

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY AP
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JAMES WARREN YOUNT,

Respondent,

v.

AABERG & FEEK, INC.; J-M
MANUFACTURING, COMPANY,
INC.,

Petitioners.

No. 49011-1-II

RULING DENYING REVIEW

A.W. CHESTERTON COMPANY;
ACTUANT CORPORATION;
BARTELLS ASBESTOS
SETTLEMENT TRUST;
BORGWARNER MORSE TEC INC.,
AS SUCCESSOR-BY-MERGER TO
BORG-WARNER CORPORATION;
CBS CORPORATION (FKA VIACOM
INC., FKA WESTINGHOUSE
ELECTRIC CORPORATION)
CERTAINTEED CORPORATION;
CHIP'S AUTO PARTS; COOPER
INDUSTRIES, LLC (FKA COOPER
INDUSTRIES INC.); FOSTER
WHEELER LLC (FKA FOSTER
WHEELER CORPORATION);
GENUINE PARTS COMPANY;
GEORGIA-PACIFIC LLC (FKA
GEORGIA-PACIFIC
CORPORATION); HENNESSY
INDUSTRIES, INC.; HONEYWELL
INTERNATIONAL, INC.; HOPEMAN
BROTHERS, INC.; J.T. THORPE &
SON, INC.; KAISER GYPSUM
COMPANY, INC.; METROPOLITAN

LIFE INSURANCE COMPANY;
PARKER HANNIFIN
CORPORATION; PARKER LUMBER
CO., INC.; PISTON SERVICE OF
BREMERTON, INC.; QUALITEX
COMPANY; THOMAS DEE
ENGINEERING COMPANY; and
FIRST DOE through ONE
HUNDREDTH DOE,

Defendants Below.

Petitioner J-M Manufacturing Company, Inc. (J-M), seeks discretionary review of the superior court's March 25, 2016 order denying its motion for a protective order. Concluding that J-M fails to demonstrate review is appropriate under RAP 2.3(b), this court denies its motion for discretionary review.

FACTS

On October 22, 2013, Respondent James Yount filed a complaint against J-M and several other defendants for several causes of action arising from Yount's exposure to asbestos in manufactured products while working in Washington for several Washington employers.¹

On March 26, 2014, Yount issued a notice to take the out-of-state deposition of Alan A. Verplough, a former vice president of J-M. Attached to the subpoena for the deposition was a copy of an internal J-M memorandum dated August 11, 1983, sent from

¹ He also worked for employers in California, Montana, and Nevada.

J-M's former in-house counsel² to its former president. The memorandum was created in California, where J-M was headquartered at that time, and the words "CONFIDENTIAL-Attorney Client Privilege" appear at the top of the memorandum's first page and "Attorney Work Product" and "Attorney Client Privilege" appear on the bottom right corners of all three pages of the memorandum.³ Mot. for Disc. Rev., App. at 68.

In September 2015, J-M filed a motion for a protective order regarding the memorandum, asserting that Yount was seeking discovery into a confidential memorandum protected by attorney client privilege. Yount opposed J-M's motion.

The memorandum was inadvertently produced to the Kazan law firm in California over 15 years ago during prior litigation not connected to Yount's case. When J-M discovered the disclosure, it requested the return of the document and Kazan complied, stating that none of the copies of the memorandum had been provided to anyone outside of the firm.

A redacted version of the memorandum, however, has been previously admitted in multiple Washington cases. In contrast, every California trial court to consider whether the memorandum is admissible has determined that it is privileged under California attorney-client privilege law.

On March 25, 2016, the superior court entered an order denying J-M's motion for a protective order. The court made the following findings: "The court finds that this

² Yount asserts that this counsel was not admitted to the California bar at the time he signed the memorandum. J-M responds that counsel was a licensed attorney in another state.

³ Because this court has not been provided with copies of the memorandum, it relies on the parties' description of the document.

document is not protected under the attorney-client privilege as it is not a communication between an attorney and client but is a document giving business advice. The court further finds that [it] is not protected under attorney work product again as this is was created to give business advice.”⁴ Mot. for Disc. Rev., App. at 1-2. The court stated further that its ruling was not a trial evidentiary ruling on the admissibility of the document and reserved ruling on admissibility at a later time if necessary.

J-M now seeks discretionary review of the court’s order.

ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only “in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010), *review denied*, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied sub nom. Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

⁴ For a communication between an attorney and a client to be privileged, the involvement of the attorney must be in his or her professional capacity and not merely as a convenient conduit for information or funds. *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010 (1996). In Washington, communications with an attorney that do not involve legal advice are not privileged.

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). J-M seeks review under RAP 2.3(b)(1) and (2).

Effect Prong

J-M fails to satisfy the effect prong of RAP 2.3(b)(1) or (2). Under RAP 2.3(b)(1), the trial court's error, if corrected, must render further proceedings useless. See Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV. 1541, 1546-47 (1986); see also Stephen J. Dwyer, Leonard J. Feldman, & Hunter Ferguson, *The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*, 38 SEATTLE U. L. REV. 91, 102 (2014).

Although RAP 2.3(b)(1) is intended to apply to evidentiary or other pretrial rulings, 38 SEATTLE U. L. REV. at 103, these rulings generally warrant review when "[o]nly interlocutory review can provide effective relief." 61 WASH. L. REV. at 1551. Privilege issues often fall into this category precisely because the disclosure is in itself the harm. See generally Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 734 (2006) ("[O]nce the information is made known, the damage is done."). Here, however, it is undisputed that the contents of the memorandum have been disclosed in other proceedings. In addition, J-M makes no argument as to the effect prong of RAP 2.3(b)(1). Regardless, the superior court's decision left the issue of admissibility open. Thus, further proceedings have not been rendered useless.

In order for the effect prong of RAP 2.3(b)(2) to be satisfied, a party must demonstrate that a court's decision has an effect beyond the party's ability to conduct the immediate litigation. *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014), review denied, 2016 WL 11090638 (Jan. 6, 2015). "[W]here a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2)." *Howland*, 180 Wn. App. at 207.

Unlike RAP 2.3(b)(1), RAP 2.3(b)(2) likely does not apply to evidentiary or other pretrial rulings. 38 SEATTLE U. L. REV. at 103 ("If pretrial orders were considered to alter the status quo or substantially limit the freedom of a party to act, subsection (b)(1), with its more stringent "obvious error" standard and requirement that further proceedings be 'rendered useless,' would be rendered nugatory."). Also, in the present case, the memorandum at issue has already been disclosed previously and admitted in multiple Washington cases, thus the court's decision has no effect outside of litigation.⁵

⁵ J-M argues that the court's decision substantially alters the status quo because it will be forced to respond to discovery regarding a document that is privileged under the laws of California and that it will suffer prejudice absent appellate review. J-M alleges further that it will face harm because other firms will seek to use Verplough's testimony in California cases, and it will be placed in an untenable position in the upcoming deposition of Verplough. These are all litigation-related effects.

In a Statement of Additional Authorities, see RAP 10.8, J-M cites *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 329 P.3d 59 (2014), for the proposition that harm to it in underlying or third party lawsuits is a valid consideration. *Expedia*, however, does not explain the basis for accepting discretionary review. See *Expedia, Inc. v. Steadfast Ins. Co.*, 177 Wn.2d 1020, 303 P.3d 1064 (2013). Moreover, the decision was premised on the fact that the trial court committed a clear legal error in delaying a decision on the insurer's duty to defend issue by confusing a duty to defend with a duty to indemnify. *Expedia*, 180 Wn.2d at 804-805. Because "an adjudication of the duty to defend cannot be delayed by discovery," *Expedia* was logically entitled to stay any "potentially prejudicial" discovery until the trial court issued a decision regarding the duty to defend. 180 Wn.2d at 807, 808.

Obvious or Probable Error⁶

J-M argues that the trial court committed obvious and probable error by not performing a conflict of laws analysis because there is a conflict between California and Washington law regarding attorney client privilege.⁷ J-M next argues that the court committed obvious and probable error by not applying California law and determining that the memorandum was protected by attorney-client privilege. J-M asserts that California law controls because California has the most significant relationship with the memorandum. Finally, J-M argues that regardless of whether the privilege law of Washington or California applied, the superior court erred by ruling that the memorandum was not an attorney-client privileged communication because it contained business advice.

Before this court will engage in a conflict of laws analysis, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state. *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007). "If the result for a particular issue 'is different under the law of the two states, there is a 'real' conflict." *Erwin*, 161 Wn.2d at 692 (quoting *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997)). In the present case, there appears to be a real conflict between

⁶ Despite that J-M fails to satisfy the effect prong of RAP 2.3(b)(1) or (b)(2), this court also briefly examines whether the trial court committed obvious or probable error.

⁷ At oral argument, both parties agreed that the trial court applied Washington law. Although J-M takes issue with the trial court's failure to explain its choice of law, this is not reversible error. *Williams v. Leone & Keeble*, 170 Wn. App. 696, 704, 285 P.3d 906 (2012) ("The Court of Appeals conducts a de novo review of a trial court's decision regarding its conflict of law analysis and, thus, does not need the benefit of any additional findings by the trial court."), *review denied*, 176 Wn.2d 1030 (2013).

Washington and California privilege law, as demonstrated by the differing results reached by the trial courts in Washington and California when addressing whether the memorandum at issue is protected by attorney client privilege.

Washington applies the Restatement (Second) of Conflict of Laws when deciding which law to apply with respect to the admissibility of evidence claimed as privileged. *State v. Donahue*, 105 Wn. App. 67, 71, 18 P.3d 608, review denied, 144 Wn.2d 1010 (2001). Restatement (Second) of Conflict of Laws § 139(2) (1971) provides:

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

(Boldface omitted.) Comments (d) and (e) to §139 provide:

d. Rationale.

... Among the factors that the forum will consider in determining whether or not to admit the evidence are (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties. ...

e. State of most significant relationship. The state which has the most significant relationship with a communication will usually be the state where the communication took place, which, as used in the rule of this Section, is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing. The communication may take place in a state different from that whose local law governs the rights and liabilities of the parties. ...

The state where the communication took place will be the state of most significant relationship in situations where there was no prior relationship between the parties to the communication. If there was such a prior relationship between the parties, the state of most significant relationship will be that where the relationship was centered unless the state where the communication took place has substantial contacts with the parties and the transaction.

(Italics omitted.) This court reviews de novo a trial court's choice of law and its application to the facts in a case. *State v. Corona*, 164 Wn. App. 76, 79, 261 P.3d 680, 682 (2011).

This court concludes that J-M fails to demonstrate the superior court committed obvious or probable error in applying Washington law to the issue before it. In its motion, J-M primarily argues that the memorandum should not be admitted because California has the most significant relationship to it. See Resp. to Mot. for Disc. Rev. at 12 (calling this a "circuitous argument"). It relies on *Ford v. Leggat*, 904 S.W.2d 643, 647 (Tex. Sup. Ct. 1995), which holds that issues of attorney-client privilege "will be governed by the law of the state with the most significant relationship to the communication." The Restatement, however, provides that even when a non-forum state has the more significant relationship, the law of the forum governs regarding privilege and the document "will be admitted" absent a "special reason" to exclude it. In light of this strong presumption that the forum law governs and the focus of its argument on the connection between the memorandum and California, J-M does not demonstrate that the trial court committed obvious or probable error in applying the privilege law of Washington, particularly in light of the lack of any Washington case law adopting *Ford*.

In addition, briefly looking to the special relationship issue, J-M asserts that the "the number and nature of the contacts that the state of the forum has with the [parties and with the] transaction involved," weighs in its favor because of the weak connection between the memorandum and the forum. Reply to Resp. to Mot. for Disc. Rev. at 5 (quoting Restatement at comment d). At least one state disagrees with this interpretation of the first factor, and instead examines the "forum's relationship with the parties and the situs of the accident." *Allianz Ins. Co. v. Guidant Corp.*, 373 Ill.App.3d 652, 670, 869

N.E.2d 1042 (2007) (“At this stage of the analysis, however, the number and nature of the contacts that the forum state has with the *communications* are of no moment.” (italics theirs)). So again, California’s more significant relationship to the document does not mean this factor weighs in J-M’s favor, especially when injuries allegedly occurred in Washington and claims implicated Washington employers. Also weighing against a finding that the trial court committed obvious or probable error is the fact that the memorandum at issue has been admitted in other Washington actions. This comports with Washington’s strong policy in favor of broad discovery. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 695, 295 P.3d 239 (2013).

This court also concludes that J-M fails to demonstrate that the trial court committed obvious or probable error in denying its motion under Washington attorney-client privilege law. Mot. for Disc. Rev. at 26.

The issuance of protective orders is within the discretion of the trial court, to be granted where, in its judgment, good cause exists, having in mind the purpose of the discovery rule to encourage full disclosure of all relevant facts so as to facilitate the administration of justice, acquaint the examiner with the testimony that will be given at trial, develop the truth, shorten and simplify the trial, eliminate elements of surprise, and permit the parties to prepare for trial.

Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 234-35, 654 P.2d 673 (1982), *affirmed*, 467 U.S. 20, *cert. denied*, 467 U.S. 1230 (1984). This court reviews a trial court’s discovery orders for abuse of discretion. *Cedell*, 176 Wn.2d at 694. This court will reverse a trial court’s discovery ruling “only ‘on a clear showing’ that the court’s exercise of discretion was ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Cedell*, 176 Wn.2d at 694 (quoting *T.S. v. Boy Scouts of Am.*, 157

Wn.2d 416, 423, 138 P.3d 1053 (2006) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971))).

In the present case, J-M fails to demonstrate that the court abused its discretion under Washington law by denying its motion for a protection order. Its motion does not cite the applicable Washington privilege standard and it cites no Washington cases to support its argument that the memorandum's contents are not business advice. Absent some authority from this state in support of its argument, J-M does not show how the trial court committed obvious or probable error in determining the memorandum was not privileged under Washington law.

CONCLUSION

J-M fails to demonstrate review is appropriate under RAP 2.3(b). Accordingly, it is hereby

ORDERED that J-M's motion for discretionary review is denied.

DATED this 12th day of July, 2016.



Aurora R. Bearse
Court Commissioner

cc: David A. Shaw
Malika Johnson
Meredith B. Good
Lloyd F. LeRoy
Hon. Scott Collier