6-29-2007

Respondent's Opposition to Protective Order Preventing Discovery and in Support of Order Compelling Production of Documents 07-2-02323-2-32

THE HONORABLE PARIS K. KALLAS

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

NO. 07-2-02323-2 SEA

RESPONDENT'S OPPOSITION TO PROTECTIVE ORDER PREVENTING DISCOVERY AND IN SUPPORT OF ORDER COMPELLING PRODUCTION OF DOCUMENTS

I. INTRODUCTION

Petitioners have brought a Motion for Protective Order that would prevent the Respondent from receiving full and complete responses to Respondent's First Document Requests. Responses have been due since May 21, 2007. Petitioners have interposed general, boilerplate objections to all requests, provided no discovery in this case and, through their proposed Protective Order, would deprive Respondent of all discovery until their summary

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judgment motion is denied and grant Petitioners' the ability to refuse even to identify any documents their counsel believes are work product. Even if the Court denies summary judgment from the bench, on or after August 24, Respondent will have lost over half of the period allowed for discovery under the current pretrial schedule.

The Court should deny the requested Protective Order. First, the majority of the discovery requested relates directly to allegations and contentions made in the Petition. Second, requiring Petitioners to produce documents, segregated according to each specific document request in compliance with Civil Rule 34, will not disclose attorney mental impressions or work product. Third, as Respondent is entitled to know what, if any, documents support the contentions in the Petition and summary judgment motion, the Court should either order immediate, complete production of the requested discovery or should strike the current pretrial schedule and trial date. Through such an Order, the Court will restore to Respondent the discovery rights taken away by Petitioners' dilatory conduct.

II. RELIEF REQUESTED

Respondent requests an Order directing Petitioners to respond fully, completely and immediately to document requests numbers 1 through 21, 24, 25, 26, 27, 29 and 30. Respondent also requests the Court to order Petitioners to supply immediately a privileged document log that identifies the documents withheld as to author, date, distributees, subject matter and nature of privilege; documents withheld shall not include documents produced by, or obtained from, Respondent or any non-parties to this case. This Order should apply to future discovery responses as well.

If the Court does not order immediate production, the Court should order the current pretrial schedule and trial date stricken and order that a Rule 16 conference occur after the Court decides the pending summary judgment motion to set a new schedule and trial date.

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III. STATEMENT OF FACTS[1]

On April 20, 2007 Respondent served its first set of document requests on Petitioners. Nineteen of the thirty requests tracked contentions pleaded by Petitioners in this case. On May 4, 2007, Petitioners filed their pending summary judgment motion. On May 21, the deadline for responding to the discovery, Petitioners served objections to every request. First, they contended their discovery obligations were suspended until the summary judgment motion was decided. Other blanket objections were based upon attorney/client privilege and the work product doctrine and the "overly broad and burdensome" nature of the requests. Finally, Petitioners claimed that the only responsive documents they had were documents their legal counsel had obtained from the State through public disclosure requests and state-sponsored websites and a few documents from third parties. Petitioners apparently do not have documents of their own that support or relate to the allegations made in their Petition.

This Court continued Petitioners' summary judgment motion on May 31and set the hearing date for August 24. The Court also directed the parties to meet and confer to resolve the disputes over discovery. On June 12, counsel met for two hours. They conferred again by telephone on June 15. Petitioners adhered to their objections to all discovery. They continued to claim that all documents were obtained by legal counsel and, therefore, constitute work product. They maintain this position despite acknowledging the documents were not created by Petitioners and despite confirming that Petitioners will make use of the work product documents they now withhold as deposition or trial exhibits at some future point in time. They declined to provide a privilege log, claiming that identifying the documents would reveal "mental impressions" about which documents appeared important, or unimportant, to their case. They specifically resist production of documents pertaining to the adequacy or inadequacy of state funding for education on relevance grounds, even though additional State funding is at the heart of the remedy they seek in their Petition and Motion. Finally, they

[1] The facts recited here are taken from the Clark Declaration submitted with this brief.

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continue to assert that all the requests are overly broad and burdensome, though they offer no details as to what burdens are involved in their production of these documents.

In their May 21 objections to discovery, Petitioners committed to bring a prompt Motion for Protective Order about these discovery requests. They did not do so until June 25. As stated previously in opposition to the pending summary judgment motion, Respondent needs the opportunity to review all responsive documents to its outstanding requests before the Court hears oral argument on Petitioners' summary judgment motion. Otherwise, Respondent will be faced with defending this case without the opportunity to conduct meaningful discovery about the potential evidence Petitioners claim they have to prove their case, but are not obligated to provide or identify.

On the afternoon of June 27, Petitioners served supplemental responses to our documents requests. A review of the responses indicates that Petitioners are alleging that Respondent "agreed to revise" a number of requests, that Petitioners "assume" Respondent is waiting for other requested documents until after the Court decides the summary judgment motion and simply restates the objections made on May 21.

Suffice to say that Respondent did not agree to revise any of the document requests and did not agree to wait for the denial of the summary judgment motion. Its position, reflected in this opposition pleading, has always been made known to Petitioners. Nothing short of the Order proposed by Respondent (attached to this brief as Attachment A) will resolve the discovery disputes in compliance with the Civil Rules.

IV. STATEMENT OF ISSUES

1. Can Petitioners assert work product immunity for documents that relate to their contentions in this case, when those documents were neither generated by or on behalf of Petitioners nor prepared in anticipation of litigation?

2. Can Petitioners refuse to produce documents in compliance with CR 34, alleging that disclosure would reveal mental impressions of legal counsel, when the subject

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matter of those documents reveals nothing about counsel's strategy or thought process and when the documents will be identified and produced eventually to comply with CR 34 and with this Court's pre-trial disclosure schedule?

3. Can Petitioners refuse to provide documents related to the adequacy or inadequacy of current or anticipated state funding for education, when the sufficiency of funding for education is central to the liability and remedy claims asserted in the Petition?

4. Can Petitioners object to discovery as overly broad and burdensome when Petitioners provide no underlying facts to support those objections?

5. Should the Court order immediate production of the requested documents, and a privilege list from Petitioners or, alternatively, order the current pretrial schedule and trial date stricken, establishing a new schedule and trial date after the summary judgment motion is denied?

V. EVIDENCE RELIED ON

Respondent relies on the Declaration of William Clark, with attachments, and the pleadings and papers on file herein.

VI. LEGAL AUTHORITY

Respondent's initial document discovery requests are designed to uncover the bases for the contentions that the State does not amply provide for the education of its students and that the appropriate remedy for this constitutional violation is to enjoin the State to study the costs of that education and then fully fund them. The requested documents are not work product. Their discovery would not reveal counsel's mental impressions or strategies. They are relevant as that standard is defined in CR 26 and Petitioners have not provided the needed showing to sustain objections that the discovery is overly broad and burdensome. Finally, the documents will be produced eventually in this case because Petitioners need them to prove their case at trial. There is no "good cause' justifying their being withheld pending determination of Petitioners' summary judgment motion.

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A. Work Product Does Not Include Another Party's Documents Generated in the Ordinary Course.

The burden of proving the applicability of the work product doctrine is on Petitioners. *FDIC v. Wachovia Insurance Services,* 241 FRD 104, 106 (D. Conn. 2007).[2] CR 26(b)(4) defines work product as "documents and other tangible things" that were "prepared in anticipation of litigation or for trial". Moreover, the Rule further states that the protection from discovery applies when one party seeks production of documents prepared "by or for another party or by or for that other party's representative." The work product doctrine simply does not apply here because the documents being withheld were generated by Respondent or third parties and were clearly not generated with litigation in mind.

First, Petitioners concede that the documents being withheld were prepared by the State or by non-parties (other than retained experts). Petitioners are not "the holders of work product protection" for any materials they or their representatives obtained from others. *Harris v. Drake,* 116 Wn. App. 261, 278-79, 65 P.3d 350 (2003). Next, Petitioners cannot demonstrate that the documents were generated in anticipation of litigation; indeed, all appear to have been generated in the ordinary course of business.[3] *Heidebrink v. Moriwaki,* 104 Wn.2d 392, 396, 706 P.2d 212 (1985); *Soter v. Cowles Pub. Co.,* 131 Wn. App. 882, 894, 130 P.3d 840 (2006); *Berry v. USAA,* 98 Wn. App. 199, 989 P.2d 1172 (1999). Documents generated by non-parties for business reasons—even those created in confidence and intended to benefit Petitioners—cannot be withheld as work product. *In re Detention of Williams,* 147 Wn.2d 476, 494, 55 P.3d 597 (2002). The documents being withheld by Petitioners do not qualify for work product protection.

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[2] That burden applies to substantiating objections that the document requests are overly broad and burdensome: party resisting discovery "must allege facts which demonstrate the extent and nature of the burden imposed." *Mead Corp. v. Riverwood Natural Resources Corp.*, 145 FRD 512, 516 (D. Minn. 1992).

[3] A privilege log will further demonstrate this fact. Documents obtained through public disclosure requests or posted on websites are publicly available, so any alleged privilege or work product is waived.

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Similarly, Petitioners cannot show that disclosure would reveal counsel's mental impressions or strategies. "Not every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions or legal theories is protected." *In re San Juan Dupont Plaza Hotel Fire Litigation,*859 F.2d 1007, 1015 (1st Cir. 1988). Instead, disclosure must involve "a real, nonspeculative danger of revealing the lawyer's thoughts." *Id.* Furthermore, if the materials will be disclosed eventually—for example, as deposition exhibits or on a trial exhibit list—"the lawyer has no justifiable expectation that the mental impressions revealed by the materials will remain private" and the work product doctrine does not apply. *Id.* Finally, a privileged document log should be supplied because Petitioners must "present detailed facts which make clear that the specifically identified and described documents are protected." *Sedlacek v. Morgan Whitney Trading Group*, 795 F. Supp. 329, 332 (C.D. Cal. 1992).

The fact that an attorney, rather than a client, locates and selects documents, does not establish work product immunity. To the contrary, a number of courts have ordered identification and production of documents which counsel believes pertain to issues in a case. *See, e.g., FDIC, supra,* 241 FRD 104[4] (Work product protection does not apply to documents selected by counsel for use in preparing client for deposition); *Central Valley Chrysler Jeep v. Witherspoon,* 2006 WL 2600149 (CD Cal. 2006) (Request for documents "related to" claims in Amended Complaint does not implicate litigation strategy or other mental impressions protected under the work product doctrine); *Mead Corp. v. Riverwood Natural Resources Corp.,*145 FRD 512 (D. Minn. 1992) (Evidentiary material in attorney's files is discoverable; requests for documents on which defendant relied in filing Answer did not implicate work product as any insight into counsel's understanding of case outweighed by efficacious operation of judicial system); *Dranchak v. Akzo America, Inc.,* 144 FRD 343, 344 (ND Ill.

[4] As in this case, the FDIC court ordered production of documents because counsel did not create them, they were not created in anticipation of litigation, they were not generated with the intention to keep them private and the documents had not previously been produced in the case. All those facts are present here.

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1992) (Requiring plaintiff to disclose specific documents selected from defense files does not reveal any theory of plaintiff's case and does not involve work product). Documents obtained by counsel through participation in industry litigation support groups is not protected work product, either.[5] *Bohannon v. Honda Motor Co., Ltd.*, 127 FRD 536, 538-39 (D. Kansas 1989).

Civil Rule 34 itself disposes of the claim that production or identification of responsive documents involves work product. The rule mandates that documents be produced "as they are kept in the usual course of business or must be organized and labeled to correspond to the categories requested." 3A Karl B. Tegland, *Washington Practice: Rules Practice*, CR 34, at 742 (5th ed. 2006). *Accord*, *Dranchak, supra*, 144 FRD at 345-46 (Documents selected for production under CR 34 do not disclose any theory of a plaintiff's case; such disclosure akin to simply disclosing sources of knowledge or of relevant information in the case.)

Production in compliance with CR 34 is not met by referring Respondent to websites or offering to download databases that include many unresponsive items. The rules require Petitioners to produce responsive materials organized and labeled by discovery request or in the manner those responsive materials are organized in the usual course of business.

B. The Requested Documents Are Relevant Without Regard to the Pending Summary Judgment Motion.

Petitioners also resist production of documents to the extent they relate to the adequacy of the state's funding of education because such evidence is irrelevant to the question of the constitutionality of the state's efforts as framed by Petitioners' pending dispositive motion. Specifically, they contend that the adequacy of current and anticipated state funding for education will be relevant, if and only if the Court denies that motion.

[5] Petitioners improperly claim work product as to documents they obtain from such third-party litigation groups. *See* Petitioners (Proposed) Protective Order, ¶ 3.

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CR 26 provides that a party may obtain discovery of "any matter...relevant to the subject matter involved in the pending action." The requirement of relevance, for discovery purposes, is nominal. 3A Karl. B. Tegland, *Washington Practice: Rules Practice*, CR 26, at 576 (5th ed. 2006). *See also In re Williams, supra,* 147 Wn.2d at 494; *Central Valley Chrysler, supra,,* 2006 WL 2600149, *2. Whatever the reason alleged for withholding documents, Petitioners bear the burden of proving facts, not conclusory statements, that demonstrate the basis for their objection. *Mead Corp., supra,* 145 FRD at 515-16.

Far from demonstrating that education funding is irrelevant, Petitioners concede the relevance of evidence pertaining to the sufficiency of state funding for education. It permeates the allegations of the Petition. Moreover, the sole remedy requested by Petitioners (in their Petition and Motion for Summary Judgment) is a court order designed to compel the Legislature to determine and fully fund the costs of educating Washington's students. Finally, Petitioners' real objection to relevance relates to when, not if, the documents become relevant. Once the Court denies the pending summary judgment motion, Petitioners fully intend to pursue claims that the State has not fully funded education. They simply want to suspend respondent's ability to get otherwise proper discovery until late summer or early fall.

C. Petitioners Have Not Established the Nature and Extent of the Burden That Document Production Imposes on Them.

The sole support for their discovery objections are hearsay reports that two education cases in Nebraska and Missouri were expensive and complex. If established by these two documents, the burden elsewhere of litigating claims for additional education funding does not establish that Petitioners face the same problems here.

According to Petitioners, the only documents they have either came from the State (outside this litigation) or non-parties. The burden of "downloading" or copying all documents from State or other websites is a red herring. Respondent did not ask for that -

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only that Petitioners produce responsive documents from those sources. The above authority establishes that this is the way discovery is supposed to be provided.

The real "burden" Petitioners face is proving their broad and unsubstantiated allegations of constitutional violations. They want to skate by with a peremptory dispositive motion, claiming they can prove this case later if the Court makes them do so. That is hardly "good cause" entitling them to avoid having to prove their case now or risk dismissal.

D. Respondent Is Entitled to Discovery Now.

Given the concession that their objections will be abandoned if the Court denies their summary judgment motion, Respondent is placed in the untenable position of losing several months of the discovery period. Petitioners' summary judgment motion will not be heard until August 24, over 90 days after discovery responses were due. If the court does not rule from the bench, the delay will be even greater. As this is Respondent's first discovery effort, follow-up written discovery and depositions, fact and expert, will be compressed into the months left until the discovery cut-off of May12, 2008.

As the cases discussed above indicate, the objections raised by Petitioners cannot stand if they intend to pursue this discovery themselves and, indeed, will "waive' the objections by using documents in depositions and disclosing them as potential trial exhibits. Petitioners cannot have it both ways—stymieing legitimate discovery for as long as it takes the Court to deny their summary judgment motion and then opening up discovery thereafter. The Court should order full and complete production now or, alternatively, rule that the time for discovery that Respondent loses while the dispositive motion is pending will require

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automatic adjustment of the pre-trial schedule and trial date at a pretrial conference to be conducted after denial of Petitioners' summary judgment motion.

DATED this 29th day of June, 2007.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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☐ State Campus Delivery

☐ Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2007, at Seattle, Washington

Agnes Roche
AGNES ROCHE

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ATTACHMENT A

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KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

NO. 07-2-02323-2 SEA

ORDER DENYING PROTECTIVE ORDER, COMPELLING DISCOVERY AND STRIKING TRIAL DATE

THIS MATTER coming before the Court on Petitioners' Motion for Protective Order; the Court having reviewed the written submissions of the parties without oral argument, having reviewed the files herein and being otherwise fully advised, it is hereby ORDERED

1. Petitioners have failed to demonstrate good cause for issuance of a Protective Order prohibiting or limiting discovery propounded in Respondents' First Documents Requests of April 20, 2007 and, accordingly, their Motion is DENIED.

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2. Petitioners shall make full, complete and immediate production of all responsive documents to Request Nos. 1 through 21, 24, 25, 26, 27, 29 and 30, from whatever sources accessed by Petitioners or their counsel, and shall provide these responsive documents in strict compliance with CR 34.

3. Petitioners shall also immediately supply Respondents with a privilege document log that identifies each withheld document as to source, author, date, person(s) to whom distributed, general subject matter and nature of privilege.

4. This ORDER overruling Petitioners' work product objections to producing documents generated or obtained from sources other than the Petitioners herein, and requiring a privilege document log shall apply to future written discovery requests.

5. Following disposition of the pending summary judgment motion, the Court will convene a CR 16 conference with counsel to set a new pretrial schedule and trial date. The current trial date of June 30, 2008, is STRICKEN.

DONE IN OPEN COURT this _____ day of July, 2007.

PARIS K. KALLAS, JUDGE

Presented by:

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