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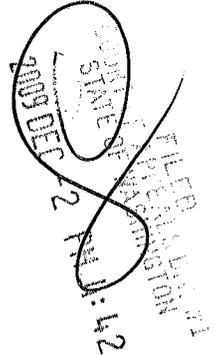
No. 62824-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

D. EDSON CLARK,
Appellant/Intervenor,

v.

SMITH BUNDAY BERMAN BRITTON, P.S., *et al.*,
Respondents



ANSWER TO AMICUS CURIAE BRIEFS OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON AND
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION
AND
THE WASHINGTON SOCIETY OF CERTIFIED PUBLIC
ACCOUNTANTS

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

EKLUND ROCKEY STRATTON,
P.S.

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TABLE OF AUTHORITIES

FEDERAL CASES

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Respondents Sharon Robertson and Smith Bunday Berman Britton, P.S., submit this answer to the amicus curiae briefs filed by Allied Daily Newspaper of Washington and Washington Newspaper Publishers Association (Newspapers) and The Washington Society of Certified Public Accountants (Accountants). The identities of the amici and the tenor of their briefing make clear the limits necessary to prevent misuse of our state constitution's open courts provisions by third parties demanding access to confidential information for "fleeting or frivolous uses." (Newspapers' Br. 2) Fortunately, the contours of those necessary limitations are found in this state's case law interpreting the open courts provisions, and were recognized by the trial court in exercising its discretion to redact and seal confidential information of third parties that petitioner attached to the unnecessary and irrelevant "expert" declaration he belatedly filed in this cause.

Here is the true nature of this dispute, which is wholly collateral to the settled litigation between the original parties: Intervenor Ed Clark, who was initially retained by plaintiffs as an accounting expert, now claims that he has an unfettered right to make confidential materials freely available to the public, by

attaching them to a declaration of his opinion as a paid expert that was filed on the day this case was settled. He makes these claims in violation of federal law (Accountants' Br. 5-7), state law (Accountants' Br. 8-9), his professional ethical obligations (Accountants' Br. 10), and the engagement agreement and discovery protective order that were the only reason he had access in the first place to the third parties' tax records. (CP 3)

Mr. Clark, of course, does not need the relief he now seeks in order to have access to this confidential tax information of third parties; it was provided to him with the express agreement and understanding that it would be held in confidence. Mr. Clark's belated intervention and insistence on a "public" right to access these confidential materials forces defendant accountants, who thought they had settled this dispute, to remain litigants in order to defend their third party clients' statutory rights to confidentiality.

But the motive for Mr. Clark's motion now becomes clear: the Newspapers as amicus also claim a right to free access to all material attached to any pleading filed in a court proceeding, no matter how scurrilous, irrelevant, embarrassing, statutorily-protected from disclosure, or false. The Newspapers' argument is

undoubtedly fueled by the knowledge that publishing information gleaned from confidential materials that were filed in a court record will be privileged from any defamation claim. See **Mark v. Seattle Times**, 96 Wn.2d 473, 493, 635 P.2d 1081 (1981) (“As to all statements attributed to the court documents, . . . the press is not required to independently verify the allegations contained therein.”), *cert. denied*, 457 U.S. 1124 (1982); **Clapp v. Olympic View Pub. Co., L.L.C.**, 137 Wn. App. 470, 475-79 ¶¶ 12-24, 154 P.3d 230 (2007), *rev. denied*, 162 Wn.2d 1013 (2008).

The Newspapers’ claim that its amicus argument depends on a “constitutional test” for sealing that is “focused on whether the parties, not the court, treated the record as relevant” rings especially hollow. (Newspapers’ Br. 5) In fact, the Newspapers demand access whether there is any dispute at all, and *especially* if the parties or the court considered the material irrelevant to the underlying dispute. (Newspapers’ Br. 3: “the public has an especially compelling interest in learning about controversies that elude judicial review,” 16: “the right to observe the justice system cannot depend on vagaries of circumstance, such as when a lawsuit is dropped before the merits are decided . . .”). Regardless

of the parade of horrors the Newspapers propose would follow were they not able to sell their wares with defamation-proof tales of defective cars, pedophile babysitters, or predatory bosses (Newspapers' Br. 3), there is no suggestion this case or the confidential information Mr. Clark now seeks to make public would be part of that parade, nor that the trial court did not carefully weigh the competing interests at issue in denying appellant's motion:

Neither party seeks disclosure. In this case, unlike in **Rufer v. Abbott Laboratories**, 154 Wn.2d 530, 114 P.3d 1182 (2005), neither party seeks disclosure of the redacted and sealed confidential information Mr. Clark chose to attach to his irrelevant expert declaration.

Neither the parties nor the court considered the confidential materials in any decision, dispositive or otherwise. Unlike in **Rufer**, or in **Dreiling v. Jain**, 151 Wn.2d 900, 93 P.3d 861 (2004), or **Marriage of Treseler and Treadwell**, 145 Wn. App. 278, 187 P.3d 773 (2008), *rev. denied*, 165 Wn.2d 1026 (2009), neither the court nor the parties considered the material at issue in *any* decision in the case. "We have already held that article I, section 10 is not relevant to documents that do not become part of the court's

decision making process.” *Rufer*, 154 Wn.2d at 548 ¶27, *citing Dreiling*, 151 Wn.2d at 909-10.

Further, contrary to the Newspapers’ cynical and wholly unsupported suggestion that open access to anything anyone places in a court record is necessary because “[i]t is common for one party to buy the opposing party’s silence by settling a controversy before it is decided” (Newspapers’ Br. 15-16), the record is clear in this case that the defendants had agreed to settle before Mr. Clark, in violation of his ethical obligations and a protective order, filed his unredacted “expert” declaration. (See Respondents’ Br. 8-11) In other words, neither the court *nor* the parties “treated the record as relevant.”

The third parties affected object to disclosure of their statutorily-protected confidential information. When confidential information of non-litigant third parties is revealed in discovery pursuant to a protective order, the court properly considers the protected nature of that information, and the third party’s objection to further disclosure, in deciding whether to keep the information confidential. (See CP 187-88, Respondent’s Br. 11-14; 6/1/09 Nonparty Todd Bennett’s Joinder In Response by Respondents To

Brief of Appellant) “As long as the opposing party has a valid interest in keeping the information confidential, there is very little, if any, interest of the public or the moving party to balance against that asserted interest.” **Rufer**, 154 Wn.2d at 548 ¶¶27; *see also Dreiling*, 151 Wn.2d at 917-18 (noting that work product or attorney privilege may provide a basis for sealing materials).

Further, unlike the information considered in **Rufer**, **Dreiling**, or **Treseler/ Treadwell**, the materials at issue here are confidential not for business or personal reasons, but as a matter of federal law. Indeed, tax information of the sort at issue here is routinely sealed in family law cases. GR 22. And as the U.S. Supreme Court has recognized, “Congress did not intend the statute to allow the disclosure of otherwise confidential return information merely by the redaction of identifying details.” **Church of Scientology of California v. Internal Revenue Service**, 484 U.S. 9, 16, 108 S. Ct. 271, 98 L.Ed.2d 228 (1987).

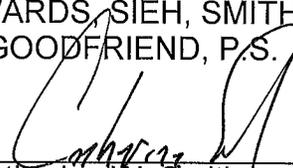
Intervenor does not need disclosure to access the information, which he was obligated to keep confidential. Finally, Mr. Clark, a party’s expert who himself had an affirmative obligation to keep the information confidential, had no need to unseal the

redacted pleadings in order to obtain access to the information himself.

Contrary to all these considerations, amicus Newspapers essentially advocates the misuse of the pleading dockets of this state's courts as a mechanism for strangers to settled litigation to make public otherwise confidential information about other third parties, even if those individuals object to the disclosure. Amicus Accountants ably explain why, under the facts of this case, the trial court properly determined that these confidential materials instead should remain protected. As argued in respondents' merits brief (Respondents' Br. 17-22) the trial court properly exercised its discretion, using the legal standards established by *Rufer*, *Dreiling*, and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), to determine that materials the parties had agreed should remain confidential were properly redacted and sealed in this case. This court should affirm.

DATED this 2nd day of December, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 
Catherine W. Smith, WSBA No. 9542
Attorneys for Respondents

DECLARATION OF SERVICE

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

That on December 2, 2009, I arranged for service of the Answer To Amicus Curiae Briefs Of Allied Daily Newspapers Of Washington And Washington Newspaper Publishers Association And The Washington Society Of Certified Public Accountants, to the court and to the parties to this action as follows:

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 STATE OF WASHINGTON
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DATED at Seattle, Washington this 2nd day of December, 2009.


 Tara D. Friesen