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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COWLES PUBLISHING COMPANY,

Petitioner,

v.

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

Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION
OF MUNICIPAL ATTORNEYS
IN SUPPORT OF RESPONDENTS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA) is a not-for-profit corporation organized under the laws of Washington. WSAMA has an interest in the rights and obligations of cities and towns in this State in their efforts to respond to and resolve claims, settle or try lawsuits, and represent the public at the grass roots level of government organization.

II. STATEMENT OF FACTS

For purposes of this amicus curiae brief, the facts set forth in the brief of the School District are adopted.

III. ARGUMENT

1. Amicus Endorses Respondents' Arguments.

The Respondents and supporting amicus have done a good job of presenting the Washington cases holding that disclosure of materials prepared in anticipation of litigation is not required, whatever the current status of the litigation. *See Harris v. Drake*, 152 Wn.2d 480, 490, 99 P.3d 872 (2004); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608-09, 963 P.2d 869 (1998); and *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). *Limstrom* relied in part upon federal Freedom of Information Act cases to decide that the exemption for materials unavailable to another party in litigation is applicable under Washington's Public Disclosure Act (PDA) (Exemption (j)), *see* 136 Wn.2d at 608, *citing NLRB v. Sears, Roebuck &*

Co., 421 U.S. 132, 148, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), and other cases, and therefore the federal cases should be considered as bearing on the question. The Respondent and supporting amicus also very adequately addressed the meritlessness of the Petitioner's argument regarding "substantial needs." As noted by the Respondents, the Court of Appeals applied straightforward, time-honored, black-letter law governing the work product doctrine and the PDA to reject the Petitioner's argument that it had a "substantial need" for the documents that superseded the controversy exemption of the former RCW 42.17.310(l)(j).

Also, as note in the pleadings of Respondent Spokane School District No. 81, the Legislature has afforded to public agencies work product and attorney-client privilege protections that are coextensive with those enjoyed by their private litigant adversaries. Supplemental Brief of Respondent Spokane School District No. 81, page 2, et seq. These authorities are set forth capably enough that Amicus endorses them by this reference, and will not repeat those arguments at length here.

2. Court of Appeals Properly Applied Attorney Client Privilege and Attorney Work Product Doctrine.

In *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 130 P.3d 840, 207 Ed. Law Rep. 406, 34 Media L. Rep. 1598 (2006), the documents requested were all generated by the School District's attorneys and their investigators. The District consulted the attorneys to give advice and prepare for the anticipated wrongful death claim, which in fact quickly followed the child's death. The Court of Appeals concluded that the

requested documents were attorney work product and affirmed the refusal of the trial judge to order disclosure.

In reaching that conclusion, the *Soter* court noted that “[a] trial judge has broad discretion to manage the discovery process so as to ensure full disclosure of relevant information while protecting the litigants against harmful side effects of disclosure.” *Soter v. Cowles Pub. Co.*, 131 Wn. App. at 892, citing *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). *Soter* also stated that the rules protect material defined as attorney work product. *Soter*, 131 Wn. App. at 892-93, citing CR 26(b)(4).

In describing the historical genesis of the attorney work product doctrine, *Soter* noted that it first appeared in *Hickman v. Taylor*.¹ *Soter*, 131 Wn. App. at 893. This doctrine was intended “to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy ‘with an eye toward litigation,’ free from unnecessary intrusion by his adversaries.” *Id.*, citing *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir.1998) (quoting *Hickman v. Taylor*, 329 U.S. 510-11). The *Hickman* doctrine is now codified in the civil rules at Fed.R.Civ.P. 26(b)(3) and Washington’s CR 26(b)(4).² *Soter*, 131 Wn. App. at 893.

¹ *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

² [A] party may obtain discovery of documents ... discoverable ... and prepared in anticipation of litigation or for trial by or for another party ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. CR 26(b)(4).

Soter also held applicable to PDA cases the statutory mandate that “an attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” *Soter*, 131 Wn. App. at 902, *citing* RCW 5.60.060(2)(a); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004).

In *Soter*, Cowles contends the privilege does not apply. Cowles urged the *Soter* court to follow the dissent from this Court’s decision in *Hangartner*. Additionally, the Washington Coalition for Open Government (COG) argued that counsel’s notes of statements by non-District witnesses who were represented by outside counsel are not attorney-client communications and thus not protected. *Soter*, 131 Wn. App. at 902-03. The court below correctly rejected these arguments, noting, instead that *Hangartner* held that the attorney-client privilege exemption “complements” the work product exemption. *Soter*, 131 Wn. App. at 903, *citing Hangartner*, 151 Wn.2d at 452. This is consistent with well settled law.

Washington courts interpret RCW 5.60.060(2) as providing two-way protection of all communications and advice between attorney and client, including communications from the attorney to the client. *Soter*, at 903 (*citing Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981)). Moreover, the *Soter* court said it tends to use the inclusive term “privileged information” to refer to information protected by the

attorney-client privilege or the work product doctrine. *See, e.g., Matter of Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411 (1991), *cited by Soter*, at 903.

Also, as noted by the *Soter* court, the legislature has amended the PDA since *Hangartner*, and did not modify this exemption. *Soter* at 903.

3. *Hangartner* Effectuates Legislative Intent.

The Legislature agrees with *Hangartner*'s treatment of the attorney-client privilege in the PDA. In each of the two sessions following *Hangartner*, sections of bills specifically designed to "correct" that aspect of *Hangartner* failed to make it out of their respective committees. *See, e.g., S.B. 5735* (2005); *H.B. 1758* (2005); *H.B. 2515* (2006); *H.B. 1350* (2006).

The Legislature's refusal to revisit the role of the attorney-client privilege must be taken as an endorsement of *Hangartner*'s treatment of that issue. *See Soproni v. Polygon Apt. Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999); *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992) ("Because the statutory language...has remained unchanged since the time of this court's decision..., we are not persuaded that we should overrule clear precedent of this court interpreting the same statutory language."); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986) ("Legislative inaction in this instance indicates legislative approval....").

Legislative endorsement of this aspect of *Hangartner* is more pronounced by contrasting this inaction with the Legislature's quick correction of *Hangartner*'s separate, "overbreadth" holding. See RCW 42.56.080 (as amended by Laws of 2005, ch. 483 § 1).

WSAMA urges this Court to adopt the reasoning of the Court in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998); *Dawson v. Daly*, 120 Wn.2d 782, 792, 845 P.2d 995 (1993); and *Hangartner*. Any other result would be catastrophic for agencies, which would lose the ability to "think, plan, weigh facts and evidence," in that zone of privacy that permits candor.

Government agencies need attorneys, and need attorneys who can help them make informed decisions. This is not possible unless a robust attorney-client privilege and work product doctrine are recognized, the same privilege afforded Cowles in this case. The legislature recognized this in the PDA exemption at issue.

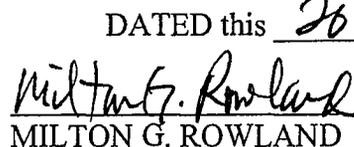
The Petitioner is trying to turn public records law on its head – or at least change it to the specific disadvantage of public agencies. No private law firm would be subject to such scrutiny. The PDA puts government agency lawyers on the same footing as private sector lawyers when it comes to privilege and work product, and that is for the very good reason that it protects the public fisc to have free and open communications between clients and lawyers, and to allow the lawyer to do his or her job when retained. This is what private firms do, and no less

ought to be available to the public attorneys for their clients. Per *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212, 54 USLW 2169 (1985), the test for determining whether such work product is discoverable is whether the documents were prepared in anticipation of litigation and, if so, whether the party seeking discovery can show substantial need. It is respectfully submitted that there was a zero probability that a human death under the circumstances of this case would NOT lead to litigation. See *Heidebrink*. Under these circumstances, this Court is respectfully requested to affirm.

IV. CONCLUSION

This Court should affirm the decision of Court of Appeals in *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 130 P.3d 840, 207 Ed. Law Rep. 406, 34 Media L. Rep. 1598, (2006), for the reasons stated herein and as argued in support of the Respondents.

DATED this 20 day of February, 2007.


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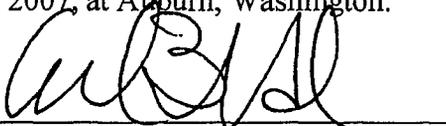
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