NO. 49011-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Clark County Superior Court Cause No. 13-2-03680-4)

JAMES WARREN YOUNT,
Plaintiff/Respondent,
v.
AABERG & FEEK, INC., et al.,
Defendants/Petitioners.

PLAINTIFF'S RESPONSE TO MOTION OF PETITIONER J-M MANUFACTURING COMPANY, INC. TO MODIFY RULING

Meredith B. Good, Esq., WSBA # 39890
BRAYTON PURCELL, LLP
Attorney for James Warren Yount, Respondent
806 SW Broadway, Suite 1100
Portland, OR 97205
503-295-4931

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INTRODUCTION

In its Motion to Modify the Commissioner's Ruling, J-MM has produced another lengthy brief which, like the brief in its initial petition for discretionary review, covers extensive territory but misses the operative point and fails to address the Commissioner's actual ruling. The case law J-MM invokes addresses matters in which a party is compelled by the trial court to disclose heretofore undisclosed information. But that is not the case here. As made clear in the underlying pleadings in the trial court, and in the briefing before the commissioner on J-MM's petition, the allegedly privileged document in this case has been in the public domain for years. Courts in at least three Washington cases have allowed its use, and none of the litany of horrors which J-MM invokes as inevitable consequences have resulted from such use.

More important, J-MM fails to address the real basis for the Commissioner's ruling or to demonstrate why that ruling was in error. The Ruling very directly states that the petition for discretionary review was denied because the Petitioner failed "to satisfy the effect prong of RAP 2.3(b)(1) or (2)." (Commissioner's Ruling at 5) Both of these provisions require more than the finding of "obvious error" (RAP 2.3(b)(1)) or

"probable error." (RAP 2.3(b)(2)) Each has what the Commissioner labeled an "effect prong." In other words, the error, if there is any, must have a specific "effect" before it makes the ruling appropriate for discretionary review. If the error was obvious the effect must "render further proceedings useless." (RAP 2.3 (b)(1)) If the error is only "probable" it must "substantially alter[] the status quo or substantially limit[] the freedom of a party to act." (RAP 2.3 (b)(2)) There is no error in the trial court's ruling. But, even if there were, that error would not, as the Commissioner correctly ruled, satisfy the "effect prong" of either subdivision of RAP 2.3. Accordingly, discretionary review is inappropriate and the motion to modify the Commissioner's ruling should, like the petition itself, be denied.

LEGAL ARGUMENT

The Petitioner's Motion to Modify the Commissioner's Ruling has wandered far from where these proceedings began in the trial court. The precipitating event was Plaintiff's issuance of a deposition subpoena to Mr. Verplough, defendant's former vice-president and director of marketing. The subpoena had attached to it a copy of the memorandum in question here. J-MM filed a motion for protective order seeking to prevent Plaintiff from

using the memorandum and to destroy all copies in Plaintiff's Counsel's possession.. The trial court reviewed the document, considered the motion and opposition, and heard argument of counsel. At its conclusion, the court ruled that the document was not subject to the attorney-client privilege and was not attorney work product. Accordingly, the court denied the motion for a protective order. It also stated that the ruling pertained only to taking of the deposition and that any decision on its admissibility would be deferred until trial. There is no court order compelling any entity to disclose information

J-MM Focuses on a Factual Situation Which Does Not Exist Here

At page two of the motion, J-MM's Statement of Relief Sought states:

> Issues of attorney-client privilege are generally considered well-suited for discretionary review under RAP 2.3(b) because of the important function the privilege serves "to the administration of justice," and because "an appeal after disclosure of the privileged communication is an inadequate remedy...." *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F. 2d 1486, 1491 (9th Cir. 1989)

Two things are very striking about this statement. One, it is not from a Washington case. In an argument about application of Washington law to allow discretionary review, J-MM has chosen to cite to an Arizona case to support its argument. Moreover, the cited case begins by noting:

> In view of the strong policy against piecemeal appeals,

> **interlocutory review of discovery orders is highly disfavored.** *United States v. Nixon*, 418 U.S. 683, 690-91, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974); *Newton v. National Broadcasting Co.*, 726 F.2d 591, 592 (9th Cir. 1984)

Admiral Ins. Co. v. United States Dist. Court, supra, at 1490.(Emphasis added)

Second and even more pertinent to this case, the point for which J-MM cites the case does not apply here. J-MM's motion relies on language from the Ninth Circuit's decision to support its argument that discretionary review is appropriate because "an appeal after disclosure of the privileged communication is an inadequate remedy...." But that language is extracted from a case in which a lower court had ordered the petitioner to disclose information which the Petitioner claimed was subject to the attorney-client privilege and which had not, prior to that time, been disclosed. Despite J-MM's efforts to make it appear otherwise, those are not the facts here. The supposedly privileged document here was disclosed long before this case began. The court below did not order anything be disclosed. The motion on which the court ruled was the defense motion for a protective order. It sought to prevent Plaintiff's counsel from using a document already in counsel's possession during the deposition of defendant's former vice-president and director of marketing. The document had previously been used in at least

three Washington cases, had not been found to be privileged in any of them, and is publicly available in the court files of those cases.[1]

The Petition Failed to Satisfy the Effect Prong of Rule 2.3(b) and the Motion to Modify Does Nothing to Cure That Defect

The Commissioner's ruling firmly grounded itself in the Petition's failure to satisfy the effect prong of rule 2.3(b). More than a showing of actual or probable error, the required adverse effect of such asserted error is necessary to obtain discretionary review. Because there was no evidence of the effect prong under either subsection of Rule 2.3(b), the commissioner correctly ruled that discretionary review is not appropriate.

Once again, as in the Petition, J-MM asserts the trial court committed obvious or probable error by failing to apply California law and by finding that the memorandum was not an attorney-client privileged document. Once again, these arguments fail to carry the day. The commissioner began her ruling with a discussion of the failure to satisfy the effect prong because that failure, by itself, is sufficient to deny discretionary review even if there had

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[1] *Dawes v Certainteed Corporation et al.*, Superior Court of Pierce County, No. 10-2-119093-1; *Mendel v. Ameron International Corp. et al.*, Superior Court of Pierce County, No. 11-2-09398-6; *Reeve, et al. v Union Carbide, et al.*, Superior Court of Pierce County, No. 12-2-11999-1. None of the plaintiffs in those cases were represented by the plaintiff's counsel here.

been obvious or probable error committed by the trial judge's ruling, which there was not. JM-M again spends the majority of its brief addressing the alleged errors of failing to apply California law and finding that the memorandum was not an attorney-client privileged document. What the brief still does not do is demonstrate an "effect" of those asserted errors which would invoke discretionary review.

It is important to note that the effect required to permit discretionary review is different for the two types of alleged error. If the error is "obvious"it must "render further proceedings useless." (RAP 2.3(b)(1)) If, on the other hand, the error is "probable" it must "substantially alter the status quo or substantially limit[] the freedom of a party to act." (RAP 2.3(b)(2)) J-MM does not assert whether it believes the error to be either "obvious" or "probable." It simply asserts the alleged errors were "obvious or probable." (Motion at 10)

More important, the extensive discussion of alleged errors does not demonstrate the adverse effect of the errors. The nearest J-MM comes to an attempt to satisfy the "effect prong" of the rule is a discussion which begins at the bottom of page eight and continues to the top of page ten of the motion. J-MM begins that discussion by misquoting the commissioner's ruling.

> Here, the Commissioner based her ruling denying J-MM's request for discretionary review, in part, on the ground that "it is undisputed that the contents of the memorandum have been disclosed in other proceedings... and once the information is made known, the damage is done." (Citing to App. D, Ex. 1, pg. 000914.)

This very loose translation of the actual language of the ruling, and the reversal of its components leads to a far different conclusion than what the Commissioner actually wrote.

> 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.

Reading of the full quote shows that, consistent with the Commissioner's starting point and foundation for her ruling, the reason for denying review is that no argument was made as to the effect prong *and* further proceedings have not been rendered useless.

J-MM then further attempts to show an effect by claiming that the order denying a protective order for the deposition of Mr. Verplough disrupts the attorney-client privilege. (Motion at 9) The problem with this argument is that it assumes, contrary to the superior court ruling, and the Commissioner's ruling, that the memorandum is privileged. The trial court, after reviewing the memorandum concluded it was not privileged because it was a document giving business advice, nor was it work product, again because it was created to give business advice. (Commissioner's Ruling at 4, citing Mot. for Disc. Rev., App at 1-2) As the commissioner noted:

> 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

(Commissioner's Ruling at 4, footnote 4)

Apparently recognizing that it cannot meet the effect prong of section 2-3(b)(1) [making further proceedings useless] J-MM then turns to an attempt to demonstrate the effect prong of section 2.3(b)(2). In support of that attempt it claims:

> Finally, J-MM will suffer immediate harm, and its "freedom

> to act," will be limited within the meaning to RAP 2.3(b) because use of the Privileged Memorandum at the deposition of Alan Verplough will have an immediate adverse effect on litigation in the State of California and nation-wide, where, for the most part, the document' s privilege has been upheld. The testimony of Mr. Verplough regarding the attorney-client privileged communication at issue will be taken by an attorney from the BP firm - a California law firm, whose attorneys regularly litigate against J-MM in California courts (where the document is privileged and nondiscoverable).

(Motion at 9)

This claim of immediate harm and limitation of its freedom to act repeats the claim made in the petitioner's initial motion. The Commissioner addressed that claim in the ruling. (Commissioner's Ruling at 6, footnote 5) The two factors making the claim ineffective initially still exist here. First, the Commissioner pointed out that Rule 2.3(b)(2) "likely does not apply to evidentiary or other pretrial rulings." (Ruling at 6, Citing to 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."]. If that section truly does not apply to pretrial rulings, the alleged limitation of J-MM's freedom to act here does not entitle it to discretionary review.

Second, the limitation on freedom to act, as pointed out in the ruling,

must be an effect beyond the party's ability to conduct the immediate litigation. "[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)." *State v. Howland*, 180 Wn. App. 196, 207, 321 P. 3d 303 (2014), *review denied*, 2015 LEXIS 180 (Jan. 6, 2015).

Howland found that subsection (b)(2) was intended to apply "primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly been appealable as a matter of right." Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545-46 (1986) (quoting RAP 2.3 cmt. b). (*Howland, supra,* 180 Wn.App at 206-207) Accordingly, orders such as a party being compelled to remove a structure, if given effect, quite literally alter the status quo. Similarly an order restraining a party from disposing of private property limits the party's freedom to act. This is the type of limitation on a party's ability to act which is contemplated by the rule and which does not exist in this case.

The Petitioner's Conflict of Laws Argument Is Still Circuitous and Fails to Demonstrate Error

J-MM returns adamantly to its argument that the lower court erred by failing to do a conflict of laws analysis to conclude that California law rather than Washington law should apply to the question of privilege. This question was addressed extensively in the petition and in Respondent's answer to the petition. J-MM's essential argument is that conducting a proper conflict analysis would show that California is the state of most significant relationship to the communication and therefore its privilege law should apply. But this argument ignores the plain language of the Restatement which it seeks to apply.

The Restatement (Second) of Conflict of Laws Section 139 (b) states:

> (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.

Thus, the starting point for the Restatement is that the memorandum is admissible in Washington unless there is some "special reason" why Washington's policy favoring admission should not be given effect. J-MM has provided no "special reason" why the policy of Washington should not

be given effect. Rather, it argues, as it did in the original petition, that the law of California, which is the state with the most significant relationship with the communication, should be applied because California is the state with the most significant relationship with the communication. (Motion at 12-16) This is the argument which Respondent previously labeled "circuitous" (Answer to Petition for Discretionary Review at 10-12) and the Commissioner recognized as such. (Commissioner's Ruling at 9)

J-MM ignores the significance of Washington's policy reasons favoring admissibility. Recalling that this is a question of discovery, not trial admission, the policies relating to discovery must be considered. As our Supreme Court has stated:

> The scope of discovery is very broad. The right to discovery is an integral part of a right to access of the courts embedded in the Washington Constitution. Besides its constitutional cornerstone, there are practical reasons for discovery. Earlier experiences with a "blindman's bluff" approach to litigation, where each side is required literally to guess at what their opponent will offer as evidence, are unsatisfactory. As modern day pretrial discovery evolves, it contributes enormously to a more fair, just, and efficient process. Effective pretrial disclosure, so that each side knows what the other side knows, narrows and clarifies the disputed issues and makes early resolution possible. As importantly, early open discovery exposes meritless and unsupported claims so they can be dismissed. It is uncontroverted that early and broad disclosure promotes the efficient and prompt resolution of meritorious claims and the efficient elimination of

meritless claims.

(*Cedell v. Farmers Ins. Co. of Wash.*, 176 Wash. 2d 686, 690, 295 P.3d 239, 241 (2013)

As noted above, this is a matter about discovery. Nothing presented in the lower court, or in the petition for review, or in the motion to modify the ruling provides any reason, much less a special reason, why the strong policy of this state in favor of its constitutional right of access to the courts should be overruled by the law of a foreign state.

The Trial Court Did Not Err in Ruling That the Memorandum Is Not Attorney-Client Privileged

In its final effort to reverse the two prior rulings, JM-M asserts that the trial court erred in finding the memorandum is not entitled to attorney-client privilege. It first points out that Respondent's citation to *Kammerer v. Western Gear Corp.*, 96 Wn. 2d 416, 421, 635 P.2d 708 (1981, in his initial opposition to the motion for protective order was not persuasive in support of the argument that "business advice" is not protected by the attorney-client privilege. Rather, J-MM asserts that the more appropriate case to apply is *Doehne v. EmpRes Healthcare Management, LLC,* 190 Wn.App. 274, 360 P.3d 34 (2015). But *Doehne* is factually and legally distinguishable from the

situation here.

In *Doehne,* the court applied the privilege to a report which had been written by an employee "to assist in-house counsel in addressing issues of liability and potential litigation." (*Id at 283*) J-MM then conflates this ruling into something far different. It interprets the ruling in this manner:

> This Court implicitly recognized that the function and role of in-house counsel is to provide advice regarding the company's potential legal liability – there is, accordingly, very little meaningful distinction between "business" advice and "legal" advice in the context of an opinion memorandum from in-house counsel to the company. *Id.* at 281.

(Motion at 19-20)

Although the above selection from the motion cites to *Doehne* at 281, neither the language nor the concept are contained in that case. *Doehne* is clear that the reason for applying the privilege to the document is because it was created and provided to the attorney for the purpose of obtaining legal advice. Nothing on the cited page or in the decision itself supports J-MM's conclusion that there is no distinction between legal advice and business advice in a memorandum from in-house counsel to the company. A memorandum from in-house counsel which gives legal advice would be privileged. One which provides nothing more than business advice cannot cloak itself in privilege merely because it comes from the in-house counsel.

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 .

CONCLUSION

The trial court did not commit either obvious or probable error in denying J-MM's motion for protective order. The Commissioner correctly determined there is no basis for discretionary review. Accordingly Respondents request the petition again be denied .

Dated: August 22, 2016

Respectfully submitted,

BRAYTON PURCELL, LLP

By:*/s/ Meredith B. Good*
Meredith B. Good,
WSBA# 39890
Attorney for Plaintiff/Respondent

CERTIFICATE OF SERVICE

James W. Yount v. Aaberg & Feek, Inc., et al.

Clark County Case No. 13-2-03680-4
Washington State Court of Appeals, Division II, Case No. 49011-1

I hereby certify that on the below date, I served a true and correct copy of:

- PLAINTIFF'S RESPONSE TO MOTION OF PETITIONER J-M MANUFACTURING COMPANY, INC. TO MODIFY RULING

upon:

P. Arley Harrel, WSBA #05170 Nicole MacKenzie Williams, Kastner & Gibbs PLLC 601 Union Street, Suite 4100 Seattle, WA 98101-2380 T: (206)628-6600 aharrel@williamskastner.com **Attorneys for Actuant Corporation**	**Fax** ____ **Email** [courtesy] x **Regular Mail** x **Overnight** ____ **Hand Delivery** ____
RICHARD D. ROSS, WSBA #34502 Selman Breitman LLP 800 Fifth Avenue, Suite 4100 Seattle, WA 98104 T: 206 388-0718 F: 206 588-4185 rross@selmanlaw.com **Attorney for BorgWarner Morse TEC Inc., as successor-by-merger to Borg-Warner Corporation**	**EMAIL SERVICE ON LY**
Jennifer Campbell, WSBA#31703 Bert W. Markovich, WSBA# 13580 Schwabe, Williamson & Wyatt, P.C. 1420 5th Avenue, Suite 3400 Seattle, WA 98101-4010 T: 206 622-1711 F: 206 292-0460 jcampbell@schwabe.com bmarkovich@schwabe.com asbestoscases@schwabe.com **Attorney for Chicago Pneumatic Tool Company LLC**	**EMAIL SERVICE ONLY**

BRAYTON ✦ PURCELL, LLP
806 SW Broadway, STE 1100
Portland, Oregon 97205-3437
Tel: (503) 295-4931; Fax: (503) 241-2573

Brian D. Zeringer, WSBA # 15566 Barry N. Mesher, WSBA# 07845 SEDGWICK LLP 520 Pike Street, Suite 2200 Seattle, WA 98101-4093 T: (206)462-7560 Asbestos.Seattle@sedgwicklaw.com **Attorneys for Georgia-Pacific LLC (fka Georgia-Pacific Corporation)**	**EMAIL SERVICE ONLY**
Mark B. Tuvim, WSBA #31909 Kevin J. Craig, WSBA#29932 Gordon & Rees, LLP 701 5th Ave., Suite 2100 Seattle, WA 98104 T 206 695-5100 asbestos-sea@gordonrees.com **Attorneys for Hennessy Industries, Inc. and Union Carbide Corporation**	**EMAIL SERVICE ONLY**
Melissa K. Roeder, WSBA # 30836 Foley & Mansfield 999 Third Ave., Suite 3760 Seattle, WA 98104 T: 206 456-5360 mroeder@foleymansfield.com **Attorneys for Hopeman Brothers, Inc.**	**EMAIL SERVICE ONLY**
David A. Shaw, WSBA # 08788 Malika I. Johnson, WSBA# 39608 Williams, Kastner & Gibbs PLLC 601 Union Street, Suite 4100 Seattle, WA 98101-2380 T: (206)628-6600 wkgasbestos@williamskastner.com **Attorneys for J-M Manufacturing Company, Inc.**	**Fax** _____ **Email** [courtesy] x **Regular Mail** x **Overnight** _____ **Hand Delivery** _____
Jason Daywitt, WSBA No. 31959 Rizzo Mattingly Bosworth, PC 1300 SW Sixth Avenue, Suite 330 Portland, OR 97201 jdaywitt@rizzopc.com asbestos@rizzopc.com **Attorney for Lent's, Inc.**	**Fax** _____ **Email** [courtesy] x **Regular Mail** x **Overnight** _____ **Hand Delivery** _____

BRAYTON ◆ PURCELL, LLP
806 SW Broadway, STE 1100
Portland, Oregon 97205-3437
Tel: (503) 295-4931; Fax: (503) 241-2573

Katherine M. Steele, WSBA # 11927 Bullivant Houser Bailey, PC 1700 Seventh Avenue, Suite 1810 Seattle, WA 98101 katherine.steele@bullivant.com T 206.521.6432 **Attorneys for LucasVarity Automotive Holding Company**	**Fax** ____ **Email** [courtesy] x **Regular Mail** x **Overnight** ____ **Hand Delivery** ____
Dana C. Kopij, WSBA # 31648 Williams, Kastner & Gibbs PLLC 601 Union Street, Suite 4100 Seattle, WA 98101-2380 T: (206)628-6600 wkgasbestos@williamskastner.com **Attorneys for Qualitex Company**	**Fax** ____ **Email** [courtesy] X **Regular Mail** X **Overnight** ____ **Hand Delivery** ____

DATED this 22nd day of August, 2016.

Cambria Winkler
Paralegal

BRAYTON ◆ PURCELL, LLP
806 SW Broadway, STE 1100
Portland, Oregon 97205-3437
Tel: (503) 295-4931; Fax: (503) 241-2573