, however, we are asked to extend recovery for a kind of harm that we do not perceive as having been contemplated by Washington law, that is, emotional distress suffered by a physician as a result of injury to his patient. We can find guidance in the cases wherein damages for emotional

harm are available to a plaintiff based upon injuries to a third person. Generally, [\*\*\*41] in cases where emotional distress is not a consequence of physical injury, or caused by intentional conduct, Washington courts have been cautious about extending a right to recovery, especially when the distress is the consequence of an injury suffered by a third person. n24 If the law [\*321] were otherwise, liability would potentially be endless. Emotional damages caused by a plaintiff witnessing, or learning of, a third person's physical injuries are only compensable in Washington under very limited circumstances. For example, in *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990), which involved a negligent infliction of emotional distress action, mental distress damages were held not to be compensable even to close family members, when they were not present at the scene of a fatal accident. n25 If we were to allow emotional distress damages to be awarded to physicians as a result of injuries sustained by their patients, we would be substantially extending our prior law regarding when a plaintiff could recover emotional distress damages caused by the physical injuries of a third person. We decline to do so.

n23 See, e.g., *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d at 763; *Touchet Vly. Grain Growers, Inc. v. Opp & Seibold Gen. Constr. Co.*, 119 Wash. 2d 334, 831 P.2d 724 (1992); *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 840 P.2d 860 (1992).

\*\*\*42]

n24 E.g., *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 260, 787 P.2d 553 (1990).

n25 See also *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976); *Schurk v. Christensen*, 80 Wash. 2d 652, 497 P.2d 937 (1972).

Our cases which involve intentional torts do not provide a basis to award damages for pain and suffering here. In those cases, emotional distress damages can be awarded as a component of total damages. [\*\*1066] n26 The level of fault involved in a PLA claim, however, may be considerably less than that in an intentional tort claim. In a product liability claim, liability can be predicated on negligence or even on strict liability. n27 Therefore, our intentional tort cases do not provide a

state law basis for concluding that the physician's claimed harm here is compensable under the PLA.

n26 See, e.g., *Nord v. Shoreline Sav. Ass'n*, 116 Wash. 2d 477, 805 P.2d 800 (1991).

[\*\*\*43]

n27 *Falk v. Keene Corp.*, 113 Wash. 2d 645, 782 P.2d 974 (1989).

Two cases in other jurisdictions have allowed professionals to recover their own damages when their patients were injured by a product. However, only pecuniary damages were recovered; emotional pain and suffering were either not sought or were disallowed. In *Oksenholt v. Lederle Labs.*, 294 Ore. 213, 656 P.2d 293 (1982), a doctor who prescribed a drug which caused injury to his patient was allowed to recover lost earning capacity and lost income caused by harm to the [\*322] physician's reputation. In *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 504, 507, 448 N.E.2d 1332, 1334, 1336, 462 N.Y.S.2d 421 (1983), a dentist who accidentally killed his patient due to defective equipment was allowed to recover pecuniary damages, but not damages for emotional injury which were a consequential result of the breach.

[9] The product liability act was designed to address a liability insurance crisis which the Legislature felt [\*\*\*44] threatened the availability of socially beneficial products and services. n28 We would not be furthering the intent of the Legislature if we extended liability so far that drug manufacturers would be chilled in marketing products and developing new ones. In the present case, a Consumer Protection Act claim was proved and substantial damages were awarded to the physician. We have upheld that. A physician may thus be able to recover pecuniary damages (damages to reputation); however, the physician's emotional pain and suffering are not recoverable under either the Consumer Protection Act or the product liability act.

n28 *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wash. 2d 847, 850, 774 P.2d 1199, 779 P.2d 697 (1989); RCW 7.72.010 Preamble; *Falk v. Keene Corp.*, 113 Wash. 2d 645, 649, 782 P.2d 974 (1989); Talmadge, Washington's Product Liability Act, 5 U. Puget Sound L. Rev. 1 (1981-1982).

Because we[\*\*\*45] conclude that the facts of this case do not support a cause of action under the PLA for the doctor's pain and suffering damages, we need not address the drug company's other arguments as to why the PLA should not apply.

Issue Three.

Conclusion. The Washington product liability act (RCW 7.72) created a single cause of action for product-related harms, and supplants previously existing common law remedies, including common law actions for negligence.

Dr. Klicpera argues that if a product liability claim under the PLA is disallowed by this court, we should then allow a negligence claim based upon the drug company's failure to warn of its product's dangers. We decline to do so. After the enactment of the PLA, such a claim is not viable in a products case.

[\*323] [10] As we explained in *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wash. 2d 847, 850-55, 860, 774 P.2d 1199, 779 P.2d 697 (1989), the PLA preempts traditional common law remedies for product-related harms. A claim previously based on negligence is within the definition of a product liability claim. n29 Since this present cause of action is predicated[\*\*\*46] upon a failure to warn by a product manufacturer, any negligence cause of action therefor is now preempted by the PLA. Therefore, this product liability claim cannot be maintained on a common law negligence theory. n30

n29 *Graybar*, 112 Wash. 2d at 853; RCW 7.72.010(4).

n30 See Talmadge, Washington's Product Liability Act, 5 U. Puget Sound L. Rev. 1, 8 n.39 (1981-1982).

The PLA does allow claimants to bring a Consumer Protection Act claim since that [\*\*1067] cause of action has been specifically exempted from the preemptive effect of the product liability act. n31

n31 RCW 7.72.010(4); Talmadge, Washington's Product Liability Act, 5 U. Puget Sound L. Rev. 1, 10 (1981-1982); *Graybar*, 112 Wash. 2d at 850.

Issue Four.

Conclusion. [\*\*\*47] The trial court did not err in declining to allow WSPIE's Consumer Protection Act claim to be submitted to the jury.

Dr. Klicpera's insurer, WSPIE, argues that the \$500,000 it paid to the Pollocks in settlement of the malpractice claim should have been recoverable from the drug company under the Consumer Protection Act. The trial court did allow WSPIE's fraud cause of action against the drug company to go to the jury. However, the jury found in favor of the defendant drug company on this issue. The trial court declined to allow WSPIE's Consumer Protection Act claim to be submitted to the jury. We agree.

[11] Such an action is simply an indirect attempt to obtain contribution from the drug company. WSPIE, on behalf of Dr. Klicpera, paid \$500,000 in settlement of the Pollocks' claim for malpractice. A hearing determined that settlement to be reasonable. Thereafter, Fisons settled with the Pollocks [\*324] and that settlement was also determined to be reasonable. Hence, as a matter of law each party's potential contribution rights available under RCW 4.22.040 were extinguished. n32

n32 *Kirk v. Moe*, 114 Wash. 2d 550, 556, 789 P.2d 84 (1990) (a settling defendant is released from all liability, including contribution).

[\*\*\*48]

RCW 4.22.060(2) provides in pertinent part:

A release . . . entered into by a claimant and a person liable discharges that person from all liability for contribution, . . .

After the drug company settled with the Pollocks, the court held a reasonableness hearing and ordered that "Dr. Klicpera's contribution/indemnity claims against Fisons are extinguished pursuant to RCW 4.22.060." WSPIE was acting on behalf of its insured and hence could have been subrogated to the rights of its insured. However, once Fisons settled, Dr. Klicpera's contribution rights for reimbursement for amounts paid to the Pollocks were extinguished. To allow the insurance company to bring a consumer protection action against Fisons for what is in reality contribution or indemnity would be to allow an "end-run" around the tort reform act (RCW 4.22).

As Senator Talmadge, Chairman of the Senate Select Committee on Tort and Product Liability Reform, explained,

the Act provides that where a party enters into a settlement agreement with the claimant, if the settlement agreement is a reasonable one, all liability on the part of that defendant for contribution and for claims by the claimant [\*\*\*49] is discharged. The senate select committee felt that the process of settlement of lawsuits must be encouraged. The ability of a party entering into a settlement with the claimant to be discharged from all claims, including contribution, was essential to fulfill the policy of encouraging settlement.

Talmadge, Washington Product Liability Act, 5 U. Puget Sound L. Rev. 1, 18-19 (1981-1982).

Therefore, neither the doctor, nor the doctor's insurer, is entitled to recover settlement amounts paid to the Pollocks after their contribution/indemnity rights were extinguished.

The trial court did not err when it disallowed WSPIE's Consumer Protection Act claim.

[\*325] Issue Five.

Conclusion. We hold that the trial court did not err in excluding the testimony of the drug company's sales representative based upon Rule of Evidence 406.

The drug company sought to introduce testimony from its sales representative, Kevin Cobley, that it was his habit to discuss the dangers of theophylline and [\*\*1068] a particular study which included information about the risks of theophylline when he visited physicians, and, therefore, he must have discussed those risks with Dr. Klicpera. Mr. Cobley [\*\*\*50] did not have any specific memory of talking with Dr. Klicpera about the study. He testified, however, that his usual "habit" was to discuss the subject, and this testimony was sought to be introduced pursuant to ER 406.

[12] ER 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Although the rule does not define "habit", the advisory committee note to Fed. R. Evid. 406 quotes Professor McCormick's description of habitual behavior as "consisting of semi-automatic, almost involuntary and invariably specific responses to fairly specific stimuli." n33 The comments to our ER 406 state that evidence offered under the rule could, of course, still be excluded if the court determines that the conduct sought to be shown did not reach the level of habit or routine. n34

n33 Comment, ER 406; 5 K. Tegland, Wash. Prac., Evidence 459 (3d ed. 1989).

[\*\*\*51]

n34 5 K. Tegland, at 459.

Mr. Cobley told the trial court that his presentation to physicians "would go virtually the same way with every physician". In response to that court's question whether he could testify that he did discuss these things with Dr. Klicpera, Mr. Cobley responded "I would say it's highly unlikely that I did not".

[\*326] Although Mr. Cobley's business notes of November 8, 1984 indicated Dr. Klicpera was "Impressed with Furukawa study . . .", n35 Mr. Cobley also stated that there was merely "some reference" in that study to viral illness and problems with theophylline toxicity. n36 After a discussion with the court, Mr. Cobley admitted he did not have a copy of the study to give Dr. Klicpera on the date that he noted the physician was "impressed" with it. n37 The trial court concluded that Mr. Cobley's behavior did not rise to the level of a habit.

n35 Report of Proceedings, at 3363.

n36 Report of Proceedings, at 3366.

n37 Report of Proceedings, at 3374-78.

[\*\*\*52]

[13] As with most evidentiary questions, determination of admissibility of habit evidence is within the trial court's discretion. n38 Since habit is "semi-automatic, almost involuntary and invariably specific responses to fairly specific stimuli", we conclude the trial court did not abuse its discretion in holding that Mr. Cobley's conduct did not reach the level of habit and was thus inadmissible. n39

n38 *Norris v. State*, 46 Wash. App. 822, 733 P.2d 231 (1987); *Maehren v. Seattle*, 92 Wash. 2d 480, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938, 69 L. Ed. 2d 951, 101 S. Ct. 3079 (1981).

n39 Compare *Meyers v. Meyers*, 5 Wash. App. 829, 491 P.2d 253 (notary's business practice, which she said never varied, was admissible as habit evidence), aff'd, 81 Wash. 2d 533, 503 P.2d 59, 59 A.L.R.3d 1318 (1972) with *Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182 (8th Cir. 1981) (on issue of whether police officer's notes were based upon the statements of accident victim, the fact the officer normally spoke to the victims first did not rise to the level of habit under Fed. R. Evid. 406).

[\*\*\*53]

Issue Six.

Conclusion. We hold that the plaintiffs' state law claims were not impliedly preempted by the Federal Food and Drug Administration (FDA) guidelines.

The drug company argues that the doctor's state law remedies are preempted by the Federal Food and Drug Administration's issuance of uniform class labeling guidelines for theophylline. We disagree.

[14] Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if [\*327] Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility [\*\*1069] of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose. n40

n40 See, e.g., *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 115 L. Ed. 2d 532, 111 S. Ct. 2476, 2481-82 (1991).

There is no allegation here of express preemption, n41 or of any intent to occupy the field. Rather, [\*\*\*54] the drug company argues that preemption should be implied because the state law stands as an obstacle to the accomplishment of the full purposes of the FDA guidelines.

n41 We recognize that there are cases decided under FDA regulation where the federal law does preempt state tort law. See *Berger v. Personal Prods., Inc.*, 115 Wash. 2d 267, 797 P.2d 1148 (1990), cert. denied, 499 U.S. 961 113 L. Ed. 2d 649, 111 S. Ct. 1584 (1991). However, those cases involve the express preemptive power of 21 U.S.C. § 360k which applies only when state law claims involve "medical devices" and not prescription drugs. *Spychala v. G.D. Searle & Co.*, 705 F. Supp. 1024, 1029 (D.N.J. 1988).

[15-17] As we recently reiterated, there is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption. n42 The presumption[\*\*\*55] against preemption is even stronger with state regulation regarding matters of health and safety. n43 State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress. n44 The defendants here have presented no statutory language or history which supports a conclusion that Congress intended to preempt state law on the subject of pharmaceutical manufacturers' liability under state law. In fact, case law and scholarly comment indicates that the FDA regulations do not have a preemptive effect on state laws.

n42 *Inlandboatmen's Union v. Department of Transp.*, 119 Wash. 2d 697, 702, 836 P.2d 823 (1992).

n43 *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988), cert. denied, 488 U.S. 908, 102 L. Ed. 2d 248, 109 S. Ct. 260 (1988); *Inlandboatmen's*, 119 Wash. 2d at 705.

n44 *Mortier*, 111 S. Ct. at 2482.

[\*\*\*56]

[\*328] One recent text summarizes the law on this issue:

#### Effect of compliance with FDA regulations

The Food and Drug Administration (FDA) has promulgated numerous regulations governing the labels and warnings required for drugs. Evidence of compliance with FDA regulations does not necessarily relieve a drug manufacturer of liability for failure to furnish an adequate warning of possible side effects, because the FDA regulations merely set minimum requirements, and does not relieve the manufacturer of the duty to warn of possible side effects or dangers of which it has actual or constructive knowledge as an expert in its field; that is, adherence to government standards does not absolve a drug manufacturer of liability to which it would otherwise be subject.

(Footnotes omitted.) 6 American Law of Products Liability § 89:9, at 17 (3d ed. 1987). This conclusion is in accord with the weight of authority. n45

n45 See, e.g., *Spychala v. G.D. Searle & Co.*, 705 F. Supp. 1024 (D.N.J. 1988) (FDA regulation of prescription drugs may establish minimum standards for design and warnings, but compliance does not necessarily absolve a manufacturer of tort liability). Accord, *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 390 N.E.2d 1214, 28 Ill. Dec. 624 (1979); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978) (fact that a package insert for a prescription drug has been approved by the FDA does not relieve a drug manufacturer of its obligation to communicate an adequate warning where insert did not adequately warn of potential dangers which were known to officials of manufacturer before inadequacy was known to the FDA); *Abbott v. American Cyanamid Co.*, 844 F.2d at 1112 (preemption does not necessarily follow from federal regulation of prescription drugs); see *Tarallo v. Searle Pharmaceutical, Inc.*, 704 F. Supp. 653, 660 (D.S.C. 1988); *Graham v. Wyeth Labs.*, 666 F. Supp. 1483, 1491 (D. Kan. 1987) (FDA certification is evidence, but not conclusive evidence of a drug manufacturer's reasonableness. Before a court can conclude federal regulations -- which traditionally set minimum standards -- have preempted the ability of states to protect their citizens through the judicial process, there should be a clear congressional intent), vacated in part on other grounds, 851 F.2d 321 (10th Cir. 1988); Comment, *Pharmaceutical Product Liability*, 42 Am. Univ. L. Rev. 199 (1992).

[\*\*\*57]

[\*\*1070] As the Oregon Supreme Court has pointed out:

A party, commenting to the FDA on its proposed rules, criticized the proposed regulations, arguing that they acted to insulate a manufacturer from liability. The agency responded:

"It is not the intent of FDA to influence civil tort liability of the manufacturer or of the physician. . . ."

44 FR 37,437 (1979).

*Oksenholt v. Lederle Labs.*, 294 Ore. 213, 220, 656 P.2d 293, 298 (1982).

[\*329] The Federal Food, Drug, and Cosmetic Act does not create any private right of action. n46 Hence, if FDA regulations preempt all state law, arguably no cause of action would exist for a violation of the manufacturer's duty to warn physicians of dangers of prescription drugs. n47

n46 See, e.g., *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1274 (D. Minn. 1988) and cases cited therein.

n47 See *Abbott*, 844 F.2d at 1112 (the presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists).

[\*\*\*58]

Given the strong presumption against federal preemption of state laws regarding health and safety issues, n48 it is clear that the Federal FDA regulations do not have a preemptive effect on state law.

n48 *Tarallo*, 704 F. Supp. at 658; *Inlandboatmen's*, 119 Wash. 2d at 705.

Issue Seven.

Conclusion. The trial court did not err in refusing to grant a new trial or to reduce the damage award because of the amount of damages awarded by the jury.

[18] The standards for an appellate court overturning a jury's damage award are well settled in Washington. n49 In our recent decision in *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 268-69, 840 P.2d 860 (1992), the principles which govern review by an appellate court of a verdict claimed to be excessive as set forth in *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wash. 2d 831, 835-37, 699 P.2d 1230 (1985) were reiterated: [\*\*\*59]

The determination of the amount of damages, particularly in actions of this nature, is primarily and peculiarly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made.

. . . Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations. The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents. The appellate court, [\*330] on the other hand, is tied to the written record and partly for that reason rarely exercises this power.

An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.

. . .

Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable. . . .

(Footnotes omitted.) *Washburn*, 120 Wash. 2d at 268-69[\*\*\*60] (quoting *Bingaman*).

[19] The appellate court does not engage in exactly the same review as the trial court because deference and weight are also given to the trial court's discretion in denying a new trial on a claim of excessive damages. The verdict is strengthened by denial of a new trial by the trial court. n50 While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages, [\*\*1071] n51 "appellate review is most narrow and restrained" and the appellate court "rarely exercises this power". n52

n50 *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 271, 840 P.2d 860 (1992).

n51 *Malstrom v. Kalland*, 62 Wash. 2d 732, 738-39, 384 P.2d 613 (1963).

n52 *Washburn*, 120 Wash. 2d at 269 (quoting *Bingaman*, 103 Wash. 2d at 835).

The drug company relies upon *Himango v. Prime Time Broadcasting, Inc.*, 37 Wash. App. 259, 680 P.2d 432, [\*\*\*61] review denied, 102 Wash. 2d 1004 (1984) in which the Court of Appeals concluded that the jury's belief that the plaintiff's reputation had suffered had to have been based on speculation. However, in *Himango*, the appellate court was deciding if the trial court properly reduced the jury's verdict and not, as here, whether the appellate court should reduce a verdict despite the trial court's refusal to do so.

Bearing the very restrictive appellate review standard in mind, our inquiry is whether the award is outside the range of substantial evidence in the record, shocks the conscience of the court or clearly appears to have been arrived at as a result of passion or prejudice.

[\*331] [20, 21] The rule in Washington on the question of sufficiency of the evidence to prove damages is that: "the fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss." n53 The drug company asks this court to make comparisons between this case and damage awards in other cases. In *Washburn*, we emphatically disallowed such comparisons; n54 the focus, rather, must be on the particular injuries in this case. [\*\*\*62]

n53 *Haner v. Quincy Farm Chems., Inc.*, 97 Wash. 2d 753, 757, 649 P.2d 828 (1982) (quoting *Wilson v. Brand S Corp.*, 27 Wash. App. 743, 747, 621 P.2d 748 (1980)). See also *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wash. 2d 712, 717, 845 P.2d 987 (1993) (doctrine that damages must be proved with reasonable certainty is concerned more with the fact of damage than the extent or amount of damages).

n54 *Washburn*, 120 Wash. 2d at 266-68.

The evidence the jury heard regarding reputation damage was Dr. Klicpera's own opinion as to such loss and a statement by the trial court that there had been newspaper accounts reporting Dr. Klicpera's alleged medical malpractice. Dr. Klicpera essentially testified that he thought there was certainly a loss to his reputation in the community, and that other physicians had been ignoring him and that he no [\*\*\*63] longer enjoyed his practice and had taken steps to find administrative work.

Pursuant to the drug company's request, the trial court initially ruled that the newspaper articles regarding Dr. Klicpera's incompetence were inadmissible. However, after expressing concern that Dr. Klicpera's reputation damages would not be provable without reference to the press articles, the court subsequently read the following statement to the jury:

Before this trial started, the press disseminated the fact in the community that Dr. Klicpera had been sued for medical malpractice on behalf of Jennifer Pollock and her parents. This information was supplied to the press by the attorneys representing the Pollocks.

This statement resulted from the fact that there was a front page article in the physician's hometown newspaper which indicated that Dr. Klicpera knew enough about the [\*332] drug to use it safely but failed to apply that knowledge, and an article on the front page of the *Seattle Post-Intelligencer* with a statement from the drug company's representative saying the settlement was made with the Pollocks on the possibility that the company could become a deep pocket in a jury award [\*\*\*64] based on the physician's negligence and that the child's injuries were the result of mistreatment by the physician who overdosed the child. According to unrefuted representations made to the trial court, articles also were published in Spokane, Chicago and Los Angeles.

[22] Damages for loss of professional reputation are not the type of damages which can be proved with mathematical certainty and are usually best left as a question of fact for the jury. Given the narrow standard of [\*\*1072] review and the deference accorded to both the jury's discretion, and the trial court's refusal to overturn the award, we conclude that the admitted evidence was sufficient to sustain the jury's award for damages to Dr. Klicpera's reputation.

There was, however, one portion of damages which was awarded under the Consumer Protection Act which

AR 013931

must be disallowed. The jury awarded \$150,000 for income loss due to lost consultations; the trial court reduced that award to \$2,250. The problem with this award is that it conflicts with the trial court's conclusion that damages based upon income lost due to time spent for trial were not recoverable. There is no challenge to this conclusion.

The physician[\*\*\*65] testified that because of his unavailability due to this trial, he missed some consultations he otherwise would have done; these consultations were all foregone because of time spent in or preparing for trial. The trial court had disallowed damages based upon income lost due to time spent for the lawsuit. The trial court recognized that "all of the losses of consultation . . . were because he was unavailable" due to trial matters. However, the trial court later reduced the consultation award from \$150,000 to \$2,250. In light of the trial court's unchallenged conclusion that damages for time lost due to trial preparation were not recoverable, we conclude [\*333] there was no evidence to support an award for loss of consultations.

The drug company also argues that the award was based upon obvious passion or prejudice. It bases this partly on certain portions of the plaintiffs' attorneys' closing argument. They argue that the court order, stating that alleged litigation fraud and alleged discovery violations should not be presented to the jury, was violated in closing argument. However, the court order, while disallowing reference to discovery disputes, allowed evidence regarding[\*\*\*66] whether certain documents were known to plaintiffs prior to settlement and whether experts had access to the discovery documents when opinions were expressed. While the timing of witnesses' knowledge may have implied "litigation fraud" or discovery violations, such testimony (introduced without objection) and argument referring to it were not in violation of the trial court's order.

In closing argument, the physician's attorney drew a comparison between the number of theophylline side effects reported in a Group Health study (which had been described to the jury during trial) to the number of people who would be shot per 10,000 people if a terrorist were to shoot a given number of times inside Husky Stadium. The drug company now argues that this analogy was so misleading that this court should overturn the jury's decision because it was based on passion or prejudice. This argument, however, was generally based upon the statistics in the study and upon numbers testified to by Fisons' own expert. Most importantly, there was no contemporaneous objection to this analogy. Any perceived inaccuracies in the analogy drawn by plaintiffs' counsel could have been drawn to

the attention[\*\*\*67] of the trial court which could have made a curative instruction if necessary.

[23] Even when portions of closing argument are improper or inaccurate, failure to make contemporaneous objections usually waives any error unless the argument was so flagrant and prejudicial as not to be subject to a curative [\*334]instruction. n55 This is especially true when the trial court instructs the jury that arguments are not evidence and that argument not supported by evidence is to be disregarded. n56 In this case, the jury was so instructed and with regard to the debatably improper arguments no contemporaneous objections were made.

n55 *Razor v. Retail Credit Co.*, 87 Wash. 2d 516, 532, 554 P.2d 1041 (1976); *Nelson v. Martinson*, 52 Wash. 2d 684, 689, 328 P.2d 703 (1958).

n56 E.g., *Jones v. Hogan*, 56 Wash. 2d 23, 31-32, 351 P.2d 153 (1960).

[24] In order to overturn a jury's verdict based[\*\*\*68] on passion or prejudice, it must be of such manifest clarity as to make it [\*\*1073] unmistakable. n57 We do not find such evidence here and decline to disturb the jury's award of damages for loss of reputation.

n57 *James v. Robeck*, 79 Wash. 2d 864, 870, 490 P.2d 878 (1971); *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 269, 840 P.2d 860 (1992).

Since we have concluded that the physician's claims of pain and suffering are not compensable, we do not address the issue of sufficiency of the evidence to support the jury's pain and suffering award of \$2,137,500.

#### Issue Eight

Conclusion. The trial court did not abuse its discretion in its calculation of the attorneys' fees awarded pursuant to the Consumer Protection Act.

The drug company argues that the trial court erred in (1) calculating the attorneys' fees based upon an



"enhanced hourly rate" and (2) by using a 1.5 multiplier of the lodestar based upon quality and contingency.

[25][\*\*\*69] Attorneys' fees available to a successful Consumer Protection Act plaintiff under RCW 19.86.090 are calculated as follows: (1) establishing a "lodestar" fee by multiplying a reasonable hourly rate by the number of hours reasonably expended on theories necessary to establish the elements of a Consumer Protection Act cause of action; and (2) adjusting that lodestar up or down based upon the contingent nature of success (risk) and, in exceptional circumstances, based also on the quality of work performed. n58 The burden of justifying [\*335] any deviation from the lodestar rests on the party proposing such an alteration. n59

n58 *Bowers v. Transamerica Title Ins. Co.*, 100 Wash. 2d 581, 593-99, 675 P.2d 193 (1983); *Travis v. Washington Horse Breeders Ass'n*, 111 Wash. 2d 396, 409, 759 P.2d 418 (1988); see also *Scott Fetzer Co. v. Weeks*, 114 Wash. 2d 109, 786 P.2d 265 (1990).

n59 *Bowers*, 100 Wash. 2d at 598 (quoting *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880, 892 (D.C. Cir. 1980)).

[\*\*\*70]

Attorneys seeking fees must provide reasonable documentation of work performed to calculate the number of hours and when attorneys have "an established rate for billing clients", that rate will likely be considered as reasonable. n60

n60 *Bowers*, 100 Wash. 2d at 597.

[26] A trial court's fee award will not be overturned absent an abuse of discretion. n61 Whether attorneys' fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys' fees. n62

n61 *Travis*, 111 Wash. 2d at 410; *Bowers*, 100 Wash. 2d at 595.

n62 *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash. 2d 148, 169, 795 P.2d 1143 (1990).

[\*\*\*71]

In this case, the trial court established the hourly fee by averaging the reduced rate charged by the attorneys in medical malpractice defense cases with the hourly rate charged in their other practice. There is no convincing showing that the trial court abused its discretion in arriving at the hourly fee in this manner. That hourly fee was multiplied by 50 percent of the hours expended during the entire case, the amount the trial court decided was attributable to theories necessary to prove the Consumer Protection Act claim. We find no abuse of discretion in this conclusion and decline to disturb the trial court's calculation of the "lodestar" fee.

The trial court then multiplied the lodestar amount by 1.5 based upon the fact that part of the fees were contingent upon success, and on the quality of the work performed by plaintiffs' attorneys in a difficult case.

[27] Quality can be a valid enhancer when the representation is unusually good, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the "lodestar". n63 A multiplier for "quality" is seldom sanctioned by this court because quality of a [\*336] lawyer's[\*\*\*72] work is usually reflected [\*\*1074] in the establishment of the lawyer's hourly rate. n64 However, in this case exceptional quality was not the only factor which caused the trial court to enhance the lodestar.

n63 *Bowers*, 100 Wash. 2d at 599.

n64 *Travis*, 111 Wash. 2d at 411; Washington State Bar Ass'n, Consumer Protection, Antitrust and Unfair Business Practices Law Developments 185 (2d ed. 1988) (hereinafter Consumer Protection).

This case was tried partially on a guaranteed fee arrangement and the remainder on a contingency agreement. Whether the difficult and novel nature of this case combined with what the court found to be high quality work and partial contingency supports the use of a 1.5 multiplier is a close question. The trial court found that the likelihood of success was low because Dr.

Klicpera's attorneys did not initially have access to what turned out to be the determinative "smoking gun" documents. The 50 percent[\*\*\*73] premium which reflects the partially contingent nature of the representation together with the unusually high quality of work performed in this novel case does not appear to us from the record to be an abuse of the trial court's discretion. This being a close question, we defer to the trial court's discretion and sustain its calculation of attorneys' fees.

[28] Attorneys' fees on appeal are recoverable under the Consumer Protection Act. n65 Because of the factfinding required to support such fees, remand to the trial court for determination of reasonable fees on appeal is appropriate in this case. n66

n65 *Bowers, 100 Wash. 2d at 602.*

n66 Consumer Protection, at 177-78; RAP 18.1(i).

#### Issue Nine.

Conclusion. The trial court applied an erroneous legal standard when ruling on the motion for sanctions for discovery abuse and erred when it refused to sanction the drug company and/or its attorneys for violation of CR 26(g).

The doctor and his insurer, [\*\*\*74] Washington State Physicians Insurance & Exchange Association (hereinafter referred to [\*337] collectively as "the doctor"), asked the trial court to sanction the drug company and its lawyers for discovery abuse. This request was based on the fact that at least two documents crucial to the doctor's defense as well as to the injured child's case were not discovered until March of 1990 -- more than 1 year after the doctor had settled with the child, nearly 4 years after the complaint was filed and approximately 1 month before the scheduled trial date. The two documents, dubbed the "smoking guns" by the doctor, show that the drug company knew about, and in fact had warned selected physicians about, the dangers of theophylline toxicity in children with viral infections at least as early as June 1981, 4 years before Jennifer Pollock was injured.

Although interrogatories and requests for production should have led to the discovery of the "smoking gun" documents, their existence was not revealed to the doctor

until one of them was anonymously delivered to his attorneys.

A motion for sanctions based on discovery abuse was heard first by a special discovery master on March 28, 1990, before the [\*\*\*75] child's case was settled. The special master ruled that he could not find "on the basis of this record that there was an intentional withholding of this document." (Italics ours.) Clerk's Papers, at 9693. The special master then turned to what he determined was the more relevant issue, additional and full discovery of other theophylline-related documents in the drug company's possession. The special master ordered the drug company's attorneys to turn over any immediately available documents concerning theophylline to attorneys for the child and the doctor by noon the next day and to review the remainder of the drug company's files and produce other relevant documents at the end of 2 weeks. The next day, the second "smoking gun", a 1985 internal memorandum describing theophylline toxicity in children, was delivered along with about 10,000 other documents.

Although other documents were relevant to the case, the two smoking gun [\*\*1075] documents were the most important. The first, a letter, dated June 30, 1981, discussed an article that [\*338] contained a study confirming reports "of life threatening theophylline toxicity when pediatric asthmatics . . . contract viral infections." [\*\*\*76] Exhibit 3. The second, an interoffice memorandum, dated July 10, 1985, talks of an "epidemic" of theophylline toxicity and of "a dramatic increase in reports of serious toxicity to theophylline." Exhibit 7.

Both documents contradicted the position taken by the drug company in the litigation, namely, that it did not know that theophylline-based medications were potentially dangerous when given to children with viral infections.

After the 1985 memorandum was discovered and still prior to trial, the special master's denial of the sanctions motion was appealed and affirmed, without specific findings, by a judge of the Superior Court (Judge Knight), who essentially deferred to the special master.

The motion for sanctions was renewed and heard by another judge of the Superior Court, the trial judge (Judge French), at the close of trial. The trial court declined to impose sanctions, deferring to the earlier decisions of the special master and Judge Knight. The doctor then appealed the denial of his sanctions motion directly to this court.

The standard of review to be applied to sanctions decisions under CR 11 and CR 26(g) has not yet been specifically articulated by this court. n67[\*\*\*77]

n67 See *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 218, 829 P.2d 1099 (1992) (reviewing the imposition of sanctions under CR 11 but declining, in that case, to establish a standard of review).

[29] The doctor urges us to review the sanctions decision de novo. However, decisions either denying or granting sanctions, under CR 11 or for discovery abuse, are generally reviewed for abuse of discretion. n68 We hold that the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard.

n68 See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) (appeal from the imposition of Fed. R. Civ. P. 11, which is substantially similar to Washington's CR 11); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976) (abuse of discretion standard applied in reviewing the imposition of sanctions for discovery abuse); *Snedigar v. Hoddersen*, 114 Wash. 2d 153, 169, 786 P.2d 781 (1990) (sanctions imposed for failure to comply with discovery order would be reviewed for abuse of discretion). Furthermore, each of the three divisions of this state's Court of Appeals has determined that the abuse of discretion standard should be applied when reviewing sanctions imposed for violation of CR 11. See, e.g., *In re Guardianship of Lasky*, 54 Wash. App. 841, 852, 776 P.2d 695 (1989) (Division One); *Lee v. Columbian, Inc.*, 64 Wash. App. 535, 539, 826 P.2d 217 (1991) (Division Two); *Cooper v. Viking Ventures*, 53 Wash. App. 739, 742, 770 P.2d 659 (1989) (Division Three).

[\*\*\*78]

[\*339] The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is "better positioned than another to decide the issue in question." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) (quoting *Miller v. Fenton*, 474 U.S. 104, 114, 88 L. Ed. 2d 405, 106 S. Ct. 445 (1985)). Further, the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to 'reduce the reluctance of courts to impose sanctions'. . . . If a review de novo was the proper standard of review, it could thwart these

purposes; it could also have a chilling effect on the trial court's willingness to impose . . . sanctions." *Cooper v. Viking Ventures*, 53 Wash. App. 739, 742-43, 770 P.2d 659 (1989) (quoting Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 198 (1983)).

[30] A trial court abuses its discretion when its order is manifestly unreasonable or based[\*\*\*79] on untenable grounds. n69 A trial court would necessarily abuse its discretion [\*\*1076] if it based its ruling on an erroneous view of the law. n70

n69 *Holbrook v. Weyerhaeuser Co.*, 118 Wash. 2d 306, 315, 822 P.2d 271 (1992); *Watson v. Maier*, 64 Wash. App. 889, 896, 827 P.2d 311, review denied, 120 Wash. 2d 1015, 844 P.2d 436 (1992).

n70 See *Cooter & Gell*, 496 U.S. at 405.

[31-33] The doctor asked that sanctions be awarded pursuant to CR 11, CR 26(g), CR 37(d), or the inherent power of the court. CR 11 sanctions are not appropriate where, as [\*340] here, other court rules more properly apply. n71 Similarly, the sanctions provisions of CR 37 do not apply where, as here, the more specific sanction rule better fits the situation. Furthermore, the inherent power of the court should not be resorted to where rules adequately address the problem. n72 Because[\*\*\*80] CR 26(g), the discovery sanctions rule, was adopted to specifically address the type of conduct involved here, it, rather than CR 11, CR 37 or the inherent power of the court, is applicable in the present case.

n71 *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d at 223; *Clipse v. State*, 61 Wash. App. 94, 97, 808 P.2d 777 (1991) (noting that the discovery sanction rule, CR 26(g), rather than CR 11, governs discovery disclosures.

n72 Where conduct occurring during the course of litigation can be adequately sanctioned under court rules, a court should ordinarily rely on the rules rather than the inherent power of the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32 115 L. Ed. 2d 27, 111 S. Ct. 2123, 2136 (1991).

CR 26(g) was added to our civil rules in 1985; it provides as follows:

Every request for discovery or response or objection thereto made by a party represented by an attorney shall<sup>\*\*\*81</sup> be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. . . .

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an<sup>\*\*\*82</sup> appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

[\*341] [34, 35] CR 26(g) has not yet been interpreted by this court. The rule parallels Fed. R. Civ. P. 26(g) (Rule 26(g)) and, like its federal counterpart and like CR 11, CR 26(g) is aimed at reducing delaying tactics, procedural harassment and mounting legal costs. n73 Such practices "tend to impose unjustified burdens on other parties, frustrate those who seek to vindicate their rights in the courts, obstruct the judicial process, and bring the civil justice system into disrepute." Schwarzer, *Sanctions Under the New Federal Rule 11 -- A Closer Look*, 104 *F.R.D.* 181, 182 (1985) (hereinafter Schwarzer).

n73 Cf. 3A L. Orland & K. Tegland, *Wash. Prac., Rules Practice* 215 (4th ed. 1992) (discussing CR 11).

Because it is essentially identical to Rule 26(g), this court may look to federal court decisions interpreting<sup>\*\*\*83</sup> that rule for guidance in construing CR 26(g). n74 In turn, federal courts analyzing the Rule 26 sanctions provision look to interpretations of <sup>\*\*1077</sup> Fed. R. Civ. P. 11. n75 The federal advisory committee notes describe the discovery process and problems that led to the enactment of Rule 26(g) as follows:

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. . . .

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

. . .

[\*342] . . . Rule 26(g) imposes an affirmative duty<sup>\*\*\*84</sup> to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. . . . The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests.

. . .

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." . . . Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

(Citations omitted. Italics ours.) Amendments to the Federal Rules of Civil Procedure advisory committee note, 97 *F.R.D.* 166, 216-19 (1983).

n74 See *Bryant v. Joseph Tree, Inc.*, 119 *Wash. 2d* at 218-19; *Miller v. Badgley*, 51 *Wash. App.* 285, 300, 753 *P.2d* 530, review denied, 111 *Wash. 2d* 1007 (1988).

[\*\*85]

n75 *Apex Oil Co. v. Belcher Co. of New York, Inc.*, 855 *F.2d* 1009, 1015 (2d Cir. 1988); *Insurance Benefit Adm'rs, Inc. v. Martin*, 871 *F.2d* 1354, 1360 (7th Cir. 1989).

The concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials is reflected in decisions of our Court of Appeals. In *Gammon v. Clark Equip. Co.*, 38 *Wash. App.* 274, 686 *P.2d* 1102 (1984), aff'd, 104 *Wash. 2d* 613, 707 *P.2d* 685 (1985), the Court of Appeals held that a new trial should have been ordered because of discovery abuse by the defendant. Then Court of Appeals Judge Barbara Durham wrote for the court:

The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." The availability of liberal discovery means that civil trials

[\*\*86]

no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

This system obviously cannot succeed without the full cooperation of the parties. Accordingly, the drafters wisely included a provision authorizing the trial court to impose sanctions for unjustified or unexplained resistance to discovery.

(Citations omitted.) *Gammon*, 38 *Wash. App.* at 280.

[\*343] It was after *Gammon* that this court adopted CR 26(g) in order to provide a deterrent to discovery abuses as well as an impetus for candor and reason in the discovery phase of litigation.

It is with these purposes in mind, that we now articulate the standard to be applied by trial courts which are asked to impose sanctions for discovery abuse.

[\*\*1078] On its face, Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing[\*\*87] law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

[36] Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. n76 Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules. n77

n76 *Bryant v. Joseph Tree, Inc.*, 119 *Wash. 2d* 210, 220, 829 *P.2d* 1099 (1992); *Rhinehart v. Seattle Times, Inc.*, 59 *Wash. App.* 332, 341, 798 *P.2d* 1155 (1990).

n77 *Miller v. Badgley*, 51 *Wash. App.* at 299-300. A proposed amendment to CR 11 would insert an intent requirement. 120 *Wn.2d* xxix (Proposed Rules of Court, Jan. 6, 1993). No similar amendment to CR 26(g) is currently pending.

[\*\*88]

[37-39] In determining whether an attorney has complied with the rule, the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request. n78

n78 *Thibeault v. Square D Co.*, 960 *F.2d* 239, 246 (1st Cir. 1992). See also *Bryant v. Joseph Tree, Inc.*, 119 *Wash. 2d* at 220-21; G. Joseph, Sanctions: The Federal Law of Litigation Abuse 484-91 (1989).

[\*344] The responses must be consistent with the letter, spirit and purpose of the rules. To be consistent with CR 33, an interrogatory must be "answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer." CR 33(a) (part). A response to a request for production "shall state, with respect to each item or category, that inspection and related activities will be [\*\*\*89] permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified." CR 34(b) (part).

In applying the rules to the facts of the present case, the trial court should have asked whether the attorneys' certifications to the responses to the interrogatories and requests for production were made after reasonable inquiry and (1) were consistent with the rules, (2) were not interposed for any improper purpose and (3) were not unreasonable or unduly burdensome or expensive. The trial court did not have the benefit of our decision to guide it and it did not apply this standard in this case.

Instead, the trial court considered the opinions of attorneys and others as to whether sanctions should be imposed. This was error. Legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony. n79 It is the responsibility of the court deciding a sanction motion to interpret and apply the law.

n79 ER 702; Comment, ER 704; 5A K. Tegland, Wash. Prac., Evidence § 309, at 479 (3d ed. 1989); *Orion Corp. v. State*, 103 Wash. 2d 441, 461, 693 P.2d 1369 (1985); *Hiskey v. Seattle*, 44 Wash. App. 110, 113, 720 P.2d 867, review denied, 107 Wash. 2d 1001 (1986).

[\*\*\*90]

The trial court then denied sanctions, in part because: (1) The evidence did not support a finding that the drug company intentionally misfiled documents to avoid discovery; (2) neither the doctor nor the child had formally moved for a definition of "product" and neither had moved to compel production of documents or answers before requesting sanctions; (3) the conduct of the drug company and its counsel [\*345] was consistent with the customary and accepted litigation practices of the bar of Snohomish County and of this state; and (4) the doctor failed to meet his burden of proving that the "evidence of discovery abuse is so [\*\*1079] clear that reasonable minds could not differ on the appropriateness of sanctions." n80

n80 Report of Proceedings, at 4523.

The trial court erred in concluding as it did. As stated above, intent need not be shown before sanctions are mandated. A motion to compel compliance with the rules is not a prerequisite to a sanctions motion. Conduct is to be measured against the spirit and purpose [\*\*\*91] of the rules, not against the standard of practice of the local bar. Furthermore, the burden placed on the doctor by the trial court in this regard was greater than that mandated under the rule.

[40] Additionally, we agree with the doctor's claim that many of the findings of fact entered by the trial court are, instead, erroneous conclusions of law or are not supported by the evidence. For example, the trial court implicitly found in finding of fact 7, and then again in finding of fact 14b, that the "product scope" had been defined by the plaintiffs early in the litigation. The record does not support this finding. In finding of fact 14c the trial court stated that the doctor had been put on notice by the drug company's discovery responses that production of documents "would be limited to responsive documents from Somophyllin Oral Liquid files". (Italics ours.) n81 There is no evidence in the record to support this finding and while findings of fact which are supported by substantial evidence will not be disturbed on appeal, unsupported findings cannot stand. n82

n81 Clerk's Papers, at 7653.

[\*\*\*92]

n82 See *Bering v. Share*, 106 Wash. 2d 212, 220, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987).

[41] A remand for a determination as to whether sanctions are warranted would be appropriate but is not necessary. n83 Where, as here, the trial judge has applied the wrong [\*346] legal standard to evidence consisting entirely of written documents and argument of counsel, an appellate court may independently review the evidence to determine whether a violation of the certification rule occurred. n84 If a violation is found, as it is here, then sanctions are mandated, n85 but in fairness to the attorneys and parties, a remand is required

for a hearing on the appropriate sanctions required and against whom they should be imposed.

n83 *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d at 222.

n84 *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d at 222.

n85 *Clipse v. State*, 61 Wash. App. 94, 99, 808 P.2d 777 (1991).

[\*\*\*93]

We now measure the conduct of the drug company and its attorneys against the standard set forth in the rule.

[42] The drug company was persistent in its resistance to discovery requests. n86 Fair and reasoned resistance to discovery is not sanctionable. Rather it is the misleading [\*\*1080] nature of the drug company's responses that is contrary to the purposes of discovery n87 and which is most damaging to the fairness of the litigation process.

n86 For example, the drug company's response to the following interrogatory propounded by the doctor demonstrates the resistance to comply with discovery. Although we do not condone this kind of answer, this answer, alone, would not warrant sanctions as it does raise some legitimate objections. The doctor's simple request, and the answer thereto, are as follows:

INTERROGATORY NO. 2: Can Theophylline cause brain damage in humans?

ANSWER: See general objections [set forth in two pages] attached hereto as Exhibit A and incorporated herein by reference. This interrogatory calls for an expert opinion beyond the scope of Civil Rule 26(b)(4), and is, in any event, premature. Furthermore, this interrogatory appears to call for an opinion based on medical knowledge after January 18, 1986, whereas the relevant time frame is on or before January 18, 1986. In addition, this interrogatory is not reasonably calculated to lead to discovery of admissible evidence under CR 26(b)(1). This interrogatory is also vague, ambiguous and overbroad. For example, the term "cause" is vague

and ambiguous in that it does not specify whether it includes indirect, as opposed to direct, causes. The term "brain damage" is similarly vague and ambiguous and is overbroad as to time and scope. For example, it is unclear whether the term "brain" includes the entire central nervous system; it is further unclear whether the term "brain damage" includes temporary as well as permanent changes.

Clerk's Papers, at 4209-10.

[\*\*\*94]

n87 See, e.g., *Jerome v. Pardis*, 240 Mont. 187, 783 P.2d 919 (1989) (holding responses to discovery that attempt to mislead by concealing information which is material to the other party's case are not consistent with the rules and the "spirit of discovery").

[\*347] The specific instances alleged to be sanctionable in this case involve misleading or "non" responses to a number of requests which the doctor claims should have produced the smoking gun documents themselves or a way to discover the information they contained. The two smoking gun documents reportedly were contained in files which related to Intal, a cromolyn sodium product, which was manufactured by Fisons and which competed with Somophyllin. The manager of medical communications had a thorough collection of articles, materials and other documents relating to the dangers of theophylline and used the information from those materials to market Intal, as an alternative to Somophyllin Oral Liquid. The drug company avoided production of these theophylline-related materials, and avoided identifying [\*\*\*95] the manager of medical communications as a person with information about the dangers of theophylline, by giving evasive or misleading responses to interrogatories and requests for production.

The following is but a sampling of the discovery between the parties.

The first discovery documents directed to the drug company were prepared by the child's attorney and were dated September 26, 1986. The interrogatories contained a short definition section stating in part:

The term "the product" as used hereinafter in these interrogatories shall mean the product which is claimed to have caused injury or damage to JENNIFER MARIE

AR 013939

POLLOCK as alleged in pleadings filed on her behalf, namely, to wit: "Somophyllin" oral liquid.

Clerk's Papers, at 4103.

These first interrogatories requested information about "the product" which is manufactured by the drug company, Fisons, as well as about theophylline, a drug entity which is the primary ingredient of the drug company's product Somophyllin Oral Liquid. The interrogatory regarding theophylline was answered by the drug company, as were the interrogatories about "the product".

[\*348] Somophyllin and its primary ingredient, theophylline, [\*\*\*96] were not distinguished in discussions between the attorneys or in drug company literature. The printed package insert for Somophyllin Oral Liquid (exhibit 93) and marketing brochures refer to the names Somophyllin and theophylline interchangeably. One marketing brochure states:

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

The one name to remember . . .

Somophyllin.

Exhibit 111.

The drug company's responses to discovery requests contained the following general objection:

Requests Regarding Fisons Products Other Than Somophyllin Oral Liquid. Fisons objects to all discovery requests regarding Fisons products other than Somophyllin Oral Liquid as overly broad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence.

See, e.g., Clerk's Papers, at 7399.

Theophylline is not a Fisons "product". Furthermore, because theophylline is the primary ingredient in Somophyllin Oral Liquid, any document focusing on theophylline would, necessarily, be one regarding Somophyllin Oral Liquid.

[\*\*1081] In November 1986 the doctor served his first[\*\*\*97] requests for production on the drug company. Four requests were made. Three asked for documents concerning Somophyllin. Request 3 stated:

3. Produce genuine copies of any letters sent by your company to physicians concerning theophylline toxicity in children.

The drug company's response was:

Such letters, if any, regarding Somophyllin Oral Liquid will be produced at a reasonable time and place convenient to Fisons and its counsel of record.

Clerk's Papers, at 8458.

[\*349] Had the request, as written, been complied with, the first smoking gun letter (exhibit 3) would have been disclosed early in the litigation. That June 30, 1981 letter concerned theophylline toxicity in children; it was sent by the drug company to physicians.

The child's first requests for production, and the responses thereto, included the following:

REQUEST FOR PRODUCTION NO. 12: All documents pertaining to any warning letters including "Dear Doctor letters" or warning correspondence to the medical professions regarding the use of the drug Somophyllin Oral Liquid.

RESPONSE: Fisons objects to this request as overbroad in time and scope for the reasons identified in response[\*\*\*98] to request number 2, hereby incorporated by reference. Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this request at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

REQUEST FOR PRODUCTION NO. 13: All documents of any clinical investigators who at any time stated or recommended to the defendant that the use of



the drug Somophyllin Oral Liquid might prove dangerous.

RESPONSE: Fisons objects to this request as overbroad in time and scope for the reasons identified in response to request number 2 hereby incorporated by reference. Fisons further objects to this request as calling for materials not within Fisons' possession, custody or control. Fisons further objects to this request to the extent it calls for expert disclosures beyond the scope of CR 26(b)(4) or which may be protected by the work-product and/or attorney-client privilege. Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this interrogatory at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

(Italics ours.) Clerk's Papers, [\*\*\*99] at 6329-30.

The doctor further requested:

Request for Production No. 4: Please produce copies of any and all seminar materials, regardless of their source, in Fisons' possession on or before January 16, 1986 regarding asthma, bronchopulmonary dysplasia, theophylline and/or allergy.

Response: Fisons objects to this discovery request as overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks seminar materials regarding subjects other than theophylline. Without waiving these objections, Fisons answers as follows:

[\*350] Fisons has no documents regarding theophylline and otherwise responsive to this discovery request.

(Some italics ours.) Clerk's Papers, at 3868.

These requests, and others of a similar tenor, should have led to the production of the smoking gun documents.

When the child or the doctor attempted to see information from the files of other products, the drug company objected. For example:

Request for Production No. 1: All documents contained in all files from the regulating department, marketing department, drug surveillance department, pharmaceutical development [\*\*\*100] department, product manager department and the medical departments regarding all cromolyn [Intal] products of Fisons Corporation. [\*\*1082] Regarding this request for

production all documents should include from inception of file to the present.

Answer: Defendant Fisons objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence, as overbroad in time, and as incredibly burdensome and harassing. This discovery request encompasses approximately eighty-five percent of all documents in the subject files and departments -- millions of pages of documents. Neither cromolyn (which should be referred to as cromolyn sodium), nor any cromolyn product, nor the properties or efficacy of cromolyn is at issue in this litigation. Furthermore, Fisons objects to this discovery request as calling for the production of extremely sensitive trade secret and proprietary material.

(Some italics ours.) Clerk's Papers, at 4124.

To requests asking for correspondence, memoranda, articles and other documents "concerning", "regarding" or "covering" Somophyllin Oral Liquid, the drug company generally objected to the requests and then stated [\*\*\*101]

Without waiver of these objects and subject to these limitations, Fisons will produce documents responsive to this request at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

See, e.g., Clerk's Papers, at 7240-55.

In support of the drug company's motion for a protective order, the drug company's in-house counsel and its Seattle [\*351] lawyer filed similar affidavits. Seattle counsel's affidavit declares:

Plaintiffs allege that Fisons failed to provide adequate warnings of possible dangers associated with the use of Somophyllin Oral Liquid, a theophylline-based prescription medication distributed by Fisons . . . [Plaintiffs'] discovery requests are extremely broad in scope. Many of these discovery requests are not reasonably related to plaintiffs' failure-to-warn allegations against Fisons.

Following receipt of plaintiffs' First Request for Production, I traveled to Fisons in Bedford, Massachusetts in order to ascertain firsthand the scope and extent of documents responsive to plaintiffs' request for production. At that time I confirmed that to produce all of the documents responsive to plaintiffs' catch-all requests would be extremely [\*\*\*102] burdensome and

oppressive to Fisons. Between one and two million pages of documents, most of which have no colorable relevance to the issues in this action, would have to be located, assembled, and made available for review or copying. The time, expense, and intrusion upon the day-to-day business activities of Fisons would be immense.

While at Fisons I identified those documents reasonably related to the claims asserted by plaintiffs in this litigation and arranged to have them copied and forwarded to Seattle for production to plaintiffs.

Clerk's Papers, at 6301-02.

The affidavit goes on to say that the drug company had "agreed to make available those documents reasonably related to plaintiffs' allegations against Fisons." Clerk's Papers, at 6302.

In its memorandum to the court in support of the motion for a protective order, the attorney for the drug company outlined the documents contained in the regulatory file on Somophyllin Oral Liquid. That file purportedly contained complete information regarding the drug including: Summaries of adverse reactions associated with the use of the medication that had been reported to Fisons; all promotional or advertising material disseminated[\*\*\*103] by Fisons with regard to the medication; the complete product file for Somophyllin Oral Liquid, which contained records of communications [\*352] with the Food and Drug Administration, internal memoranda, and miscellaneous medical literature regarding theophylline. The memorandum goes on to tell the court

In short, Fisons' Regulatory File for Somophyllin Oral Liquid contains all or nearly all documents in Fisons' possession [\*\*1083] that are reasonably related to plaintiffs' failure-to-warn allegations.

Clerk's Papers, at 6277. A footnote to this comment states "Fisons has also agreed to make available to plaintiffs an index of periodicals maintained in Fisons' internal library as well as certain other documents." Clerk's Papers, at 6277 n.3.

The drug company's responses and answers to discovery requests are misleading. The answers state that all information regarding Somophyllin Oral Liquid which had been requested would be provided. They further imply that all documents which are relevant to the plaintiffs' claims were being produced. They do not specifically object to the production of documents that discuss the dangers of theophylline, but which are not

within[\*\*\*104] the Somophyllin Oral Liquid files. They state that there is no relevant information within the cromolyn sodium product files.

It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not being produced. Instead the general objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement.

The drug company does not claim that its inquiry into the records did not uncover the smoking gun documents. Instead, the drug company attempts to justify its responses by arguing as follows: (1) The plaintiffs themselves limited the scope of discovery to documents contained in Somophyllin Oral Liquid files. (2) The smoking gun documents were not intended to relate to Somophyllin Oral Liquid, but rather were intended to promote another product of the drug company. [\*353] (3) The drug company produced all of the documents it agreed to produce[\*\*\*105] or was ordered to produce. (4) The drug company's failure to produce the smoking gun documents resulted from the plaintiffs' failure to specifically ask for those documents or from their failure to move to compel production of those documents. (5) Discovery is an adversarial process and good lawyering required the responses made in this case.

If the discovery rules are to be effective, then the drug company's arguments must be rejected.

First, neither the child nor the doctor limited the scope of discovery in this case. Attorneys for the child, the doctor and the drug company repeatedly referred to both theophylline and Somophyllin Oral Liquid. There was no clear indication from the drug company that it was limiting all discovery regarding Somophyllin Oral Liquid to material from that product's file. Nor was there any indication from the drug company that it had information about theophylline, which is not a Fisons "product", or information regarding Somophyllin Oral Liquid that it was not producing because the information was in another product's file. The doctor was justified in relying on the statements made by the drug company's attorneys that all relevant[\*\*\*106] documents had been produced and he cannot be determined to have impliedly, albeit unknowingly, acquiesced in limiting the scope of discoverable information.

Second, the drug company argues that the smoking gun documents and other documents relating to theophylline

were not documents regarding Somophyllin Oral Liquid because they were intended to market another product. No matter what its initial purpose, and regardless of where it had been filed, under the facts of this case, a document that warned of the serious dangers of the primary ingredient of Somophyllin Oral Liquid is a document regarding Somophyllin Oral Liquid.

Third, the discovery rules do not require the drug company to produce only what it agreed to produce or what it was ordered to produce. The rules are clear that a party [\*354] must fully answer all interrogatories and all requests for production, unless a [\*\*1084] specific and clear objection is made. n88 If the drug company did not agree with the scope of production or did not want to respond, then it was required to move for a protective order. In this case, the documents requested were relevant. The drug company did not have the option of determining[\*\*\*107] what it would produce or answer, once discovery requests were made. n89

n88 CR 33(a); CR 34(b).

n89 *Gammon v. Clark Equip. Co.*, 38 Wash. App. 274, 281, 686 P.2d 1102 (1984) (defendant may not unilaterally determine what is relevant to plaintiff's claim and defendant's remedy, if any, was to seek a protective order pursuant to CR 26(c)), aff'd, 104 Wash. 2d 613, 707 P.2d 685 (1985); *Taylor v. Cessna Aircraft Co.*, 39 Wash. App. 828, 836, 696 P.2d 28 (defendant and its counsel could not unilaterally decide what was relevant in a particular case, defendant's remedy was to seek a protective order, not to withhold discoverable material), review denied, 103 Wash. 2d 1040 (1985).

Fourth, the drug company further attempts to justify its failure to produce the smoking guns by saying that the requests were not specific enough. Having read the record herein, we cannot[\*\*\*108] perceive of any request that could have been made to this drug company that would have produced the smoking gun documents. Unless the doctor had been somehow specifically able to request the June 30, 1981, "dear doctor" letter, it is unlikely that the letter would have been discovered. Indeed the drug company claims the letter was not an official "dear doctor" letter and therefore was not required to be produced.

Fifth, the drug company's attorneys claim they were just doing their job, that is, they were vigorously representing their client. The conflict here is between the attorney's duty to represent the client's interest and the attorney's duty as an officer of the court to use, but not abuse the judicial process.

Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that [\*355] govern the system. Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice [\*\*\*109]system to represent his client, and in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of that system.

Schwarzer, *Sanctions Under the New Federal Rule 11 -- A Closer Look*, 104 F.R.D. 181, 184 (1985).

[43] Like CR 11, CR 26(g) makes the imposition of sanctions mandatory, if a violation of the rule is found. n90 Sanctions are warranted in this case. What the sanctions should be and against whom they should be imposed is a question that cannot be fairly answered without further factual inquiry, and that is the trial court's function. While we recognize that the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge, it is a necessary one if our system is to remain accessible and responsible.

n90 *Cascade Brigade v. Economic Dev. Bd.*, 61 Wash. App. 615, 619, 811 P.2d 697 (1991) (interpreting CR 11); *Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 220 (1983).

[\*\*\*110]

Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.

Schwarzer, 104 F.R.D. at 205.

In making its determination, the trial court should use its discretion to fashion "appropriate" sanctions. The rule provides that sanctions may be imposed upon the signing attorney, the party on whose behalf the response is made, or both. n91

n91 CR 26(g).

[44] In determining what sanctions are appropriate, the trial court is given wide latitude. n92 However certain principles guide the trial court's consideration of [\*\*1085] sanctions. First, the least severe sanction that will be adequate to serve the [\*356] purpose of the particular sanction should be imposed. n93 The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. n94 The wrongdoer's lack of intent to violate the rules and the other party's[\*\*\*111] failure to mitigate may be considered by the trial court in fashioning sanctions. n95

n92 *In re Guardianship of Lasky*, 54 Wash. App. 841, 855, 776 P.2d 695 (1989).

n93 *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 225, 829 P.2d 1099 (1992); *In re Guardianship of Lasky*, 54 Wash. App. at 855.

n94 *Gammon v. Clark Equip. Co.*, 38 Wash. App. at 282 (sanction award of \$2,500 was disapproved for being "cheap at twice the price in the context of a \$4.5 million wrongful death case").

n95 Schwarzer, at 200.

[45, 46] The purposes of sanctions orders are to deter, to punish, to compensate and to educate. n96 Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the sanctions rules are not "fee shifting" rules. n97 Furthermore, requests for sanctions should not turn[\*\*\*112] into satellite litigation or become a "cottage industry" for lawyers. To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds. n98 In the present case, sanctions need to be severe enough to deter these attorneys and

others from participating in this kind of conduct in the future.

n96 *Miller v. Badgley*, 51 Wash. App. 285, 303, 753 P.2d 530, review denied, 111 Wash. 2d 1007 (1988).

n97 *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d at 228 (Andersen, J., concurring in part, dissenting in part).

n98 See, e.g., *J.M. Cleminshaw Co. v. Norwich*, 93 F.R.D. 338, 354 (D. Conn. 1981).

The trial court's denial of sanctions is reversed and the case is remanded for a determination of appropriate sanctions.

In[\*\*\*113] sum, we hold as follows: Dr. Klicpera did have standing to bring a Consumer Protection Act claim and damages for [\*357] injury to his reputation are compensable damages under the Consumer Protection Act. However, the physician cannot, under the facts herein, recover damages for his own emotional pain and suffering under the Washington product liability act. Dr. Klicpera cannot maintain a common law negligence cause of action based upon a claim of failure to warn of a product's dangers as such claims were subsumed in the Washington product liability act. We also conclude that the trial court correctly declined to allow the Consumer Protection Act claim of Washington State Physicians Insurance Exchange & Association to go to the jury and did not err in excluding the "habit" testimony of the drug company's sales representative proffered under ER 406. The physician's claims under the laws of this state were not preempted by federal law. We also decline to overturn or reduce the jury's award of damages to the physician for loss of reputation and conclude that the trial court did not abuse its discretion in calculating the amount of attorneys' fees recoverable under the Consumer[\*\*\*114] Protection Act. Finally, we hold that the trial court erred in failing to find that sanctions for discovery abuse were warranted in this case and, in that regard, remand the case to the trial court for imposition of adequate sanctions.

Affirmed in part; reversed in part; and remanded to the trial court for imposition of sanctions.

AR 013944

CONCURBY: BRACHTENBACH (In Part)

DISSENTBY: BRACHTENBACH (In Part)

DISSENT: Brachtenbach, J. (concurring in part/dissenting in part) -- I fully concur with the majority except on issue 2. I strongly disagree with the reasoning and result on issue 2 and respectfully dissent.

The issue is whether a drug manufacturer is liable to a physician for damages for his physical and mental injuries when the [\*\*1086] drug manufacturer proximately caused those damages because it failed to warn the physician of known risks in the use of its drug.

Plaintiff was the pediatrician treating a 2-year-old child. He prescribed a drug manufactured and distributed by defendant. [\*358] The jury found, and it is not here challenged, that defendant failed to adequately warn of the risks in use of its drug. The child suffered permanent brain damage.

The jury found that the resulting publicity and malpractice [\*\*\*115] action against plaintiff, Dr. James A. Klicpera, damaged his professional reputation. The majority affirms that part of the special verdict.

But Dr. Klicpera contends that he suffered more than loss of or damage to his professional reputation. He personally suffered emotional damages with accompanying physical illness; that evidence will be discussed hereafter. It is for these personal damages that Dr. Klicpera sought damages under the product liability act (PLA), RCW 7.72. The jury was properly instructed as to the law of the PLA and was properly instructed as to the type of damages recoverable. The jury made its award; the trial court refused to overturn the jury verdict.

Yet the majority sets aside the jury verdict and reverses the trial court, as a matter of law. It is essential to understand that the majority reverses the jury and the trial court on a theory of its own, a theory never raised, briefed or argued by the defendant.

This dissent will first make an abbreviated review of the product liability act as it relates to this cause of action; second, I will examine the majority, and third, provide a more detailed analysis of the PLA, particularly showing that the legislative[\*\*\*116] history, not examined by the majority, supports this verdict. Because I would affirm the verdict, it is necessary to examine defendant's challenges to sufficiency of proof of proximate cause and its challenges to the amount of the verdict.

The PLA contains a number of definitions which are critical to understanding it and its application, but the following are the essential considerations supporting the plaintiff's verdict. The PLA expressly recognizes a product liability claim of the very type brought here, i.e., failure to discharge a duty to warn or instruct, whether negligent or innocent. RCW 7.72.010(4). Liability is imposed specifically if adequate [\*359] warnings or instructions were not provided. RCW 7.72.030(1). The jury was instructed correctly on this phase of the law; defendant does not challenge the correctness of the PLA instructions. n99 The jury held for plaintiff on this point, so it is an established fact that the defendant is liable.

n99 Defendant assigns error to certain instructions, but only as a precaution to comply with RAP 10.3(g). Defendant makes no argument that the contents of the instructions are incorrect. Brief of Appellant, at 2.

[\*\*\*117]

The PLA also defines who is a "claimant", i.e., who is a proper person to make a product liability claim. The definition is remarkably broad: "'Claimant' includes any person or entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller." RCW 7.72.010(5). Defendant argues that plaintiff doctor did not have standing to sue under the PLA, i.e., defendant contends, as a matter of law, plaintiff was not a claimant as defined in the PLA. This issue was not submitted to the jury. Unless plaintiff is not a proper claimant, as a matter of law, defendant is foreclosed on this issue. The majority never addresses this issue.

As noted, a claimant is any person that suffers harm. The term "harm" is also strikingly broad in definition: "'Harm' includes any damages recognized by the courts of this state. . . ." (Italics mine.) RCW 7.72.010(6). The definition goes on to exclude economic loss under the Uniform Commercial Code, RCW Title 62A.

The majority rests its decision against the verdict solely on the basis that [\*\*\*118] plaintiff's [\*\*1087] damages are not the type of harm recoverable under the above definition. Majority, at 319. Thus, the majority necessarily holds that the physical and emotional suffering of plaintiff are not within "any damages recognized by the courts of this state". RCW 7.72.010(6).

Defendant never raises, briefs nor argues that the damages suffered by plaintiff are not within the statutory

definition of "harm". Yet this is the exclusive focus and foundation of the majority's holding. Defendant's opening brief, from the table [\*360] of contents to the conclusion, raises only the issue of standing, i.e., whether plaintiff was a proper "claimant". Opening Brief of Appellant, at i, 3, 24, 28, 30-31, 33, 82. Defendant's reply brief continues to raise only that single issue, not mentioning the majority's theory. Reply Brief of Appellant, at 5-7.

In a nutshell, defendant's only challenge is to WHO can be a plaintiff under the PLA; the majority's singular inquiry is WHAT can be recovered, describing that as "the most precise inquiry". I suggest it is the wrong question, but even if it were the issue, the majority's conclusion is contrary to Washington law[\*\*\*119] and legislative history of the PLA.

The majority seems to find only two perceived policy grounds to justify its reversal. First, if recovery were allowed, "liability would potentially be endless". Majority, at 320. This merely echoes the unsupported supposition asserted by Justice Dore in *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 260, 787 P.2d 553 (1990). My answer to this dire warning of "opening the floodgates of litigation" remains the same as expressed before: "I prefer to continue with a faith in trial courts and juries to dispense appropriate justice, rather than create an unjust artificial rule based on some unsupported fear." *Gain*, at 265 (Brachtenbach, J., concurring in result only; dissenting).

The second policy ground asserted by the majority is its statement: "We would not be furthering the intent of the Legislature if we extended liability so far that drug manufacturers would be chilled in marketing products and developing new ones." Majority, at 322. The opinion reveals no authority for this significant insight into the pharmaceutical industry. Not even the source of the majority's speculation is disclosed.

This[\*\*\*120] speculative ground lends no support to the majority's conclusion. In stark contrast, the Oregon Supreme Court has rendered a reasoned and rational decision rejecting the foundation upon which the majority places such emphasis. The facts are remarkably similar, except the doctor sought only economic damages. In *Oksenholt v. Lederle Labs.*, 294 Or. 213, [\*361] 656 P.2d 293 (1982), the court held that a prescribing physician had a cause of action against the drug manufacturer for failure to warn as required by federal regulations, 21 C.F.R. § 200 et seq. (1993). The defendant argued, as does this defendant, that its duty to warn runs to the patient; that such is its exclusive duty, and thus no liability is owed to the doctor when it is the patient who suffers direct injury from the product.

Oksenholt makes this telling and persuasive statement:

Affording such a remedy for injury to a physician that results from a prescription drug manufacturer's failure to supply adequate information will encourage drug manufacturers to supply that information and thus further the regulatory objective.

Oksenholt, at 220. When [\*\*\*121] one evaluates the validity of the majority's supposition that recovery would "chill" drug manufacturers in marketing products and even in developing new ones, it must be remembered that this case did not involve the scientific complexities of some new drug. All this defendant had to do to escape liability was give the plaintiff and other doctors a fair warning of the literally lethal potential consequences of its widely used drug. Defendant knew those facts; its marketing strategy, the bottom dollar line, led to liability. Hiding the truth is what "chilled" its drug and left the plaintiff's child patient permanently brain damaged.

[\*\*1088] I turn to other reasons advanced by the majority. It correctly notes that there is no directly applicable Washington product liability case on the issue presented, whether the issue be who is a proper claimant or are these type of damages "harm" within the statute. However, the majority errs in asserting that in our prior product liability cases under the PLA, "the 'harm' involved has been for injury caused directly by the product to the person or the property of the claimant." (Footnote omitted.) Majority, at 320. It cites *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 763, 818 P.2d 1337 (1991); [\*\*\*122] *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 840 P.2d 860 (1992). The majority's statement is not accurate and the cited cases lend it no support, but [\*362] rather support the dissent. In *Ayers*, there was a \$500,000 recovery by the parents of the child who had been injured directly by the product. In *Washburn*, there was a \$2 million recovery by the wife of the person injured by the product. Neither the parents nor the wife suffered injuries caused directly by the product. They were persons whose emotional injuries alone were linked to the person who was injured by the product, just as plaintiff doctor claims injuries linked to the person who was injured by the product.

Next, the majority relies by analogy on *Gain v. Carroll Mill Co.*, *supra*. It too provides no support for the majority. The sole holding in *Gain* is that the mental distress of family members who were not present when their son and brother were killed is not foreseeable as a matter of law. *Gain*, at 261. The holding in *Gain* is entirely irrelevant here; foreseeability is not an issue. We recently[\*\*\*123] so held: "foreseeability is not an

element of a failure to warn claim arising under subsection (b)" of RCW 7.72.030(1). Ayers, at 765.

I can discern no other rationale in the majority other than that discussed and rejected above. Because the majority repeatedly emphasizes what it perceives to be legislative intent in enacting the PLA, we should examine evidence of legislative intent.

First, we should consider the only theory raised by the defendant, the one never considered by the majority, i.e., that the plaintiff doctor lacked standing because he is not a "claimant" as defined by the PLA. To read the plain language of the statute answers the question. RCW 7.72.010(5) could hardly be stated more broadly: "Claimant. 'Claimant' means a person or entity asserting a product liability claim . . . 'Claimant' includes any person or entity that suffers harm."

Up to this point in the statutory definition of claimant, there is nothing which suggests the limitation created by the majority. However, the Legislature went further and enlarged the scope of the definition by providing: "A claim may be asserted under this chapter even though the claimant did [\*363] not [\*\*\*124]buy the product from, or enter into any contractual relationship with, the product seller." RCW 7.72.010(5).

The legislative history rejects the restrictive reading rendered by the majority. The report of the Senate select committee clearly illustrates the intent that the definition of "claimant" was intended to be broad and sweeping. That report states: "Claimant. Recovery may be had under this act by any person or entity which suffers harm, including those not in privity with the product seller, bystanders as well as product users." (Italics mine.) Senate Journal, 47th Legislature (1981), at 630.

It is critical to note what relationship with the product the claimant does not have to establish. The claimant need not have bought the product from the product seller. The claimant need have no privity with the product seller. By the Legislature's own declaration of intent, claimants may include bystanders with no connection to the product. Note that the Legislature declared that "claimant" includes all these potential plaintiffs, and not that it is restricted to those classes.

Within these very wide boundaries, is a physician who prescribes a drug without[\*\*\*125] proper warning of its dangers (an established fact in this case) a claimant? We know from *Ayers v. Johnson & Johnson* [\*\*1089] *Baby Prods. Co., supra*, and *Washburn v. Beatt Equip. Co., supra*, that parents and spouses are claimants, even if not bystanders. Yet the Legislature went so far as to mention

specifically bystanders. Nowhere is there a suggestion that there must be some familial relationship.

If mere bystanders are included, what relationship does the prescribing physician occupy? The duty to warn about the drug ran to the plaintiff doctor. The jury was so instructed in an instruction which defendant does not challenge. Instruction 17. The Oregon court in *Oksenholt v. Lederle Labs., supra*, clearly understood this:

By law, a prescription drug manufacturer cannot sell its products to the consumer without the physician's approval. The [\*364] patient must rely on the physician to sift through the relevant literature, to match a medicine's indications and contraindications with the patient's ailment and to prescribe the appropriate drug. [\*\*\*126] The [federal] regulations presume this three-way relationship and were designed to aid the physician. We hold that physicians are in the class protected by the [federal] regulations.

Oksenholt, at 219-20.

The telling point is made entirely clear in *Carmichael v. Reitz*, 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381 (1971). The court, in considering the necessity of a warning from the drug manufacturer to the physician, stated: "Because of the foregoing law [relating to warnings to the physician], it is the prescribing doctor who in reality stands in the shoes of 'the ordinary consumer.'" (Italics mine.) The court went on to hold it was proper to instruct that the drug had to be dangerous to an extent beyond that which could be contemplated by the physician. In this case, the jury was so instructed in this language: "you shall consider whether the product was unsafe to an extent beyond that which would be contemplated by an ordinary physician user." Instruction 17.

If we start with the definition of the statute that a "claimant" includes any person who suffers harm, and add the fact that the statute does not require [\*\*\*127]the claimant to be in privity or even be a buyer, and then add the clear legislative history that "even bystanders" are included, what is there which would exclude the plaintiff-prescribing physician? We must eliminate any question of foreseeability. There is no requirement of any special relationship, such as a family member. The statute is perfectly clear that it includes all of the above categories, but does not limit the definition to those described.

Instead of a mere bystander, Dr. Klicpera was an essential participant in the distribution and ultimate sale

of defendant's product. By law, without his participation, defendant could not have sold its product. I suggest the California court was exactly correct in stating "it is the prescribing doctor who in reality stands in the shoes of 'the ordinary consumer.'" Carmichael, at 989.

[\*365] I would hold that plaintiff was a proper claimant to bring this PLA action, thereby rejecting the only challenge mounted by the defendant and never answered by the majority.

Because the majority chose to create an entirely separate issue from that raised by defendant, it is necessary to answer that issue. The majority states the[\*\*\*128] issue which it alone creates as follows: "We perceive the most precise inquiry here to be whether these pain and suffering damages are the type of 'harm' contemplated as recoverable by the Legislature under the PLA." Majority, at 319.

The statute provides the definition of "harm" to be: "'Harm' includes any damages recognized by the courts of this state." RCW 7.72.010(6). It is absolutely clear that the Legislature was referring only to the type of damages recoverable, not to the person who was the claimant because the same statute contains a proviso that "the term 'harm' does not include direct or consequential economic loss under Title 62A RCW."

The majority never denies that emotional distress with accompanying pain and suffering are types of damages recognized by the Washington courts. That is all the [\*\*1090] statute requires. Indeed, the majority cannot deny that recovery for mental distress has long been recognized as a proper element of damages in this state. Recovery was permitted for mental distress as early as 1918 in *Redick v. Peterson*, 99 Wash. 368, 169 P. 804 (1918). There has been a long debate in the cases about the[\*\*\*129] necessity of physical harm as a condition of recovering for emotional distress, but that issue is not raised here and there were physical injuries. The physical impact requirement was abandoned 17 years ago, but our courts have not experienced the endless litigation and fraudulent claims, then predicted, as the majority now predicts endless liability. *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

The majority correctly notes that the Legislature chose not to use the definition of "harm" contained in the Model Uniform Product Liability Act (UPLA), 44 Fed. Reg. 62,713, 62,717 (1979). However, the majority fails to explore the [\*366] difference between the UPLA and the definition enacted in RCW 7.72. The definition of "harm" in the model act is much more restrictive and might justify the result of the majority, but the Legislature intentionally and knowingly rejected that

restrictive definition which might support the majority. The UPLA included four definitions of "harm", including:

- (3) mental anguish or emotional harm attendant to such personal physical injuries, illness or death; and[\*\*\*130]
- (4) mental anguish or emotional harm caused by the claimant's being placed in direct personal physical danger and manifested by a substantial objective symptom. . . .

44 Fed. Reg. 62,717 § 102(F) (1979).

Under said section 102(F)(3) of the UPLA, recovery here would be dependent upon physical injuries or illness. As discussed hereafter, the evidence may well support recovery under such definition, depending upon its interpretation, but it is not an issue raised by the defendant or the majority. Clearly, under subsection (F)(4), quoted above, Dr. Klicpera would be denied recovery because he was not placed in direct personal damage.

It is obvious that the UPLA proposed a much more restrictive definition of "harm". It is highly significant and relevant here that the definitions in RCW 7.72 "are taken substantially from the Uniform Product Liability Act". Senate Journal, 47th Legislature (1981), at 629. But when it came to defining "harm", the Legislature rejected the more restrictive definition in the UPLA. Intent to allow a much broader type of damage recovery is apparent. The select committee report states: "(6) Harm. The Select Committee[\*\*\*131] has chosen not to utilize the definition of 'harm' contained in the UPLA, and instead has adopted a broad definition allowing for the continued development of the concept through case law." (Italics mine.) Senate Journal, 47th Legislature (1981), at 630.

I suggest that this legislative declaration of intent destroys the majority's claim that its restrictive vision of legislative intent furthers legislative intent. The question is not what the majority wants to accomplish, but rather what the Legislature [\*367] put in writing about its intent. First, it rejected the narrow definition of the UPLA. Second, it instead adopted a broad definition which allowed for continued development of the concept of recoverable damages. There is nothing in the past several decades of this court's opinions which could lead the Legislature to believe that a broad definition and continued development of the concept would mean a more restrictive recovery. Quite the contrary.

In short, there is nothing in the majority opinion which convincingly demonstrates that the type of damages in



the PLA verdict in this case does not constitute damages "recognized by the courts[\*\*\*132] of this state". That is exactly what the majority has to show to justify its conclusion and result because that is the precise requirement of RCW 7.72.010(6).

The jury instruction given on damages is exactly the standard instruction one would expect under our existing law. It included the following as an element the jury could consider if it found for the plaintiff: "the pain and suffering, both physical and mental, [\*\*1091] experienced and reasonably certain to be experienced in the future." Instruction 29. While the majority holds, as a matter of law, a verdict pursuant to this instruction was error, not even the defendant claims it to be an erroneous statement of the type of damages recoverable under the statutory definition of "harm".

Because plaintiff has standing under the PLA and I believe the majority is incorrect in using an analysis of "harm" to reverse, it is necessary to consider two arguments which are raised by defendant.

First, defendant argues there was insufficient evidence of proximate cause. Defendant takes the improbable position that: "As a matter of law, a plaintiff's testimony that he would have acted differently if there had been a stronger warning is insufficient[\*\*\*133] to establish proximate cause." Opening Brief of Appellant, at 44. On its face that contention is without merit and the cases cited do not support it, despite defendant's assertions as to what those cases hold. At best, [\*368] its description of the holdings of cited cases is incomplete, if not outright misleading.

There is no question but that Dr. Klicpera testified that he would not have treated the child patient with the drug had he been properly warned of its dangers, and that, since learning of those dangers, he has stopped prescribing the drug. Verbatim Report of Proceedings, at 1968, 1081. This testimony alone was sufficient evidence of proximate cause to go to the jury and to support the verdict.

In support of the statement quoted above, defendant cites *Baughn v. Honda Motor Co.*, 107 Wash. 2d 127, 144, 727 P.2d 655 (1986), which does not hold what defendant represents. What Baughn did hold, correctly, is that whether warnings were adequate or not, failure to warn was not a cause in fact because the purchaser already knew of the dangers in the vehicle and had warned the injured child of the very danger for which they contended[\*\*\*134] a warning was needed. Defendant's representation of the holding in *Greiner v. Volkswagenwerk Aktiengesellschaft*, 429 F. Supp. 495 (E.D. Pa. 1977) is equally misleading. Defendant states:

"The court held that the plaintiff's bare allegation that she would not have bought the car if there had been a stronger warning was insufficient as a matter of law." Opening Brief of Appellant, at 45. In fact, the plaintiff was not the buyer of the automobile and did not testify that she would not have bought it if warned. The holding was that the jury could not speculate what she would have said had she been asked.

This dissent need not be extended by an examination of each case cited by defendant because none holds what defendant claims. Counsel responsible for writing this portion of the brief should consult RPC 3.3 -- Candor Toward the Tribunal.

In *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 754-55, 818 P.2d 1337 (1991), we rejected a similar claim about speculation of the effect of a warning and proximate cause. We stated that to overturn a verdict on such basis: "This court must be prepared to[\*\*\*135] conclude that no reasonable person could infer, as did the jury, that a warning would have altered the [plaintiffs'] behavior." Ayers, at 755. [\*369] The evidence in Ayers did not permit such a conclusion and without question the positive testimony of Dr. Klicpera, cited above, was sufficient and does not permit such a conclusion.

Finally, defendant attacks the PLA verdict as (1) not supported by substantial evidence, or (2) such that it should shock the conscience of the court, or (3) the result of passion and prejudice. Defendant claims all three grounds exist.

As to the sufficiency of the evidence, defendant describes it as minimal. While the plaintiff was not verbose on the subject, he testified that he developed at least a gastritis or an ulcer for which he was being treated by a gastroenterologist. He described severe abdominal pain. He had never had those difficulties before. He positively related those problems to the stress arising from the litigation. He had loved his pediatric work because he liked taking care of kids. Now he does not enjoy [\*\*1092] it as much and considered going into administration.

The doctor testified to a changed relationship with his [\*\*\*136] family. He described himself as hard to live with, spending less time with his children, and a lot less time with his wife. He summed it up as "We don't get along as well as I guess as we used to." His wife testified that he had become uncommunicative. He was on a prescribed medication for his stomach difficulties which caused him to awaken a lot at night. There was substantial evidence before the jury.

The majority has reviewed thoroughly and ably the standards which govern appellate review of the amount of a jury verdict. Majority, at 329-32. I need not repeat them, but they lead to the conclusion that we should not disturb the jury verdict.

Comment, however, is appropriate on defendant's claim that the amount should shock the conscience of the court. In its 2-page argument, defendant's only argument is a comparison of this verdict with other cases. As the majority notes: "In Washburn, we emphatically disallowed such comparisons. . . ." (Footnote omitted.) Majority, at 331. Thus, we give no consideration to defendant's argument on this point.

[\*370] The third challenge is that the verdict was the result of passion and prejudice by the jury. Again, I need not repeat[\*\*\*137] the applicable standards of review fully set out by the majority. Majority, at 332-34. Because defendant makes the same arguments about both of the verdicts, that is, the verdict under the Consumer Protection Act and the verdict under the PLA, the majority's rejection of those arguments under the CPA is equally applicable to the PLA verdict. Therefore, the PLA verdict was not the result of passion and prejudice for those same reasons.

However, I must note an egregious lack of candor in defendant's argument regarding passion and prejudice. The defendant states: "The trial court, in ruling on the JNOV/new trial motion, stated that the size of the jury's award did 'startle' his conscience." Verbatim Report of Proceedings, at 4366. Because of the deference we give the trial court on this question and because a verdict is strengthened by denial of a new trial by the trial court, the above quotation could be highly significant. *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 271, 840 P.2d 860 (1992).

When one goes to the record and reads the entire statement of the trial court, it is obvious that the defendant's statement, quoted above, [\*\*\*138] is at best misleading and more accurately a plain attempt to misrepresent the ruling and to mislead this court. This is what the trial court said: "I'm not able to say that the verdict shocked the conscience of the Court. I will say that it -- I blinked and it did startle my conscience. But I can't really say that it shocked my conscience or it was a result of passion or prejudice." Verbatim Report of Proceedings, at 4366. In conclusion, I agree with the majority on every issue, and its disposition of those issues, except as to issue 2 on which I would affirm.



WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA, Plaintiff, v. BROWN TRANSFER AND STORAGE CO., INC., et al., Defendants/Third-Party Plaintiffs, v. FREDERIC GOODMAN and FINANCIAL DIVERSIFIED SERVICES, INC., Third-Party Defendants  
No. 88-6080-CV-SJ-6

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, ST. JOSEPH DIVISION

141 F.R.D. 142; 1990 U.S. Dist. LEXIS 1716

February 9, 1990, Decided and Filed

CASE SUMMARY

**PROCEDURAL POSTURE:** Third-party defendants, individual and corporations, filed a motion to compel discovery of plaintiff life insurance company's conversations with its expert witness that concerned the expert's opinion on the individual's conduct.

**OVERVIEW:** Third-party defendants filed a motion to compel the life insurance company's expert to respond to questions with regards to the nature and content of the expert's conversations with the life insurance company and the life insurance company's counsel concerning the expert's opinions of the individual. The life insurance company objected to the questions and asserted attorney-client privilege and work product immunity. The court granted the motion. The court stated that when the thoughts and observations of an attorney formed a part of the material that the expert used to form its opinion it was discoverable. The court stated that third-party defendants were entitled to explore the effect the communications had on the expert's formation of his opinion.

**OUTCOME:** The court granted third-party defendants' motion to compel discovery of the conversations the life insurance company's expert witness had with the life insurance company and its counsel that concerned the expert's opinion of the individual's conduct.

**CORE TERMS:** work product, expert witness, third-party, discovery, impeachment, medical malpractice, expert opinion, discoverable, deposition, formation, preparing, outweighs, objected, immunity

**CORE CONCEPTS -**

**Civil Procedure: Disclosure & Discovery: Work Product**

Although opinion work product is normally entitled to a high level of protection from discovery, an exception to that general rule exists when opinion work product is provided to an expert witness before the witness forms his opinion. The federal rules provide for the discovery of the materials upon which an expert witness bases his opinion. When the thoughts and observations of an attorney form a part of that material, the attorney's opinion becomes discoverable. Without discovery of such material the adversary is deprived of the opportunity to adequately explore the extent to which counsel's observations affected the expert's opinion, and to impeach the expert on that basis.

**Civil Procedure: Disclosure & Discovery: Work Product**

When the possibility exists that the attorney's opinion was instrumental in the formation of the expert's opinion, the need to reveal that possibility to the trier of fact outweighs the need to protect the attorney's work product.

OPINION BY: [\*\*1]

SACHS

OPINION: [\*142] MEMORANDUM AND ORDER

HOWARD F. SACHS, UNITED STATES DISTRICT JUDGE

Third-party defendants Frederic Goodman and Financial Diversified Services, Inc., have filed a Motion to Compel Discovery. The third-party defendants seek to

**AR 013952**

compel Bruce McClelland, expert witness for plaintiff William Penn Life Assurance Company, to respond to questions regarding the nature and content of the expert's conversations with plaintiff or plaintiff's counsel concerning the expert's opinion of Mr. Goodman's conduct. Plaintiff has objected to the questions asserting attorney-client privilege and work product immunity.

Representative of the questions to which plaintiff's counsel objected and to which [\*143] counsel advised the witness not to respond are the following notes:

Have you had a discussion with [plaintiff's counsel] about the pending question? . . . What was the nature of the discussion?

....

Have you and [plaintiff's counsel] had any discussions about the advice that Mr. Goodman gave to Brown Transfer about the existing C and A policy?

....

Have you had any discussions with [plaintiff's counsel] about the conduct of Mr. Goodman on June 6th and the opinions you have expressed [\*\*2] on that subject?

The third-party defendants rely on *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983). Defense counsel in a medical malpractice action had provided an expert witness with documents to assist him in preparing for deposition and in reaching his expert opinion. Those documents included defense counsel's impressions of the plaintiff's demeanor, a summary of her deposition testimony, and his thoughts and opinions regarding medical malpractice suits in general. The court's opinion arose from its review of a magistrate's order requiring defense counsel to produce the documents.

The court upheld the magistrate's ruling, noting that although opinion work product is normally entitled to a high level of protection from discovery, an exception to that general rule exists when opinion work product is provided to an expert witness before the witness forms his opinion. *Id.* at 406. The Federal Rules provide for the discovery of the materials upon which an expert witness bases his opinion. When the thoughts and observations of an attorney form a part of that material, the attorney's opinion becomes discoverable. Without

discovery of such material the adversary is deprived of the[\*\*3] opportunity to adequately explore the extent to which counsel's observations affected the expert's opinion, and to impeach the expert on that basis. *Id.* at 408.

A contrary position is found in *Bogosian v. Gulf Oil Co.*, 738 F.2d 587 (3d Cir. 1984). There the court reviewed the decision of the trial court to order production of documents, including legal memoranda, that had been provided to expert witnesses. The court determined that the materials containing opinion work product were not discoverable. Although such materials could have some value to opposing counsel in preparing for impeachment of the experts, the court concluded that the policy against disclosure of work product overrode the impeachment value of the materials. *Id.* at 595.

Judge Becker dissented, advancing an argument similar to that found in *Boring*, *supra*. He disagreed with the majority's proposition that the policy in favor of immunity for opinion work product necessarily outweighs the value such material provides for impeachment of expert witnesses. Judge Becker concluded that when the possibility exists that the attorney's opinion was instrumental in the formation of the expert's opinion, the need[\*\*4] to reveal that possibility to the trier of fact outweighs the need to protect the attorney's work product. *Bogosian*, 738 F.2d at 598.

The court is persuaded by the reasoning expressed in the *Boring* opinion and the *Bogosian* dissent. Although both cases dealt with discovery of documents containing opinion work product and the motion here seeks to compel deposition answers, the distinction does not override the principles discussed above. Insofar as the questions at issue in the instant case sought to elicit matters that plaintiff's counsel had communicated to the expert witness, the third-party defendants are entitled to explore the effect those communications had on the expert's formation of his opinion. Accordingly, it is hereby

ORDERED that Mr. McClelland shall answer questions concerning information or opinions that plaintiff's counsel provided to him to assist him in forming his expert opinion.

DATED: February 9, 1990

```

****-----****
*      29 PAGES          948 LINES          JOB 18623 103B93      *
* 11:26 A.M. STARTED  11:26 A.M. ENDED      01/18/02      *
****-----****
****-----****
*          EEEEE      N  N      DDDD      *
*          E          N  N      D  D      *
*          E          NN N      D  D      *
*          EEE        N N N      D  D      *
*          E          N  NN      D  D      *
*          E          N  N      D  D      *
*          EEEEE      N  N      DDDD      *
****-----****
****-----****

```

SEND TO: WITEK, MICHAEL  
 HELSELL FETTERMAN LLP  
 1325 4TH AVE  
 SEATTLE, WASHINGTON 98101-2573

**AR 013954**