

78574-1

No. 78574-1

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

v.

C.S. SOTER, a minor child; FRANCIS SOTER and  
GLEND A CARR, individually, and as parents of C.S. SOTER;  
THE ESTATE OF N.W. WALTERS, a deceased minor child; RICK WALTERS  
and TERESA WALTERS, individually and as parents of N.W. WALTERS,  
a deceased minor child, SPOKANE SCHOOL DISTRICT NO. 81,  
a Washington municipal corporation,

Respondents.

**SPOKANE SCHOOL DISTRICT NO. 81's  
ANSWER TO COWLES PUBLISHING COMPANY'S  
PETITION FOR DISCRETIONARY REVIEW  
BY THE SUPREME COURT**

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## **I. OVERVIEW OF ANSWER TO PETITION FOR REVIEW**

The decision below faithfully plows the same legal ground already covered by well-established, recently reaffirmed case law under the Washington Public Disclosure Act (“Act”). The decision is entirely consistent with the uniform rulings of this Court and the Courts of Appeal governing the work product doctrine and attorney-client privilege issues that were presented below in the context of the “controversy” exemption to the Act. There is no public interest to be advanced through acceptance of review and a rote restatement of already-uniform law.

Indeed, the overwhelming record of this case and the uniformity of the applicable law made this a simple case below – one described as “easy” by the Court of Appeals. The record overwhelmingly established that the documents at issue are “classic” opinion work product materials and therefore protected from disclosure. Moreover, many of the documents are also protected in complementary fashion by the attorney-client privilege. Respectfully, Cowles’ Petition for Review requests nothing more than that this Court re-plow the same ground already covered by unassailable legal principles.

## **II. NO ASSIGNMENT OF ERROR**

Spokane School District No. 81 (“School District” or “District”) assigns no error to the Court of Appeals’ opinion below. Cowles’

appended that opinion to its Petition for Review and it is referenced here as “Opinion.”

### **III. STATEMENT OF THE CASE**

The School District in this case responded to the tragic accidental death of a student after a school-sponsored field trip by immediately anticipating litigation and seeking the advice and assistance of its legal counsel. That counsel either created or directed the creation of every record at issue in this case, pursuant to the School District’s anticipation of that litigation. If ever there were a scenario establishing a public agency’s entitlement – indeed, its *obligation* – to invoke the work product doctrine and the attorney-client privilege for the benefit of the public it serves, the undisputed record of this case presented that scenario below.

#### **A. UNDISPUTED FACTS**

Between 3:45 to 4:00 p.m. on Friday, May 18, 2001, Mark Anderson, Ph.D., the School District’s chief legal official, received an urgent phone call. A third grader at one of the District’s elementary schools had just died after a school-sponsored field trip and it appeared the School District was at fault. Dr. Anderson learned that even though school staff knew the student had a life-threatening peanut allergy, the District had nevertheless provided him a lunch for the field trip that

included a peanut butter sandwich, trail mix with peanuts, and a peanut butter cookie. Additionally, Dr. Anderson learned at that time:

- Shortly after lunch on the trip, Nathan reported to his teacher – who knew of Nathan’s allergy – that he had eaten part of the peanut butter cookie and was feeling ill.
- Neither the teacher or the other District employees or District parent-volunteer chaperones on the trip had called 911 or administered an Epinephrine shot that had been brought along specifically for the purpose of giving it to Nathan if he had an allergic reaction.
- Instead, Nathan’s teacher placed Nathan on a school bus and enlisted a parent volunteer chaperone, who was a licensed practical nurse, to monitor Nathan’s condition while Nathan’s classmates engaged in the field trip activities.
- On the way home from the field trip, Nathan’s condition worsened dramatically and he ended up at the Holy Family Hospital emergency room.
- Nathan was given the Epinephrine shot en route but it was too late, and he had died either in transit to the hospital or shortly after arrival.

CP 516-17.

As of that time, Dr. Anderson was the District official responsible for tort claims against the District and had extensive experience assisting the District’s legal counsel in defending such claims. Upon receiving this information, Dr. Anderson immediately assessed that Nathan’s family would likely assert a wrongful death claim against the District. He thus immediately telephoned the District’s general counsel law firm, which

also served as the District's standing "insurance defense" counsel through its liability insurer, Hartford Insurance Company. Dr. Anderson first spoke with attorney John Manix, who had extensive previous experience representing the District, upon Hartford's retention, in defense of insured tort claims. Upon hearing the reported facts of Nathan's death, Mr. Manix assessed it was nearly certain that the District would receive a wrongful death claim because of the incident. Dr. Anderson also communicated the same facts to another attorney in the firm, Paul Clay, who at the time had served for almost a decade as the District's general counsel in the role of anticipating and resolving litigation. Mr. Clay independently assessed the likelihood of a wrongful claim due to Nathan's death was a near certainty. CP 385-91, 517-19, 523-24, 551, 553 <sup>1</sup>

In their initial discussions within minutes of Nathan's death, the District's legal counsel discussed the following with Dr. Anderson:

- Opinions regarding how negligence law might apply to the conduct of District cafeteria staff who had prepared Nathan's lunch, to Nathan's teacher, and to the District parent volunteer who had monitored Nathan's condition while on the bus;

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<sup>1</sup> These immediate assessments proved accurate within a few days of Nathan's death, as on Wednesday, May 23, 2001, a Spokane attorney announced through the media that he had been retained by the Walters family to assert a wrongful death claim against the School District. CP 385, 395, 426-27, 552.

The Court of Appeals agreed that upon receipt of this information, the District's legal position appeared "dire," Opinion at 15, and that its representatives did in fact perceive that "potentially enormous liability was inevitable," *id.* at 23.

- Opinions concerning Washington wrongful death and survival action damages law as applied in the context of the death of a minor child;
- The role Hartford would be expected to play with respect to the anticipated wrongful death claim;
- The need for Mr. Manix and Mr. Clay to immediately begin gathering documents and interviewing witnesses in anticipation of the claim, and how attorney-client privilege and work product doctrine principles would apply to their investigation of the incident; and
- That confidentiality of the attorneys' investigation would need to be protected with vigilance due to concerns that an unauthorized disclosure of the fruits of that investigation might undermine the District's ability to defend itself and might result in waiver of work product and attorney-client privilege protections.

CP 386-87, 388-89, 517.

Beginning that same evening and over the ensuing two days, Saturday, May 19 and Sunday, May 20, the attorneys gathered and began reviewing pertinent documents, preparing a list of witnesses to interview, and formulating potential legal theories and defenses to the anticipated wrongful death claim. Those theories and defenses, albeit in relative infancy, related to issues such as:

- Whether the District's nurses had properly trained Nathan's teacher to respond to any allergic reaction involving Nathan;
- Whether the actions taken by Nathan's teacher and the District volunteer parent had been prudent given their observations of Nathan's progressing condition;

- Whether Nathan himself might have some contributory fault for eating the peanut product;
- Whether Nathan's ingestion of the peanut butter cookie was in fact the medical and proximate cause of his death;
- Whether another person, not in an employment or volunteer capacity with the District, might have liability for the incident; and
- Whether Nathan's parents might have contributory fault based on information or lack of information they had provided to the District concerning Nathan's allergy.

CP 390-91, 517-19; 525-26, 551, 553-55.

That same weekend, the attorneys decided to enlist the services of a private investigator, Mr. David Prescott, for assistance with the interviews they intended to conduct. CP 391, 517-18, 524-25, 536, 555-56. On Sunday evening, May 20, Mr. Clay telephoned Mr. Prescott at his home. Mr. Prescott, familiar with the incident from the extensive media attention it had received that weekend, agreed to assist counsel. In that conversation, Mr. Clay shared with Mr. Prescott: (1) the legal and factual theories that had already been developed, (2) the strengths and weaknesses that the attorneys preliminarily believed would exist in the context of a liability claim, (3) the witnesses that Mr. Prescott needed to initially interview, commencing the next morning, (4) the attorneys' understanding of each of those witnesses' roles in the events of Nathan's death, and (5)

how each witness pertained to the attorneys' views of the liability issues of the case. CP 391, 394-95, 517-18, 524-25, 536, 538, 555-56.

Mr. Clay further gave Mr. Prescott examples of questions and a description of the type of information he wanted from each person. Mr. Clay directed Mr. Prescott to check in with Mr. Clay or Mr. Manix, after each of the interviews, to report on the information he had learned and to discuss whether that information might prompt a need to interview different persons or otherwise change Mr. Clay's and Mr. Manix's investigation strategies. Mr. Clay told Mr. Prescott to take notes of the interviews and to provide the notes to him or Mr. Manix for their review. CP 391, 394-95, 517-18, 524-25, 536, 538, 555-56..

The next morning Mr. Prescott began his interviews pursuant to the direction provided by Mr. Clay. As directed, he reported back to legal counsel after those first interviews. Based on that information, Mr. Clay and Mr. Manix directed Mr. Prescott to interview additional witnesses. This ended up being the typical pattern as Mr. Prescott continued to work under the direction of Mr. Clay and Mr. Manix over the next several weeks. Mr. Prescott worked precisely and only at the direction of Mr. Clay and Mr. Manix – and no one at the District. He reported only to Mr. Clay and Mr. Manix – and to no one at the District. After Mr. Prescott concluded an interview or set of interviews, he would check in with Mr.

Clay and/or Mr. Manix and provide them his interview notes. They, in turn, would confirm the identity of the next person or persons they wanted him to interview. On these occasions, the attorneys continued to discuss with Mr. Prescott, in detail, the importance of obtaining certain information from a given interviewee or potential interviewee in terms of their assessment of the legal and factual issues that the liability exposure of Nathan's death presented to the District. CP 394-95, 556, 536-37, 538.

In the meantime, Mr. Manix had placed Hartford on notice of the initially-anticipated, and shortly thereafter actual, claim. He confirmed his and Mr. Clay's role as the District's liability defense counsel for the claim at Hartford's expense, and confirmed that Mr. Prescott had been retained at Hartford's expense. Also in the meantime and within only 12 days of Nathan's death, Mr. Manix prepared his first extended tort liability and damages evaluation report to Hartford, which he sent to the Hartford "large loss" claims representative to whom he was reporting. CP 396-97, 552.

Within only four weeks of the incident, Mr. Manix and Mr. Clay felt that they, working with Mr. Prescott's assistance, had gathered sufficient information to meaningfully assess the District's liability and damages exposure for purposes of settlement discussions. They and the Walter's counsel scheduled a mediation for mid-August, 2001. At that

time, Mr. Manix directed Mr. Prescott to suspend his investigation work because of the prospect of settlement. CP 401; 538.

Mr. Prescott's investigation assistance never resumed because the parties did settle the liability claim at that mediation. Upon settlement, Hartford paid Mr. Prescott's invoice for his investigative services. CP 403-04, 538.

As the trial court and the Court of Appeals found – based not only on the factual record discussed in part above, but also with the benefit of *in camera* review of the disputed documents themselves – disclosure of the work product generated by Mr. Prescott would provide the reader a “window” into Mr. Manix's and Mr. Clay's mental impressions, conclusions, opinions, and legal theories. This was because Mr. Manix and Mr. Clay had freely shared with Mr. Prescott their factual and legal defense theories concerning the anticipated and actual claim, at each stage of their direction of his work, in the context of explaining to him who they wanted him to interview and in what regards each particular interviewee's story would affect their tort liability theories and defenses. *See* Opinion at 17, 26, 76; RP 87-89.

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#### IV. ARGUMENT

##### A. **THIS COURT SHOULD NOT DEDICATE ITS LIMITED RESOURCES TO REAFFIRMING THE COURT OF APPEALS' STRAIGHTFORWARD APPLICATION OF WELL-SETTLED "SUBSTANTIAL NEED" PRINCIPLES.**

The Court of Appeals applied time-honored, black-letter law governing the work product doctrine and the Public Disclosure Act to reject Cowles' argument that it had a "substantial need" for the documents that superceded the controversy exemption of RCW 42.17.310(1)(j). The Court of Appeals' straightforward treatment of this issue does not plow any new ground.

The Court of Appeals began with the unassailable principle that the legislature intended the controversy exemption of RCW 42.17.310(1)(j) to incorporate Washington Rule of Civil Procedure 26(b)(4) and the cases construing it. Opinion at 6-7. This ruling hardly plows new ground.

Then the Court of Appeals found that the documents at issue are "imbued with the mental impressions, legal theories, and confidential instructions of a team of lawyers and all people working under their direction defending" the School District. Opinion at 17-18; *see also id.* at 276. The trial court's finding of the same was supported not only by the requisite level of "substantial evidence," in this case, it was supported by

overwhelming, uncontradicted evidence.<sup>2</sup> Again, this ruling is hardly worthy of review and plows no new ground.

Upon affirming this factual finding, the Court of Appeals then determined that under CR 26(b)(4), (and therefore under RCW 42.17.310(1)(j)), the documents fall within that special category of work product materials entitled to enhanced protection from disclosure – immunity even in the face of a hypothetical showing of “substantial need” under the standards of CR 26(b)(4). Opinion at 17, 26; *see* CR 26(b)(4)(1) (whereas “substantial need” may be sufficient to overcome protection of ‘ordinary’ work product materials, it is not sufficient where disclosure would reveal “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party...”); *In re Firestorm 1991*, 129 Wash.2d 130, 136, 916 P.2d 411 (1996); *Pappas v. Holloway*, 114 Wash.2d 198, 211, 787 P.2d 30 (1990) *see also* Fed. Rule. Civ. Pro. 26(b)(4); *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir.1998) (*citing Hickman v. Taylor*, 329 U.S. 495, 510-

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<sup>2</sup> 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. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wash.2d 895, 905, 25 P.3d 426 (2001). Whether a particular document falls within the definition of work product is a finding of fact. *Dawson v. Daly*, 120 Wash.2d 782, 792, 845 P.2d 995 (1993). On appeal the trial court's findings of fact will be upheld if substantial evidence supports them. *Org. to Preserve Agric. Lands v. Adams County*, 128 Wash.2d 869, 882, 913 P.2d 793 (1996).

11, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). The Court of Appeals thus concluded that it need not even examine the substantive merit of Cowles’ “substantial need” arguments, as they were legally immaterial on Cowles’ appeal. Opinion at ¶¶ 17, 26. Again, this rote analysis fails to plow any new ground and does not justify review.

Overall, given the well-established Washington authorities governing these subjects, the Court of Appeals’ mode of analysis and its conclusions reveal a nearly rote exercise that plowed no new legal ground whatever under the Act, the work product doctrine, or CR 26(b)(4). The public’s interest would not be advanced by an exercise of discretion in favor of reviewing and merely restating these well-settled legal principles.

**B. THIS COURT SHOULD NOT DEDICATE ITS LIMITED RESOURCES TO REVIEWING THE COURT OF APPEALS’ HONORING OF EXPRESS STATUTORY LANGUAGE THAT UNAMBIGUOUSLY AUTHORIZED THE SCHOOL DISTRICT’S INITIATION OF A DECLARATORY JUDGMENT ACTION UNDER RCW 42.17.330.**

Neither is there a basis or reason for this Court to review the Court of Appeals’ holding that the District was entitled to initiate the underlying declaratory judgment action along with Nathan’s Estate and his parents.

The Public Disclosure Act itself expressly and unambiguously authorized the procedure employed by the Walters and by the School

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District. RCW 42.17.330 provides in pertinent part:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative [i.e., the School District here] or a person who is named in the record or to whom the record specifically pertains [i.e., Nathan’s Estate and his parents], the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would substantially and irreparably damage vital government functions.

(Emphasis added.) The plain and unambiguous language of RCW

42.17.330 expressly authorized the School District’s filing of the action.<sup>3</sup>

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<sup>3</sup> Cowles has not and cannot cite any Washington authority in its quest for a “construction” of RCW 42.17.330 directly contrary to its express language. All Cowles cites is immaterial North Carolina authority, *City of Burlington v. Boney Publishers, Inc.*, 166 N.C.App.186, 600 S.E.2d 872 (2004) and *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C.App. 459, 596 S.E.2d 431 (2004). As is evident from those cases, North Carolina’s public records statute expressly limited entitlement to bring a declaratory action thereunder to the person requesting the record from the governmental agency, *Boney Publishers*, 164 N.C.2d at 876; *McCormick*, 596 S.E.2d at 463. This is directly contrary to Washington’s statute, which expressly authorizes the requester or the agency to initiate a declaratory judgment. Moreover, many other states have recognized either the requester’s or the agency’s entitlement to initiate a declaratory judgment action to determine applicability of public records act exemptions, *see e.g.*, *State ex rel. Fisher v. PRC Public Sector, Inc.*, 99 Ohio App. 3d. 387, 391, 650 N.E.2d 945 (1994) (Ohio); *Scottsdale Unified Sch. Dist. No. 48 of Maricopa County v. KPNX Broadcasting Company*, 191 Ariz. 295, 299; 955 P.2d 534 (1998) (Arizona); *Tribune Company v. In re Public Records, P.C.S.O.*, 493 S.2d 480, 11 Fla. L. Weekly 1533, 13 Media L. Rep. 1201 (1986) (Florida).

In addition, Cowles’ imagining that the term “agency” in RCW 42.17.330 somehow refers not to the agency that has received the public records request, but to ‘other’ or ‘different’ governmental agencies ignores the definitional section of the Act. This is made manifestly clear by importing into RCW 42.17.330 the Act’s definition of “person” as set forth at RCW 42.17.020. There, at RCW 42.17.020(35), “person” is defined for the entirety of the Act to include a: “...governmental... agency however constituted...”. Cowles’ urged “construction” of RCW 42.17.330 is therefore non-sensical, as RCW 42.17.020(35) would require the following reading of RCW 42.17.330:

If upon motion and affidavit by an agency [who is named in the record or to whom the record specifically pertains] or its

The Court of Appeals' faithful and obviously-mandated application of that unambiguous statutory provision hardly merits this Court's review.

**C. THE COURT OF APPEALS PROPERLY RECOGNIZED THE PAWS HOLDING AND ITS RULING WAS ENTIRELY CONSISTENT WITH PAWS.**

This Court's decision in *Progressive Animal Welfare Society v. University of Washington*, 125 Wash.2d 243, 884 P.2d 592 (1995), ("PAWS"), reversed prior cases that had held RCW 42.17.330 provides a substantive "stand-alone" exemption under the Act, where disclosure of a public record would substantially or irreparably damage "any person" or "vital governmental functions." *Id.* PAWS held that RCW 42.17.330 instead is merely a procedural statute; therefore, a public record is exempt from disclosure only if it fits within one of the substantive exemptions set forth in RCW 42.17.310, and not simply if disclosure of it would substantially and irreparably harm a person or vital governmental functions.

RCW 42.17.330 is simply an injunction statute. It is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records **if they fall within specific exemptions found elsewhere in the Act.** Stated another way, section .330 **governs access to a remedy, not the substantive basis for that remedy.**

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representative or a person governmental agency who is named in the record or to whom the record specifically pertains... .

In short, this demonstrates that Cowles simply cannot reconcile its argument with the express statutory language.

*PAWS*, 125 Wn.2d at 257-58 (citations omitted; emphasis by italics in original; emphasis in bold and underscoring added).

The Court of Appeals' expressly acknowledged the binding authority of *PAWS* as having procedural-only effect, Opinion at 26, and its decision was absolutely consistent with the mode of analysis required by *PAWS*.

Precisely as mandated by *PAWS*, the Court of Appeals reviewed whether the School District had carried its burden of proving that the documents at issue fell within an exemption to RCW 42.17.310 – namely, the work product doctrine incorporated into the Act by the controversy exemption of RCW 42.17.310(1)(j) – and found that the District had “easily” done so, by more than substantial evidence. Opinion at 9, 26. Cowles' suggestion that the Court of Appeals improperly shifted the burden of proof, or that it somehow upheld the trial court on a stand-alone “substantial or irreparable damage to vital governmental function,” is simply untenable. *See id.* at 26

The opinion below is entirely consistent with *PAWS* and with the well-established rules set forth in the some eighteen work product doctrine and Public Disclosure Act decisions of this Court and the Courts of Appeal that it cited and substantively relied upon.

## V. CONCLUSION

Respectfully, there is no basis for a suggestion that the Court of Appeals' decision will have any impact whatever on public records requests in this state, much less a substantial impact, nor that it does anything but squarely honor the sound public policy of this state as expressed in the controversy exemption to the Public Records Act. The opinion plows no new legal ground and merely follows uniform, well-settled principles of law. As such it does not merit this Court's exercise of discretion in favor dedicating its limited resources toward conducting review.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2006.

STEVENS - CLAY - MANIX, P.S.



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**FILED AS ATTACHMENT  
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