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No. 231364

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

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**SURREBUTTAL BRIEF  
OF RESPONDENT SPOKANE SCHOOL DISTRICT NO. 81**

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## I. INTRODUCTION

Petitioner Cowles Publishing Company (“Cowles”) raises a new argument in its Reply Brief here. That argument is that John Manix, counsel here for the School District and for Mary Patterson, Ladd Smith, Heidi Dullanty, Kathe Reed-McKay, Linda Bordwell, and Lonna Heimstrah, waived the protection otherwise due those clients in the documents at issue under the attorney-client privilege and the work product doctrine, by statements made in his declaration testimony to the trial court which were submitted there for the very purpose of carrying the burden of proving the existence of those protections. See Cowles’ Reply Brief at 25-27.

It is easy to demonstrate that no substantive disclosure was made by Mr. Manix that implicate waiver. However, at the threshold, the legal inadequacy inherent in Cowles attempt to even raising this otherwise-substantively-meritless argument must first be addressed.

**A. Aside From Its Substantive Lack of Merit, Cowles’ Argument Fails As a Matter of Law Because the District’s Necessary Evidence For Proving Its Entitlement to Privileges Cannot Be Held To Have Concomitantly Operated to Have Waived Those Privileges.**

Here in response to Cowles’ Public Disclosure Act request, the School District asserted that attorney-client privilege and/or work product doctrine protections justified withholding each of the documents under

RCW 42.17.310(1)(j). Cowles itself then obtained from the trial court a Show Cause Order directing the School District to appear and demonstrate the validity and application of the attorney-client privilege and/or work product doctrine as to each of the documents. CP 143-44; *see* RCW 42.17.340(1) “Upon motion..., the superior court ... may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.”) Indeed, the School District thereupon bore the burden of proving the application of the exemption it had invoked. *Id.* (“The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.”); *see also Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997) (public agency bears burden of proof as to whether an exemption to Act applies).

And, as Cowles well knows, a party cannot discharge that burden absent sworn, personal knowledge, factual testimony proving each element which the party must carry – as opposed to mere conclusions. *E.g. Grimwood v. Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). As stated by the court in *Grimwood* with respect to the necessity

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for factually-specific testimony in order for affidavit or declaration testimony to be considered by a court:

A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality... Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.

*Id.* (citations omitted).

Thus specifically in the context of responding to the attorney-client privilege and work product doctrine issues that were joined by the Show Cause proceedings which Cowles itself initiated below, the School District here could **not** have protected and preserved the documentary protections due it (and due Mr. Manix's individual clients) by submitting conclusory affidavit testimony stating, for instance: "I was counsel for the School District and for clients X, Y, Z, etc. I generated records reflecting communications with those clients that were within the scope of that representation, and that I and the clients intended be kept confidential. Those records are included within the documents at issue."; or "I anticipated litigation. I, my office, and my investigator generated records in anticipation of litigation. Those records are among the records at issue here."

Instead, the burden borne by the District was to present specific, personal-knowledge, fact evidence probative to the following legal elements, as concerns the attorney-client privilege:

- 1) **Facts** supporting the conclusion that an attorney-client relationship existed between Mr. Manix and his partners and not only the School District, but Ms. Patterson, Mr. Smith, Ms. Dullanty, Ms. Reed-McKay, Ms. Bordwell, and Ms. Heimstrah, each;
- 2) **Facts** supporting a conclusion as to the substantive scope of that legal representation as to each such client;
- 3) **Facts** supporting a conclusion as to the timing of the onset of that legal representation as to each of them;
- 4) **Facts** supporting a conclusion that communications between counsel and those clients occurred within the scope of that representation;
- 5) **Facts** supporting a conclusion that those communications were intended by counsel and clients to be held in confidence;
- 6) **Facts** supporting a conclusion that those communications are among the documents at issue here or are reflected within documents that are at issue here;<sup>1</sup>

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<sup>1</sup> As an example of application of the burden to prove these necessary elements of the attorney-client privilege by detailed facts and not by conclusory statements, *see, e.g., Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997):

The initial inquiry... is whether an attorney-client relationship or other protected relationship exists. An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists. However, **the belief of the client will control only if it is reasonably formed based on the attending circumstances, including the attorney's words or actions.** The determination of whether an attorney-client relationship exists is a question of fact. The burden of proving the existence of the relationship and that the information the Dietzes sought fell within the privilege rested squarely with Doe.

and as concerns the work product doctrine,

- 1) **Facts** supporting a conclusion that anticipation of a wrongful death claim was in fact subjectively held by counsel, by School District officials, and by the investigator hired by counsel;
- 2) **Facts** supporting a conclusion as to the timing of the onset of such subjective anticipation by each of them;
- 3) **Facts** supporting a conclusion as to the reasons why such anticipation was or was not objectively reasonable, under the totality of the then-existing factual circumstances;
- 4) **Facts** supporting a conclusion that the investigation that was conducted by counsel and the investigator hired by counsel was done for the purpose of defense against the initially-anticipated, and shortly thereafter actual, claim, and not for any other purpose such as the “ordinary course administrative investigation” purpose that Cowles has imagined up.<sup>2</sup>

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*Id.* at 843-44 (emphasis added) In that case, the court ruled against the party invoking the attorney-client privilege, on the basis that he had failed to provide specific testimony as to the facts necessary to carry his burden of showing the existence and application of the privilege:

The trier of fact on the issue of the existence of an attorney-client relationship between Doe and Ritchie **may not simply accept Ritchie’s legal conclusion that Dow was his client.** The trial court **needed the facts of what actually occurred between Doe and Ritchie to decide the legal question** of whether Doe was Ritchie’s client.

*Id.* at 845 (emphasis added; citations omitted).

<sup>2</sup> “[T]he test should be whether, in light of the nature of the document and the **factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.**” *Heidebrink v. Moriwaki*, 38 Wash. App. 388, 396, 685 P.2d 1109 (1984), quoting 8 Wright & Miller, Federal Practice and Proc. §§ 2017, 2021-28, pp. 198-99, *rev’d on other grounds*, 104 Wn.2d 392, 706 P.2d 212 (1985) (emphasis added).

The School District did below what it was therefore required to do by Cowles' own Show Cause proceedings. And it did so by what the District has rightly termed a virtual "mountain" of evidence fulfilling the District's factual evidentiary burdens on each of these elements – including facts establishing that immediately upon being apprised of the event, subjective anticipation of a claim was held, and the detailed reasons why such anticipation was objectively reasonable under the totality of the factual circumstances; that counsel indeed immediately performed initial analyses on the subjects of application of negligence law principles to the then-reported event facts and an assessment of wrongful death and survival action damages tort law in the context of death of a minor child; hired liability defense experts to analyze medical and proximate causation; took great pains to confirm and establish its representation role vis-à-vis various potential individual defendants; confirmed tort liability insurance coverage would apply for the benefit of those individuals; eliminated conflict-of-interest concerns related to representation of those individuals for tort defense purposes; obtained authority from the liability insurer regarding its payment for the expert witnesses and investigator hired to assist in defending the claims, wrote liability and damages evaluation reports to that insurer; terminated its investigation mid-stream when the claims were settled; etc.; etc.; etc.; etc.

In short, Cowles cannot now employ a stratagem wherein, after affirmatively putting the School District to its proof as to the necessary specific, detailed, evidence required in the first instance to establish the protections invoked by the School District, thereupon proclaim that that very same required proof somehow concomitantly waives those protections.<sup>3</sup>

**B. As a Substantive Matter, the Trial Court Was Correct In Rejecting the Waiver Contention.**

And regardless, Cowles did not below, and cannot now, substantively support a suggestion that Mr. Manix disclosed in his declaration any of the protected information in the records at issue related to the facts and circumstances leading up to Nathan Walters' death, as those facts and circumstances were disclosed by his, his firm's, and their investigator's, tort-liability investigation. In this regard the Court is invited to read Mr. Manix's declaration, CP 379-452. The only portion of the declaration wherein Mr. Manix discussed the facts and circumstances

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<sup>3</sup> Indeed, Cowles protested below that Mr. Manix's, his firm's and the firm's investigator's investigation was not really conducted for the purpose of tort-claim defense, but was an "an ordinary course administrative investigation" on behalf of the District's Safety Office. Cowles surely cannot be contending that it would have abandoned that protestation if the District had simply filed declaration testimony proclaiming, in conclusory fashion "The investigation was for tort defense purposes." Rather, the District was required to present facts proving a negative – that the investigation was not an ordinary course administrative investigation. And after the District did so with overwhelming evidence, that showing cannot now be used by Cowles to claim that the same evidence concomitantly operated to somehow waive the very same attorney-client privilege and work product protections that were established by it.

of Nathan's death is at paragraph 14 thereof, CP 384-85. In fact – as Mr. Manix expressly prefaced his statement in that paragraph, (“As has been reported in the media,...”, CP 384) – the only facts of the underlying incident that he disclosed were those same facts that had been reported in the media some two years previous to his declaration filing. (Principally, in fact, that media reporting had been done by the *Spokesman Review* itself, in the some 12 articles that it ran concerning Nathan's death, *see* published news articles submitted by Cowles below at CP 306-320; 325-32; 682-84).

Cowles does not explain how a “disclosure” of facts by counsel that were previously given extremely widespread dissemination by the media could operate as a waiver by counsel of “confidential” attorney-client privileged and work product-protected information. Cowles cannot.<sup>4</sup>

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<sup>4</sup> The only other “disclosure” of facts concerning the events surrounding Nathan's death contained in the School District's evidentiary submission below is set forth in Dr. Anderson's declaration, wherein he recounted the initial information he received in a phone call from fellow administrator Larry Parsons, who telephoned Dr. Anderson from the hospital about the situation, before Nathan had officially been pronounced dead, on the afternoon of May 18, 2001.

No claim has ever been made by the School District that that conversation between Mr. Parsons and Dr. Anderson, or the information communicated within it by Mr. Parsons, was privileged or protected by the work product doctrine. Nor could such a claim have been legitimately made. It was a conversation between school administrators as to an event that had just occurred. Neither Mr. Parsons nor Dr. Anderson is an attorney. And the conversation occurred before Dr. Anderson had a subjective anticipation that the District would face a wrongful death claim, because it was based on that very same conversation that Dr. Anderson formed his anticipation of the likelihood of such. CP

Cowles' new waiver argument additionally points to the fact that Mr. Manix disclosed in his declaration below that he discussed certain **subject matters** with Dr. Anderson and Dr. Livingston and that Mr. Manix disclosed that he and his partner, Paul Clay, held legal theories on certain **subject matters** related to liability issues concerning Nathan's death.<sup>5</sup>

All that Mr. Manix did in this regard in his declaration below was disclose that he and his partner **possessed** legal theories on a certain

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517. And of course the conversation preceded Dr. Anderson's consultation with Mr. Manix; *id.*; it therefore necessarily preceded the tort claim investigation which followed, by Mr. Manix, by his law firm, and by the firm's investigator. Disclosure of the substance of that non-privileged and not-work-product-protected conversation between Mr. Parsons and Dr. Anderson thus could not form a basis for a claimed waiver of confidential attorney-client privileged or work-product information.

<sup>5</sup> The full pertinent quote from Mr. Manix's Declaration is as follows:

As to my discussions with Dr. Anderson over that weekend, I can only again describe these as "pure" attorney-client communications. ***Without disclosing the privileged substance of those communication,*** by the end of that weekend, Mr. Clay and I had already developed theories (albeit some in relative infancy) as to whether a negligence claim could prevail against the District on issues such as: (1) whether the District nurses had properly trained District personnel to respond to any allergic reaction involving Nathan; (2) whether the actions taken by the District's employees and the volunteer parent chaperone on the field trip had been prudent, in the context of the information they possessed and their observations of Nathan's condition while they were monitoring him; and (3) whether Nathan himself might have some contributory fault for taking a bite of the cookie; (4) whether Nathan's ingestion of the part of the cookie was in fact the medical and proximate cause of Nathan's death; (5) whether there was another person, not in an employment or volunteer capacity with the District, whom might have liability for the incident; and (6) whether Nathan's parent(s) might have liability based on information or lack of information provided to the District.

CP 390-91 (emphasis added).

subject matters, and discussed those theories with their client. That is a far different matter than disclosing what that theory on that subject matter happened to **be**. And it certainly could not be construed to operate as a disclosure that waived either the attorney-client privilege or work product protections that Mr. Manix's clients enjoy – and as to which each of them specifically did not (and still have not) consented to a waiver. CP 455-55; 513-14; 521; 528; 530-31; 533-34; 544-45; 548-49.<sup>6</sup>

To argue that privileges are waived when an attorney discloses that he has a theory on a certain subject matter or that he has discussed with his client a theory he holds on a certain subject matter is to argue that an attorney waives those protections every time he or she says, or writes, to the adversary, “I do not believe you can prove liability in this case”; or “I believe our damages theory is correct”; or “I have discussed with my client our liability [or damages] theory”; or the like. Indeed, if a litigant's or his attorney's disclosure that he does or does not possess a given theory in relation to claim or a case operates as a waiver of privileges, then

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<sup>6</sup> These citations to the record are to the testimony of Dr. Anderson, Dr. Livingston, Ms. Patterson, Mr. Smith, Ms. Dullanty, Ms. Reed-McKay, Ms. Bordwell, and Ms. Heimstrah, wherein each of them testified that they expressly relied on the attorney-client privilege when they communicated with Mr. Manix, have never intended or authorized a waiver of the privilege concerning those communications, and never intend to do so.

In this regard, see *State v. Sullivan*, 60 Wn. 2d 214, 217, 373 P.2d 474 (1962), citing *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953) and *State v. Ingalls*, 4 Wn.2d 676, 104 P.2d 944 (1940), holding succinctly with respect to waiver of the attorney-client privilege: “The privilege is that of the client and only he can waive it.”

litigants would waive those privileges every time they file a Complaint or a listing of Affirmative Defenses articulating their theories concerning the case, or they answer an interrogatory or a deposition question asking, for instance, “Do you contend my client was comparatively negligent?;” or “Do you believe you are entitle to damages for elements X, Y, or Z?”

Such an approach would render our adversary system completely unworkable. This was expressly recognized in Seattle Northwest v. SDG Holding Co., 61 Wn. App. 725, 812 P.2d 488 (1991). There, an attorney representing the defendant in a civil case wrote to the plaintiffs’ attorney that he believed “strong and valid defenses are available to the [ ] plaintiffs’ claims.” The plaintiff contended that the defendant’s attorney’s “disclosure” operated to waive the defendant’s attorney-client privilege protection for documents that contained facts that might support the defendant’s attorney’s basis for his belief. Id. at 739. Unsurprisingly, the court rejected the contention, as follows:

The statement that “strong and valid defenses are available to the [WPPS] class plaintiffs’ claims found in Burgess’ letter is at most a disclosure of a legal *conclusion*, not a confidential legal opinion. ***If such a disclosure did waive the attorney-client privilege, every letter an attorney writes to opposing counsel, an audit firm, or a witness in a case could be construed as waiving the privilege.*** To penalize a disclosure of a legal conclusion by characterizing it as a waiver would greatly hamper attorneys in their ability to effectively represe4nt and

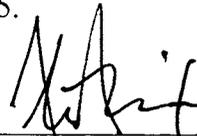
advise their clients. *The exception would swallow the rule and render the privilege a virtual nullity.*

Id. at 739-741 (emphasis added.) Here indeed, under this controlling holding, Mr. Manix could have written in his affidavit, for instance, a statement along the lines of “Mr. Clay and I had developed a litigation theory that Nathan’s death was not medically or proximately caused by his ingestion of part of the cookie but instead by another medical condition from which Nathan suffered” without risking waiver. Here, in fact, Mr. Manix did not even say such a thing. What he said was that he and Mr. Clay had developed “a theory” with regard to medical causation, and “theories” as to other issues, without disclosing what those theories were.

No waiver can be argued to have arisen from Mr. Manix’s statement that he held theories on certain subject matters or that he had discussed those theories with his client. Indeed, were Cowles’ assertion correct, a party could never successfully invoke the protections of the work product doctrine, because by affirming in the very first instance that certain documents were generated “in anticipation of litigation,” the attorney and his client are thereby necessarily “disclosing” their mental impression that the facts known to them reasonably led them to subjectively expect litigation would be filed against the client.

For the foregoing reasons, should this Court not grant the School District's Motion to Strike Cowles' argument, raised for the first time in Reply, that counsel's declaration testimony below operated to waive attorney-client privilege and work product doctrine protections for the documents here at issue, the Court is respectfully requested to reject that argument on the merits.

Dated this ~~21~~<sup>22</sup> day of April, 2005.



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