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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

DAVID B. SITTERSON, d.b.s,
"DBS FINANCIAL SERVICES",

Plaintiff/Appellant/Cross-Respondent

v.

EVERGREEN SCHOOL DISTRICT NO. 114,

Defendants/Respondent/Cross-Appellant

BRIEF OF RESPONDENT/CROSS-APPELLANT

Todd S. Baran, WSBA 34637
Attorney for Respondent
Evergreen School District No. 114

Todd S. Baran
Todd S. Baran, PC
4004 SE Division St
Portland, OR 97202-1645
503.230.2888

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I. ANSWER TO APPEAL

A. Assignment of Error and Issue Presented

Sitterson assigns error to the order denying his motion for prejudgment interest. CP 17, pp. 230-231. The issue presented by that assignment is whether prejudgment interest can be awarded when a jury returns a general verdict in a case involving alternative claims, one of which alleges unliquidated damages.

B. Response to Assignment of Error

A court cannot speculate about the basis for a verdict. That being so, when a general verdict could permissibly be based on any one of several claims, a court cannot determine which claim was the basis for the verdict. Sitterson asserted a claim for breach of contract, and a claim for quasi contract damages. Both claims were submitted to the jury under proper instructions, and the jury returned a general verdict. Sitterson's breach of contract claim was for liquidated damages that would support an award of pre-judgment interest. His quasi contract claim was for unliquidated damages that would not support an award of pre-judgment interest. Because the trial court could not determine, from the face of the

verdict, whether the jury awarded liquidated or unliquidated damages, the trial court properly denied Sitterson's request for prejudgment interest.

C. Statement of the Case

Sitterson's statement of the case relates a litany of facts and circumstances that have no bearing on the issue presented by his assignment of error. The factual statement is also argumentative in places. A point-by-point refutation of Sitterson's unnecessary and argumentative assertions will not advance the analysis of the issue at hand. That being so, Evergreen rejects those portions of Sitterson's statement without further discussion or elaboration. Evergreen accepts Sitterson's statement only to the extent that it relates these pertinent facts:

- Sitterson's complaint alleged claims for (1) breach of express contract, and (2) breach of quasi contract. CP 24, pp. 1 - 32.

- Sitterson's breach of contract and quasi contract claims were both submitted to the jury under proper instructions. CP 3, pp. 149-178.

- Instruction 25, which related to the quasi contract claim, informed the jury that “Mr. Sitterson is entitled to the reasonable value to the District of the services rendered to the District. You may consider, but are not bound by, the contract price as evidence of the value of the services.” CP 3, p. 177.

- Sitterson asked for \$111,250 in damages on his breach of express contract claim. RT Vol IV-B 880: 13 – 881:2. However, the jury was later instructed that it could adjust that sum up or down. RT Vol. V 914:15-21.

- The jury returned a general verdict that awarded Sitterson \$151,000 of damages. CP 26, p. 178.

- The jury was not given any special interrogatories, and Sitterson did not object to the form or content of verdict before the jury was excused.

D. Standard of Review

Sitterson contends that a *de novo* standard of review applies to this assignment. He asserts that a court has no discretion to deny pre-judgment interest when it is clear that damages are liquidated.

Division I addressed this same contention in *Colonial Imports v. Carlton Northwest, Inc.*, 83 Wash.App. 229, 921 P.2d 575 (Div. 1 1996). In that case, the court concluded that a trial court has some discretion to deny a request for prejudgment interest even if the damages are liquidated. Thus, in all cases a denial of an award of prejudgment interest is reviewed for an abuse of discretion. 83 Wash.App. at 245.

Following this authority, the trial court would have had discretion to deny Sitterson's request for prejudgment interest even if some of the damages awarded in the verdict were liquidated. Nevertheless, the trial court never exercised any discretion because it could not determine whether any of the awarded damages were liquidated. That being so, cases that discuss the standard that governs review of a denial of prejudgment interest in a case involving liquidated damages are inapposite. The pertinent cases are those that discuss the standard that governs review of a trial court's refusal to speculate about the basis for a verdict. The interpretation of a judgment is a question of law, that is reviewed *de novo*. *Chavez v. Chavez*, 80 Wash. App. 432, 435, 909 P.2d 314 (Div. II 1996), *rev. den.* 129 Wash.2d 1016, 917 P.2d 576 (1996)

Likewise, so the interpretation of a verdict that underlies a judgment should be reviewed *de novo*.

E. Argument

Sitterson alleged alternative claims for (1) breach of express contract, and (2) breach of implied contract. The jury was instructed on both claims, and returned a general verdict for \$151,000. Nothing on the face of the verdict discloses which of the alternative claims was the basis of this liability. Nevertheless, Sitterson asserts that the verdict necessarily includes \$111,250 of damages on his express contract claim. Because any such damages would be liquidated, Sitterson contends that he is entitled to prejudgment interest on this amount of damages.

Although Sitterson asked for \$111,250 in damages on his breach of express contract claim, the jury was instructed that it could adjust any damages on that claim up or down. On the quasi contract claim, the jury was instructed that Sitterson was entitled to the reasonable value of the services rendered to the District, and that it was not bound by the contract price. As so instructed, the jury could have returned the same verdict on either of Sitterson's claims.

The damages alleged in Sitterson's breach of contract claim were liquidated. Conversely, the damages alleged in his quasi contract claim were not. Quasi contract damages are discretionary, and unliquidated. That being so, prejudgment interest cannot be awarded on a claim for breach of an implied, or *quasi*, contract. See, e.g., *Douglas Northwest v. O'Brien & Sons*, 64 Wn.App. 661, 692, 828 P.2d 565 (1992); *Heaton v. Imus*, 21 Wn.App. 914, 918, 587 P.2d 602 (1978).

"Neither parties nor judges may inquire into the internal processes through which the jury reaches its verdict." *State v. Linton*, 156 Wash.2d 777, 787, 132 P.3d 127 (2006). It is also impermissible for a court to speculate about the basis for a verdict. Because of these rules, a court cannot speculate or infer that a general verdict was based on any one of several alternative liability theories. See, e.g., *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994). Nor can a court speculate about what damages are included in a general verdict. *Shay v. Parkhurst*, 38 Wash.2d 341, 352, 229 P.2d 510 (1951); *Thompson v. Grays Harbor Community Hosp.*, 36 Wash.App. 300, 309-310, 675 P.2d 239 (1983).

Because the general verdict could have been based on either of Sitterson's claims, the damages may or may not be liquidated. It is impossible to determine from the face of it whether the verdict was based on the express contract claim. It is therefore impossible to determine what damages, if any, awarded in the verdict were liquidated. Because the trial court could not speculate to determine the basis of the verdict, or, thus, the nature of the damages, the trial court could not say whether prejudgment interest was due on any of the damages. That being so, the trial court properly denied Sitterson's motion.

Sitterson contends that the verdict necessarily included damages for breach of an express contract because the jury asked a question about how it could determine damages on that claim.

The question proves nothing. In *Linton*, the court reiterated:

Furthermore, "[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict." Ng, 110 Wash.2d at 43, 750 P.2d 632 (quoting State v. Miller, 40 Wash.App. 483, 489, 698 P.2d 1123 (1985)). "[J]urors' post-verdict statements regarding matters which inhere in the verdict cannot be used to attack the jury's verdict." Ng, 110 Wash.2d at 44, 750 P.2d 632.

156 Wash.2d at 788. Under this authority, nothing can be inferred from the question or the answer: the decision of the jury is contained exclusively in the verdict.

Even if a jury question could, in theory, be used to interpret a verdict, the question and answer at issue here do not prove that the general verdict awarded damages on the express contract claim. After the question was answered, the jury continued to deliberate. Because neither the question or the answer compelled the jury to award breach of contract damages, or precluded the jury from awarding damages on the implied contract claim, the question and the answer do not prove that the verdict awarded any, let alone \$111,250 in damages on the breach of express contract claim.

Sitterson argues that he would have been entitled to prejudgment interest as a matter of law if the jury had awarded exactly \$111,250. Under those circumstances, Sitterson contends the verdict would necessarily establish that the verdict was based on a breach of an express contract. This too is incorrect. Because the jury was instructed that the contract amount could be considered in determining an award of implied contract damages,

an award of that exact amount would not foreclose the possibility that the verdict was based on the implied contract claim. In short, because the jury was told that it could award exactly \$111,250 on the implied contract claim, and award of that amount would not foreclose the possibility that the damages were based on a breach of implied contract and, thus, unliquidated.

Finally, Sitterson argues that there was compelling evidence of a breach of express contract, and of the amount of the express contract damages. The evidence was not sufficiently compelling to persuade Sitterson to withdraw his implied contract claim. Because he asked the court to submit two claims to the jury, and both were supported by the evidence, Sitterson cannot now ask a court to speculate that the verdict was based on one claim, not the other, no matter the strength of the evidence.

If Sitterson wanted to avoid the ambiguity that inheres in a general verdict, he could have withdrawn his implied contract claim. Sitterson could also have avoided uncertainty by proposing that the jury answer special interrogatories to indicate what claim was the basis for the verdict. Because Sitterson chose to submit two alternative claims and to forego interrogatories, the ambiguity

inheres in the verdict and it is impossible to say that the jury awarded liquidated damages.

When a party has an opportunity to avoid uncertainty in a verdict, but fails to invoke the processes that would remove the uncertainty, that party cannot obtain any relief that depends on proving the basis for the verdict. This has long been the rule. See, e.g., *Tribble v. Yakima Valley Transp. Co.*, 100 Wash. 589, 600-603, 171 P. 544 (1918).

F. Summary

The damages resulting from a breach of an implied, or quasi, contract are not liquidated. That being so, prejudgment interest cannot be awarded on a claim for breach of an implied contract. The jury in this case could have awarded damages based on a breach of implied contract. Because the trial court could not say for certain that the general verdict includes breach of express contract damages, let alone the precise amount of any such damages, the trial court properly denied Sitterson's request for prejudgment interest.

II. CROSS-APPEAL

A. Assignment of Error and Issue Presented

Evergreen assigns error to the admission of exhibits 55, 59, 62 and 64. RP IV, p. 837. The issue presented by this assignment of error is whether the inadvertent disclosure of a privileged communication waives the privilege.

B. Summary of Argument

A waiver is an intentional and voluntary relinquishment of a known right. Waiver can be inferred only from conduct inconsistent with any intention other than such relinquishment. Because an inadvertent disclosure is, by definition, unknowing, such a disclosure will not support an inference of waiver. It follows that an inadvertent disclosure of a privileged communication will not waive the privilege.

C. Statement of the Case

As required by rule, Sitterson and Evergreen exchanged exhibits shortly before trial. Sitterson's exhibits included several letters that were exchanged between Evergreen and its attorney, Brian Wolfe. See Ex's 55, 59, 62 and 64. The letters had been inadvertently produced three years earlier. RP VI-B, p. 1064.

Nevertheless, they were not used as exhibits during any of the pre-trial depositions, and Evergreen was not aware of the inadvertent production until it received Sitterson's exhibit list. RP VI-B, pp. 1050, 1064.

On the morning of trial, Evergreen objected to the admission of these exhibits, asserting that each was protected by the attorney-client privilege. RP VI-B, pp. 1047-1050. Sitterson did not dispute that the letters constituted communications that would ordinarily be protected by the attorney-client privilege.

Nevertheless, he argued that the letters were admissible because Evergreen waived that privilege. RP VI-B, p. 1048. Evergreen argued that there was no waiver because the disclosure of the privileged communications was inadvertent. RP VI-B, pp. 1050, 1065. The trial court overruled the objection and admitted the exhibits. RP IV, p. 837.

D. Standard of Review

A trial court ruling on the admissibility of evidence is generally reviewed under an abuse of discretion standard. *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990). But rulings on questions of law are reviewed *de novo*. *In re Det. of*

Williams, 147 Wash.2d 476, 486, 55 P.3d 597 (2002). Thus, if a ruling on the admissibility of evidence is predicated on an legal determination, such as the interpretation of a statute, the trial court's resolution of the legal issue is reviewed *de novo*.

Identifying the test to be used to determine whether a privilege has been waived is a question of law. Evaluating whether a waiver has occurred after identifying the applicable test or standard is also a question of law. See, e.g., *Pappas v. Holloway*, 114 Wash.2d 198, 787 P.2d 30 (1990) (*sub silentio*, the court conducted a *de novo* review of determination of test for waiver of attorney-client privilege and of the application of that test); *Estate of Thomas*, 165 Wash. 42, 7 P.2d 1119 (1932) (same); *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wash.App. 725, 812 P.2d 488 (Div. 1 1991) (same).

Even if selecting the test that governs whether a waiver has occurred, or the application of that test, was reviewed under the abuse of discretion standard, a trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). If a trial court bases an evidentiary

determination on an erroneous interpretation of the applicable legal standard, the trial court's determination is based on untenable grounds and, thus, constitutes an abuse of discretion as a matter of law.

E. Argument

To resolve this assignment of error, this court must determine when, if ever, the inadvertent production of a privileged communication results in a waiver of the privilege. The statute that creates the attorney-client privilege does not answer this question. See RCW 5.60.060(2). Nor is there a Washington case on point.

Numerous courts in other jurisdictions have resolved this precise issue, but there is no consensus among them. In *Pavlik v. Cargill Inc.*, 9 F.3d 710 (8th Cir. 1993), the court recognized that federal and state courts were split three ways on the issue:

Courts in other jurisdictions reaching the question have adopted three positions: there is no waiver of the privilege if the document is inadvertently produced because the privilege must be knowingly waived; the privilege is always waived even if the document is inadvertently produced because the confidentiality is lost once the document is produced; or the privilege may or may not be waived depending upon the results of an ad hoc balancing test that

considers the precautions taken to prevent inadvertent disclosure, the number of such disclosures, the extent of the disclosure, the steps taken to remedy the disclosure and the timeliness with which they were taken, and whether or not Justice would be served by protecting the document. See, e.g., *In re Grand Jury Investigation*, 142 F.R.D. 276, 278-79 (M.D.N.C. 1992) (discussing all options).

Because this is an issue of first impression, none of the out-of-state decisions are binding here. This court is free to adopt any one of the established tests, or one of its own making. In blazing this trail, the Court should adopt a test that best comports with logic, fairness and existing Washington law on the issues of waiver and privilege. Based on these considerations, the view that inadvertent production of a privileged communication never results in a waiver is the one that should prevail.

Support for this view comes from the opinion in *State v. Marshall*, 83 Wn. App. 741, 748-749, 923 P.2d 709 (1996), where the court observed:

One of the underpinnings of our legal system is that a client be able to talk freely to his or her lawyer in strict confidence:

“Both the fiduciary relationship existing between lawyer and client and the proper

functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

quoting Doe v. A Corp., 330 F. Supp.1352, 1354-55 (S.D. N.Y, 1971), *aff'd*, 453 F.2d 1375 (1972) (quoting American Bar Association Ethical Canon 4-1, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1985)). A client's candor with counsel would be chilled if mere inadvertence by counsel could result in loss of the communication privilege. Thus, a rule that inadvertence never results in waiver would promote the purpose of the attorney-client privilege.

Conversely, the rule that an inadvertent disclosure can result in a waiver is inconsistent with the rule that the privilege is the

client's to waive, not the attorney's. *State v. Sullivan*, 60 Wn.2d 214, 373 P.2d 4747 (1962). "There is no authority, however, for an attorney to waive the privilege unilaterally on behalf of a client. Wash. State Bar Assoc., Code of Prof. Responsibility Comm., Formal Op. 175 (1982) (analyzing former Canon 4 and Disciplinary Rule 4-101)." *State v. Marshall*, 83 Wn. App. at 749 n 10. Under the automatic waiver rule, inadvertence by counsel results in a loss of the privilege. Because the privilege is not counsel's to waive, this rule conflicts with a bedrock component of Washington privilege law.

In other contexts, the rule in Washington is that a waiver must be knowing and voluntary. *Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 365, 705 P.2d 1195, 713 P.2d 1109 (1985). By definition, an inadvertent disclosure is unknowing. That being so, inadvertence should not ever result in a waiver.

The Washington courts have also recognized that the waiver of an evidentiary privilege must be "distinct and unequivocal." *Tate v. Tate*, 75 Va. 522. See, also, *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S.W. 699, 48 L.R.A. (N.S.) 394, and the copious notes following." *Packard v. Coberly*, 147 Wash. 345, 349, 265

Pac. 1082 (1928).¹ Because an implied waiver is neither “distinct” or “unequivocal”, a non-waiver rule protects this traditional rule of waiver law.

In *Mendenhall v. Barber-Greene Co.*, 531 F.Supp. 951, 954 (N.D.Ill. 1982), the court observed that

the better-reasoned rule is that mere inadvertent production does not waive the privilege. *Dunn Chemical Co. v. Sybron Corp.*, 1975-2 Trade Cas. ¶ 60,561 at 67,463 (S.D.N.Y. 1975); *Connecticut Mutual Life Ins. Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955); see also *Transamerica Computer Co. v. IBM Corp.*, 573 F.2d 646, 653 (9th Cir. 1978) (Kennedy, J., concurring); *Permian Corp. v. United States*, 665 F.2d 1214 at 1220 n. 11 (D.C.Cir-1981).

In adopting this rule, the *Mendenhall* court recognized that the strict waiver rule “is atavistic, generating (in much the same way as a flawed pleading in the era of common law pleading) harsh results out of all proportion to the mistake of inadvertent disclosure.” *Id.*, at n. 9. “We are taught from first year law school that waiver imports the ‘intentional relinquishment or abandonment of a known right.’ Inadvertent production is the antithesis of that concept.” 531

1. Although *Packard* is a case concerning waiver of the physician-patient privilege, the same general rules of waiver apply to the attorney-client privilege. See *In Re Thomas' Estate*, 165 Wash. 42, 4 P.2d 837 (1931).

F.Supp. at 954. *Accord Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936 (S.D.Fla 1991) (“we believe the better reasoned rule is that of *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954 (N.D.Ill. 1982), that mere inadvertent production by the attorney does not waive the client's privilege.”).

In sum, general principals of Washington law establish that a waiver of the attorney-client privileged must be made by the client; must be knowing and voluntary; and must be unequivocal. These waiver principals promote the purpose of the privilege, which is to encourage client candor in communications with counsel. Because a non-waiver rule is consistent with the general rules governing waiver, and with the purpose of the attorney-client privilege, this court should adopt that rule.

The trial court followed the lead of those courts that apply a balancing test to determine if a waiver occurred. RP VII, p. 963. Under that test, the court weighs several factors “including: (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.” *Alldread v. City of Grenada*, 988 F.2d 1425 (5th

Cir. 1993). Because Sitterson represented that he had planned his case around the privileged documents, the trial court concluded that the equities weighed in favor of finding a waiver. RP VII, p. 963.

This balancing test is inconsistent with general principals of Washington privilege and waiver law, because application of this test could result in finding a waiver that was not intentional, knowing, unequivocal or consented to by the client. To the contrary, unilateral and inadvertent conduct by counsel alone can result in a waiver under this test. Thus, this test, like the strict waiver rule, should not be adopted.

The balancing test also imposes onerous and unfair procedural and evidentiary burdens. A person who inadvertently produces a privileged document to an opponent obviously will not be aware that has occurred. The production typically will not be discovered until the adversary reveals the disclosure. By that time, it may be impossible to reconstruct how the inadvertent disclosure occurred, or precisely what document controls that were in use at the time of the disclosure. If the adversary reveals the disclosure shortly before trial, as occurred in this case, the press of other required case preparation activities may also impede development

of the record required to perform a meaningful balancing test.

This case presents a compelling example of the problem. Here, Sitterson's counsel waited three years, and until the eve of trial, to reveal that an inadvertent production had occurred. Because of the timing of the revelation, Evergreen's counsel was in no position to conduct an investigation to determine, or to build a record to show, precisely why the disclosure occurred. Nor was he in a position to show how, when, or what document security protocols were being used at the time of the disclosure. In short, because Sitterson delayed revelation of the disclosure, Evergreen could not create the type of record contemplated by the balancing test. This is presumably why the trial court focused on the issue of fairness: That is the only issue that the court could meaningfully evaluate under the circumstances.

A balancing test that turns on factors that may be beyond the control of the discloser to prove will not adequately protect the attorney-client privilege or promote its purpose. That being so, the trial court erroneously applied the balancing test to find a waiver.

Even if the balancing test set the standard for determining waiver, the application of that test supports a finding

that there was no waiver here. Significantly, the extent of the disclosure was minimal, Sitterson would not be prejudiced by enforcing the privilege, and counsel for Evergreen acted expeditiously after discovering the disclosure.

With respect to the latter point, Sitterson received the privileged documents three years earlier, but did not reveal that until exhibits were exchanged until the Thursday before trial, which was January 18, 2007. RP I-B, p. 1050. Sometime between that date and January 22, 2007, the first day of trial, Mr. Wolfe sent Sitterson's counsel a letter objecting to the use of those documents as exhibits. *Id.*, at p. 1049. That letter prompted Sitterson's counsel to prepare a brief supporting the admissibility of the exhibits, which was filed on the first day of trial. CP 19, pp. 107-12. Thus, less than four days passed from the time that Evergreen discovered the disclosure and when it acted to claw back the privileged documents. Under no circumstances could this timing be construed as unreasonable delay.

The trial judge concluded that the timing of the objection was prejudicial to Sitterson because his counsel had built a case around the privileged documents. The record refutes that

conclusion. Sitterson's counsel did not question a single witness about the exhibits; at trial or at any deposition. And there is no evidence that Sitterson held back on discovery, witness preparation, or evidence presentation in reliance on the admissibility of the exhibits. Rather, the record reflects that Sitterson's counsel persuasively used the exhibits in his opening and closing statements to show that Evergreen's counsel essentially agreed that there was evidence to support Sitterson's theory of the case, and that the evidence supporting Evergreen's theory was problematic. RP IV, pp. 870 - 873.

In short, Sitterson used the exhibits as expert opinion that vouched for his evidence and substantiated his arguments. He also argued that the exhibits showed that Evergreen's defenses were a creative afterthought. It would not have been unfair to require Sitterson to prove his case without that corroboration and Evergreen's critical self-analysis. To the contrary, but for the inadvertent disclosure of the privileged communications, Sitterson would have presented the same evidence and made the same arguments. He simply would not have had corroboration of his argument from his opponent's counsel. Conversely, allowing these

documents into evidence allowed Sitterson to try his case with defendant's admissions. That was not fair.

In short, Sitterson did not build a case around the privileged documents; Sitterson could have tried the case without the documents; and Sitterson failed to offer any cogent explanation as to why he could not proceed with the trial had the documents been excluded. That being so, excluding the exhibits would not have derailed Sitterson's case or case preparation. Rather, that would have leveled the field by placing the parties in the exact positions they would have been in had there been no inadvertent disclosure. Thus, the trial court gave undue weight to fairness considerations relating to Sitterson's case preparation and presentation.

To summarize, waiver never results from an inadvertent disclosure of a document protected by the attorney-client privilege. Even if the trial court properly concluded that a balancing test applies to determine whether a waiver results from an inadvertent disclosure, the trial court mis-evaluated the factors that are important to the balance. Significantly, the trial court gave undue weight and consideration to Sitterson's trial preparation, and

improperly disregarded the evidence which showed the Evergreen acted promptly to claw back the privileged documents. For either reason, the trial court erred in finding a waiver of the attorney client privilege, and in admitting the privileged documents into evidence.

The error was highly prejudicial. The trial court recognized, and Sitterson agreed, that revealing the privileged communications to the jury would be devastating to Evergreen. Here are some pertinent excerpts from the colloquy concerning the motion to exclude the exhibits:

THE COURT: But this gets right into the heart of the lawsuit and –

MR. TURNER: Absolutely. RP I-B, p. 1052.

* * * * *

MR. TURNER: Well, no, what I was saying is that we -- we have a situation here where the district did one thing and then they tried to recharacterize it as something else.

THE COURT: Uh-huh.

MR. TURNER: And I think that we're entitled to show that to the jury so that they can test the veracity of the arguments that are being made now why Mr. Sitterson's not entitled to compensation. You know, they -- they could have --

THE COURT: Would you be using those for impeachment purposes?

MR. TURNER: Well, it's not necessarily impeachment, it's for substantive value as well, because the question is who knew what when. When is in Evergreen's case did Mr. Melching first learn, for instance --

THE COURT: So they're part and parcel of your case in chief.

MR. TURNER: That's right.

THE COURT: After -- and some of these documents deal with after the lawsuit was filed.

MR. TURNER: Very few. I think the only one that is after the law- --

THE COURT: After --

MR. TURNER: -- -suit --

THE COURT: -- your client was making claims.

MR. TURNER: Yes, after the client was making claims, that's right. That's right. But, again, you have to try to figure out what is the - - I know that the judicial instinct is to keep it out because it is extremely powerful.

THE COURT: Uh-huh. I can tell you right now that's, in fact, what I'm thinking.

MR. TURNER: I know. It's extremely powerful. RP I-B, pp. 1060 - 1061.

Sitterson's counsel was candid, and he was correct. The

privileged communications were “extremely powerful”, and they went “right into the heart of the lawsuit * * *.” Quite simply, they were devastating. Because it cannot be said that erroneous admission of the privileged communications had no impact on the verdict, the error was prejudicial, and reversible. To cure the harm, this Court must reverse and remand this case for a new trial.

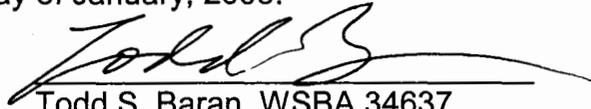
F. Summary

As a matter of law, an inadvertent disclosure of a communication protected by the attorney-client privilege does not waive the privilege. Even if a balancing test applies to determine whether there has been an inadvertent waiver, the trial court improperly weighed the equities in Sitterson’s favor. That being so, the trial court erroneously admitted exhibits 55, 59, 62 and 64 into evidence. Because the error prejudiced Evergreen, the appropriate remedy is to reverse and remand for a new trial.

III. CONCLUSION

The court should affirm on the appeal, and reverse and remand this case for a new trial on the cross-appeal.

DATED this 22nd day of January, 2008.



Todd S. Baran, WSBA 34637
Attorney for Respondent
Evergreen School District No. 114

CERTIFICATE OF SERVICE

I hereby certify that I served the (1) BRIEF OF RESPONDENT/CROSS-APPELLANT on:

Mr. Bruce White
Mitchell Lang & Smith
101 SW Main St Ste 2000
Portland, OR 97204-3230

Mr. Steve E. Turner
Miller Nash LLP
500 East Broadway Ste 400
Vancouver, WA 98666-0694

by mailing a full, true, and correct copies thereof in sealed, first class postage-prepaid envelopes, addressed as shown above, and deposited with the United States Postal Service at Portland, Oregon, on January 22, 2008.



Todd S. Baran