

No. 81556-9

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 61466-5-I

Hon. MICHAEL F. MORGAN, Individually and in his Official Capacity
as Presiding Judge of the Municipal Court of Federal Way,

Petitioner/Appellant/Cross-Respondent

v.

CITY OF FEDERAL WAY, a code municipality; and the CITY
ATTORNEY FOR FEDERAL WAY,

Respondents/Cross-Appellants

and

TACOMA NEWS, INC. d/b/a THE NEWS TRIBUNE,

Intervenor/Respondent

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STATE OF WASHINGTON
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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Kimberly Prochnau)

**APPELLANT'S RESPONSE TO BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF WASHINGTON**

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ORIGINAL

I. INTRODUCTION

Judge Morgan, individually and in his official capacity as presiding judge of the Federal Way Municipal Court, submits the following response to the brief of Amicus Curiae the Attorney General of Washington. Although the Attorney General purports to “offer an independent perspective concerning the application of [attorney-client privilege and the work product doctrine] in the context of the Public Records Act,” Attorney General’s Motion at 2, his amicus brief does little more than summarize the Executive Branch’s disputed factual assertions, while utterly failing to address or even acknowledge the factual arguments in Judge Morgan’s briefing. Indeed, the Attorney General’s brief makes no legal or factual arguments regarding attorney-client privilege or the work product doctrine that the parties have not already addressed.

The Attorney General also fails to address the threshold judicial independence legal issue in this case. As this Court is aware, Judge Morgan’s primary argument in this appeal is that the Public Records Act (“PRA”) does not apply to the Stephson Report because the Stephson Report is a Municipal Court document. *See* Judge Morgan’s Br. at 15-34. The Attorney General largely ignores this argument, relying upon the trial court’s oral ruling as if it constituted findings of fact, which it does not. *See* Attorney General’s Br. at 3.

Judge Morgan does not dispute the substance of the general legal arguments the Attorney General makes, but the Attorney General's legal arguments reach the wrong conclusions here because they rest on faulty factual assumptions. Based on a proper understanding of the facts, the Stephson Report is a Municipal Court document not subject to the PRA, it is privileged, it is work product, and it is protected from disclosure under the PRA's personal records exemption. Each of those grounds independently warrants reversal of the trial court.

II. ARGUMENT

A. **The Attorney General's brief rests on an inaccurate understanding of the facts underlying this appeal and the undisputed de novo standard of review.**

The Attorney General's brief relies exclusively on the trial court's oral ruling and the Executive Branch's brief for the factual assertions to which it applies the law. This is improper. The trial court issued no findings of fact regarding the public records issue, *see* CP 101-03, and this Court's review of the trial court's decision on the public records issues is de novo. *See* Judge Morgan's Br. at 14-15 (citing *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 744, 958 P.2d 260 (1998)). None of the parties disputes this standard of review.

Indeed, even if the trial court had issued written findings of fact—which it did not—this Court's review would still be de novo. As here,

“[w]here the record consists only of affidavits, memoranda of law, other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses’ credibility or competency, [this court is] not bound by the trial court’s factual findings and stand[s] in the same position as the trial court.” *Dragonslayer, Inc. v. Wash. State Gambling Com’n*, 139 Wn. App. 433, 441-42, 161 P.3d 428 (2007) (citing *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989); *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994)).

But given the lack of findings of fact and the undisputed de novo standard of review, simply offering summaries of the trial court’s oral ruling and the facts as stated by the Executive Branch hardly advances the Attorney General’s ostensible purpose of discussing “the scope and construction of the provision of the Public Records Act.” Attorney General’s Br. at 1. An amicus curiae’s proffered interpretation of the law is only helpful to a court if the amicus applies its interpretation of the law to an accurate set of facts. Here, the Attorney General only applies his interpretation of the PRA to a set of factual assertions that is (1) disputed by the parties and (2) reviewed de novo by this Court.¹ Properly applied to the facts, the law cited by the Attorney General supports Judge

¹ As an amicus curiae, the Attorney General has no special knowledge of the facts underlying this appeal and should not be permitted to use an amicus curiae brief as a platform for opining upon the parties’ factual disputes.

Morgan's arguments regarding work product and attorney-client privilege, and it warrants reversal of the trial court.

B. This Court should disregard the Attorney General's attempt to assert a legal position on the judicial independence issue without raising it as an issue or making a legal argument.

The Attorney General asks this Court to affirm the trial court's decision on the threshold judicial independence issue while failing to make any arguments regarding the Stephson Report's status as a Municipal Court document. In his brief, the Attorney General states that, "[f]or purpose of this brief," he "accepts the findings of the trial court . . . that the Public Records Act governs whether the Stephson Report should be publicly disclosed." Attorney General's Br. at 3. He then argues that "[t]his Court . . . need not explore the scope and contours of *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), since the Stephson Report is not a court record that was requested from a court." *Id.* at 3 n.1.

As an amicus curiae, the Attorney General is free to limit the scope of his brief to only some of the issues raised by the parties in this appeal. From his issues statement, this is precisely what the Attorney General purports to do—limiting his brief to the privilege and work product issues, while avoiding the judicial independence, personal records exemption, sealed documents, and attorneys' fees issues. *See* Attorney General's Br. at 1-2. But then, only one page later, the Attorney General changes course and tells this Court that it "need not explore the scope and contours of

Nast . . . since the Stephson Report is not a court record that was requested from a court.” *Id.* at 3 n.1. This approach—stating that an amicus brief will not address an issue, and then turning around and taking a position on precisely that issue—is improper, and the Attorney General’s failure to cite any authority (other than the trial court’s oral ruling) supporting his position compounds this impropriety. *Id.* at 3. This Court should therefore disregard the Attorney General’s statements as to the judicial independence issue and *Nast* as outside the scope of his amicus curiae brief.²

C. Applied to the proper understanding of the facts underlying this appeal, the Attorney General’s interpretation of the PRA supports reversing the trial court and finding that the Stephson Report is protected by the work product doctrine.

Judge Morgan does not dispute the Attorney General’s purely legal arguments regarding work product. But the Attorney General’s factual assumptions, coupled with his application of otherwise sound legal arguments to these faulty factual assumptions, are erroneous. For example, the Attorney General asserts without citing the record that “no

² That said, Judge Morgan agrees that this Court “need not explore the scope and contours of *Nast*” to resolve this case, albeit for a different reason than that advanced by the Attorney General. *Nast* is not at issue in this appeal because none of the parties have made it an issue—there is no dispute amongst the parties that judicial branch documents are not subject to the PRA. If, however, this Court decides to “explore the scope and contours of *Nast*” in connection with *City of Federal Way v. Koenig*, No. 82288-3, this Court should apply *Nast* the same way the Court of Appeals applied *Nast* in *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 621, 150 P.3d 158, *rev. denied* 162 Wn.2d 1004 (2007), and reaffirm that judicial branch documents are not subject to the PRA. See Judge Morgan’s Response to WCOG’s Br. at 2-4.

lawsuit was filed or anticipated when the city attorney hired Ms. Stephson.” Attorney General’s Br. at 4. In fact, the record shows that litigation was reasonably anticipated. *See* Judge Morgan’s Br. at 38-39 (citing CP 12-13; Judge Morgan’s Supp. Memorandum ¶ 2); Judge Morgan’s Reply Br. at 17-19 (citing CP 189, 279, 399, Judge Morgan’s Supp. Memorandum ¶ 2). Furthermore, the Attorney General acknowledges that the Stephson Report is a *Faragher-Ellerth* report, *see* Attorney General’s Br. at 5, and *Faragher-Ellerth* reports by their nature are only prepared if there is a reasonable possibility of litigation, *see* Judge Morgan’s Br. at 38-40.

The Attorney General then argues that “Ms. Stephson was hired to conduct an investigation to comply with the city’s Anti-Harassment Policy, under which the city investigates complaints of harassment and hostile work environment and takes remedial action to prevent harassment whether or not litigation is anticipated” and that, “[c]onsistent with the policy, the Stephson Report was not prepared in reasonable anticipation of litigation.” Attorney General’s Br. at 4-5 (not citing the record). The record does not support this assertion, *see* Judge Morgan’s Reply Br. at 9-10, and even if City Attorney Richardson believed the Executive Branch’s anti-harassment/anti-discrimination policy applied to Municipal Court employees, applying that Executive Branch policy to Judicial Branch employees would violate GR 29(f), *see* Judge Morgan’s Br. at 24-32.

As explained in Judge Morgan's briefing, the Stephson Report is work product because it was prepared in anticipation of litigation. *See* Judge Morgan's Br. at 35-41; Judge Morgan's Reply Br. at 17-20. That anticipated litigation did not occur, but, as in *Soter*, whether or not reasonably anticipated litigation actually occurred is irrelevant to a work product analysis. *See Soter*, 162 Wn.2d at 725, 732-33. Consequently, work product protection applies, and the Stephson Report should not be disclosed in response to Tacoma News's PRA request.

D. Applied to the proper understanding of the facts underlying this appeal, the Attorney General's interpretation of the PRA supports reversing the trial court and finding that the Stephson Report is protected by attorney-client privilege.

The Attorney General's argument regarding attorney-client privilege suffers from the same flaws as his work product argument. As before, the Attorney General's purely legal arguments are accurate up to the point where he misapplies the undisputed law to the very much disputed facts. For example, the Attorney General states that "[t]he superior court found . . . that Ms. Stephson was not acting as an attorney when she conducted her investigation and prepared her report." Attorney General's Br. at 6. As explained, Judge Morgan disputes that the trial court entered factual findings of any kind. Moreover, any such finding would be inaccurate—Stephson was in fact acting as an attorney when she prepared her report. *See* Judge Morgan's Br. at 42-43 (citing Judge Morgan's Supp. Memorandum ¶ 3; CP 189, 191, 390, 393, 396, 399);

Judge Morgan's Reply Br. at 24-25; *see also* Richardson Letter (added to the appellate record per this Court's order dated May 1, 2009).

The Attorney General continues, asserting that "[Stephson] was not hired to prepare legal theories, plan strategy, or develop legal opinions; she was hired to prepare a factual report regarding the allegations," and that "Stephson did not provide legal analysis or conclusions in her report." Attorney General's Br. at 6 (citing the Executive Branch's brief and the trial court's oral ruling). These assertions are also disputed. *See* Judge Morgan's Reply Br. at 24 (citing CP 83, 393; Judge Morgan's Supp. Reply Memorandum ¶ 1). Indeed, as Judge Morgan has explained in his briefing, Stephson was hired because of her status as an attorney, she was hired to perform legal work, and the Stephson Report constitutes an attorney-client communication. *See* Judge Morgan's Br. at 41-45; Judge Morgan's Reply Br. at 21-26; Judge Morgan's Response to WCOG's Br. at 5-8; *see also* Richardson Letter.

Finally, the Attorney General claims that "[n]either the city nor Ms. Stephson prepared the report with any expectation or intent that it would be confidential." Attorney General's Br. at 7. This is inaccurate. The Stephson Report itself is clearly labeled "privileged and confidential," CP 161; Judge Morgan's Br. at 42, and both Judge Morgan and City Attorney Richardson had viewed the report as confidential at the time it was being generated, *see* Judge Morgan's Reply Br. at 21 n.17 (citing CP

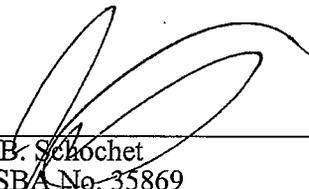
82, 399; Judge Morgan's Supp. Memorandum ¶ 3). As such, the Stephson Report is privileged and protected from disclosure.

III. CONCLUSION

Although the Attorney General's broad legal statements are sound, his applications of these legal principles to inaccurate factual assumptions are unsound. In effect, his amicus curiae brief merely summarizes the factual and legal arguments made by the Executive Branch on the work product and privilege issues. The Attorney General then treats the trial court's oral ruling as if it were a statement of undisputed facts, when the trial court's decision is disputed, subject to de novo review, and contains no findings of fact. Far from offering an "independent perspective," the Attorney General's amicus curiae brief offers little more than a digest of the Executive Branch's brief. This Court should reverse the trial court and hold that the Stephson Report is either a Municipal Court document not subject to the PRA or a document protected from PRA disclosure by the work product doctrine, attorney-client privilege, or the personal records exemption.

RESPECTFULLY SUBMITTED, this 29th day of May, 2009.

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DECLARATION OF SERVICE

I declare that on May 29, 2009, I caused true and correct copies of the foregoing document to be served on the following counsel of record via email and U.S. mail.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of May, 2009.


Sally Jarvis