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No. ~~52304~~-0-1

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION ONE

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BELLEVUE JOHN DOES 1-11, FEDERAL WAY JOHN DOES 1-5
AND JANE DOES 1-2, and SEATTLE JOHN DOES 1-13 and JOHN
DOE,

Appellants,

vs.

BELLEVUE SCHOOL DISTRICT #405, a municipal corporation and a
Subdivision of the state of Washington, FEDERAL WAY SCHOOL
DISTRICT #210, a municipal corporation and a subdivision of the state of
Washington, and SEATTLE SCHOOL DISTRICT #1, a municipal
corporation and a subdivision of the state of Washington, and

THE SEATTLE TIMES COMPANY

Respondents.

REPLY BRIEF OF APPELLANT BELLEVUE JOHN DOE #11

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ORIGINAL

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II. ARGUMENT

Bellevue #11 agrees that Washington citizens have the right to review and assess how school districts respond to allegations of abuse against students. He agrees that this monitoring of school district conduct requires the disclosure of documents that reflect that conduct, in this case, police reports and other notes and letters containing the student complaints and district response. He also agrees that children must be protected from sexual abuse by teachers. Where a teacher has been found to have committed acts of sexual abuse, the public has a right to know the identity of that teacher to protect children from further potential harm. These are the “stated” purposes of The Seattle Times in this case. Bellevue #11 lauds these purposes.

The purposes of the Act are not served by arbitrary inspections of school teachers. Misconduct must be present to justify scrutiny of a teacher. The language of the Act itself, prior case law, Constitutional

guarantees, and basic notions of justice and fair play require the following rule:

Allegations of misconduct, absent opportunity for the teacher to respond and rebut those allegations, are not sufficient to warrant scrutiny of a teacher.

1. **The WPDA authorizes review of governmental conduct.**

Bellevue #11 and The Seattle Times agree that the Washington Public Disclosure Act was enacted to afford Washington citizens the ability to monitor the conduct of government. Consistent with RCW 42.17.020(36), The Times agrees that it is not entitled to a record unless it relates to the conduct or performance of government. It asserts:

The Times' request focuses solely on governmental operation. The actions of a teacher . . . with his or her students is governmental.

BR 38. On an individual teacher basis, The Times is properly interested only in the "actions" of the teacher.

If a teacher has not acted in a governmental capacity, The Times concedes that neither it nor the public has the right to scrutinize that teacher. In re Rosier, 105 Wn.2d 606, 611, 717 P.2d 1353 (1986) (The Act does not authorize scrutiny of individuals). Yet The Times engages in no discussion of whether allegations constitute conduct.

In his opening brief, Bellevue #11 explained how allegations, standing alone, do not equate to misconduct. The allegations against him were uninvestigated. He had no opportunity to present evidence to rebut the allegations. He had no opportunity to respond and defend against them in any way. The record regarding Bellevue #11 contains no evidence of conduct by him. It consists solely of allegations.

Nowhere in the structure of our society do we allow the merits of an issue to be determined without an opportunity for both sides to present evidence in support of their respective positions. The Times did not respond to this argument at all. In so doing, it concedes that allegations do not constitute misconduct. In the context of the records The Times seeks, Bellevue #11 is not a governmental actor subject to scrutiny. He remains an individual. The WPDA does not apply to his identity.

2. Disclosure of Bellevue #11's identity unlawful invasion of privacy.

a. Disclosure would be offensive to reasonable person. The Times contends that the law is well settled that disclosure of a person's identity in conjunction with allegations of misconduct is not offensive. The Times misstates the holdings of both *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998) and *Cowles Publ'g v.*

State Patrol, 109 Wn2d 712, 726-27, 784 P.2d 597 (1988) on which it relies. In *Woessner*, the court held that dissemination of employee names was not offensive, but “*only if*” not coupled with employee identification numbers, which could then allow public access to private facts about the employees. [emphasis in original]. *Woessner, 90 Wn. App. at 222.* In this case, The Times has the underlying records of Bellevue #11. Releasing his name in conjunction with those records would be highly offensive because allegations of sexual misconduct are personal to the teacher. *See also, Cowles Publ’g v. State Patrol, 109 Wn2d 712, 726-27, 784 P.2d 597 (1988)* (disclosure of identities of police officers in conjunction with sustained complaints not offensive to reasonable person).

b. No legitimate public interest in identity. The Times claims that the law in Washington is well settled that the public has a legitimate interest in teacher identities in conjunction with allegations of misconduct. The cases it cites do not support its position:

The Times asserts that the court in *Brouillet v. Cowles Publ’g Co., 114 Wn2d 788, 791 P.2d 526 (1990)* determined that teacher identities, in conjunction with allegations of misconduct, are of legitimate public concern. BR 25. The court in *Brouillet*, was asked neither to address “allegations” nor the issue of “legitimate public concern.” In

Brouillet, none of the decertified teachers disputed that they had committed the conduct for which they were decertified. Moreover, all of them had an opportunity for a hearing on the issue.

As to “legitimate public concern,” the teachers did not contest that “known sexual misconduct” is a matter of legitimate public concern. *Brouillet*, 114 Wn.2d at 798. *Brouillet* concluded that underlying records should be disclosed in conjunction with teacher identities in cases of known sexual misconduct. *Brouillet*, 114 Wn.2d at 798. Bellevue #11 takes no issue with this holding.

The Times also implies that *Columbian Pub. Co. v. City of Vancouver*, 36 Wn. App. 29, 671 P.2d 280 (1983) addressed allegations of misconduct. It did not. Rather, it addressed the release of complaints about a public official regarding his performance on the job. The subject of the request did not contend that the conduct giving rise to the complaints was false. The court in *Columbian Publishing* was not asked to address the issue. Undisputed complaints of job performance of a public official are not synonymous with disputed allegations of sexual misconduct against someone who is not a public official.

Similarly, *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) did not hold that allegations are a matter of legitimate

public concern. In *Amren*, the only issue before the court was whether the Act's exemptions applied to the City and the Court held that because it was a municipality and not the state, the exemptions did not apply. Nowhere did the court engage in any discussion of privacy nor was the issue before the court. *Amren*, 131 Wn.2d at 33.

The Times also misstates the holding of *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 517, 521. The court held that the name of the ambulance company was not private nor would its disclosure harm effective law enforcement. An ambulance company is not a private individual.

The Times criticizes the court in *Tacoma v. Tacoma News*, 65 Wn. App. 140, 149-50, 827 P.2d 1094 (1992) for relying upon the common law tort of invasion of privacy/false light in holding that the public has no legitimate interest in knowing false information. It cites *Eastwood v. Cascade Broad Co.*, 106 Wn.2d 466, 463-74, 722 P.2d 1295 (1986) for the proposition that Washington does not recognize the tort of false light. The court in *Eastwood* addressed the issue of what statute of limitations should apply to a false light claim. *Eastwood*, 106 Wn.2d at 474. It did not reject the existence of the claim in Washington. Indeed, the tort of invasion of privacy/false light is well established. See e.g. *Mark v. Seattle Times*, 96

Wn.2d 473, 635 P.2d 1081 (1981); *Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 770 P.2d 203 (1989).

The Times further asserts that the court in *Tacoma News* erred in relying on the Restatement (Second) of Torts to determine that the public has no legitimate interest in false information. It claims that invasion of privacy is fully defined by the WPDA. The Act's definition of privacy was codified after *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), in which the Washington Supreme Court expressly relied on the Restatement (Second) of Torts §652(D) to determine when a person's right of privacy was violated in the context of publishing a true statement. In *Tacoma News*, the court was faced with the question of whether the public has a legitimate interest in false information. It relied on the same section of the Restatement (Second) of Torts cited by the court in *Hearst*, (this time subsection (E)) to hold that publication of false information violates a person's right of privacy under the WPDA. The court's analysis in *Tacoma News* was sound.

The Times finally complains that *Tacoma News* requires courts to make an independent determination from the administrative record whether allegations are true or false. If the court in *Tacoma News* actually required that, it would be wrong. The trial court in this case

interpreted *Tacoma News* that way and attempted to determine on an administrative record whether allegations were true or false. In so doing, it erred. As described in Bellevue #11's opening brief, it is unreliable and violative of every rule of evidence and notion of fair play to allow substantive fact finding on the double and triple hearsay statements of one side with no opportunity for response from the other.

But the court in *Tacoma News* did not so hold. In *Tacoma News*, the court relied on the conclusions of four independent agency investigations to conclude that the allegations were not subject to disclosure. Its holding was well founded in law and fact. The Times has offered no alternate rule that the court in *Tacoma News* should have applied. It has offered no argument why the public has any interest in false information. It can't. The idea is absurd.^{1[1]}

Still, The Times clings fast to the idea that whether information is true or untrue is irrelevant to whether the public has a "legitimate public interest" in knowing it. This is a disturbing premise coming from a news agency charged with providing the public with information upon which it can rely. The Times' use of language in its brief illustrates that it firmly believes that all those accused of misconduct are guilty, and further, that it

^{1[1]} The Times's claim that several courts have considered the premise of *Tacoma News* and either ignored it or rejected it is unsupported by any authority. BR at 39.

will portray all facts in a light that best supports its conclusions. See, for example the following statements:

7. “[Public] allegations of sexual misconduct can encourage other victims to come forward.” BR at 26.

Use of the word “victim” assumes that the allegations are true.

8. “In 1995, three students raised sexual harassment complaints involving B11.” BR at 21.

The records makes clear that there was no 1995 incident. The Times capitalizes on an obvious typographical error in a memo dated January 1995 (should have been Jan 1996) to aggrandize the allegations against Bellevue #11.

9. “. . . in a case like this . . . the records are not routine performance evaluations but are limited to those discussing misconduct. BR at 28.

Equates allegations of misconduct with actual incidents of misconduct.

10. “The Times’ request focuses solely on governmental operation. The actions of a teacher in his classroom and with his or her students is governmental Only by knowing the identities of the teachers . . . can the public monitor government action. BR at 38.

The Times seeks identities related to allegations of misconduct. This statement exposes its assertion that allegations are synonymous with actual misconduct.

Both The Times and the counsel representing them are specially trained regarding the danger of error when only one side of a story is presented.

As a news organization, The Seattle Times is ethically bound to seek the truth, provide a fair and comprehensive account of events and issues, and never deliberately distort a story. *Code of Ethics*, Society of Professional Journalists (1996).

Despite these obligations, both The Times and its counsel seek to portray one side of the story in this case as the full truth. Its proposed rule demands incomplete and therefore unreliable information. The Times does this, knowing that the public relies on it for accuracy and will trust what The Times prints.

Worse, The Times argues vehemently against any mechanism by which it could learn the full truth. In its brief, it refuses to acknowledge the value of providing accused teachers any opportunity to rebut the allegations before publishing their identities in conjunction with allegations. It argues strenuously against the rebuttal evidence offered by Bellevue #11 on appeal, complaining that the evidence is hearsay and/or that the teachers submitting declarations were not subject to cross examination by The Times. *See Seattle Times' Response to Motion to Take Additional Evidence*. It demands for itself the protections of justice and fair play and then seeks to withhold those same protections from Bellevue #11.

The Times threatens that if the names aren't released, it will circumvent the court's rule by making its request in the reverse: that is, it will list all of the teachers teaching at all of the schools and request their records by name. BR at 36. In making this assertion, it asks the Court to impermissibly rule on an issue not before the Court.

Substantively, its threat rings hollow. The purpose of the Act is to monitor government. It is not to scrutinize individuals. Its proposed method of identifying teachers absent any basis for scrutiny and then demanding full access into their personnel files constitutes scrutiny of individuals, not of government. Case law is well settled that where the files regarding specifically named individuals are sought, only those records relating to actual misconduct or other limited governmental conduct are subject to disclosure. *Woessner*, 90 Wn. App. at 208; *Tacoma News*, 65 Wn. App. at 149-50.

The Times contends that agencies often cannot determine whether actions occurred or didn't occur. On that basis, the Times claims that teacher identities should be released out of an abundance of caution in favor of students. At first blush, that seems reasonable. But on closer review, it is really a way to circumvent the question of what standard of proof is required to determine if the teacher acted as alleged.

If allegations are significant enough that, if true, students are endangered, then a fact finding hearing is essential. In every adjudicative context, finders of fact assess the evidence from both sides and make credibility determinations when reaching his or her conclusion. Upon conclusion of the hearing, the finder of fact must determine whether the conduct occurred. This context is no different. Both student and teacher must have full opportunity to present evidence in support of or in rebuttal to the allegation. Upon consideration of all the evidence, if the finder of fact determines that the teacher acted as alleged, then misconduct has been established for which the teacher may be scrutinized. Until that occurs, disclosure of the teacher's identity is neither warranted nor authorized under the statute.

The Times next makes dire references to "beleaguered school districts" "investigating one of their own." In this case, it was not the school district, but the Bellevue Police Department that recorded the allegations of misconduct against Bellevue #11. As an independent law enforcement agency, the Bellevue Police Department had no motive to create "veils of secrecy" or to "protect" an errant teacher.

The police officers in this case determined that no criminal conduct had occurred. (The Times admits this. BR 21.). This is significant. The

alleged touching of buttocks and snapping of bra straps, if done intentionally, would constitute a crime. RCW 9A.36.041(1); (*Clarke v. Baines*, 150 Wn.2d 905, 908, 84 P.2d 245 (2004) (Intentional unlawful touching of the body of another is an assault).

Here, the officers had the unique opportunity to see the demeanor of the complaining students and to evaluate their credibility – with no motive for bias in either direction. They concluded that even if the conduct occurred – and they did not conclude that it did -- there was no evidence that it was done with any sexual intent. Bellevue #11, retired for seven years, is not a threat to Washington school children. The public has no legitimate interest in knowing Bellevue #11's identity.

3. **Efficient government outweighs interest in Bellevue #11 identity.** The Times argues that the efficient administration of government cannot be a factor in determining whether disclosure of Bellevue #11's identity is required. RCW 42.17.010(11) expressly states that the public desires efficient administration of government. In *Dawson v. Daly*, 120 Wn.2d 782, 798, 845 P.2d 995 (1993), the Washington Supreme Court held that where public interest in efficient government competes with public interest in disclosure, a balancing of those interests is the appropriate method to resolve the competing interests. Failure to

consider the efficient administration of government in this case would run contrary to statute and supreme court precedent.

The Times next dismisses without analysis Bellevue #11's concerns about the harm to efficiency of government if every allegation of misconduct required the disclosure of the subject's name in conjunction with that allegation. It complains that Bellevue #11 offered no evidence in support of his claim. But until a rule is established, there can be no actual evidence of the consequences of that rule. This is well illustrated by The Times' derision of plaintiff declarations at the trial court level as "speculative." BR at 30, n. 21.

When deciding matters of public policy, courts must consider the potential consequences of a proposed rule of law. In so doing, it may consult the wisdom of other courts that have considered the issue. It may also draw reasonable inferences about the effects of the new law. In this case, the court in *Reichardt v. Flynn*, 374 Md. 361, 823 A.2d 566 (2003) discussed the statistics and data showing that false allegations are occurring with increasing regularity. But the lasting stigma of those allegations has not lessened one iota. The Times makes no substantive rebuttal to *Reichardt or In re Heather B.* 369 Md. 257, 799 A.2d 397 (Six students falsely accuse teacher of sexual misconduct).

The Times has also not rebutted the argument that the effectiveness of teachers will be undermined or that students' quality of education will suffer. It does not respond to the concern that dollars will be unnecessarily redirected from teaching to the increased demand for full evidentiary hearings by all teachers, regardless of the significance of the accusations involved or whether or not the teachers are disciplined. It does not address the chill on candor by administration officials.

The Times' only response asks this Court to take "judicial notice" that five individuals accused of inappropriate thoughts or comments continue to teach in Washington public schools. BR at 30, n. 20. Bellevue #11 objects to this reference. First, the facts asserted are not properly a matter of judicial notice, the proffered evidence is not part of the record, and The Times has not moved the Court to accept this additional evidence on appeal.

Substantively, the evidence is hearsay and not reliable for the purposes asserted by the Times. The alleged anecdotal report of five employed teachers does not provide the Court with full insight into the employment choices of the thousands of teachers or would be teachers within Washington. Bellevue #11 has no opportunity to respond with evidence of his own. This evidence should not be considered.

4. **Vital Government Interests.** Contrary to The Times' assertion, Bellevue #11 does not contend that a general exemption exists for "vital government interests." RCW 42.17.310(2) addresses the issue of redaction of records – precisely the issue in this case. It states in relevant part that the exemptions in the statute do not apply if information can be redacted from the records sought to protect vital governmental interests. RCW 42.17.310(2). The Washington Supreme Court stated it in another way by holding that, "if the requested material contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed." Amren v. City of Kalama, 131 Wn.2d 25, 32, 929 P.2d 389 (1997). If disclosure of certain portions of a record will harm vital governmental interests, those portions should be redacted from the records.

In this case, the preservation of vital governmental interests is a statutorily prescribed alternate basis for redacting Bellevue #11's identity from the records sought by The Times. In his opening brief, Bellevue #11 argued that the constitutional requirement of providing an ample education to Washington children is a vital governmental interest. The Seattle Times does not dispute that. Bellevue #11 also described how disclosure of his

identity would harm that vital governmental interest. The Times did not respond or rebut this in any way.

Washington students need outstanding teachers, who hold them accountable in their educational pursuits. They need to be challenged by high expectations of academic achievement and deportment as citizens. If teachers fear that their careers can be ruined on allegations alone, they will not take the difficult path with students and the students will be the ones to suffer.

5. Due Process Requires Notice and Opportunity for Hearing.

Preliminarily, the Times complains that Bellevue #11 argues the Constitutional due process claim for the first time on appeal. Because it is of Constitutional magnitude, Bellevue #11 has that right. RAP 2.5.

Substantively, Bellevue #11's position is well grounded in law and fact. The Times correctly asserts that harm to reputation, alone, does not invoke due process protections. Paul v. Davis, 424 U.S. 693, 709, 712, 96 S. Ct. 1155, 47 L.Ed.2d 405 (1976). But Bellevue #11 did not assert that only his reputational interests were implicated. He also asserted that disclosure of his name would infringe on his ability to obtain future employment.

The Supreme Court has held that the Constitutional interest in liberty is defined, in part, as the right of an individual to contract and to engage in an occupation. Giles v. Department of Social and Health Services, 90 Wn.2d 457, 461, 583 P.2d 1213 (1978), citing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct.2701, 33 L.Ed.2d 548 (1978). That liberty interest can be infringed upon if the government calls into question the individual's good name, honor, or integrity, or imposes a stigma or other disability that forecloses the employee's freedom to take advantage of other employment opportunities. Giles, 90 Wn.2d at 461.

In this case, there can be no doubt that accusations of sexual misconduct with children call into question Bellevue #11's good name, honor and integrity. The legislature understands the stigma that such allegations impose on individuals. It mandated that reports of child abuse shall "be maintained and disseminated with strictest regard for the privacy of the subjects of such reports so as to safeguard against arbitrary, malicious or erroneous information or actions." RCW 26.44.010; Tacoma v. Tacoma News, 65 Wn. App. 140, 149-50, 827 P.2d 1094 (1992). Public allegations of sexual misconduct against an individual whose profession was working with children will most certainly chill his freedom to take

advantage of other employment opportunities.^{2[2]} See e.g. *Monroe v. Tielsch*, 84 Wn.2d 217, 525 P.2d 250 (1974) (Dissemination of juvenile arrest records to employers would deny juveniles' access to jobs).

Division Three agreed that disclosing names of individuals in conjunction with sexual misconduct allegations, without prior hearing, states a cause of action for due process violations. *Dunning v. Pacerelli*, 63 Wn. App. 232, 818 P.2d 34 (1991). The Times does not argue that Division Three was wrong. Bellevue #11 and all teachers must have the opportunity for a hearing to rebut allegations of sexual misconduct before their identities can be made public in conjunction with those allegations.

6. Disclosure of Bellevue #11 Identity Violates Constitutional Right of Privacy. The Times contends that governmental bodies may disseminate personal information collected from an individual without regard for that individual's Constitutional right of privacy. It cites no authority for that position. To the contrary, the Washington Supreme Court has held that dissemination of private information by governmental bodies may constitute a violation of an individual's constitutional right of privacy. In *Matter of Maxfield*, 133 Wn.2d 332, 340-41, 945 P.2d 196 (1997), the court held that a public utility district, acting in a governmental

^{2[2]} Bellevue #11's retirement from the school system does not mean that he wouldn't seek supplemental employment by other employers.

capacity, violated a defendant's constitutional right of privacy when it disclosed records of the defendant's electrical usage without his consent.

In this case, The Times asks that the school district disclose Bellevue #11's identity in conjunction with allegations of sexual misconduct. But it can offer no rational basis for its request. It seeks his identity for the following reasons:

- a) To expose sexual abuse of students in the schools;
- b) To determine how school districts respond to the complaints.
- c) To assess misconduct allegations and investigations.

BR at 27, 31. None of these purposes is furthered by the release of Bellevue #11's identity. Bellevue #11 was not found to have sexually abused children. The Times can fully assess the allegations, the investigations, and the district responses from a review of the records it has in its possession. Bellevue #11's identity adds nothing to the records for the purposes The Times asserts. There is no relation, let alone a rational relation to a governmental interest in disclosing Bellevue #11's identity.

7. **In Camera Review of Entire Records.** The Seattle Times does not allege that the trial court did not review all of Bellevue #11's

records. On this basis, Bellevue #11 does not respond to The Times' Brief, section E.

8. Protective order is not vague. The Times contends that the Protective Order issued by the trial court is vague and ambiguous. It bases its argument on federal district court cases. BR 53-54. Absent proper authority, the issue should not be considered. RAP 10.3(a)(5); 10.4(h).

The Times alternatively claims that the order violates the specificity requirement of CR 65. Language of injunctions must be reasonably clear so that ordinary persons will know precisely what action is proscribed. Premier Communications Network, Inc. v. Fuentes, 880 F.2d 1096, 1100 (9th Cir 1989). Our jurisprudence recognizes, however, that 'some degree of vagueness is inherent in the use of language.' Halstien, 122 Wn.2d at 118 (citing City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366, 78 A.L.R.4th 1115 (1988)). In the context of statutory construction, courts have held that language should receive a sensible construction which will effect the legislative intent and avoid unjust or absurd consequences. Crown Zellerbach Corp. v. Department of Labor & Indus., 98 Wash.2d 102, 653 P.2d 626 (1982); Whitehead v. Department of Social & Health Servs., 92 Wash.2d 265, 595 P.2d 926 (1979). The same principles of construction apply in this case.

In *Fuentes*, the court held that certain language in an injunction was not sufficiently specific under CR 65, despite its approval of the identical language in another case. It reasoned that the facts of each case will determine whether language in an injunction is vague. *Fuentes*, 880 F.2d at 1100. The trial court's order in this cases states:

The Seattle Times shall not make use of, or reveal, names inadvertently disclosed to the Times during the discovery process in this case, which the court had ordered redacted from documents turned over to the Times: the names of the schools and individuals involved in the incidents and the investigations of the incidents, as well as the names of the students and parents involved. This protective order applies only to information received through the discovery process in this case.

CP ** The Times asserts that it cannot adequately determine the meaning of “use” and “inadvertently disclosed.” BR 54.

Bellevue #11 understands this language. If The Times received his name during the course of this lawsuit (and it did because it was erroneously left in the records that should have been redacted), it is not entitled to print or publish that name in any context related to the subject of this lawsuit. The purpose of the protective order is to protect his name from being published in conjunction with allegations of sexual misconduct. The language is not vague. Nevertheless, Bellevue #11 does

not object to alternate language so long as it achieves the purpose and result articulated above.

9. Delay in Seeking Protective Order. The Times claims that Bellevue #11 is not entitled to any protective order because he did not timely seek protection. Bellevue #11 sought protection of his identity at the time he filed this lawsuit. There has never been any secret or delay that he wanted his identity protected. By reference, Bellevue #11 hereby incorporates the response of the respondent John Does, contained in their brief, and drafted by Tyler Firkins.

10. Discovery. The Times also takes issue with the definition of discovery, claiming that it is entitled to use any information it received outside the context of formal discovery requests under the Civil Rules. The documents The Times received regarding Bellevue #11 were supplied by court order. RP 82 (2/24/03). Bellevue #11 offered no voluntary interviews or any other information that gave to The Times his identity. Any knowledge that The Times has of his identity is not authorized by law and should not be permitted to be used. By reference, Bellevue #11 hereby incorporates the response of the Respondent John Does, contained in their brief, and drafted by Tyler Firkins.

11. **Attorney fees**. The Times seeks attorney fees on the basis that the trial court dissolved the preliminary injunction regarding Bellevue #11. Bellevue #11 should have the benefit of an injunction regarding his identity, making the issue of fees for The Times moot. In any event, The Times concedes that Bellevue #11 should not be responsible for fees. In Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998), the court held that the decision to award fees is discretionary with the court and further, that an award of fees is not appropriate in a case where the injunction is necessary to preserve a party's rights before trial on the merits. As in *Confederated Tribes*, Bellevue #11's suit would have been moot if his identity had been disclosed prior to trial. Attorney fees in favor of The Times is unwarranted and should be denied.

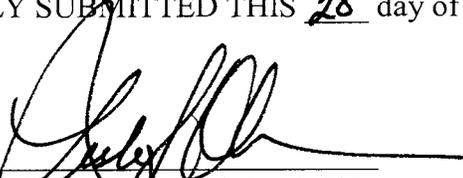
The Seattle Times consistently misstated the law in its brief. It has litigated this case in every possible way, regardless of the lack of merit of its position or the substantial cost of attorney fees in doing so (*see e.g.* Notice of Appeal for denial of attorney fees and imposition of CR 11 sanctions against Seattle Times). It seeks to escalate the cost of litigation and it has. Bellevue #11, a retired teacher of limited means, has been forced to expend substantial time rebutting the misstatements of The

Times and the untenable positions of law it has taken. He respectfully requests an award of attorney fees from The Seattle Times under CR 11 and the Court's inherent authority to award fees in cases of procedural and substantive bad faith. Rogerson Hiller Corp. Port of Angeles, 96 Wn.App. 918, 927-28982 P.2d 131 (1999).

III. CONCLUSION

Before Bellevue #11's identity may come under the scrutiny of the public, he must be afforded the opportunity for a hearing to respond to and rebut the allegations against him. To hold otherwise would contravene the express language of the WPDA, violate Bellevue #11's right of privacy under the state and federal constitutions and under the statute, and violate his Constitutional right of due process. The WPDA stands for truth and accountability in government. It should not be manipulated to further the Times' goal of creating scandal to sell newspapers. The identity of Bellevue #11 should be protected and he should be awarded attorney fees for The Times' conduct in this appeal.

RESPECTFULLY SUBMITTED THIS 28th day of May, 2004.



Leslie J. Olson, WSBA #30870
Attorney for Appellant,
Bellevue John Doe #11

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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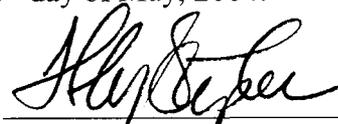
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