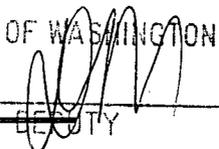


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DIVISION II

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STATE OF WASHINGTON

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NO. 43859-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

MARGARITA MENDOZA DE SUGIYAMA,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Resolving this case requires only the straightforward application of the unambiguous “litigation” or “controversy” exemption to the Public Records Act (PRA), RCW 42.56.290. In that statute, the Legislature chose to exempt from production records that are not available through discovery under the Superior Court Civil Rules. *See O’Connor v. Wash. State Dep’t of Soc. & Health Servs.*, 143 Wn.2d 895, 906, 910, 25 P.3d 426 (2001). Here, the records sought by Ms. Mendoza de Sugiyama were specifically protected from discovery under the Superior Court Civil Rules in her separately pending tort case. Under the plain terms of RCW42.56.290, those records are exempt from production.

Instead, Ms. Mendoza de Sugiyama urges this Court to judicially amend the plain language of RCW 42.56.290 to limit the exemption to only work product or privileged documents. Ms. Mendoza de Sugiyama does not refute the Washington State Department of Transportation’s (WSDOT’s) argument that the lower court misapplied RCW 42.56.080 to the litigation exemption. Instead, she asks this Court to adopt an interpretation that ignores the valid discovery order issued by a superior court in a separate tort action, which explicitly foreclosed the disclosure by the state *to her* of the records in question. She asks this Court to ignore this order despite the fact that she was a party to that order, has not

appealed or otherwise challenged the order, and makes no assertion that the order is otherwise invalid. The unchallenged order determined that the records at issue were not discoverable under the Superior Court Civil Rules, thereby rendering application of the public records exemption under RCW 42.56.290 necessary and appropriate in this case.

Alternatively, by reference, Ms. Mendoza de Sugiyama appears to support the lower court's holding that the Legislature silently amended RCW 42.56.290 by implication when it amended RCW 42.56.080 so that RCW 42.56.290's litigation exemption would not apply to records the Civil Rules (CR) protect from discovery when a discovery request is overbroad. The Legislature has not amended RCW 42.56.290 to limit application of CR 26, and this Court should reject the lower court's attempt do so.

Accepting Ms. Mendoza de Sugiyama's arguments nullifies the tort court's discovery order in a separate case that is not before this Court. That type of indirect challenge to a court order should not be permitted.¹ The superior court's order should be reversed.

¹ Under Washington law, res judicata and collateral estoppel bar parties from re-litigating claims and issues resolved in another action. *See, e.g., Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995).

II. AUTHORITY AND ARGUMENT

A. RCW 42.56.290 is not Ambiguous and the Court Need Only Apply the Plain Language of the Litigation Exemption

In 2001, the Washington State Supreme Court determined that while the litigation exemption contained in RCW 42.56.290 “is awkwardly worded, it is not . . . ambiguous.” *O’Connor*, 143 Wn.2d at 906.² When a statute is unambiguous, it is not subject to judicial construction and its meaning must be derived from the plain language of the statute alone. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012, 1019 (2001). Here, the plain language of RCW 42.56.290 exempts records from disclosure if they are “relevant to a controversy to which an agency is a party but . . . would not be available to another party under the rules of pretrial discovery” Despite arguments to the contrary, nothing in the litigation exemption limits application of CR 26. As the application of CR 26 is not limited and the records in this case were found undiscoverable under CR 26, they are exempt from production.

When interpreting statutes, “[c]ourts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155, 158 (2006) (internal citations omitted), *citing Kilian v. Atkinson*,

² *O’Connor* addresses former RCW 42.17.310(1)(j), which was recodified in 2005, without substantive change, as RCW 42.56.290. Laws of 1995, ch. 274, §§ 401, 409.

147 Wn.2d 16, 21, 50 P.3d 638 (2002). Where, as here, a statute has been determined to be unambiguous, a court cannot add language even if it believes the Legislature intended something else but did not adequately express it. *Id.*

Here, however, both the lower court and Ms. Mendoza de Sugiyama ask this Court to apply language outside of RCW 42.56.290 to limit application of the litigation exemption. The lower court attempted to limit the exemption by applying RCW 42.56.080. Clerk's Papers (CP) at 345, l. 1–351 l. 19. Ms. Mendoza de Sugiyama, by reference, appears to support the lower court's reasoning, but also tries to reach the same outcome by arguing that the Legislature meant to say that RCW 42.56.290 exempts only records that are undiscoverable to all people in all cases. Ms. Mendoza de Sugiyama, therefore, effectively asks this Court to read language into the statute that is not present. Brief of Respondent (Br. Respondent) at 10–11. Neither the language of the litigation exemption nor its interpretation supports Ms. Mendoza de Sugiyama's arguments.

Ms. Mendoza de Sugiyama argues that the term "another party" means "all other parties." *Id.* She also argues that "causes pending in superior court" mean "all causes pending in superior court." *Id.* Utilizing Ms. Mendoza de Sugiyama's definitions, the litigation exemption would

read: records not available to *all parties* under the rules of pretrial discovery in *all causes pending in superior courts* are exempt from disclosure. *Id.* But that is not the language used in RCW 42.56.290. It states “[r]ecords that are . . . not . . . available to *another party* under the rules of pretrial discovery for *causes pending* in the superior courts are exempt from disclosure” (Emphasis added.) In the absence of a statutory definition, courts are to give terms their plain and ordinary meanings ascertained from a standard dictionary. *Id.*

Black’s Law Dictionary does not define the complete phrase “another party,” but does define each word separately. *See Black’s Law Dictionary* 84, 1010-1011 (5th ed. 1979). “Another” is defined as “additional, distinct, or different.” *Id.* at 84. “Party” is defined as “those by or against whom a legal suit is brought” or “a person whose name is designated on record as plaintiff or defendant.” *Id.* at 1010. Therefore, read into RCW 42.56.290, “another party” means a plaintiff or defendant, different from the agency. Ms. Mendoza de Sugiyama, as a plaintiff in her employment lawsuit, is a different or distinct individual by whom a legal suit was brought. The term “causes pending” is part of the descriptive phrase “under the rules of pretrial discovery for *causes pending* in the superior courts” and has been interpreted as referring to discovery under CR 26. *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731-34, 174 P.3d 60,

68-69 (2007); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605-609, 963 P.2d 869 (1998). Here, the records were unavailable to Ms. Mendoza de Sugiyama under CR 26 in her tort case.

Judicial application of RCW 42.56.290 also refutes Ms. Mendoza de Sugiyama's interpretation. Under the civil discovery rules, attorney work product can be held undiscoverable. CR 26(b)(4). However, a party in a civil suit may obtain some materials protected by the attorney work product privilege by showing that the party seeking discovery has substantial need of the materials in the preparation of his case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. *Id.*; *Koenig v. Pierce County*, 151 Wn. App. 221, 230, 211 P.3d 423 (2009). Therefore, under Ms. Mendoza de Sugiyama's interpretation, the litigation exemption could never apply to attorney work product records as they are not undiscoverable to all parties in all cases. However, multiple courts have upheld the attorney work product exemption to a public records request. *See, e.g., Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009); *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007); *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010).

Nor has the Legislature limited application of RCW 42.56.290, despite having the opportunity to do so. In 2001, the Washington State

Supreme Court in *O'Connor* held that “records relevant to a controversy to which an agency is a party are exempt from public inspection and copying under the Public Records Act if those records would not be available to another party under superior court rules of pretrial discovery.” *O'Connor*, 143 Wn.2d at 906. The Court does not stop there, but goes on to say that “under superior court rules of pretrial discovery” means CR 26, and the Court does not place any limitations on its application. *Id.* at 906–907. Since that time, and particularly in 2005 when RCW 42.56.080 was amended in response to *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004), the Legislature could have limited application of CR 26 in the public records context, but did not. When the Legislature amended RCW 42.56.080 to prevent agencies from rejecting overly broad requests, they had, but did not take, the opportunity to prevent application of CR 26’s overly burdensome and expensive criteria. However, the Legislature did not limit the scope of CR 26 as applied to RCW 42.56.290. When the Legislature uses certain language in one instance, but different, dissimilar language in another, a difference in legislative intent is presumed. *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791, 795 (1998). The legislative decision not to amend RCW 42.56.290 to limit application of CR 26 or to reference or add language similar to RCW 42.56.080

indicates that it was not the Legislature's intent to limit the litigation exemption to universal discovery privileges only. *Id.*

Under the plain reading of RCW 42.56.290, any materials that are not discoverable in the context of a controversy under civil pretrial discovery rules are also exempt from public disclosure. *Soter*, 162 Wn.2d at 731. Accordingly, where, as here, a superior court issues a proper protective order under the civil discovery rules (CR 26), the records subject to that order are not available to another party under the superior court rules of pretrial discovery. Therefore, the records are exempt from a public records request while the civil discovery order is in effect.

B. Ms. Mendoza de Sugiyama's Reliance on *O'Connor* is Misplaced

The Court in *O'Connor* was explicit: a plain reading of RCW 42.56.290 provides that records unavailable for discovery in civil litigation are exempt from disclosure under the Public Records Act. *O'Connor*, 143 Wn.2d at 906. Therefore, Ms. Mendoza de Sugiyama's reliance on the *O'Connor* decision as holding anything different is misplaced.

Ms. Mendoza de Sugiyama states that "[t]he Supreme Court [in *O'Connor*] addressed this very issue." Br. Respondent at 12. However, the Washington State Supreme Court in *O'Connor* was asked to decide

whether a person pursuing litigation against an agency was barred from seeking records through the Public Records Act, and instead required to proceed only using the normal rules of discovery. *See O'Connor*, 143 Wn.2d at 904-905. The Court determined that while an individual can simultaneously use discovery and public records requests to obtain records pertinent to litigation, only discoverable records can be obtained. *Id.* at 910. The *O'Connor* case supports reversal of the lower court's decision.

C. The Records are Exempt as They are Undiscoverable Under a CR 26 Order Issued in a Civil Case

The records in this case are exempt from Ms. Mendoza de Sugiyama's public records request because they were deemed undiscoverable under a CR 26 discovery order. Ms. Mendoza de Sugiyama erroneously asserts that the State is asking this Court to weigh the motives of the requestor. Br. Respondent at 9. Her motives are not at issue. It is the litigation exemption in RCW 42.56.290 that makes the records exempt, not Ms. Mendoza de Sugiyama's motives. If the lower court's order denying injunctive relief is not reversed, the outcome will be that Ms. Mendoza de Sugiyama will be allowed to obtain records that have been protected from discovery. She will be able to unilaterally render the superior court order a nullity. This Court should not countenance Ms. Mendoza de Sugiyama's attempt to circumvent a

discovery order issued in her tort case by filing a public records request for precisely the same records identified in the discovery order.

D. Ms. Mendoza de Sugiyama is not Entitled to Attorney Fees

Even if this Court does not reverse the lower court's decision, it should deny Ms. Mendoza de Sugiyama's request for attorney fees and expenses on appeal. Her request does not comply with RAP 18.1(b), which requires a party to devote a section in its brief to the request for fees or expenses.

III. CONCLUSION

For the reasons stated in its opening brief and this reply brief, this Court should reverse the superior court's order denying injunctive and declaratory relief, hold that records deemed nondiscoverable by a discovery order in a pending superior court civil case are also exempt from public disclosure under the PRA, and deny respondent's request for attorney fees.

RESPECTFULLY SUBMITTED this 14 day of March, 2013.

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CERTIFICATE OF
SERVICE

I, MAUDELLE PADILLA, an employee of the Transportation & Public Construction Division of the Office of the Attorney General of Washington, certify that on the date indicated below, true and correct copies of the Reply Brief of Appellant and this Certificate of Service were served on the following parties via electronic mail pursuant to an E-Service Agreement between the parties:

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

DATED this 14th day of March, 2013, at Tumwater, Washington.

A handwritten signature in black ink, appearing to read 'Maudelle Padilla', written over a horizontal line.

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