

NO. 31404-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

JANE DOE, Appellant,

v.

PIERCE COUNTY, Respondent

BRIEF OF RESPONDENT PIERCE COUNTY

GERALD A. HORNE
Prosecuting Attorney

By
DANIEL R. HAMILTON
Deputy Prosecuting Attorney
Attorneys for Respondent
Pierce County

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-7746

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I. STATEMENT OF THE ISSUES

Was plaintiff's action under the Public Disclosure Act (hereinafter "PDA") properly dismissed under CR 56?

II. STATEMENT OF THE CASE

On April 16, 2002, Norma Rodriguez – an Equal Opportunity Officer with the Pierce County Personnel Department – wrote to her supervisor complaining of what she repeatedly characterized as a “hostile work environment” and her supervisor's “retaliation” against her. See CP 28, 34, 36-37. Because her memorandum described employment law causes of action against the head of the County's Personnel Department, see, e.g., Bierlein v. Byrne, 103 Wn.App. 865, 867, 14 P.3d 823 (2000) (dismissal of "hostile work environment" claim but remand on “retaliation” claim), and was drafted by one familiar with the legal significance of such allegations, the matter was forwarded to the Pierce County Prosecuting Attorney's Office. CP 28-29, 237. In anticipation of litigation, Deputy Prosecuting Attorney Denise Greer – whose responsibilities include employment law litigation on behalf of Pierce County – retained a human resources consultant, i.e. Ms.

Kristina Morris of “The Washington Firm, LTD.,” to conduct an investigation into these allegations. See id. The deputy prosecutor's retention letter to the Washington Firm and Ms. Morris not only expressly explained they were being retained “to assist [the prosecutor] by investigating” the Rodriguez complaint but also expressly identified that communication as “Attorney Work Product.” See CP 83.

As anticipated, on September 20, 2002, the County received notice that Ms. Rodriguez had filed a complaint with the Washington State Human Rights Commission. See CP 38. A month after filing her complaint, on October 23, 2002, Ms. Rodriguez wrote requesting that Deputy Prosecuting Attorney Greer provide her “the full investigative report submitted by Ms. Morris [of the Washington Firm, LTD.], copies of her investigative notes, and other related communications between department officials and Ms. Morris concerning this matter.” See Ex. CP 52. Three days later, on October 28, 2002, the deputy prosecutor responded and declined to do so on the authority of RCW 42.17.310(1) and Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993) (prosecu-

tor's files protected from public disclosure as work product). See CP 40. Six months later, on April 23, 2003, plaintiff simultaneously filed both an administrative claim for two million dollars against Pierce County, see CP 41, and the instant PDA action. See CP 5.

Because the documents plaintiff requested were both work product and protected by RCW 42.17.310(1)(d), the County moved to dismiss plaintiff's public disclosure action under CR 56. See CP 21. In response, plaintiff filed hearsay and argumentative declarations, newspaper articles regarding different parties to a different suit in a different county, and numerous other inadmissible attachments. See, e.g., CP 48-65, 95-228, 252-260. Though the County moved to strike these improper submissions, see CP 68-73; 241-249, that motion was denied. CP 262. However, the County's motion for summary judgment was granted -- though an order was not entered at that time because plaintiff objected that any summary judgment order should contain "findings." CP 262, RP 35-36. However, plaintiff neither submitted a proposed order nor appeared at the later hearing noted for presentment of the

County's proposed order. See CP 266. Accordingly, on January 9, 2004, the trial court entered an order dismissing plaintiff's claim. CP 267.

III. ARGUMENT

Plaintiff spends several pages of her brief describing the right to be "free from discrimination," and the "significance of employer investigations as evidence" that favors employers and refutes liability in such cases. See App.'s Br. pp. 5-8. Indeed, she later asserts that any privilege against disclosure "disappears in an employment discrimination context because the conduct of such investigations constitute the subject of the lawsuit" and that in discrimination suits the County must defend itself by the "claim that it conducted an investigation in compliance with its own County code" Id. pp. 11-12.

First, as a matter of law, a party in a civil suit can elect not to waive a privilege and thereby simply choose to forgo the use of the evidence in that action. See, e.g., Seattle Northwest Sec. Corp. v. SDG Holding Co., 61 Wn.App. 725, 744, 812 P. 2d 488 (1991) ("when a party is asserting the attorney-client privilege,

that party must make an election prior to any deadline for completion of discovery as to whether or not the privilege will be voluntarily waived at trial and, if the privilege is to be waived, provide to opposing counsel a statement of the subject matter of the testimony"). Second, no such "election" is at issue here because the "subject" of the instant action is not whether such evidence will be used in a discrimination suit but whether records can be compelled under the PDA.¹ See CP 5. Hence, as reflected by plaintiff's "Issues Pertaining to Assignments of Error," the only question at issue in the instant appeal is "[w]hether the trial court properly concluded that all of the requested public records were exempt from disclosure" under the PDA. See App.'s Br. p. 1.

As demonstrated below, plaintiff's stated issue on appeal is easily answered in the affirmative.

A. PLAINTIFF REQUESTED WORK PRODUCT

As noted by the Washington Supreme Court, "RCW 42.17.310(1) lists categories of records that are exempt from dis-

¹ Indeed, plaintiff represented to the trial court that she "is not pursuing litigation against Pierce County, except for the present lawsuit." See CP 46.

closure.” Dawson v. Daly, 120 Wn.2d 782, 789, 845 P.2d 995 (1993). Specifically, RCW 42.17.310(1)(j) exempts from public disclosure any record that “would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.” The Dawson court noted that this “exemption incorporates the work product doctrine as a ‘rule of pretrial discovery’” and “is triggered prior to the official initiation of litigation,” Id. at 790, where litigation is “reasonably anticipated.” Id. at 791. See also Limstrom v. Ladenburg, 136 Wn.2d 595, 609, 963 P.2d 869 (1998) (“Application of the civil rule, CR 26(b)(4), to requests for disclosure of documents held in a public attorney’s files is consistent with the legislative intent of the work product exemption.”)

On appeal, plaintiff initially argues that the trial court should have made a “finding” that the requested documents “would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.” App. Br. pp. 9-11. First, of course, no “finding” was entered because a summary judgment order is reviewed de novo and a trial court’s

"findings of fact and conclusions of law are superfluous . . ."

See, e.g., Washington Optometric Ass'n v. County of Pierce, 73 Wn.2d 445, 448, 438 P.2d 861 (1968). Second, documents "prepared in anticipation of litigation . . . by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)" expressly are not available to another party under the rules of pre-trial discovery. See CR 26(b)(3) (emphasis added); Dever v. Fowler, 63 Wn.App. 35, 47, 816 P.2d 1237 (1991) (prosecutor's files in separate action protected from discovery in civil suit).²

Oddly, plaintiff for some reason next asserts that "non-exempt records were sent to the investigator" by the prosecutor's office, App.Br. at 12, perhaps intending to argue she was at least entitled to production of those documents. However, plaintiff's PDA request never sought the underlying documents provided by the prosecutor to the consultant but specifically requested instead

² Plaintiff for some reason claims the County elected to waive the work product privilege in a separate unreported employment case. App. Br. p. 10. However, such an "election" for tactical reasons in a different unreported superior court employment case does nothing to show the report involved here is required to be produced "under the rules of pretrial discovery for causes pending in the superior courts." See RCW 42.17.310(1)(j).

“the full investigative report submitted by Ms. Morris [of the Washington Firm, LTD.], copies of her investigative notes, and other related communications between department officials and Ms. Morris concerning this matter.” See CP 52 (emphasis added). In any case, such underlying documents have always been available to plaintiff. See RP 34-35. In contrast, the listing by the prosecutor of those documents the County's attorney deemed important enough to provide the consultant is exactly the type of materials expressly protected by the work product doctrine. See CR 26(b)(3) (protecting "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney....").

Citing Barry v. USAA, 98 Wn.App. 199, 207-08, 989 P.2d 1172 (1999), plaintiff then argues without explanation that the consultant's assistance to the prosecutor was not prepared in anticipation of litigation because somehow it was instead "prepared in the regular course of business." App.Br. p. 13. In fact, Barry expressly holds that "[i]n determining whether particular materials were prepared in anticipation of litigation or in the regular course

of business, the trial court looks to the specific parties involved and the expectations of those parties." 98 Wn.App. at 208. Here, it is undisputed that the report was produced outside the ordinary course of the Personnel Department's business and for purposes of preparing for litigation by the Prosecutor's Office who retained an investigator with the express stated expectation the investigator would "assist [it] by investigating the above referenced matter" and that such was "work product." See CP 29, 81, 83; Overlake Fund v. City of Bellevue, 70 Wn.App. 789, 792-94, 855 P.2d 706 (1993) (report of consultant retained by municipal counsel and relied upon "to enable the City to evaluate its potential liability" was protected from public disclosure as "work product"). Having used employment law terminology in the document to which the prosecutor was responding, having filed a complaint with the Human Rights Commission before making her PDA request for that response, see CP 38, and having actually filed the prerequisite to a civil suit against the County contemporaneously with filing this PDA action, see CP 41, plaintiff cannot seriously dispute that the prosecutor's investigation into her written com-

plaint was in anticipation of litigation.

Finally on the issue of work product, plaintiff for some reason cites to the right to access one's own personnel file (i.e. RCW 49.12.240 & 49.12.250). App.Br. p. 13. However, nothing in the record indicates that a report concerning a complaint against someone else would be placed in the personnel records of the person making the complaint. Rather, the record is uncontested that the requested documents were neither produced by the Personnel Department nor a part of plaintiffs' personnel records. See CP 237-38.

B. PLAINTIFF REQUESTED EXEMPT DOCUMENTS

Though the trial court dismissed plaintiff's claim on the grounds that the requested material was protected as work product, the documents in question were also protected under RCW 42.17.310(1)(d). Such also supports the order of dismissal. See State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) ("judgment of the trial court" on appeal "can be sustained on any theory, although different from that indicated in the decision of the trial judge.") (quoting Sprague v. Sumitomo Forestry Co., 104

Wn.2d 751, 758, 709 P.2d 1200 (1985)); see also Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 480 (1976) (it is an "inveterate and certain" rule that an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.") (quoting United States v. American Railway Express Co., 265 U.S. 425, 435 (1924)); Sims v. Mulchahy, 902 F.2d 524, 545 (7th Cir. 1990), cert. denied, 498 U.S. 897 (1990) (when a prevailing defendant cross-appealed to raise an additional ground to affirm, the Seventh Circuit called the cross appeal "improper and unnecessary" because "[c]ross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary") (quoting Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987)).

Specifically, RCW 42.17.310(1)(d) provides a privilege against disclosing "intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibil-

ity to discipline members of any profession, the non-disclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy." Here, the record is undisputed that the report in question concerns specific allegations of misconduct against a particular county official and was produced as part of an investigation compiled by an investigative agency – i.e. the Prosecuting Attorney's Office. Further, as demonstrated below, the law is clear that the non-disclosure of this investigative report is essential for the protection of both various rights to privacy as well as the investigatory process itself.

Here, the report addresses plaintiff's complaints of unlawful employment practices that were ultimately found to be baseless after investigation. CP 40. In Cowles Publishing Co. v. State Patrol, the Washington Supreme Court noted that "[r]elease of files dealing . . . with complaints which were later dismissed, would constitute a more intrusive invasion of privacy than would the release of files relating only to a completed investigation which resulted in some sanction against the officers involved." 109 Wn.2d 712, 725, 748 P.2d 597, 604 (1988). Similarly, in City

of Tacoma v. Tacoma News, Inc., 65 Wn. App. 140, 146-151, 827 P.2d 1094 (1992), investigative reports were exempt from disclosure because the right to privacy is violated by, and the public has no legitimate interest in, disclosure of information that is unsubstantiated after reasonable efforts to investigate it.³

Indeed, the Cowles court's observations concerning police internal investigations are equally applicable in the context of a public agency's investigation of alleged unlawful employment practices because each "requires a workable reliable procedure for accepting and investigating complaints," ensures that public "officers do not abuse their authority or engage in unlawful activities" and upholds "the integrity of the . . . agency in the minds of the public and the officers." 109 Wn.2d at 729. Equally applicable are Cowles court's observations of the harm that would result if a governmental agency's internal investigations of misconduct are

³ Plaintiff mischaracterized Fincher v. State, 231 Ga. App. 49, 497 S.E.2d 632 (1998), a case from another jurisdiction, as holding that "no legitimate expectation of privacy attaches to misconduct investigation[s]." App.Br. p. 11. In fact, Fincher held that where no work product privilege was raised, it was proper to disclose a report that affirmatively found misconduct. Fincher, 231 Ga.App. at 53, 497 S.E.2d at 636. The report here affirmatively found no misconduct, see CP 40, and the courts in our jurisdiction hold that privacy expectations attach in such instances. See Cowles Publishing Co., supra; City of Tacoma, supra.

later disclosed:

If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future . . . efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants.

Id. at 732-733 (quoting Aspin v. Dep't of Defense, 491 F.2d 24, 30 (D.C. Cir. 1973)). Similarly, cooperation of officials "is available because they know the incident will be kept confidential" and if reports were to be disclosed many officials "would not report incidents of misconduct, or give statements which would discredit a fellow officer" and "even internal investigations officers would hesitate to uphold a complaint against an officer, knowing that se-

rious consequences could result from the adverse publicity." Id.
at 733. Accordingly, Cowles did not allow the disclosure of in-
ternal investigations linked to any identified official pursuant to
RCW 42.17.310(1)(d). Id. at 729. The same is true of the report
of the internal investigation here.

IV. CONCLUSION

For the above stated reasons, the dismissal is well sup-
ported by the record and law and therefore should be affirmed.

DATED: August 13th 2004.

GERALD A. HORNE
Prosecuting Attorney

By 

DANIEL R. HAMILTON

Deputy Prosecuting Attorney

Attorneys for Respondent

Pierce County

Ph: (253)798-7746/WSB #14658

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