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BY C. J. HERRITT

NO. 78574-1

CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COWLES PUBLISHING COMPANY,
a Washington corporation,
Appellant,

v.

CODY SOTER, a minor child; FRANCES SOTER and GLENDA CARR,
individually and as parents of CODY SOTER; THE ESTATE OF
NATHAN WALTERS, a deceased minor child; RICK WALTERS and
TERESSA WALTERS, individually and as parents of Nathan Walters, a
deceased minor child; and SPOKANE SCHOOL DISTRICT NO. 81,
a Washington municipal corporation,
Respondents.

AMICUS CURIAE MEMORANDUM OF ALLIED DAILY
NEWSPAPERS OF WASHINGTON, THE WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION AND THE
WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of *Amici Curiae* Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and the Washington Coalition for Open Government, hereinafter “the *Amici*,” is set forth in the accompanying Motion to File *Amici Curiae* Memorandum.

II. STATEMENT OF THE CASE

The *Amici* adopt the Statement of the Case of Appellant Cowles Publishing Company (“*The Spokesman-Review*” or “the newspaper”).

III. ARGUMENT AND AUTHORITY

Nathan Walters, a 10-year-old boy, died while in the care of the Respondent Spokane School District. The District acknowledges its conduct related to Nathan’s death was cause for alarm.¹ It acknowledges that it sent Nathan, a child with a known peanut allergy, on a field trip with nothing but peanut-laden food, allowed him to eat a peanut cookie, and, when he became ill, did not promptly give him the medication on hand to address his allergy.² The District argued, and the lower court found, that no records related to the investigation of Nathan’s death were disclosable because all records are attorney-client privileged or work product and created only because of the threat of a lawsuit. The court also

¹ District’s Answ. to Pet. for Review at 2-3.

² *Id.*

held the District was within its rights to sue the newspaper that requested the records seeking a Declaratory Judgment.

The District's arguments and the Court of Appeals' holdings on these two issues are flawed and conflict with binding precedent of this Court and other courts of appeal. This memorandum focuses on two issues in the Division III opinion: the test for the attorney work product exemption to the Public Disclosure Act ("PDA") and the grounds under which an agency may sue itself and a requester seeking a Declaratory Judgment. This Court must accept the Petition for Review to provide clarity to agencies and requesters on these two highly important issues. Left alone, the Division III opinion will result in considerable harm to requesters of public records and the public.

A. The Agency Would Have Investigated Nathan's Death Without the Threat of Litigation.

The opinion contends the records of the investigation of the death of a child are not disclosable because the agency alleges they were prepared in anticipation of litigation. The opinion misinterprets the newspaper's claim as what the District "should have" done. The test for whether the records are privileged, however, is what the District "would have" done. To accept the argument that all of the records are privileged, this Court must accept that the District, when faced with the death of a child under its care and

evidence of clear lapses in judgment, common sense, and accordance to school policies, would have turned a blind eye and not investigated --not interviewed witnesses, not visited the scene, and not explored what went wrong and how to prevent it in the future. The District has not stated, let alone proven, that it would not have investigated in the absence of a suit. Indeed, here the District was required by an administrative policy to investigate all injuries to children, regardless of whether a suit was likely. The District *would have* investigated and interviewed witnesses, taken notes and photographs, and prepared most, if not all, of the documents in question here whether it anticipated a lawsuit or not. CP 249-53.

B. The Work Product Doctrine Does Not Shield Materials Prepared Pursuant to Administrative Procedures or Party or Witness Statements.

The work product doctrine exempts from disclosure documents and tangible things prepared in anticipation of litigation.³ Work product does not include statements made by parties or other persons “concerning the action or its subject matter” which are signed or otherwise adopted or approved by the person making the statement or contemporaneously recorded or transcribed.⁴ It also does not protect materials prepared in the ordinary course of business even though litigation may have been

³ CR 26(b)(4); Fed. R. Civ. 23(b)(3)

⁴ CR 26(b)(4).

contemplated.⁵ When an internal policy mandates an investigation, the documents collected and prepared are not work product. *Collins v. Mullins*, 170 F.R.D. 132 (W.D. Vir. 1996), citing *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F. 2d 980 (4th Cir. 1992).

In *Collins*, the plaintiff sought discovery of witness statements taken by the sheriff's office in its investigation of the plaintiff's complaint of a police officer's alleged misconduct. The defendant argued that the statements were protected work product because they were taken in anticipation of litigation though internal regulations required that an investigation be made of all police misconduct complaints. The defendant maintained that the sheriff's office selectively determined when to follow

⁵ See, e.g., *Simon v. G.D. Searle & Co.* 816 F.2d 397, 401 (8th Cir. 1987) (finding risk management documents that track and control company's litigation cost not work product); *United States v. Adlman*, 134 F.3d 1194, 1202-04 (2d Cir. 1998) (holding memorandum of accountant/lawyer analyzing tax implications of company's merger containing legal analysis and strategy not work product if created in the ordinary course of business); *Chaney v. Slack*, 99 F.R.D. 531, 533 (S.D. Ga. 1983) (rejecting work product claim for records of school's investigation of student's complaint about excessive corporal punishment); see also *Spell v. McDaniel*, 591 F. Supp. 1090, 1119-20 (E.D.N.C. 1984) (internal police investigation records of police brutality complaints not work product because routine and not in anticipation of litigation; even if work product, requestor would have substantial need); *Mercy v. Suffolk County*, 93 F.R.D. 520, 521-22 (E.D.N.Y. 1982) (same); *Litton Systems, Inc. v. AT&T Co.*, 1979-1 Trade Cases P 62,563 (S.D.N.Y. Mar. 30, 1979) (investigation records of suspected misconduct by sales employees not work product); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603-04 (8th Cir. 1977) (law firm's investigation of alleged misconduct by employees of corporation not work product; "work was not done 'in anticipation of litigation,' . . . although of course, all parties concerned must have been aware that the conduct of employees of [corporation] in years past might ultimately result in litigation of some sort in the future"); see also Fed. R. Civ. P. 26(b)(3) Advisory Committee's Note (1970) ("Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by [Fed. R. Civ. P. 26(b)(3)].")

its internal regulations and that an investigation was conducted only when litigation was imminent. The *Collins* court, however, found the statements were discoverable because they were taken in accordance with normal operating procedures under the internal regulations. It reasoned that even though witness statements were not taken after every complaint, the driving force behind the investigation was the agency's internal policy to investigate all complaints.

Here, similar to the defendant in *Collins*, the District argues that its investigation into Nathan's death was made in anticipation of litigation because it retained a law firm and a private investigator to implement its internal investigation procedures, and it, like the defendant in *Collins*, further claimed the District often disregarded its own policies requiring an investigation.⁶ But selective compliance with an internal policy does not negate the policy's existence. Nor does retention of a law firm or an investigator satisfy the "anticipation of litigation" requirement. The District's Superintendent stated the investigator was retained to investigate because the District wanted to make sure the investigation was "objective" and was performed by someone "with experience." CP 309-312.⁷ Thus, according to the District's own statements the investigation was at least

⁶ CP 249-53.

⁷ The District's belated objections to consideration of the Superintendent's statements – which are party opponent admissions and not hearsay – have been waived as they were not raised below when the statements were introduced in the trial court. RAP 2.5.

partially designed to fulfill the District's internal investigative obligations. The District cannot render materials work product by selectively complying with its administrative procedures. Such an argument failed in *Collins*, and it must also fail here.

C. Division III Misapplied the "Substantial Need" Test.

RCW 42.17.310(1)(j) only prevents disclosure if the same records would have been unavailable to a litigant against the agency under the civil discovery rules. A party may obtain work product if that party has a 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. CR 26(b)(4). Therefore, for (1)(j) to apply at all, the District must show that other parties in litigation against the District – including parents of children who died while in the District's care – would not be able to obtain the records in question – either by showing they are not privileged at all or by showing substantial need.

The lower court's opinion suggests there is no "substantial need" component to the work product exemption, and it illustrates confusion regarding whose need is to be assessed. As this issue is likely to be repeated, this Court should accept review and clarify this issue for agencies and requesters. The text of RCW 42.17.310(1)(j) and decisions from this Court make clear the need test is to be performed as if the

requester was standing in the shoes of the opposing litigant. *See, e.g.,*

O'Connor v. Washington Dept. of Social and Health Servs.:

Although awkwardly worded, the statutory provision is not ambiguous. **A plain language interpretation of it is 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. The corollary to this is the records would not be exempt if they are available to another party under superior court rules of pretrial discovery.**

143 Wn.2d 895, 912, 25 P.3d 426 (2001) (emphasis added). The District did not, and could not, demonstrate that the parents could not have shown substantial need for the materials, and thus the District did not meet the terms of the exemption.⁸

D. The Lower Court's Opinion Improperly Sanctions Agency Declaratory Judgment Actions When There is No Justiciable Controversy.

Finally, the Division III opinion authorizes agencies to file suit against themselves and requesters seeking a declaratory judgment in the absence of a justiciable controversy. The District, which had already decided not to release records to a record requester, filed suit against the requester

⁸ *See, e.g., Southern Railway Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1968) (finding appellees would be unable to obtain full and accurate disclosure of facts by deposing witnesses because suit was filed ten months after incident and interrogatories were answered one year after); *Smith v. Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582 (S.D. Tex. 1996) (finding statements taken three days after accident discoverable); *Baker v. General Motors Corp.*, 197 F.R.D. 376 (W.D. Mo. 1999) (work product of prior statements discoverable under the substantial need exception for impeachment and credibility assessment); *Reedy v. Lull Engineering Co., Inc.*, 137 F.R.D. 405 (M.D. Fla. 1991) (work product photographs discoverable due to substantial need if taken of a changed condition that was not available for observation by the party seeking disclosure).

seeking a judicial rubber-stamp of the District's decision not to disclose. The requester had never expressed an intention to sue. Courts are not authorized to issue such advisory opinions.⁹ Courts are charged to decide only justiciable controversies.¹⁰ If there was any uncertainty whether a legal claim would be filed, there is no justiciable controversy.¹¹ The possibility of a future claim for damages and the desirability of a party to be able to presently ascertain his or her risks are not sufficient.¹²

In *Washington State Republican Party v. Washington State Public Disclosure Commission*, this Court rejected a Declaratory Judgment request by the Republican Party challenging a PDC complaint that the party broke the law by using exempt funds to buy polls and opposition research. Though the PDC enforcement staff filed a complaint against the party, the Commission by a vote of 2 to 2 did not reach a decision whether a violation occurred. No further enforcement action was certain to occur. Thus, the Court found no justiciable controversy and overturned the earlier grant of a Declaratory Judgment. 141 Wn.2d at 252, 284-85.

⁹ *Washington State. Republ. Party v. Washington State Pub. Discl. Comm'n*, 141 Wn.2d 245, 284-85, 4 P.3d 808 (2000); *Walker v. Monroe*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994).

¹⁰ 124 Wn.2d at 411-12.

¹¹ *Diversified Indust. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814, 514 P.2d 137 (1973) (holding no justiciable controversy between tenant and landlord over liability for guest's injury when guest had yet to sue or threaten suit though guest had 20 year statute of limitation period to bring claim); *Washington State Republican Party*, 141 Wn.2d at 284-85 (finding no justiciable controversy where PDC had not taken action against political advertiser though PDC enforcement staff indicated its opinion a violation had occurred).

¹² *Divers. Indust. Dev.*, 82 Wn.2d at 814; *Wash. St. Rep. Party* 141 Wn.2d at 284-85.

Here, a reporter made a PDA request, and the District denied the request. The District then ran to court to seek a Declaratory Judgment that its view of the law was correct. In the *State Republican Party* case, this Court found that there was no justiciable controversy and no right to a Declaratory Judgment when there was no clear indication the party would be sued or prosecuted by the PDC for the questioned use of exempt funds. Here, there was no indication the District was about to be sued or would ever be sued by the requester. If a party, who was the subject of a PDC complaint and a 2 to 2 decision regarding whether it had broken the law could not establish the requisite standing for a declaratory judgment action, the District here – with no threat of litigation or even an administrative appeal – certainly cannot meet the requirements.

Though this Court in *Dawson v. Daly* appeared to accept that an agency could initiate suit based on RCW 42.17.330, it made clear this was an alternate course from an agency that was relying on an exemption in RCW 42.17.310, and that the agency denying a request based on Section 310 was simply allowed to withhold the record and wait to see if the requester would sue.¹³ The following year, this Court reversed itself stating that Section 330 did not create an independent basis for

¹³ *Dawson*, 120 Wn.2d 782, 794, 845 P.2d 995 (1993).

exemption.¹⁴ The end result of these two opinions is clear. When an agency relies on an exemption to Section 310 as the basis for denying a record, its only remedy is to deny the record and wait for the requester to sue. It has no right or need to initiate suit itself based on Section 330 to rubber-stamp its earlier denial. If the requester sues under RCW 42.17.340, the agency is free pursuant to Section 330 to file a motion or affidavit arguing why records should not be disclosed, but the agency may not ignore well-established doctrine barring use of the courts for advisory rulings. Division III's holding ignores this doctrine and encourages unnecessary lawsuits against taxpayers at taxpayer expense wasting the precious judicial resources of our already-burdened trial courts.

IV. CONCLUSION

For those foregoing reasons, the Court should accept the Petition for Review and address the important issues raised therein.

RESPECTFULLY SUBMITTED this 7th day of June, 2006.

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Coalition for Open Government

By /s/ Michele Earl-Hubbard
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¹⁴ See *Progressive Animal Welfare Society v. University of Washington* ("PAWS"), 125 Wn.2d 243, 261, 884 P.2d 592 (1994).

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2006, I caused to be served, a true and correct copy of the attached document upon the following:

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DATED this 7th day of June, 2006.

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