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STATE OF WASHINGTON

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No. 84903-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

D. EDSON CLARK,

Appellant/Intervenor/Petitioner,

v.

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

Respondents.

**FILED**  
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STATE OF WASHINGTON

ANSWER TO AMICUS CURIAE MEMORANDUM OF  
ALLIED DAILY NEWSPAPERS OF WASHINGTON AND  
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

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TABLE OF AUTHORITIES

CASES

**Clapp v. Olympic View Pub. Co., L.L.C.**, 137 Wn. App. 470, 154 P.3d 230 (2007), *rev. denied*, 162 Wn.2d 1013 (2008) ..... 4

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**Mark v. Seattle Times**, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982)..... 4

**Marriage of Treseler and Treadwell**, 145 Wn. App. 278, 187 P.3d 773 (2008), *rev. denied*, 165 Wn.2d 1026 (2009) ..... 1

**Rhinehart v. Seattle Times Co.**, 98 Wn.2d 226, 654 P.2d 673 (1982), *judgment affirmed*, 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17, *cert. denied*, 467 U.S. 1230 (1984)..... 2, 3

**Rufer v. Abbott Laboratories**, 154 Wn.2d 530, 114 P.3d 1182 (2005)..... 2

STATUTES

CR 26..... 1

The amicus memorandum presents no additional, and no compelling, reasons for this Court to take review of the Court of Appeals decision. The materials at issue here were obtained pursuant to a protective order in discovery and attached by intervenor to a declaration filed after the parties had settled the case. Respondents' answer to the petition for review fully explains why the Court of Appeals decision conflicts with no decision of this Court or the Court of Appeals, including ***Marriage of Treseler and Treadwell***, 145 Wn. App. 278, 187 P.3d 773 (2008), *rev. denied*, 165 Wn.2d 1026 (2009). In particular, intervenor's declaration attaching materials obtained through discovery pursuant to a protective order was not filed "in anticipation of a decision," but on the day the parties settled this lawsuit, and was never considered by the trial court or the parties.

The parties were entitled to keep these materials confidential:

Inherent in CR 26(c), providing for protective orders, is a recognition that parties generally are not eager to divulge information about their private affairs, and that when called upon to do so in a lawsuit, will be even more reluctant if they are not assured that the information which they give will be used only for the legitimate purposes of litigation.

**Rhinehart v. Seattle Times Co.**, 98 Wn.2d 226, 255, 654 P.2d 673 (1982), *judgment affirmed*, 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17, *cert. denied*, 467 U.S. 1230 (1984). The Court of Appeals decision confirming that right to confidentiality implicates no important public interest in press access to the courts:

In view of the fact that the discovery rules have a long history of functioning without exposure of litigants to unwanted publicity and at the same time the news media has flourished, giving extensive coverage to the bizarre and the unorthodox, we do not perceive that continued protection of the discovery proceedings will constitute a substantial impediment to news gathering in this area.

**Rhinehart**, 98 Wn.2d at 255. "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 v. Abbott Laboratories**, 154 Wn.2d 530, 548 ¶27, 114 P.3d 1182 (2005), *citing Dreiling v. Jain*, 151 Wn.2d 900, 909-10, 93 P.3d 861 (2004).

The public, and the press, have a legitimate interest in how the courts go about their business. But the courts can and should easily dispose of the parade of horrors trotted out by amici as a basis for review. In the case of a criminal charging document, land developments, property taxes, or condemnation of private property,

a decision will be made on the basis of the pleadings filed in the court record. In this case, on the other hand, neither the court *nor* the parties treated the record as relevant, and making the information public would have no effect on the administration of justice:

[T]he function of the media in serving not only the public's need to know but the integrity of governmental functions themselves is of great importance in balancing First Amendment rights against other interests of the state. Here, there is nothing to indicate that publicity given to the evidence furnished by a party in a pretrial proceeding will in any way tend to promote the proper functioning of such proceedings. There is involved here no evaluation or criticism of judges or other officials administering the system nor of the system itself, but only a proposal to exploit the fruits of that system.

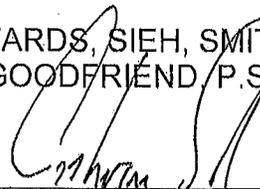
***Rhinehart***, 98 Wn.2d at 255-56.

Amici essentially advocate 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 obtained in discovery about other third parties, even if those individuals object to the disclosure. Amici's business interest in this case is understandable: they wish to "exploit the fruits of the system" because publishing information gleaned from confidential materials that were filed in a court record would 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). But that is not a legitimate public interest that supports acceptance of review in this case.

DATED this 1<sup>st</sup> day of November, 2010.

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

By: 

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

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**DECLARATION OF SERVICE**

BY RONALD R. CARPENTER  
CLERK The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:.....

That on November 1, 2010, I arranged for service of the foregoing Answer to Amicus Curiae Memorandum of Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 1<sup>st</sup> day of November, 2010.

  
Tara D. Friesen

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Rec. 11-1-10

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Attached for filing in .pdf format is the Answer to Amicus Curiae Memorandum of Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association, in *Clark v. Smith Bunday Berman Britton, P.S., et al.*, Cause No. 84903-0. The attorney filing this document is Catherine W. Smith, WSBA No. 9542, e-mail address: [cate@washingtonappeals.com](mailto:cate@washingtonappeals.com).

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