

WASHINGTON CASE UPDATE

Incident Reports: Privileged or Discoverable?

From the Desk of Kyle Riley: Can an incident report prepared by an employee be privileged even though no demand or suit has been filed and the report is commissioned at the request of in-house counsel? Find out how the Washington Court of Appeals ruled on this issue below.

Claims Pointer: The attorney-client privilege protects reports and statements made by representatives of a party prepared in “anticipation of litigation.” In the following case, the Court of Appeals held that an incident report of an employee, who was directed by her risk management department to prepare the report after a trip and fall, was protected by attorney-client privilege. The Court held that the report was privileged because its purpose was to assess possible liability and was ultimately provided to an attorney. The Court also ruled that the report was also protected work product, even though similar reports were conducted in the regular course of business. Importantly here, the Court refused to examine the purpose of the report in pieces, but rather analyzed the report as a whole document and the specific circumstances under which the report was generated. This case shows how important it is to prepare incident reports in a way that will protect them from discovery.

case in point...

Doehne v. EmpRes Healthcare Management, LLC, No. 46467-II, Washington Court of Appeals Division II (August 11, 2015).

After visiting her husband in a healthcare facility managed by EmpRes Healthcare Management LLC (EmpRes) in Vancouver, Washington, Valaree Doehne was injured in the facility’s parking lot when she tripped over a cement wheel stop. She reentered the facility to receive treatment and was taken to the hospital soon after by ambulance.

A few days after the accident, EmpRes’ in-house counsel directed the Risk Management Director Dick Pfleuger, to conduct an investigation of the incident. Pfleuger then directed Heather Clarno, an administrative assistant in another department to inspect the parking lot. Clarno prepared a one-page report of her investigation, which she provided to Pfleuger and the legal department.

Three years later, Doehne filed a suit against EmpRes, alleging that at the time of her fall, the parking lot was not well lit and that the wheel stop was not painted or marked. In her request for production of documents, Doehne asked EmpRes to turn over “all memos, documents, logs, notes or other written or electronic memorialization of reports.” EmpRes objected to turning over the report prepared by Clarno because it was work product and protected by the attorney-client privilege. Doehne moved to compel the report.

EmpRes contended that the report was prepared in anticipation of litigation (and therefore privileged) because Doehne had asked the facility managed by EmpRes to pay for her injuries at the time they conducted the investigation. In support of their argument, they submitted the declaration of Clarno, who stated that she “prepared this investigation and incident report consistent with how I generally performed these tasks for my employer on anticipated worker’s compensation claims.”

The trial court reviewed the report in chambers, so the report was kept private from the public and Doehne. (Note: because the report was reviewed only by the judge, the report was not part of the record, so the content of the report is not available) After its review, the trial court ruled that of the four paragraphs of the report, only the second, third, and fourth paragraphs were protected. The trial court ordered EmpRes to turn over the first paragraph of the report. EmpRes asked the court to reconsider its motion and further argued that the last sentence of the first paragraph was work product because it presented Clarno’s opinion. The trial court denied the motion. EmpRes appealed.

The Washington Court of Appeals held that the entire document was protected. First, the Court analyzed the issue of attorney-client privilege. The Court agreed with EmpRes that the report as a whole was protected by attorney-client privilege. Doehne argued that Clarno’s statement that she prepared the report “consistent with how [she] generally performed”



Contact: Kyle Riley | www.smithfreed.com | email: kriley@smithfreed.com

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW Fifth Avenue, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.



SMITH FREED & EBERHARD P.C.

Your Litigation Partner

WASHINGTON CASE UPDATE

Incident Reports: Privileged or Discoverable?

case in point...

similar reports, showed that the report was not prepared in anticipation of litigation. The Court rejected that reasoning, explaining that the report was performed on behalf of Pfleuger, the risk management director, who was preparing information to give to in-house counsel.

Contrary to Doehne's argument, the purpose of Clarno's report was related to possible litigation resulting from the incident. The Court emphasized that when an employee prepares a report intending to provide it to an attorney in order to notify the attorney of a claim or to evaluate possible liability, the report will likely be protected.

The Court also held that the final sentence of the first paragraph of the report was protected work product. Doehne contended that the final sentence was not work product because Clarno stated that the report was prepared for her employer. The Court explained that the "work product doctrine" protects not only the work of attorneys and their representatives, but also the work of the party or its representative. One exception to that rule is that work product does not include documents generated in the "ordinary course of business." Because Clarno prepared her report only in response to Doehne's incident, her work product was protected and not made in the "ordinary course of business."

The Court reversed the trial court ruling ordering EmpRes to produce Clarno's report.



Contact: Kyle Riley | www.smithfreed.com | email: kriley@smithfreed.com

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW Fifth Avenue, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.



SMITH FREED & EBERHARD P.C.

Your Litigation Partner