

S223876

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

SUPREME COURT
FILED

ESTUARDO ARDON, ON BEHALF OF HIMSELF AND
OTHERS SIMILARLY SITUATED

FEB 17 2015

Plaintiff and Respondent,

Frank A. McGuire Clerk

v.

Deputy

CITY OF LOS ANGELES

Defendant and Petitioner

REPLY IN SUPPORT OF PETITION FOR REVIEW

Of a Decision of the Second Appellate District of the
Court of Appeal
Case No. B252476

Affirming a Judgment of the Superior Court of
the State of California for the County of Los Angeles, Lead Case No. BC363959
Honorable Lee Smalley Demon, Judge Presiding

[Related to Case Nos. BC406437; BC404694; BC363735; and BC447863]

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The Answer to Petition for Review (“Answer”), which inks just 359 words, does not dispute that the appellate court’s opinion (“Opinion”) is based on an erroneous conclusion that inadvertent disclosure in discovery is protected by statute:

Unlike litigation discovery, where inadvertent disclosure is expressly protected from waiver by statute (see Evid. Code, § 912; Code Civ. Proc., § 2031.285), any privileged document disclosed pursuant to the [PRA] is waived as to the world (Opinion at p. 181 [internal quotations omitted].)

As explained in the City’s Petition for Review (“Petition”), the Opinion’s reliance upon Evidence Code section 912 and Code of Civil Procedure section 2031.285 is error; no statutory protection exists for privileged documents inadvertently disclosed in discovery. This rule is judge-made, and the Answer’s silence on this issue does not vanquish the Elephant in the Room.

In fact, neither *Rico v. Mitsubishi Motors Corporation* (2007) 42 Cal.4th 807 [inadvertent disclosure under undetermined circumstances] nor *Clark v. Superior Court (VeriSign)* (2011) 196 Cal.App.4th 37 [disqualification of counsel provided privileged records of defendant employer by plaintiff employee] involved discovery, and the analysis in *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 did not address whether disclosure occurred during discovery (which in that case it did not), much less

limit its holding to those circumstances.¹ As noted in the Petition, the *Palsgraf* rule is not limited to train stations, and the distinction drawn in the Opinion between document production and responses to a Public Records Act (“PRA”) request has no bearing on whether the attorney-client and work product privileges are waived by inadvertent disclosure to opposing counsel. This is a distinction without a difference.

Nor does the 359-word Answer recognize that the Opinion sets new precedent that weakens the attorney-client and work product privileges. Instead, it dismisses this point with the unsupported conclusion that “[t]he City has not demonstrated that its Petition presents an unsettled and important question of law.” (Answer at p. 1.) However, Mr. Ardon hedges his bet on this issue by arguing that to the extent this is a case of first impression, *State Fund* rejected the sanction of disqualification where the law is unsettled. (Answer at. pp. 1-2.) While disqualification may be contested on those grounds if the Opinion is ultimately overturned, that observation does nothing to dispel the fact that the Opinion sets new precedent undermining vital privileges, based on an erroneous conclusion that inadvertent disclosure in discovery is protected by

¹ The inadvertent disclosure in *State Fund* occurred approximately four months after the discovery cutoff date. (*State Fund, supra*, 70 Cal.App.4th at 648.)

statute, when it indisputably is not.

Nor does the Answer — or the Opinion — address the practical impact on public agencies throughout the state that rely on clerical employees to respond to PRA requests, the vast majority of which can be handled with a simple keyword search. If the unprecedented conclusion that those employees can inadvertently waive attorney-client and work product privileges (held by the City Council and the City's attorneys, respectively) is allowed to stand, public agencies must either risk their privileges or treat PRA requests even more defensively than discovery requests, which involve expensive legal services but not a waiver of privilege when documents are inadvertently disclosed.

Nor does the Answer — or the Opinion — even attempt to explain how a clerical employee could waive the work product privilege, which is held by the City's attorneys and not subject to waiver even by the City Council. Here, opposing counsel did not notify the City's attorneys of her PRA request, and it cannot be disputed that the attorneys whose work product was in issue had no opportunity to waive privilege and could not have done so.

Instead, the Answer points to “published guidelines” of the Counties of Ventura and San Diego stating that inadvertent or mistaken disclosure of materials subject to an exemption under the PRA results in waiver. These guidelines, of course, do not amount to published appellate authority, or any other form of legal authority.

Moreover, the statements made in the materials attached as Exhibit B to the Answer pertain only to general exemptions under the PRA, rather than the attorney-client and work product privileges, which are subject to the *State Fund* rule.

Finally the Answer's — and the Opinion's — reliance upon *Masonite v. County of Mendocino Air Quality Management District* (1996) 42 Cal.App.4th 436 is misplaced, because that case involved an inadvertent disclosure of trade secrets, which are not subject to the same protection as the attorney-client and work product privileges. (*Wallis v. PHL Associates* (2008) 168 Cal.App.4th 882, 889 [citing *State Fund* for the proposition that “[i]nadvertent disclosure of a trade secret is unlike inadvertent disclosure of information subject to the attorney-client privilege, which requires counsel who receives the inadvertent disclosure to protect the privileged information.”].) Simply put, the case at bar does not involve trade secrets, *Masonite* is not on point, and the Opinion's reliance on that case is error.

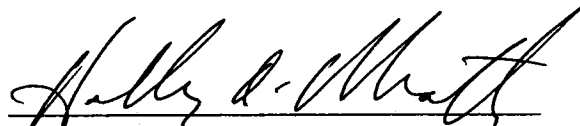
For all of these reasons, the Answer – barely exceeding one page – does not even attempt to address the points raised in the Petition, which merit more serious consideration. In short, the Opinion sets new precedent that dilutes fundamental privileges for thousands of public agencies throughout the state, on the basis of an indisputably erroneous statutory analysis.

This Court should grant review.

DATED: February 13, 2015

Respectfully submitted,

COLANTUONO, HIGHSMITH &
WHATLEY, PC

A handwritten signature in cursive script, appearing to read "Holly O. Whatley", written over a horizontal line.

MICHAEL G. COLANTUONO

HOLLY O. WHATLEY

AMY C. SPARROW

Attorneys for Petitioner and
Defendant City of Los Angeles

CERTIFICATION OF COMPLIANCE

WITH CAL. R. CT. 8.504(d)

Pursuant to California Rules of Court, Rule 8.504(d), the foregoing **Reply in Support of Petition for Review** contains 1,325 words (including footnotes, but excluding the tables and this Certificate) and is within the 4,200 word limit set by Rule 8.504, subd. (d), California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on February 13, 2015 at Los Angeles,
California.

COLANTUONO, HIGHSMITH &
WHATLEY, PC


Holly O. Whatley

CERTIFICATE OF SERVICE

I, Martha C. Rodriguez, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on February 13, 2015, declarant served the **REPLY IN SUPPORT OF PETITION FOR REVIEW** via U.S. Mail in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February, 2015, at Los Angeles, California.

COLANTUONO, HIGHSMITH &
WHATLEY, PC

By: 
Martha C. Rodriguez

SERVICE LIST

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 Court of Appeal Case No. B252476, Trial Court Lead Case No. BC363959
 [Related to Case Nos. BC406437; BC404694; BC363735; and BC447863]

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