In re Detention of West (Gale)

No. 82568-8

MADSEN, C.J. (concurring)—I agree with the result reached by the majority. However, I write separately because I continue to believe, as I explained in my concurrence in *In re Firestorm 1991*, 129 Wn.2d 130, 153, 916 P.2d 411 (1996) (Madsen, J., dissenting), that when CR 26(b)(4) states that its provisions are "[s]ubject to the provisions" of CR 26(b)(5), it means that insofar as provisions in CR 26(b)(5) are different from those in CR 26(b)(4), CR 26(b)(5) controls. It does not mean that if CR 26(b)(5) applies to discovery sought from an expert, then CR 26(b)(4) cannot apply at all. Instead, by its plain language and the purposes of the two subsections, when discovery is sought from experts the work product rule of CR 26(b)(4) is not thereby rendered wholly irrelevant and inapplicable. Rather, a party's expert might possess information that may and should be protected by the work product doctrine and CR 26(b)(4)'s requirement of a showing of "substantial need."

Although I concur with the result in this case, we should not be surprised when we are presented with a case where, following the majority's interpretation of CR 26, we are led to an anomalous and unfortunate result.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: