

COURT OF APPEALS  
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STATE OF WASHINGTON  
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No. 36252-0-II

COURT OF APPEALS DIVISION II  
FOR THE STATE OF WASHINGTON

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ARTHUR WEST,

Appellant

v.

THURSTON COUNTY, MICHAEL PATTERSON,  
LEE, SMART, COOK, MARTIN and PATTERSON,

Respondents,

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Appeal of the rulings of the Honorable Toni Sheldon,  
of the Mason County Superior Court

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OPENING BRIEF OF APPELLANT WEST

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P.M. 9-17-07

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## INTRODUCTION

This case presents two main public record issues; the first being whether the public's interest in open, accountable government includes disclosure and an accounting of attorney invoices for counsel representing a public agency such as Thurston County and the second, whether such public attorney invoices may be withheld in their entirety by a public entity in a request for documents under RCW 42.56 under a single blanket exemption with no showing that the redacted material would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt, and without any burden upon the public entity to justify each separate redaction and narrowly construe any exception to full disclosure.

It is the express intent of the Legislature and the law of this state that no reasonable interpretation has ever allowed the withholding of such records in the manner that Thurston County has demonstrated in this case.

A third issue presented is whether counsel appearing unlawfully in violation of the express terms of RCW 36.32.200 may legally represent the County and collect fees for such unlawful action.

In short, the question presented to this court is whether Thurston County, as an agency of the State of Washington is subject to the clear intent of the Legislature and the express terms of the law. Appellant maintains that the answer to this inquiry is affirmative, and that Thurston County should have to follow the law.

Counsel, appearing for Thurston County without lawful authority to begin with, argues that both he and Thurston County are above the law.

The De novo Standard of review is the proper standard of review for the issues of this case.

## **STATEMENT OF THE CASE**

This appeal concerns records related to a public records request originally made by Appellant West on January 22, 2007 for attorney fee invoices related to the defense of Thurston County in the Audrey Broyles Case. (CP 153)

A public records request originally made by Appellant West on January 22. (CP 153) Although the request was addressed to Thurston County Public Records officer, respondent Patterson responded for the county, denying the request on January 24 (CP 154-5).

On February 12, 2007, plaintiff West filed the original Public Records Act lawsuit. A show cause hearing was set for March 12. (CP 144-155)

On March 8, 2007, the County officially notified West that Counsel was not lawfully authorized

to represent the County. (CP 54-58)

On March 12, The Honorable Toni Sheldon dismissed plaintiff's breach of contract claims against Patterson and the firm of Lee-Smart, etc (CP 61-2).and required a further hearing on the public records issues to be held upon March 26, 2007 (CP 59-60)

On March 26, 2007, the court entered an order exempting from disclosure the Broyles billings and dismissing the public records claim. (CP 28-30)

The Court denied West's motion to reconsider on 7 May, 2007.( CP 46 )

On April 25, 2006, West filed a notice of Appeal, which was subsequently amended (CP 4-10, 156-8 )

#### **ASSIGNMENTS OF ERROR**

I. The court erred in failing to require disclosure of Thurston County's attorney fee invoices in the orders of March 24 and May 7 when the public's interest in open, accountable government includes disclosure and an accounting of attorney invoices for counsel representing public agencies and when it is the manifest intent of the legislature that no reasonable construction of law has ever allowed blanket non-disclosure of public counsel's invoices.

II. The court erred in failing to require disclosure of Thurston County's attorney fee invoices in the orders of March 24 and May 7 by ordering that public attorney invoices may be withheld in their entirety under a single blanket redaction with no

showing that the redacted material would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or were otherwise exempt, and without any burden upon the public entity to justify each separate redaction and narrowly construe any exception to full disclosure, when it was the manifest intent of the legislature that no reasonable construction of law has ever allowed such withholding.

**III.** The court erred in giving preclusive effect to a ruling from another action where appellant West was not party, based solely upon counsels representations, when said ruling was never filed in the record and it was never shown that said ruling was based upon a full adjudication and there was no identity of parties as required under the doctrines of res judicata and collateral estoppel

**IV.** The court erred in dismissing appellant's breach of contract claims and in failing to allow West to amend his complaint when it was demonstrated that counsel was appearing unlawfully for respondent County in violation of RCW 36.32.200, and was, at best, a de facto officer acting under an unlawful contract void for its violation of public policy.

**ISSUE PERTAINING TO ASSIGNMENT OF ERROR NO. I**

1. Did the court err in entering the order of March 26 and May

7, 2007 withholding attorney fee invoices in their entirety when no reasonable construction of law had ever authorized such ruling?

**ISSUE PERTAINING TO ASSIGNMENT OF ERROR NO. II**

2. Did the court err in determining that the records were exempt in their entirety based upon a blanket exemption and without conducting an in camera review?

**ISSUE PERTAINING TO ASSIGNMENT OF ERROR NO. III**

3. Did the court err in relying upon a ruling from another case for res judicata or collateral or equitable estoppel effect when there was no full adjudication or identity of parties and such reliance was inequitable?

**ISSUE PERTAINING TO ASSIGNMENT OF ERROR NO. IV**

4. Did the Court err in the order of March 12 and May 7 in denying plaintiff's breach of contract claims when clear evidence demonstrated that counsel was appearing unlawfully in violation of RCW 36.32.200, and was, at best, merely a de facto officer acting under a contract void for violation of public policy?

**ARGUMENT ERROR I**

The Court erred in entering the order of March 26 (CP 28-30) which held that the Broyles attorney invoices were not public records when the public's interest in open, accountable government includes disclosure and an accounting of attorney invoices for counsel representing such public agencies and when it is the manifest intent of the legislature that no reasonable construction

of law has ever allowed such non disclosure.

The Public Records Act requires government agencies to disclose public records that are not protected by a specific statutory exemption. PAWS v. University of Washington, 125 Wn.2d 258, 884 P.2d 592. The exemptions to the disclosure requirements must be narrowly construed.

(T)he people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivisions of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy. RCW 42.56.030, see also PAWS at 251.

In order to clarify this narrow construction of the act as relates to attorney fee invoices, it is the binding law of this state that:

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under this act or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants. Laws of 2007, Chapter 391.

The court erred in failing to require disclosure of Thurston County attorneys' invoices when it is the clear intent of the Legislature that no reasonable construction has ever allowed such a blatant failure to disclose public records. This violates the

primary objective of statutory interpretation-to give force to the language of statute and carry out the intent of the legislature. State v. Brown, 140 Wn. 2d 456, 466, 998 P.2d 321 (2000).

## **ARGUMENT ERROR II**

The court erred in the order of March 26 and the reconsideration of May 7, 2007 when RCW 42.56.290 is inapplicable to the circumstances of this case where the requested records are neither work product or attorney-client privileged according to the very case law cited by defendants.

In Dawson v. Daily, 120 Wn. 2d 782, 845 P.2d 995 , (1993), the Supreme Court explained the operation of the specific exemption claimed by defendants in this case, formerly codified as RCW 42.17.310(1)j, noting that "This exemption incorporates the work product doctrine as a rule of pretrial discovery."

As the Supreme Court noted in Lindstrom v. Ladenburg, 136 Wn. 2d 595, at 613, 963 P.2d 869, (1998), "We find it unnecessary to broadly interpret the work product exemption..."

The Court cited to Professor Orland's suggested "bright line" rule for determining the scope of such exemptions as contained in his Observations on the Work Product Rule, as follows;

This encompasses (1). legal research and opinions, mental impressions, theories and conclusions of an attorney...  
( 2) Notes and memoranda of factual statements or investigation:  
and, (3). Formal or written statements of fact and other tangible

facts gathered by an attorney in anticipation of litigation.

In Kleven v. King County Prosecutor, 112 Wn. App 18, 53P.3d 516, (2002), the court ruled that "This (work product) doctrine protects the mental impressions, conclusions, and legal theories of an attorney from disclosure."

Significantly, the billings at issue here are not mental impressions, nor are they prepared from oral communications, nor are they factual written statements or other items gathered by an attorney in the process of investigation. Instead they are billing statements issued by an attorney, for the purpose of collecting money. While it is conceivable that some very minor portion of the billings might be properly redacted, their wholesale withholding as work product is not reasonable.

The attorney client exemption is equally unavailing, in that...

"The attorney-client privilege protects confidential attorney-client communications...so that clients will not hesitate to speak freely and fully inform their attorney of all relevant facts. It is not an absolute privilege, however, and must be strictly limited to its purpose." Overlake Fund v. Bellvue, 60 Wn. App. 787 at 796, 810 P.2d 507, (1991).

In addition, "The attorney client privilege is a narrow privilege and protects only "communications and advice between attorney and client"; it does not protect documents that are prepared for some other purpose than communicating with an

attorney. Hangartner v. Seattle, 151 Wn.2d 439 at 452, 90 P.3d 26, (2004)

The documents at issue in this case cannot reasonably be represented to have been prepared for the purpose of communicating with an attorney or client, **they are bills prepared for the purpose of getting paid.**

It is to be seriously considered by both counsel and this court that the Hangartner Court determined that the assertion of the attorney-client exemption for documents not properly within it's scope could be tantamount to an act of bad faith for which might "cost the agency dearly".

In this context it is also important to note that the particular counsel representing the County has no interest whatever in whether the agency pays "dearly" or otherwise for non-disclosure of records, and has, instead, a financial motive to delay and obstruct the course of litigation with frivolously interposed objections and personal attacks in order to needlessly prolong and extend this case so that the agency will (once again) pay "dearly" for his representation.

Under the circumstances of this case, this court should follow the reasoning of the dissent in Hangartner v. City of Seattle, 151 Wn.2d 439, at 458-60, 90 P.3d 26 (2004) and rule that the attorney client exemption is not available for an "absurd" and over broad purpose that "swallows" the PRA's intent of allowing citizens the right to disclosure of public records.

The circumstance that the trial court refused to conduct an in camera inspection of the records to determine whether they were properly exempt is another factor weighing heavily against its ruling. Spokane Research v. City of Spokane, 96 Wn. App. 568, 983 P.2d 686 (1999), Overlake Fund v. Bellvue, 60 Wn. App. 787, 810 P.2d 507, (1991)

### **ARGUMENT ERROR III**

The court erred in finding the January 22 ruling in Broyles v. Thurston county to be preclusive when there was no full adjudication of issues or identity of parties.

The court erred in finding the January 22 Broyles order to have preclusive effect when west was not a party to or in privity with the parties to the action, when there was no full adjudication,. And when such preclusion was otherwise unlawful.

The doctrine of estoppel and res judicata both require identity of parties, full and fair adjudication, and an absence of prejudice. Mill Workers v. Delaney, 73 Wn.2d 956,442 P.2d 250,(1968) In this case, West was not party to or in privity with the parties to the Broyles case. Neither was there a full adjudication of the issues, as reflected by the "Without Prejudice" status of the disputed order.

It is highly inequitable to employ such an order to prejudice west when it was supposed to be without prejudice, and it has been used to justify a determination under the public Records Act far beyond that anticipated by the court. Such application violates

both the PRA and all principles of technical or equitable preclusion.

**ARGUMENT ERROR IV**

The court erred in dismissing plaintiff's claims for breach of contract when it was clear from the record that counsel was unlawfully appearing for the county. Appearing at CP 54-58 is a declaration and appended true and correct copy of a March 8, 2007 response to a public records request from Thurston County. This response reveals that the only contract issued to Michael Patterson to represent Thurston County was executed on January 24, 2003. RCW 36.32.200 provides...

It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law. Any contract written pursuant to this section shall be limited to two years in duration.

Therefore, before January 24, 2003, and after January 24, 2005, neither Mr. Patterson or Lee Smart, etc. were duly authorized by the Commissioners to represent Thurston County or perform legal functions such as administering compliance with the Public Records Act. Nor have Mr. Smart or Mr. Rosenberg ever been duly appointed as deputy prosecutors. As such, any appearance by Mr. Patterson for Thurston County after January 24, 2005 in either the Audrey Broyles

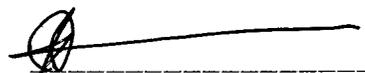
case or in this instant case is unlawful and violative of RCW 36.32.200. In such a case, counsel can be found to be, at best, a de facto officer.

A de facto officer is not entitled to the emoluments of office. Snohomish County Builders Assn. v. Snohomish Health District, 8 Wn. App. 589, 508 P.2d 617, (1993). Therefore, the court erred in allowing Patterson and Lee Smart to profit from their unlawful conduct when they were not legally entitled to profit from such unlawful activity. Mr. Patterson and Lee Smart simply cannot be allowed to violate public policy and profit from an unlawful contract. In Re the Discipline of Smith, 42 Wn.2d 188, 254 P. (2d) 464, (1953), Cited in 30 A. L. R. 188; 5 Am. Jur. 361

#### CONCLUSION AND RELIEF SOUGHT

This court should act in accord with the clear letter of the law and remand this case back to the trial court with instructions to vacate the March 26 and May 12 orders and require disclosure of all requested records, and to impose per diem penalties and award costs for plaintiff's work in the trial court and on appeal. A further instruction should issue to the trial court to enter an order vacating the March 12 order and requiring Patterson, et al to reimburse the public for the funds they have unlawfully received.

Done September 17, 2007.

  
ARTHUR WEST