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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON

DAVID SITTERSON,

Appellant,

v.

EVERGREEN SCHOOL DISTRICT NO. 114,

Respondent.

REPLY AND OPPOSITION BRIEF OF
APPELLANT/CROSS-RESPONDENT

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I. Preliminary Statement

On its cross-appeal, the Evergreen School District No. 114 (the "District") assigns error to the trial court's evidentiary ruling admitting four letters between the District and its counsel. The District argues that this Court should adopt a strict and inflexible rule that the inadvertent disclosure of attorney-client communications should never waive the privilege, regardless of the facts and circumstances surrounding the disclosure. But the "no waiver" approach has serious disadvantages, is the minority view, is not consistent with Washington's jurisprudence regarding waiver of privileges, runs counter to impending amendments to the Federal Rules of Evidence, and would render new provisions of Washington's Rules of Professional Conduct meaningless. For the reasons stated herein, this Court should adopt the "middle test" or "balanced approach," which is the majority view, is consistent with Washington's jurisprudence, is in line with the impending amendments to the Federal Rules of Evidence, and gives meaning to new provisions of the Rules of Professional Conduct.

In the alternative, the District argues that the privilege was not waived, even under the "balanced approach." But when it comes to evidentiary rulings by the trial court, the proper standard of review is for an abuse of discretion, and the trial court was well within its discretion in admitting the documents into evidence. The trial court properly applied the relevant factors, and the District cannot show any clear error. Thus, under the proper application of the "balanced approach," the privilege had been waived.

Finally, in its response to Mr. Sitterson's appeal, the District argues that the trial court could not have awarded prejudgment interest on a portion of the general verdict because doing so would have required the trial court to speculate as to the basis of the jury's verdict. But where the verdict exceeds the liquidated damages sought, the trial court should be allowed to draw the reasonable inference that the verdict includes the liquidated amount. Thus, the trial court could have, and should have, awarded prejudgment interest on the liquidated sum of \$111,250.

II. Statement of the Case Regarding the Privileged Documents

Mr. Sitterson filed his complaint in August 2003.¹ One month later, Mr. Sitterson propounded document requests on the District.² The following month, in October 2003, the District responded to these requests by producing several inches of documents totaling 439 pages.³ The District's production included at least five documents containing attorney-client communications regarding Mr. Sitterson's claims.⁴ The clearly privileged documents were comprised of three letters from counsel to the District, one letter from the District to counsel, and one memorandum recounting a conversation between the District Superintendent and counsel.⁵ Of these five documents, the District appeals from the admission of the four letters between the District and its counsel, Exhibits 55, 59, 62, and 64.

For more than three years after the documents were produced, the District did nothing to recover the documents. In fact, the first

¹ Clerk's Papers ("CP") 5-32.

² CP 253:19-20.

³ CP 253:21-24.

⁴ CP 242:15-18.

⁵ Exhibits ("Ex.") 55, 58, 59, 62, and 64.

time the District raised the issue with the trial court was the morning of trial, after the jury had already been selected.⁶ When the trial court asked how the documents came into Mr. Sitterson's possession, the District's counsel responded that they were produced in response to a request for production of documents. Even at that late date, the District did not initially claim that the disclosure had been inadvertent. To the contrary, the District's counsel indicated that the production of these documents was on purpose:

I suspect that we—we provided them to Mr. Turner in the discovery because, you know, you have—you're supposed to provide everything that may lead to admissible evidence. But just because you provide it doesn't mean that it is admissible evidence.⁷

But later in the same hearing, counsel for the District did admit he did not take adequate precautions to prevent the disclosure.

THE COURT: Mr. Wolfe, let me point—give you a couple of points that I'm interested in with you. Number one, what role did you have in the release of these documents? I mean, did they not go through you—

⁶ CP 243:18-19.

⁷ Report of Proceedings (“RP”) 1048:4-9.

MR. WOLFE: They did. And I just didn't—I guess I wasn't thorough enough.⁸

During the same hearing, the trial court also asked the District's counsel to address the issue of prejudice should the documents be admitted. Rather than make any showing of substantial prejudice, counsel for the District downplayed the potential prejudice to the District: "... I didn't think there was a smoking gun in the letters anyway, so I wasn't—if you ruled against me, I wasn't particularly concerned."⁹

After oral argument, the trial court made a provisional ruling that the documents would not be excluded. The trial court explained some of the reasons for its ruling: "Number one, these documents should have been caught by due diligence by opposing counsel back when. They were not."¹⁰ Because Mr. Sitterson had built his presentation to the jury around the privileged documents, the trial court also found that Mr. Sitterson would be prejudiced by taking these documents away from him just moments before his opening statement to the jury. "It's coming to me the day of trial. It just—I

⁸ RP 1064:25-1065:6.

⁹ RP 1065:25-1066:3.

¹⁰ RP 1070:23-25.

think I—I just can't do that to the preparation for a case.”¹¹ Before the case was submitted to the jury, the District renewed its objection to these exhibits. The trial court overruled the District’s objection and admitted the four letters into evidence.

III. Legal Authority and Analysis re Waiver of Privilege

A. Washington Should Adopt the "Balanced Approach" to Waiver by Inadvertent Disclosure

Washington’s appellate courts have not yet addressed the issue presented by the District's cross-appeal: whether the inadvertent disclosure of attorney-client communications can waive the privilege. Washington’s privilege rules, however, are patterned after the federal rules, and thus this Court "may look to decisions and analysis of the federal rule for guidance."¹² The federal court decisions that have directly addressed this issue fall into three camps.

¹¹ RP 1071:1-3.

¹² *American Disc. Corp. v. Saratoga West*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972).

1. The “Absolute Waiver” Approach

On one end of the spectrum lie those federal court decisions holding that the privilege is always waived whenever an attorney-client communication is disclosed to the other side, regardless of the circumstances. Wigmore described the absolute waiver view as the traditional approach. “Under the traditional approach an inadvertent disclosure automatically waived the privilege.”¹³

This approach is not the majority view, but it does have its proponents. For example, one of the leading decisions adopting the absolute waiver approach is *International Digital Systems Corp. v. Digital Equipment Corporation*.¹⁴ In that case, out of 500,000 documents reviewed, 20 privileged documents were inadvertently produced to the other side.¹⁵ The court held that—regardless of whether the client intended to waive the privilege and regardless of the precautions taken by counsel—any disclosure to the other side waives the attorney-client privilege. “When confidentiality is lost through ‘inadvertent’ disclosure, the Court should not look at the

¹³ 8 John Henry Wigmore, *Evidence* § 2325 at 633 (McNaughton rev. 1961).

¹⁴ 120 F.R.D. 445 (D. Mass. 1988).

¹⁵ *Id.* at 446 and 448.

intention of the disclosing party. It follows that the Court should not examine the adequacy of the precautions taken to avoid ‘inadvertent’ disclosure either.”¹⁶ The court reasoned that the absolute waiver rule would actually advance the privilege by increasing counsel's vigilance against inadvertent disclosures: “a strict rule ... would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure.”¹⁷

The *International* court relied on several prior cases that adopted the same view. One of those cases, *Underwater Storage, Inc. v. United States Rubber Co.*,¹⁸ further explained the absolute waiver approach. First, this approach does not look to the intent of the parties. “The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the [privileged] letter examined.”¹⁹ Second, this approach charges the client with the inadvertence of counsel. “Nor will the Court hold that the inadvertence of counsel is not chargeable to his client.”²⁰

¹⁶ *Id.* at 449-50 (citation omitted).

¹⁷ *Id.* at 450.

¹⁸ 314 F. Supp. 546 (D. D. Columbia 1970).

¹⁹ *Id.* at 549.

²⁰ *Ibid.*

Third, this approach is consistent with the basis of the privilege, which extends only so far as the communication is kept confidential. “Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.”²¹

The absolute waiver approach has several advantages: it is simple to apply, would lead to consistent results, and would put an end to *ad hoc* litigation regarding whether an inadvertent disclosure waived the privilege. Moreover, the strict waiver approach would send a strong message to counsel to take all precautions necessary to protect the confidentiality of attorney-client communications. In this sense, this approach can be said to best promote the confidentiality of such communications.

But the absolute waiver approach has obvious disadvantages, too. First, it could lead to unduly harsh results that are not warranted by the relative benefits and harms to each side. Second, it could impose an enormous financial burden on parties to litigation because

²¹ *Ibid.*

counsel would have to implement precautions that could never, ever fail.

Because the substantial disadvantages seem to outweigh the advantages of the absolute waiver approach, Mr. Sitterson did not ask the trial court to adopt this approach, and he does not urge this Court, either, to adopt this approach.

2. The “No Waiver” Approach

At the other end of the spectrum lie cases adopting what can be called the “no waiver” approach. The District urges this Court to adopt the “no waiver” approach because—under this approach—no matter how many attorney-client communications counsel inadvertently discloses, the privilege would never be waived.

This view is clearly the minority view, but it also has some proponents. One of the leading cases advancing this view is *Mendenhall v. Barber-Greene Co.*²² Counsel in *Mendenhall*—like counsel for the District—simply produced the client’s files without determining first whether they contained attorney-client

²² 531 F. Supp. 951 (N.D. Ill. 1982).

communications.²³ Despite the negligent conduct of counsel, the court held that the privilege was not waived. “[I]f we are serious about the attorney-client privilege and its relation to the *client’s* welfare, we should require more than such negligence by *counsel* before the client can be deemed to have given up the privilege.”²⁴

The no waiver approach shares the same main advantage as the absolute waiver approach: it is extremely simple to apply, it is predictable, and it would end *ad hoc* litigation regarding whether an inadvertent disclosure waived the attorney-client privilege. Its proponents also argue that it promotes the attorney-client communication privilege by requiring express consent of the client to waive the privilege.

But, as its detractors have noted, the “no waiver” approach could actually lead to the deterioration of the attorney-client communication privilege. Such an approach could encourage sloppy conduct by counsel in responding to document requests, even when the cost of reviewing the documents to cull privileged matter would

²³ *Id.* at 952 & n.2 (emphasis supplied).

²⁴ *Id.* at 955 (citation omitted).

be modest. Moreover, a “no waiver” rule could also lead some counsel to engage in “gamesmanship” by disclosing privileged documents, claiming the disclosure was inadvertent, and then arguing that the opposing party has made improper use of the privileged matter in the litigation, or even that opposing counsel must be disqualified.

Despite the disadvantages, the District urges this Court to adopt the “no waiver” approach. For support, the District points to several Washington decisions. But the cases cited by the District provide nothing more than general pronouncements about the importance of the attorney-client communication privilege—which all courts have recognized—and the District ignores more recent expressions by Washington's courts regarding waivers of privilege.

For example, the District quotes extensively from the opinion in *State v. Marshall*.²⁵ It is true that this opinion expresses eloquently the important reasons for recognizing the attorney-client communication privilege. But this case did not address the issue of waiver by inadvertent disclosure. Instead, the appellate court

²⁵ 83 Wn. App. 741, 923 P.2d 709 (1996).

reversed the trial court's holding criminal defense counsel in contempt for refusing to testify about communications with a former client.

The District cites *Marshall* for the proposition that Washington holds the attorney-client privilege sacrosanct. But the District's assertion runs counter to the much narrower view of the privilege expressed by our Supreme Court. The Supreme Court's view is that the attorney-client privilege is in derogation of the search for truth and is, therefore, limited strictly to serve its intended purpose. "Because the privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists."²⁶

In further support of the "no waiver" approach, the District cites *State v. Sullivan*²⁷ for the proposition that a waiver by an attorney can never bind the client. But that case merely held that it

²⁶ *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990) (citations omitted).

²⁷ 60 Wn.2d 214, 373 P.2d 474 (1962).

was prejudicial error, in a prosecution for first-degree murder, to compel defense counsel to testify in a way that would reveal client confidences. Contrary to the District's assertion, there is no blanket rule in Washington prohibiting an attorney's conduct from waiving a client's privilege. As the Supreme Court stated ten years ago, "when the attorney is authorized to speak and act for the client on particular matters, *disclosures by the attorney ... waive the privilege to the same extent as disclosures by the client.*"²⁸

Finally, the District argues that all evidentiary waivers should be "knowing and voluntary" and that Washington courts have required evidentiary waivers to be "distinct and unequivocal."²⁹ But the Washington case cited by the District for this proposition, *Packard v. Coberly*,³⁰ dealt with the patient-physician privilege, not the attorney-client communication privilege. In addition, the statement quoted by the District is mere *dicta*. And the Supreme Court's *dicta* from 80 years ago does not reflect more modern developments in this area. For example, two years ago the appellate

²⁸ *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997) (citations and internal quotations omitted) (emphasis added).

²⁹ Brief of Respondent, p. 17.

³⁰ 147 Wn. 345, 265 P. 1082 (1928).

court observed that “[d]ocuments released to a civil litigation adversary *may lose their privileged status.*”³¹

In sum, while it is true that Washington recognizes the importance of the attorney-client communication privilege, there is nothing in Washington’s jurisprudence compelling this Court to adopt the “no waiver” approach. To the contrary, Washington’s courts have made numerous statements indicating that it should not. Moreover, as shown below, there is a third approach—the “balanced approach”—that is more consistent with Washington’s jurisprudence, with Washington’s Rules of Professional Responsibility, and with the likely amendment to the Federal Rules of Evidence.

3. The "Balanced" Approach

In the middle of the spectrum lie the majority of the courts that have adopted a “balanced” approach—or “middle test”—to waiver by inadvertent disclosure. Under this “modern” approach, “consideration is given to all of the circumstances surrounding the

³¹ *Soter v. Cowles Publ’g Co.*, 131 Wn. App. 882, 130 P.3d 840 (2006) (emphasis added) (citations omitted).

disclosure.”³² One of the leading cases applying this approach,

Alldread, listed the main factors that the trial court should consider:

- (1) The reasonableness of precautions taken to prevent disclosure;
- (2) the amount of time taken to remedy the error;
- (3) the scope of discovery;
- (4) the extent of the disclosure; and
- (5) the overriding issue of fairness.³³

The *Alldread* court also explained the benefits of this balancing approach: “This analysis serves the purpose of the attorney client privilege, the protections which the client fully intended would remain confidential, yet at the same time will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances surround the disclosure do not clearly demonstrate that continued protection is warranted.”³⁴

Other courts have compared the advantages and disadvantages of the three approaches and adopted the balanced approach. For example, in *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, the court observed that “each of the two rigid alternatives fail to

³² *Alldread v. City of Grenada*, 988 F.2d 1425, 1433 (5th Cir. 1993).

³³ *Ibid.*

³⁴ *Id.* at 1434.

take highly relevant issues into account.”³⁵ As the *Amgen* court noted, “[t]he ‘never waived’ approach, for example, creates little incentive for attorneys to guard privileged material closely and fails fully to recognize that even an inadvertent disclosure undermines the confidentiality which undergirds the privileges.”³⁶ The *Amgen* court also criticized the rigidity of the absolute waiver approach: it “diminishes the attorney-client relationship because, in rendering all inadvertent disclosures—no matter how slight or justifiable—waivers of the privileges, the rule further undermines the confidentiality of communications.”³⁷ Thus, the *Amgen* court promoted the “middle test” as “[p]roviding a measure of flexibility” that “best incorporates each of these concerns and accounts for errors that inevitably occur in modern, document-intensive litigation.”³⁸

At least one Washington Supreme Court Justice—in the context of an inadvertent disclosure of attorney work product—has indicated that Washington’s courts should adopt the balanced

³⁵ 190 F.R.D. 287, 292 (D. Mass. 2000).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

approach. In *Harris v. Drake*, Chief Justice Alexander noted that “there are no Washington cases discussing the inadvertent disclosure of work product protected materials.”³⁹ Due to the lack of Washington state precedent, Chief Justice Alexander recommended looking to the federal courts for guidance. “In the absence of state precedent, we look to the federal courts interpretation of similar rules of civil procedure.”⁴⁰ The “balanced approach” was then cited as the majority view. “The majority of the federal courts apply a flexible test to determine whether the work product privilege is waived when documents are inadvertently disclosed.”⁴¹ Chief Justice Alexander listed and applied the relevant factors.

Under this flexible test, courts are called on to balance four relevant factors: (1) the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure at issue; (3) the length of time taken by the producing party to rectify the disclosure; and (4) the overarching issue of fairness.⁴²

³⁹ 152 Wn.2d 480, 495, 99 P.3d 872 (2004) (Dissenting Opinion).

⁴⁰ *Ibid.* (citation omitted).

⁴¹ *Ibid.* (citation omitted).

⁴² *Id.* at 495-96 (citation omitted).

Chief Justice Alexander applied these factors and concluded that the privilege had been waived. As to the precautions taken, he wrote: "[I]t is apparent that USAA took no precautions to assure that Drake or others would not receive the examination; indeed, USAA turned it over to its adversary, Harris."⁴³ As to the time between the disclosure and the attempt to claw back the documents, he observed: "Moreover, USAA failed to take any action to rectify the disclosure until over two years after it occurred and even then the court had to inquire as to USAA's position."⁴⁴ As to the factor of fairness, "fairness weighs heavily toward waiver, considering Drake gave notice of her intent to use the examinations, and USAA failed to act until the day of trial."⁴⁵ "Based on these factors," Chief Justice Alexander concluded "that USAA waived any work product privilege as to Drake."⁴⁶

Under the same analysis, it is clear that the District has also waived the privilege. The District may seek solace in the fact that the Chief Justice was writing in dissent, but the majority opinion

⁴³ *Id.* at 497.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

does not support the "no waiver" approach, either. In *Harris*, the majority never addressed the issue of waiver by inadvertent disclosure. Because it never reached the issue, the *Harris* case does not reveal what the other Justices would do in a case where a party claimed the privilege had been waived by an inadvertent disclosure.

Adoption of anything other than the balanced test would put Washington's courts out of step with the majority of the federal courts and with anticipated amendments to the Federal Rules of Evidence. On February 27, 2008, the Senate passed Senate Bill S. 2450, adding new Evidence Rule 502 to the Federal Rules of Evidence.⁴⁷ The new rule adopts the balanced test by providing, in pertinent part:

(b) INADVERTENT DISCLOSURE.—

When made in a

Federal proceeding or to a Federal office
or agency, the

disclosure does not operate as a waiver
in a Federal or

State proceeding if:

(1) the disclosure is inadvertent;

⁴⁷ Senate Report No. 110-264.

(2) the holder of the privilege or protection

took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps

to rectify the error, including (if applicable) following

Federal Rule of Civil Procedure 26(b)(5)(B).

This new rule was approved and recommended to Congress by the U.S. Judicial Conference's Committee on Rules of Practice and Procedure. The Committee Note stated that it was an attempt to adopt the balanced test, which was the majority view of the federal courts.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.⁴⁸

⁴⁸ Memorandum from Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, at 7 (May 15, 2006).

Not adopting the balanced approach would also put Washington's courts out of step with the Washington State Bar's recent amendment of the Rules of Professional Conduct. In September 2006, the Bar added a new rule, RPC 4.4(b). Under this rule, an attorney who knows or believes he or she has inadvertently received a privileged communication has a duty to advise the other side promptly of the disclosure. "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."⁴⁹

This new rule makes sense only if the courts adopt the balanced approach. If the privilege is either never waived or always waived, then there would be no reason to require counsel to notify the other side "promptly" of an inadvertent disclosure. The new rule seems geared to allowing the disclosing attorney to take prompt measures to claw back the privileged material. As Comment 2 to the rule plainly states: "If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires

⁴⁹ The subject documents were received by counsel for Mr. Sitterson in October 2003, three years before this new rule was adopted.

the lawyer to promptly notify the sender *in order to permit that person to take protective measures.*”⁵⁰

In conclusion, the Court should not adopt the absolute waiver approach or the no waiver approach. Instead, this Court should adopt the balanced approach. This flexible and moderate approach best serves the interests of the parties to litigation, gives due consideration to the importance of the attorney-client privilege, has already been adopted by the majority of the federal court cases, will soon be made part of the Federal Rules of Evidence, and is consistent with the ethical duties imposed on counsel by Washington’s Rules of Professional Conduct.

B. Under the Balanced Approach, the Privilege was Waived

1. The Proper Standard of Review is Abuse of Discretion

Mr. Sitterson agrees with the District that the trial court's *adoption* of the balanced approach is subject to *de novo* review; this is a purely legal question of first impression. But if this Court agrees with the trial court and also adopts the balanced approach, then the

⁵⁰ RPC Rule 4.4, Comment 2 (emphasis added).

trial court's *application* of the balanced approach should be reviewed only for an abuse of discretion.

As the District candidly concedes in its opening brief, “A trial court ruling on the admissibility of evidence is generally reviewed on an abuse of discretion standard.”⁵¹ This is the proper standard of review because the trial court is in a much better position to evaluate the factors that need to be weighed under the balanced approach, and because the Court of Appeals would not want to micro-manage the trial courts by second-guessing evidentiary rulings made in the heat of trial. Thus, this Court should only reverse the trial court's admission of these exhibits if it finds that doing so was an abuse of the trial court's discretion.

2. The Trial Court Did Not Abuse Its Discretion in Applying the Factors

Under any reasonable application of the balanced approach, the trial court did not err in ruling that the District could not claw back the privileged documents on the morning of the trial, after the

⁵¹ Brief of Respondent/Cross-Appellant, p. 12 (citing *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990)).

District had produced the documents in discovery more than three years earlier.

a. The District Failed to Take Reasonable Precautions

To recover the privileged documents, the burden is on the disclosing party to prove that the disclosure was inadvertent and to prove that the party took reasonable precautions to prevent the inadvertent disclosure. The District proved neither to the trial court. The District initially suggested that the documents were willingly produced because the District believed they were responsive to the discovery requests. The District then reversed course and argued that the disclosure was inadvertent. But even if the disclosure was inadvertent, the District utterly failed to show that it took any precautions to prevent the inadvertent disclosure. In fact, the record does not show that counsel had even reviewed the documents before they were produced to Mr. Sitterson. Thus, this factor clearly militates in favor of waiver.

b. The District Did Not Act Promptly to Recover the Documents

More than three years elapsed between the time the

documents were produced, in October 2003, and the time the District sought to pull them back, in January 2007. The trial court found that this was too long to wait. Not surprisingly, the District would rather start its clock ticking ten days before trial, when the District received Mr. Sitterson's proposed trial exhibits. But the District must be held responsible for knowing what documents it produced, especially when the entire production was a fairly modest 439 pages. This is not a situation where tens of thousands of documents were produced and the privileged documents were a "needle in the haystack." The entire production was several inches thick, and it would have taken less than an hour to review the documents that were produced. The District had more than three years to figure out that its document production included numerous documents that were clearly attorney-client communications. Three years is far beyond any range of promptness.

c. The Scope of the Discovery was Narrow

As noted above, the entire document production was several inches thick. The requests simply sought the District's files relating to Mr. Sitterson's contract with the District. This was not sweeping

discovery that was difficult to respond to, and the District was able to provide its response within the normal thirty day period. The District did not contend, nor has it shown, that the scope of the discovery was so broad that the disclosure was excusable on that basis.

d. The Documents Disclosed Were Clearly Privileged

All four of the exhibits in question are clearly recognizable as attorney-client communications. Three exhibits are letters written by counsel to the client (Exhibits 55, 59, and 64), and two of those are on counsel's letterhead. The remaining letter is on District letterhead addressed directly to counsel (Exhibit 62). They all discussed Mr. Sitterson's claims and his pending litigation against the District. Thus, it was not a "close call" whether these documents were privileged.

On this appeal, the District argues that the documents should have been excluded because the extent of the disclosure was "minimal." The District does not elaborate on this characterization, but it is not supported by the record. Numerous privileged

documents were produced, and the District made no showing of how many privileged documents were not produced. In fact, it is not clear that any privileged document in the District's possession was not produced. Accordingly, this factor militates against the District as well.

e. It was Fair to Admit the Privileged Documents

The trial court asked the District during oral argument how it would be prejudiced if the documents were admitted. The District's counsel responded that he did not believe they contained any "smoking gun," and he was not "particularly concerned" if they were admitted. On the other hand, the trial court felt that excluding the documents on the morning of trial would be too prejudicial to Mr. Sitterson's trial presentation.

In its opening brief on appeal, the District takes two, mutually exclusive positions regarding the importance of these documents to Mr. Sitterson's case. On the one hand, the District seeks to downplay the prejudice to Mr. Sitterson of excluding the documents at the last minute by arguing that the documents were not central to

Mr. Sitterson's case. The District argues that the privileged documents merely corroborated all the other evidence Mr. Sitterson produced at trial. Yet, at the same time, the District argues that the admission of the documents was so prejudicial that the District does not even need to show prejudice—that prejudice is presumed.

The District cannot have it both ways. If the District wants to attack the fairness factor by minimizing the importance of the subject documents, then the District should be required to show that the court's ruling was prejudicial. In other words, the District must show that—but for the admission of these documents—the outcome of the trial would have been different. “An evidentiary error requires reversal only if it results in prejudice; only if it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred.”⁵²

This showing was not made in a similar case involving evidence that was merely cumulative. In *Brown v. Fire Protect. Dist.*, the Supreme Court applied the general rule that “[e]rror will

⁵² *Lutz Tile, Inc. v. Krech*, 2007 Wn. App. (33573-5-II) (Div. II, January 30, 2007).

not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.”⁵³ And in *Brown*—like the instant appeal—because the evidence in question was merely cumulative of other evidence introduced at trial, the Supreme Court held that any error in admitting the evidence was harmless error. “We find that the evidence, being merely cumulative in nature, was harmless error.”⁵⁴

In conclusion, the trial court adopted the proper approach, it applied that approach within its discretion, and all the factors weigh in favor of finding a waiver of the privilege. Mr. Sitterson should not be required to re-try his case because, three years earlier, counsel for the District inadvertently produced four written communications with his own client and then failed to seek their recovery until the morning of the trial. There is no attorney's fees provision in this case, and every dollar the District forces Mr. Sitterson to spend is a dollar that reduces his net recovery. Thus, this Court should deny the District's cross-appeal and affirm the jury's verdict.

⁵³ 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

⁵⁴ *Ibid.*

IV. Prejudgment Interest is Warranted in this Case

Washington has "historically treated prejudgment interest as a matter of right"⁵⁵ when a claim is "liquidated;" *i.e.*, when the "evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion."⁵⁶ The evidence adduced at trial clearly and unequivocally proved that in July 2002—when the District sold \$59 million in bonds—the District's contract with Mr. Sitterson called for a commission payment of precisely \$111,250. The commission was based on a percentage of the bonds sold, and its calculation was a matter of simple mathematics.

At the conclusion of trial, the jury returned a general verdict in favor of Mr. Sitterson for \$151,000. In its opening brief on this appeal, the District argues that the trial court would have had to "speculate" to determine that the \$151,000 verdict included \$111,250 in liquidated damages. But there is a difference between speculation and drawing a reasonable inference. Given the evidence

⁵⁵ *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397 (1997) (citation omitted).

⁵⁶ *Ibid.* (internal quotations and citation omitted).

of damages presented at the trial, it is a reasonable inference that the jury included the \$111,250 commission in its calculation of the \$151,000 in total damages to Mr. Sitterson. Accordingly, the trial court could have, and should have, awarded Mr. Sitterson pre-judgment interest on the commission that was wrongfully withheld by the District.

V. Conclusion

The time for this litigation to end is now, and Mr. Sitterson is entitled to get paid what he was owed, with interest. The jury's verdict should be affirmed, and this Court should remand the matter to the trial court with instructions to award prejudgment interest on the sum of \$111,250 from the date this commission was due until the date the judgment was entered.

DATED this 17th day of March, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Reply and Opposition Brief of Appellant/Cross-Respondent on:

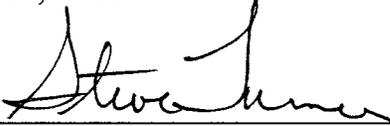
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DATED this 17th day of March, 2008.



Steven E. Turner