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No. 231364

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Washington Court of Appeals Division III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

CODY SOTER, a minor child; FRANCIS SOTER and GLENDA CARR, individually, and as parents of CODY SOTER; THE ESTATE OF NATHAN WALTERS, a deceased minor child; RICK WALTERS and TERESA WALTERS, deceased minor child; and SPOKANE SCHOOL DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
THE HONORABLE JEROME LEVEQUE

APPELLANT COWLES PUBLISHING COMPANY'S ANSWER TO AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Cowles Publishing Company, publisher of *The Spokesman-Review* (hereinafter "*The Spokesman-Review*"), hereby responds to the brief filed by amicus curiae Washington State Association of Municipal Attorneys ("WSAMA"). Amicus WSAMA, in its Summary of Argument, raises certain arguments identical to those asserted by Amici Washington Schools Risk Management Pool ("WSRMP"), the Washington Association of School Administrators ("WASA"), the Washington Council of School Attorneys ("WCSA"), the Southwest Washington Risk Management Insurance Cooperative ("SWRMIC"), and the Washington Governmental Entity Pool ("WGEP") (collectively "WSRMP *et. al.*"). *The Spokesman-Review* therefore responds herein only to those arguments and authority raised exclusively by WSAMA, and respectfully refers the Court to *The Spokesman-Review*'s Answer to Amici WSRMP *et. al.* for its response to those issues raised both by WSAMA and the other amici curiae.

WSAMA, in its Summary of Argument, urges the Court to hold that the Washington Public Disclosure Act, RCW 42.17 *et. seq.*, "was not designed as a tool for the benefit of those contemplating or bringing damage claims against agencies in this State..." (WSAMA Brief, p. 2.) Because WSAMA mischaracterizes the nature of the public records

request or arguments of *The Spokesman-Review*, *The Spokesman-Review* reiterates that it is not seeking access to records divulging communications between a public agency and its counsel in which legal advice is conveyed, nor is it seeking access to public records, or portions thereof, that discuss the mental impressions, stratagems or thought processes of agency counsel. Rather, the focus of *The Spokesman-Review*'s request is the factual statements assembled by the private investigator hired by Spokane School District No. 81 (the "District") to provide an "objective" review of the incident. *See* C.P. 309-12.

Amicus WSAMA argues that the work product doctrine protects materials even if the anticipated litigation never occurs or is concluded. *The Spokesman-Review* has not disputed this rule; however, WSAMA misses the importance of the fact that any litigation relating to the death of Nathan Walters is foreclosed because of a settlement entered into between the District and Nathan Walters' parents, without litigation ever having been initiated. Because the District does not face a potential lawsuit, disclosure will not prejudice the District. This is not a case, as suggested by WSAMA, where an adverse litigant contemplating claims against a public agency seeks to use the Public Disclosure Act as an improper discovery tool. Rather, the public (through the efforts of *The Spokesman-*

Review) seeks access to the only materials containing the facts surrounding the death of a child and the District's related actions, including payment of a settlement of $985,000, in a situation where the District is exposed to no further litigation.

Amicus further argues that the Court should apply federal case law and hold that the work product exemption, RCW 42.17.310(1)(j) does not incorporate the "substantial need exemption" of CR 26(b)(4), which allows for production of work product to an opposing party under certain circumstances. The federal statute, however, contains language different than the Washington Public Disclosure Act. In addition, the Washington Supreme Court applies RCW 42.17.310(1)(j) as incorporating the substantial need exception, in contrast to federal courts interpreting the federal statute. As such, federal case law is not persuasive.

II. ARGUMENT

A. PUBLIC RECORDS CREATED PURSUANT TO AN AGENCY'S ADMINISTRATIVE PROCEDURES ARE NOT WORK PRODUCT, EVEN IF CONCURRENT LITIGATION EXISTS.

Amicus argues that the records constitute "pre-claim" work product created in anticipation of litigation, but does not address how such records should be treated when they would have been created through administrative procedures even if litigation were not anticipated. Records prepared in the ordinary course of business are not protected by the work-

product doctrine. *Escalante v. Sentry Insurance*, 49 Wn. App. 375, 395, 743 P.2d 832 (1987); *United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998) (records "that would have been created in essentially similar form irrespective of the litigation" are not work product.); *Long v. Anderson University*, 204 F.R.D. 129, 136-37 (S.D. Ind. 2001) (documents not work product despite threat of litigation from adverse counsel because documents were "an ordinary and customary step" pursuant to the university's procedures). In sum, the work product doctrine does not operate to protect documents that would have been created regardless of any concurrent pending litigation (or anticipation of pending litigation).

Here, at the time of Nathan Walters' death, the District had in place a set of administrative procedures to be followed in the event of injury to a student. C.P. 249-53. To comply with these procedures, the District necessarily had to interview all witnesses and gather information about the circumstances of the injury. *Id.* Early on, the District announced the hiring of a private investigator. C.P. 309-12. The District's rationale for retention of the investigator (whose interviews with witnesses are now claimed to constitute attorney work product) underscores the administrative nature of his work for the District. According to the District, the investigator was not hired to be a handmaiden of legal

counsel, but rather, because, given the "serious nature" of the incident, the District "wanted to make sure" the investigation "was objective and wanted to have someone with experience" undertake the review. C.P. 192, 309-312.

What the District did in its retention of the private investigator and counsel was no more than what its internal procedures said it should do to assemble facts concerning the Nathan Walters incident, the only difference being that the District chose to hire non-District personnel to assemble the same information that the procedures and rules said should be assembled by District personnel. As such, the District should not be afforded the protection of RCW 42.17.310(1)(j) for what, in essence, are administrative records merely because the records were assembled and are now maintained by non-District personnel.

Stated differently, the records would have been created by the District even without anticipated litigation, and to the extent the records at issue contained any specific mental impressions, conclusions, or legal theories of counsel for the District, those portions of the factual reports may be deleted as exempt under RCW 42.17.310(1)(j). However, to the extent the records contain factual statements provided by witnesses assembled as part of the District's administrative investigation, such

factual statements do not fall under the protection of RCW 42.17.310(1)(j) and should be disclosed.

B. THE PUBLIC DISCLOSURE ACT, UNLIKE THE FEDERAL FREEDOM OF INFORMATION ACT, CONTEMPLATES THE DISCLOSURE OF WORK PRODUCT WHERE THERE IS NO OTHER REASONABLE AVENUE FOR THE PUBLIC TO OBTAIN FACTS DISCOVERED BY A PUBLIC AGENCY.

Amicus WSAMA relies upon federal case law construing the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for its argument that the work product exemption in the Washington Public Disclosure Act does not contain the substantial need exception so as to render disclosure of work product appropriate under certain circumstances. Because FOIA's language is different than that contained in the Washington Public Disclosure Act, and because the federal courts' interpretation of FOIA conflicts with the Washington Supreme Court's interpretation of RCW 42.17.310(1)(j), the Court should reject WSAMA's attempt to apply federal instead of state law.

The Public Disclosure Act exempts from disclosure:

> Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

RCW 42.17.310(1)(j). In *Limstrom v. Ladenburg*, 136 Wn.2d 595, 609 (1998), the Washington Supreme Court explicitly incorporated CR 26 as

the applicable rule of pretrial discovery under the statute.

Correspondingly, the *Limstrom* Court explicitly applied CR 26(b)(4)'s substantial need exception to a party who made a public records request, holding that access to public records was denied only because the same records were available from other public sources:

> ...[W]e hold the documents are part of the prosecutor's fact-gathering process and are work product. Consequently, <u>these documents are protected from disclosure unless Mr. Limstrom is unable to demonstrate a substantial need and an inability to obtain the documents from other sources.</u>

Id. at 614-15 (emphasis added). Because the *Limstrom* plaintiff admittedly had obtained the records at issue from other public agencies, he was, therefore, unable to demonstrate the requisite inability to obtain the records from other sources. *Id.*; *see also Kleven v. King County Prosecutor*, 112 Wn. App. 18, 24-25 (2002) (applying same test and holding that requester at issue did not have substantial need for requested records, two pages of an attorney's notes and a memorandum seeking legal advice, just because he did not already possess them).

In contrast to RCW 42.17.310(1)(j), the FOIA work product exemption does not make reference to pretrial discovery rules and, thus, has a key distinction from the language of RCW 42.17.310(1)(j). The federal statute exempts:

> [I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. § 552(b)(5). Moreover, the Supreme Court of the United States has construed FOIA to include a provision that the records are exempt if the documents are "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added).

Thus, because of the difference in statutory language and the different interpretations of the two statutes, the "substantial need" exemption explicitly recognized to apply to the Washington Public Disclosure Act by the *Limstrom* Court does not come within the ambit of the federal statute. *See Federal Trade Commission v. Grolier, Incorporated*, 462 U.S. 19, 28 (1983) ("It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the *normally* privileged" so as to allow public disclosure under FOIA). Because the FOIA statute language and federal court interpretations thereof incorporate a different standard than the Washington Public Disclosure Act as interpreted by *Limstrom* and its progeny, FOIA case law is not persuasive and the Court should reject

WSAMA's attempt to integrate a different standard than CR 26 into RCW 42.17.310(1)(j).

In short, because *Limstrom* explicitly addressed the substantial need exception and applied it in a public records context, WSAMA's argument – that the exception to the work product doctrine does not exist in a public records context because of federal case law interpreting a federal statute – fails.

III. CONCLUSION

For the reasons set forth above and those detailed in its earlier briefing, *The Spokesman-Review* requests that the Order of the trial court granting summary judgment and denying access to the requested public records be reversed and an Order be entered requiring the Spokane School District No. 81 to make available for public inspection the requested documents.

RESPECTFULLY SUBMITTED this 5th day of December, 2005.

WITHERSPOON, KELLEY,
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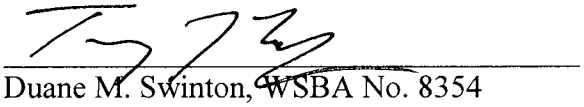

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CERTIFICATE OF SERVICE

On the 5th day of December, 2005, I served the within document described as **APPELLANT COWLES PUBLISHING COMPANY'S ANSWER TO AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS** on all interested parties to this action as follows:

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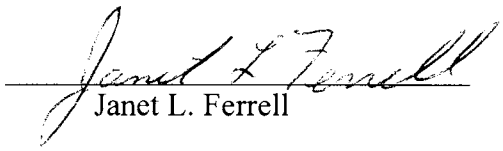

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