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SUPREME COURT OF THE STATE OF WASHINGTON

SKY ALLPHIN, ABC HOLDINGS, INC., and CHEM-SAFE
ENVIRONMENTAL, INC.,

Petitioners,

v.

KITTITAS COUNTY, a municipal corporation and political subdivision
of the State of Washington,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

LEE OVERTON, WSBA No. 38055
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6770
OID No. 91024

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I. INTRODUCTION

The Court of Appeals correctly applied the work product doctrine, holding that county attorney work product retained its privilege when shared with consulting state agency employees. This Court should affirm because the privilege is not waived when work product is disclosed to a third party under conditions that ensure the material will not fall into the hands of an adversary. The Court of Appeals also correctly applied this Court's precedent pertaining to a related but distinct doctrine, the common interest exception to waiver, which allows disclosure without loss of privilege to a third party joined in pursuit of a common interest.

Petitioners argue that the work product privilege cannot survive disclosure to a third party, and that the County waived its privilege when it revealed legal opinions and strategy with the Department of Ecology, a third party. This confuses the work product privilege with the attorney-client privilege. The purposes are different, yielding different conditions for waiver. The purpose of the work product privilege requires courts to distinguish between disclosures to adversaries and disclosures to non-adversaries. Because the work product doctrine serves to protect an attorney's work product from falling into the hands of an adversary, a disclosure to a third party does not necessarily waive the protection of the work product privilege.

Consistent with this inherent aspect of the work product doctrine, the common interest doctrine, endorsed by this Court in *Sanders v. State*, addresses the waiver issue squarely, excepting third-party disclosures from waiver through specific requirements that ensure an adversary would not gain access. Under this doctrine, privilege is not waived if the disclosure was made in the course of a joint effort, it was designed to further that effort, and the underlying privilege not waived outside of the common interest group.

The 32 emails at issue here, exchanged to further a shared litigation goal and with effort to maintain confidentiality against opponents, fall comfortably within the ambits of both the broader principle and the narrower common interest doctrine. They should be accorded the privilege without waiver.

II. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae is the State of Washington, whose administrative and regulatory agencies often align and collaborate with other government agencies both in the ordinary course of business and in anticipation of litigation. The State's interest here relates to collaboration in anticipation of litigation. Communicating about legal strategy can be critical to the orderly pursuit of goals it shares with other government agencies. Ensuring the confidentiality of such exchanges is essential, and is

accomplished in large part by reliance on the work product privilege. Without this privilege to protect their communications, government agencies would be disadvantaged in litigation.

State statutory schemes frequently create, in effect, a division of labor, with state agencies developing expertise and adopting technical regulations, and local governments administering permit and enforcement regimes while relying on the state agency for technical assistance and regulatory interpretation. The statutory schemes governing shorelines management and solid waste management are examples of this. *See* RCW 90.58.050; RCW 70.95.020. Collaboration and assistance is expected during the ordinary course of business, but when litigation is anticipated or commences, with state and local governments aligned, privileged consultation on technical matters and regulatory interpretation to inform legal strategy is appropriate and occasionally essential. Alignment in anticipation of litigation also arises where there is no express statutory division of labor, such as when a state agency with relevant expertise informs a county prosecuting attorney's legal position and strategy in the context of civil proceedings brought by the county, or when a county collaborates with the state in a matter such as antitrust litigation.

Upholding the important doctrines surrounding work product ensures that Washington agencies can continue to work with other

government agencies when their interests align, with the expectation that work product communications will be privileged.

III. ARGUMENT

A. Work Product Is Exempt From Production Under the Public Records Act

Records not discoverable in the context of a controversy under the civil rules of pretrial discovery are exempt from production under the Public Records Act (PRA). RCW 42.56.290. Civil Rule 26(b)(4) embraces the work product doctrine, protecting from discovery documents prepared by a party or its representative in anticipation of litigation.¹ *Harris v. Drake*, 152 Wn.2d 480, 485–86, 99 P.3d 872 (2004); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). Work product is therefore exempt from production under the PRA. *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608–09, 963 P.2d 869 (1998).

B. The Court Determined That the 32 Emails Are Work Product

The trial court enjoined Ecology from releasing 11 emails exchanged between Kittitas County attorneys and Department of Ecology employees, concluding that “it is clear and there is no doubt that the

¹ The civil rule establishes two tiers of work product protection. First, an attorney’s documented “mental impressions, conclusions, opinions, or legal theories” are always immune from discovery. CR 26(b)(4). Second, other documents “prepared in anticipation of litigation or for trial by or for another party” are exempt from disclosure unless the party seeking disclosure demonstrates a substantial need for them and an inability without undue hardship to procure their equivalent by other means. *Id.*

emails were a product of the litigation . . . and relate only to the facts, legal strategy, and issues involved in that litigation.” CP 788. The court also found that 21 emails in the County’s possession were “created at the request of and in coordination with the County attorney,” and “reveal litigation strategy of the County as well as the opinions, theories and legal analysis of its attorney.” CP 2968. Finding the emails to be attorney work product, the trial court held them exempt from production under the PRA.²

C. The Privilege Survives Disclosure of Work Product to a Third Party if It Would Not Result in Disclosure to an Adversary

This Court has held, when considering whether the attorney work product privilege attached to a given document, that “the better approach to the problem is to look to the specific parties involved and the expectations of those parties.” *Heidebrink*, 104 Wn.2d at 400; *Harris*, 152 Wn.2d at 487. This approach should apply equally to the question whether a given work product was disclosed with an expectation of confidentiality. Washington courts have held, as did the appellate court here, that disclosure of work product to a third party does not constitute waiver if there is little or no risk that the materials will fall in to the hands of the disclosing party’s adversary. *Kittitas Cty. v. Allphin*, 195 Wn. App. 355, 367, 381 P.3d 1202 (2016), *review granted in part*, 386 P.3d 1089 (2017);

² For purposes of its analysis in this amicus brief, the State accepts the trial court’s work product determinations. The State does not address any alleged factual disputes over the work product nature of the documents.

Limstrom v. Ladenburg, 110 Wn. App. 133, 145, 39 P.3d 351 (2002); *Mockovak v. King Cty.*, No. 74459-3-I, 2016 WL 7470087, at *10 (Wash. Ct. App. Div. I, Dec. 19, 2016) (unpublished) (“mere disclosure is insufficient if the party who allegedly waived the protection did not do so in a way that would disclose the documents to an adverse party”).³

Here, the emails between County attorneys and Ecology employees were written in anticipation of litigation by the County attorneys, they relate to the opinions, theories, and legal analysis of the County attorneys in that litigation, and they were disclosed with expectation of confidentiality. CP 788.

The view that disclosure to a third party does not constitute waiver if there is little or no risk that the materials will fall in to the hands of the disclosing party’s adversary is the preferred view in the federal courts.⁴ Lewis H. Orland, *Observations on the Work Product Rule*, 29 Gonz. L. Rev. 281, 295 (1993–94). Most federal cases confronting the issue have held that disclosure of a document to third persons should not waive the work product immunity unless it has substantially increased the

³ *Mockovak* is an unpublished opinion, cited pursuant to GR 14.1. It has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

⁴ The language of CR 26(b)(4), governing work product, is nearly identical to Fed. R. Civ. P. 26(b)(3). *Soter*, 162 Wn.2d at 739. Where a state rule is identical to its federal counterpart, analyses of the federal rule provide persuasive guidance as to the application of our comparable state rule. *Id.*

opportunities for potential adversaries to obtain the information. 8 Charles A. Wright et al., *Federal Practice & Procedure: Civil* § 2024 (3rd ed. Update 2016). The few federal cases to the contrary confuse the work product immunity with the attorney-client privilege. Wright, *supra* § 2024.

The purpose of the work product doctrine differs from that of the attorney-client privilege. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3rd Cir. 1991). The purpose of the work product doctrine requires courts to distinguish between disclosures to adversaries and disclosures to non-adversaries. *Westinghouse Elec.*, 951 F.2d at 1428. The attorney-client privilege promotes the attorney-client relationship, and, indirectly, the functioning of the legal system, by protecting the confidentiality of communications between clients and their attorneys. *Id.* In contrast, the work product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. *Id.* Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

The work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. *Am. Tel. & Tel.*, 642 F.2d at 1299 (citing *Hickman*, 329 U.S. at 510-11). The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. *Am. Tel. & Tel.*, 642 F.2d at 1299.

A disclosure to a third party will waive the attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009); *Westinghouse Elec.*, 951 F.2d at 1428. But because the work product doctrine serves instead to protect an attorney's work product from falling into the hands of an adversary, "disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege." *Am. Tel. & Tel.*, 642 F.2d at 1299. Thus, most courts hold that to waive the protection of the work product doctrine, the disclosure must enable an adversary to gain access to the information. *Westinghouse Elec.*, 951 F.2d at 1428; *In re Chevron Corp.*, 633 F.3d 153, 165 (3rd Cir. 2011); *In re Grand Jury Subpoena*, 220

F.3d 406, 409 (5th Cir. 2000); *United States v. Deloitte LLP*, 610 F.3d 129, 139–40 (D.C. Cir. 2010) (listing cases finding no waiver); *In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981).

D. A Party Who Assists a Government Agency in Investigation or Prosecution of Another Is Not an Adversary

With respect to the disclosure and development of work product, the government has the same entitlement as any other party to assistance from those with shared interests, whatever their motives. *Am. Tel. & Tel.*, 642 F.2d at 1300. A person who assists the government in investigating or prosecuting another is not an adversary, and the mere fact of disclosure of work product to such a person does not result in waiver of the privilege.⁵ *Id.* There is no reason why this protection should not equally cover written communications of work product between government agencies. In any such case, the nature of the interactions and assistance between the agencies, before and after litigation commences, is relevant to establishing whether there is an adversarial relationship.

⁵ Petitioners make much of the trial court’s use of the expression “legal team” to characterize the relationship between the County attorneys and the Ecology employees who assisted them in both the pre-litigation regulatory enforcement and in the litigation that followed. The trial court here appears to highlight the assistance that Ecology provided throughout this matter, in order to demonstrate that Ecology, far from being an adversary, was a committed partner and helpful confidante in both pre-litigation enforcement and preparation for litigation. This point does not rely on any equivalence with the relationship between attorney and investigator in *Soter*.

E. It Is Irrelevant That Ecology Employees Were Not Hired by County

Petitioners argue that *Soter v. Cowles Publishing Company* supports their contention that the County's attorneys waived their privilege when they disclosed work product to Ecology employees. Suppl. Br. of Pet'rs at 17. This argument is misguided, focusing on the irrelevant.

In *Soter*, attorneys hired an investigator to conduct client and witness interviews on behalf of their client, in anticipation of litigation. *Soter*, 162 Wn.2d at 725. The investigator made notes reflecting his thoughts on the interviews. The Court considered whether the work product privilege attached to these notes and held that it did, thus concluding that the notes were exempt from production under the Public Records Act. *Id.* at 744. Petitioners state that “[t]he critical distinction between *Soter* and the present case is that the school district hired the private investigator specifically for the purposes of preparing for the lawsuit,” whereas the County did not hire the Ecology employees. Suppl. Br. of Pet'rs at 17. But the distinction is not critical because it is not relevant. *Soter* addressed the question whether documents created by an investigator qualified as work product when they were created without the involvement of the attorneys, even if on their behalf. No analogous question is presented here. The emails at issue were direct correspondence

between County attorneys and Ecology employees about legal strategy in the case. Whether or not the Ecology employees were hired by the County when they acted in this consultative capacity has no relevance to the question of whether the County attorneys consulted with them on the basis of shared litigation interests and with a well-grounded expectation of confidentiality.

F. The Common Interest Doctrine Yields the Same Result

Application of the common interest doctrine to these facts yields the same result, excepting from waiver the work product disclosed in the 32 emails.⁶ The common interest doctrine is the rule that “when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group.” *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010). Work product immunity is not waived if the disclosure of the work product is made in the course of a joint effort, it is designed to further that effort, and the underlying privilege has not been waived outside of the common interest group. *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3rd Cir. 1986).

⁶ As shown above, there was no waiver of the work product privilege by sharing documents with others because of a continued expectation of confidentiality. Thus, the common interest doctrine, which operates as an exception to waiver, is not needed here. By contrast, the common interest doctrine would be needed if the case involved attorney-client privilege—to ensure exception to waiver of the attorney-client privilege because, given the purpose of that privilege, there is no assured protection when disclosing to non-adversaries.

The doctrine does not itself afford a privilege, but provides an exception to the rule that voluntary disclosure of privileged work product to a third party waives the privilege. *Avocent Redmond Corp. v. Rose Elec., Inc.*, 516 F. Supp. 2d 1199, 1202 (W.D. Wash. 2007). No written agreement is required, but the parties must intend and agree to work jointly with respect to the litigation. *Avocent Redmond*, 516 F. Supp. 2d at 1203; *see also In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). The common interest doctrine applies in the PRA context. *Sanders*, 169 Wn.2d at 854. The *Sanders* court held that certain documents were exempt from disclosure under the PRA as work product under the common interest doctrine, acknowledging that the Attorney General's Office had shared those documents with other agencies, including County agencies. *Id.* at 840, 853–54.

Here, Ecology had an interest in the County's success in defending against Petitioners' appeal of its enforcement order. The County's order was issued in January 2011, after two years of cooperative efforts between County and Ecology staff to bring Petitioners into compliance with state and local regulatory requirements. CP 1265. Although these two years of efforts make it clear that the regulatory aims of the agencies were aligned, they are distinct and of a different nature from the agencies' joint efforts in preparation for litigation, after the order was appealed. It is apparent from

disclosed emails that County attorneys and Ecology began working together to defend the County's order soon after Petitioners appealed it. CP 1715. By summer of 2011, the County attorneys had begun working with Ecology, exchanging legal opinions and strategy in preparation for the impending litigation, creating the work product emails here at issue. CP 1047, 1380. While correspondence between the agencies during the pre-litigation regulatory enforcement period may not have been protected, the 32 emails, exchanged in obvious agreement to further a shared litigation goal and with effort to maintain confidentiality *against opponents*, fall comfortably within the ambits of both the broader non-waiver principle and the narrower common interest doctrine. They should be accorded the privilege without waiver.

IV. CONCLUSION

For the foregoing reasons, the Court should conclude that the 32 emails did not lose their work product immunity when exchanged between County attorneys and Ecology employees, and are therefore exempt from

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disclosure under the PRA.

RESPECTFULLY SUBMITTED this 10th day of February 2017.

ROBERT W. FERGUSON
Attorney General



LEE OVERTON, WSBA No. 38055
Assistant Attorney General
Attorneys for Amicus Curiae
State of Washington
(360) 586-6770
Lee.Overton@atg.wa.gov