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COURT OF APPEALS

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STATE OF WASHINGTON

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Clerk

No. 35084-0-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

SPOKANE & EASTERN LAWYER,  
a Washington non-profit corporation,

Appellant,

vs.

HON. LINDA G. TOMPKINS,  
presiding judge, Spokane County Superior Court for  
the State of Washington in and for Spokane County  
(Spokane County Superior Court); DAVID HARDY,  
Administrator, Spokane County Superior Court; and  
the SPOKANE COUNTY SUPERIOR COURT,

Respondents.

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REPLY OF APPELLANT

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## **I. INTRODUCTION<sup>1</sup>**

As expected, Respondents (hereinafter the "Court") argue that *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) and *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003) hold that the Public Disclosure Act<sup>2</sup> does not apply to the Court - that these cases hold that the Court is not a "state agency" under the Public Disclosure Act. This is not the holding of these cases. This is not the result this Court should reach on this appeal.

## **II. ARGUMENT**

### **A. Introduction.**

The case on appeal is a case of first impression. The court has yet to address the issue of whether the records of a superior court,

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<sup>1</sup> This Reply brief is filed now because Appellant did not receive the Response Brief until August 1, 2006 and despite the fact that the Response was filed with the court on June 26, 2006.

<sup>2</sup> The Public Disclosure Act (Initiative 276, November 2, 1972) public records and disclosure provisions are now found in RCW Cp. 42.56. Originally, all of the Public Disclosure Act was found in RCW Ch. 432.17.

apart from case records, are public records subject to the Public Disclosure Act. RCW Ch. 42.17.

The Court makes two arguments against the position of the Appellant that the court's non-case records are subject to the Public Disclosure Act.

First, the Court asserts that the issue of the application of the Public Disclosure Act has already been decided by *Nast* and *Beuhler*.

Second, the Court asserts that the application of the Public Disclosure Act to the court would violate the principles of separation of powers.

Third, the Court asserts that the application of the Public Disclosure Act to the Court would create a lack of harmony between the Court and the other two branches of government.

**B. The Holdings in *Nast* and *Beuhler*.**

The Court is wrong on its understanding of the holdings in *Nast* and *Beuhler*, wrong because it

has failed to realistically and honestly read the cases. Neither holds that a Washington court is not a state agency.<sup>3</sup>

*Nast* only stands for the rule that case records are publicly available under the case records rule. The court did not rule on whether non-case records were to be disclosed under the Public Disclosure Act. The court simply did not reach the issue. In fact, the court clearly indicated that the issue was to be decided another day. *Nast v. Michels*, 107 Wn.2d 300, 307, 730 P.2d 54 (1986) ("[w]e hold the PDA does not apply to court case files because the common law provides access to court case files, and because the PDA does not specifically include courts or

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<sup>3</sup> The author of the Court's Response seems to read cases so that the holding is what is desired. The better approach, the one we were taught in law school, is to read cases for what a case is and to seek the message of the court in what the court said and did regarding the case before it - that is, to look upon the case as a reality rather than a wish or an illusion. See K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (Oceana, 1930, 1951 and 1960) starting with Chapter II, *The Case System: What Lies Behind the Case*.

court case files within its definitions and because to interpret the PDA public records section to include court case files undoes all the developed law protecting privacy and governmental interests").

The court says *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003) stands for the rule that the court is not an agency under the Public Disclosure Act. The case does not stand for that at all. It stands only for the rule that only so much of case records are publicly disclosable under the case records rule of *Nast* - that case records do not include a judge's notes regarding the case.

In *Beuhler v. Small*, 115 Wn. App. at 918, the court said: "*Nast* held, a public citizen must look to the common law and the discretion of the trial court for inspection of judicial records. *Id.* at 303-04, 730 P.2d 54." The court went on to hold that "[a]ssuming for the sake of this argument that Judge Small's computer notes constitute

judicial records, we find that the trial court here properly concluded that the PDA did not grant Mr. Beuhler a right to access the computer files." *Id.*

**C. What is Dicta; What is a Holding?**

The Court confuses the difference between a "holding" and "dicta." These cases are only of precedential value to the extent of the holdings in the cases.

Dicta is not controlling as precedent. *See, e.g., State v. Potter*, 68 Wn. App. 134, 149 n. 7, 842 P.2d 481 (1992).

Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed. *Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984); *Concerned Citizens v. Coupeville*, 62 Wn. App. 408, 416, 814 P.2d 243, *review denied*, 118 Wn.2d 1004, 822 P.2d 288 (1991).

In *Ruse v. Department of Labor & Industries*,

138 Wn.2d 1, 8, 977 P.2d 570 (1999), the court pointed out that dicta is to be "disregarded."

In Wikipedia<sup>4</sup>, it is said:

In common law legal terminology a *dictum* (plural *dicta*) is any statement that forms a part of the judgment of a court, in particular a court whose decisions have value as precedent under the doctrine of *stare decisis*.

Conceptually, *dicta* are divided into those which form a part of the reason for the decision or *ratio decidendi*, which are binding as precedent, and those which do not, which are called *obiter dicta*.

What we have in *Nast* and *Beuhler* as to whether the PDA applies to the court because it is an agency is simply "obiter dicta." Comments about the application of the Public Disclosure Act to the court are *obiter dicta* and not to be followed. The cases simply did not deal with the issue. The cases dealt only with the case records already under the common law rule of disclosure by the court.

#### **D. The Separate Branch of Government**

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<sup>4</sup><http://en.wikipedia.org/wiki/Dictum>

**Argument.**

The Court argues that since the court is a separate branch of government, distinguished from the legislative branch and the executive branch, the Public Disclosure Act should not apply to it. According to the Court, treating the court as not subject to the Public Disclosure Act means that the separation of powers will be preserved and that there will be harmonious relations between the various branches of government as a result.

This is sheer nonsense.

The court provides no authority for the statements and no reasons why separation of powers applies to answer the question and no reason why disclosure of the court's non-case records would jeopardize the separation of powers between the three branches of government.

Separation of powers - Because there are three branches of government, does it hold that the court as a branch should be able to do its non-judicial work in secret? How does separation

of powers lead one to the conclusion that efforts by a court to set up secret rules of conduct for lawyers before the court should be secret - that it can act in secret in making complaints to the Washington State Bar Association regarding conduct some of the judges on a bench of the court consider to be inappropriate?

To ask these questions is to answer them.

And, furthermore, separation of powers does not mean that one branch of government has power to act arbitrarily and in secret.

But there are other reasons why the separation of powers argument is nonsense.

First, the records sought are not judicial function records. Thus, it cannot be said that the separate power of the court to perform judicial functions extends to non-decision, non-judicial functions. The judicial branch has power only over judicial decisions. Wash. Const. Art.

I, §1.<sup>5</sup>

Second, the law assumes the legislative branch, in this instance the people of the state of Washington by initiative, have some authority over the judicial branch - look at all of the laws wherein the functions and financing of the court are the subject of legislative action:

The legislature has the power to remove judges. Wash. Const. Art. I §9.

The "legislature [has the] power to provide that any of the courts of this state, excepting justices of the peace, shall be courts of record." Wash. Const. Art. I §11.

The "legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution." Wash. Const. Art. I §12.

The courts are to report to the legislature concerning various matters. Wash. Const. Art. I

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<sup>5</sup> "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."

§25.

Third, the legislature has passed a host of laws dealing with courts of record. Title 2 RCW Courts of record.

Fourth, the legislature has passed a host of laws dealing with civil procedure. Title 4 RCW Civil procedure.

The election of judges is controlled by legislative enactment as are other elected offices. RCW Title 29.

The Public Disclosure Act applies to judges. RCW Ch. 42.17.

**E. The Harmony Argument.**

Besides the separation of powers argument, the Court asserts that it should not be covered by the Public Disclosure Act because such would lead to a lack of "harmony" between the three branches of government.

This argument makes even less sense than the separation of powers argument itself.

Harmony is nice, to be sure. Not so deep in

every soul there is the desire to "just get along" with one another.

But, the branches of government would certainly not get along very well if, because of harmony considerations, one branch was subject to the Public Disclosure Act and another branch was not.

How does branch of government "harmony" come about by a rule that says a court is not an agency of state government? How, one might ask, is there harmony where a branch of government is not subject to public scrutiny except as to its "case records."

The court has a great deal of power. If its operations and functions are not subject to scrutiny, it will be perceived as a part of government with too much power. The result, disharmony.

Such vaunted desire for harmony would create the harmony that could only be gained if one branch of government had absolute power.

**F. Justice Durham Dissenting in *Nast v. Michels*.**

As has been said, the issue is a matter of first impression. It is not a matter that has not been discussed, however.

The court might wish to consider the thoughts expressed by Justice Durham in her dissent in *Nast*. There, Justice Durham makes a clear and convincing argument for the application of the Public Disclosure Act to records of the court which are not judicial case records subject to disclosure under the common law. *Nast v. Michels*, 107 Wn.2d 300, 309, 730 P.2d 54 (1986).

**III. CONCLUSION**

The court should determine that the records sought in this case are public records under the Public Disclosure Act and must be disclosed.

Appellant should also be awarded penalties and reasonable attorneys' fees. RCW 42.56.550.

Respectfully submitted this 14<sup>th</sup> day of August 2006.

EUGSTER LAW OFFICE PSC

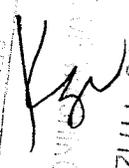
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**PROOF OF SERVICE**

I, the undersigned, certify that on the 14<sup>th</sup> day of August, 2006, I caused a true and correct copy of the foregoing to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following persons:

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Cynthia A. Lawson

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