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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.

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

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ORIGINAL

TABLE OF AUTHORITIES

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As argued in respondent's supplemental brief in this Court, the *Ishikawa* factors are properly applied to proceedings and pleadings relevant to the *administration* of justice when a court has engaged in decision-making under Article I, § 10 of the state Constitution. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). But as this Court recently once again recognized, "mere discovery is not subject to Article I, § 10 unless the information or documents obtained through discovery becomes part of the decision making process." *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 69, ¶ 24, 256 P.3d 1179 (2011). *Cayce* confirms the distinction, articulated in *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005) and *Drelling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004), between discovery materials that are relied upon in judicial decision-making and those, as here, which are not.

Amici propose a "standard" that would make presumptively open any pleading filed in anticipation of judicial decision-making – regardless whether a decision is in fact made, and regardless whether the pleading contains material obtained in discovery that the parties agreed and the court ordered should remain

confidential. This is no standard at all. The argument by amici in the next case will be that *every* pleading is filed in anticipation of a decision, and that the parties cannot agree, and a court cannot order, that materials obtained in discovery may remain confidential, contrary to ***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) (*discussed in Answer to Amicus Memorandum in Support of Review*).

Amici proclaim their involvement "throughout the appellate process" in this case, and assert, contrary to ***Cayce*** and ***Rhinehart***, a right to know anything that affects *the parties'* litigation decisions. But "[t]here 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. While recognizing the legitimate interest of the public, and the press, in how the courts go about their business, this Court should also recognize the true consequence to defendants and other civil litigants such as respondents here of amici's relentless insistence on access to confidential discovery.

The declaration at issue here was filed by an intervenor on the afternoon of the day the underlying dispute had been settled, attached documents obtained pursuant to a protective order, and plainly violated the terms of that protective order and of the confidentiality agreement that governed intervenor's access to the documents. Respondents should not be forced to protect their clients' right to keep these financial records private¹ by defending against a claimed public "right" to access private information long after the underlying dispute was settled and the action dismissed, all without consideration of the declaration at issue.

This Court in **Cayce** rejected the argument that the **Ishikawa** factors must be addressed before sealing a deposition that occurred in a Pierce County court room, before a sitting Pierce County judge, in proceedings related to the criminal prosecution of another Pierce County judge. In making the distinction between proceedings relied upon in judicial decision-making and proceedings that are not, this Court also rejected amici's argument here (Amicus Br. at 11), that "public knowledge of civil disputes

¹ See 26 U.S.C. §7216 (making it a crime to disclose federal tax information when client objects to disclosure) (*discussed in* Resp. Br. at 4, 29, Appendix A).

should not depend on whether a court has a chance to act before settlement.”

In the civil context, this does not mean that the right of access to the courts requires that the deposition testimony become public, nor does the potential for settlement mean that the public and press must be allowed to attend depositions so they can know what occurred.

Cayce, 172 Wn.2d at 71, ¶ 28.

Amici do not even acknowledge this Court’s decision in **Cayce**, which was decided two months before their latest amicus memorandum was filed. Instead, amici falsely claim that “this is the first time that the presumption of openness has been limited to records actually affecting an issued ruling.” (Amicus Br. at 5) In fact, the use of records in “rulings” – either by the court or in a jury trial – was the basis for the decisions in **Rufer**, 154 Wn.2d at 549 ¶ 30, **Jain**, 151 Wn.2d at 918-19, and **Marriage of Treseler and Treadwell**, 145 Wn. App. 278, 187 P.3d 773 (2008), *rev. denied*, 165 Wn.2d 1026 (2009). *See also State v. DeLauro*, ___ Wn. App. ___, 258 P.3d 696 (Aug. 29, 2011) (written reports that were part of trial court’s decision-making process in determining defendant’s competency to stand trial presumptively available to public review). It is amici that proposes to *expand* the presumption of openness to

materials that were intended to remain confidential and that were never considered in judicial decision-making.

Amici's business interest in this case is understandable: privileged from any defamation claim, they wish to "exploit the fruits of the system" to publish information gleaned from confidential materials that were filed in a court record in violation of a protective order. 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). That interest does not justify imposing upon civil litigants the burden of defending the right to confidentiality in discovery materials absent extensive, and expensive, litigation of the *Ishikawa* factors, particularly when the issue of access is wholly collateral to resolution of the underlying dispute.

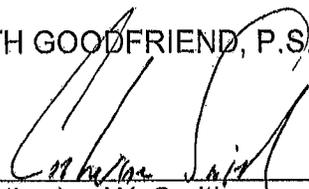
Amici claim that their proposed access to anything ever filed by anyone in any court file will insure the openness of the courts. (Amicus Br. at 10-11) But all it will really do is drive parties to civil

disputes who can afford it further into the private dispute resolution industry, leaving only the legal woes of criminal defendants and those too poor to avoid the courts for the entertainment of the masses. Far from increasing "public knowledge of civil disputes" (Amicus Br. at 10), amici's proposal would further erode the state's participation in the peaceful and open resolution of its citizens' disagreements.

The dockets of this State's courts were not intended to provide easy access to manufactured "smoking guns" by any pajama-clad blogger or ad-hungry website that wants to post a .pdf of any pleading filed at any time for any reason. Yet that would be the consequence of the holding urged by amici. This Court should confirm that Article I, § 10 and the *Ishikawa* factors apply only when records have been used in judicial decision-making.

DATED this 10th day of October, 2011.

SMITH GOODFRIEND, P.S.

By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 10, 2011, I arranged for service of the foregoing Answer to Amicus Curiae Brief 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 10th day of October, 2011.


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