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No. 90194-5  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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MATTHEW A. NEWMAN, an incapacitated adult; and  
RANDY NEWMAN and MARLA NEWMAN,  
parents and guardians of said incapacitated adult,

Respondents,

v.

HIGHLAND SCHOOL DISTRICT NO. 203,  
a Washington State government agency,

Petitioner.

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REVIEW FROM THE SUPERIOR COURT  
FOR YAKIMA COUNTY  
THE HONORABLE BLAINE G. GIBSON

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BRIEF OF RESPONDENTS

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 ORIGINAL

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## I. INTRODUCTION

Matthew Newman and his family sued petitioner Highland School District for its negligence in allowing him to play varsity football the day after Matthew suffered a concussion during practice, an injury witnessed by his coach. The Newmans noted the depositions of several former coaches, none of whom remained District employees, and all of whom the District had previously interviewed as part of its investigation of Matthew's injury. The District's counsel then "prepared" the former coaches for their deposition testimony to support its theory that the Newmans and their counsel had conspired to manufacture a bogus claim against the District.

When the Newmans sought to discover the content of the former coaches' pre-deposition communications with the District's counsel, the District's counsel first purported to "appear" for the former coaches at their depositions, claiming that discovery of counsel's communications with the former coaches would violate the *coaches'* attorney-client privilege. Only after the trial court barred the District's counsel from jointly representing the District and its former employees, in an order unchallenged on appeal, the District

claimed that these pre-deposition communications violated the *District's* attorney-client privilege.

The trial court properly rejected the District's assertion that the District's corporate privilege shielded communications with the former coaches who were no longer District employees. These former coaches are no different than other third party witnesses. The attorney-client privilege is narrowly construed, and is waived if it is not timely asserted. This Court should adopt the reasoning of *Wright by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984) and hold that the former coaches are neither "parties" nor the District counsel's "clients" because they are not authorized to speak on behalf of the District. At a minimum, the Court should narrowly limit the District's privilege to counsel's investigation and formulation of litigation strategy, and affirm the trial court's decision under the facts of this case that District counsel's communications with the former coaches to prepare them for their depositions are not privileged.

This Court should affirm and award the Newmans their attorney fees in pursuing their right to discovery pursuant to Court orders that the District continues to disobey.

## **II. RESTATEMENT OF ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Does a corporation's attorney-client privilege extend to former employees who are not speaking agents with the power to bind their former employer?

2. Does the corporate attorney-client privilege preclude discovery of communications with corporate counsel preparing former employees for depositions, long after any factual investigation concerning the corporation's potential liability?

3. Does a corporation waive its attorney-client privilege by asserting that its pre-deposition communications with former employees are shielded by the former employees' personal privilege, and asserting a corporate privilege only after corporate counsel has been disqualified from representing the former employees?

4. Is a recalcitrant party that has been found in contempt for refusing to comply with a court order to provide discovery liable for the attorney fees incurred to enforce the trial court's order rejecting its claim of privilege?

### III. RESTATEMENT OF THE CASE

The District concedes that the merits of plaintiffs' theory – that Matthew's brain injury was the result of a secondary impact caused by the District's negligence in failing to adequately train its staff and adhere to the requirements of the Lystedt Law, RCW 28A.600.190 – presents disputed issues of fact. (Pet. Br. 5) The District then offers what it characterizes as "highly disputed" evidence to support its version of events (Pet Br. 5), often with no citation to the record. (*e.g.* Pet. Br. 6, 8, 10-11) This Court should disregard the District's unsupported factual allegations as violative of RAP 10.3(a)(5). The following restatement of the case relies on the allegations in the Newmans' complaint and the evidence elicited in discovery that supports the District's liability under the Lystedt Law.

**A. Matthew Newman suffered a catastrophic head injury after sustaining multiple hits to the head when the District allowed him to play varsity football the day after he suffered a concussion during football practice.**

Matthew Newman, a 16-year-old junior, was Yakima Highland High School's starting quarterback, played free safety or outside linebacker on defense, and returned punts and kickoffs on special teams. (CP 4, 194) On Thursday, September 17, 2009, the day before a varsity game against Highland's arch rival Naches High

School, Matthew suffered a concussion during practice when he was tackled by a teammate while already out of bounds and struck his head on the hard and unprotected asphalt surface of a pole vault runway located only four to five feet from the sideline. (CP 4-7, 471)

Matthew's coaches either witnessed the hit or heard the unusual sound of "concrete on a football field." (CP 627, 630, 1474) Dustin Shafer, the team's 21-year-old defensive coordinator, was no more than 10 yards away. (CP 616, 1445, 1548)

Matthew's teammates helped him up off the pole vault runway. (CP 1301-02) Matthew complained that his head hurt (CP 1413-14), removed his helmet, and walked toward the end zone with coach Shafer. His teammates observed the two talking. (CP 1228, 1414, 1417, 1446) Matthew did not participate in any further plays, and stood by the goal post with coach Shafer for the remainder of practice. (CP 1283, 1447, 1468, 1475-76)

Matthew's teammate Forrest Kopta asked Shafer if Matthew was okay. Shafer responded that he didn't think Matthew had a concussion. (CP 1447) During a water break, the whole coaching staff convened and discussed the fact that their quarterback had "taken a fall because of a late hit." (CP 628)

That evening, and the next day at school, Matthew complained of a headache. (CP 1245-46, 1370-71, 1603-04) His teammates thought “it was probably just nerves” before the “big rivalry game.” (CP 1448)

Washington’s ground-breaking Lystedt Law, RCW 28A.600.190, was the first legislation in the country addressing the serious risk of secondary impacts in youth sports. The Lystedt Law declares that “[c]ontinuing to play with a concussion or symptoms of head injury leaves the young athlete especially vulnerable to greater injury and even death.” RCW 28A.600.190(1)(c). The Lystedt Law requires school districts to “inform and educate coaches, youth athletes, and their parents . . . of the risk of concussion and head injury including continuing to play after concussion or head injury.” RCW 28A.600.190(2). A student athlete “who is suspected of sustaining a concussion” must be removed from competition and practice and cannot be allowed to return to the playing field until obtaining written clearance from a licensed health care professional “trained in the evaluation and management of concussion.” RCW 28A.600.190(3), (4).

The 2009 football season was the first after the Lystedt Law became effective. Laws 2009, ch. 475, § 2, effective July 26, 2009.

The District did not change its "very brief" preseason meeting with student athletes about concussions after the Lystedt Law went into effect. (CP 1461-62) It is undisputed that Matthew's coaches did not direct him to see a health care professional, did not notify Matthew's parents of a possible concussion, and did not require Matthew to obtain a written medical clearance before allowing him to play after he hit his head on the asphalt surface.

Instead, Matthew started as quarterback, on defense, and on special teams the very next day, Friday September 18, 2009, in the much anticipated game against Highland's "biggest rival" Naches. (CP 1461) Matthew played the entire game, sustaining multiple hits. At the end of regulation play, as the tied game went into overtime, Matthew collapsed on the field, lost consciousness and lapsed into a coma. (CP 6-7, 1448-49, 1606-07)

Matthew had sustained an acute subdural hematoma, a catastrophic brain injury. Following emergency brain surgery that saved his life, Matthew required eight additional surgeries. Matthew suffers severe brain injury deficits and learning disabilities. On October 7, 2011, he was declared fully incapacitated as to both his person and estate. (CP 7-8)

**B. The District invoked its attorney-client privilege to shield communications between former coaches and the District's counsel only after the trial court, in an unchallenged order, prohibited the District's counsel from personally representing the former coaches at their depositions.**

Matthew and his family sued the District in Yakima County Superior Court on September 13, 2012, alleging that Matthew's injuries were caused by the District's negligence in violation of the Lystedt Law. (CP 1-11)<sup>1</sup> The District's defense was that none of its coaches knew or reasonably should have known that Matthew suffered a head injury in practice.

Assistant Coach Dustin Shafer, who spoke with Matthew immediately after Matthew's injury at practice, had left the District after the 2009 football season. (CP 275) Head coach Shane Roy, and the other assistant coaches, Justin Burton, Thomas Hale and Matt Bunday, were also no longer employed by the District by the time the lawsuit was filed. (CP 1546, 1557-58) Shortly after the Newmans filed suit, the District's investigator obtained statements from the

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<sup>1</sup> The District places significance on the fact the Newmans named only the District, and not the individual coaches, as defendant, as somehow indicative of an illicit motive to avoid application of the privilege. (Pet Br. 2) The District ignores entirely its own institutional negligence in failing to train its young staff regarding the requirements of the Lystedt Law whenever they suspect a player has suffered a concussion. There is no merit to the District's accusation that the Newmans seek to "vilify the coaches." (Pet. Br. 5)

four coaches and teammates present at the Thursday practice when Matthew hit his head on the pole vault runway. (CP 591, 1186)

Depositions of Matthew's teammates supported the Newmans' theory that the District's coaches were aware that Matthew hit his head on the asphalt pole vault runway and complained of concussive symptoms. (*See, e.g.*, CP 625-30, 1411-17) The District claimed "a conspiracy" in the trial court (CP 1317; 9/27/13 RP 12), and now asserts on appeal that Matthew's lawyers "fabricated or 'suggested'" to his former teammates that the coaches allowed Matthew to play in the game on Friday even though they had reason to know he had sustained a concussion. (Pet. Br. 6)

The District pursued its conspiracy theory in meetings between its counsel and Matthew's former teammates, as well as with the former coaches, prior to their depositions. (CP 489, 507-08, 661-62, 856-58) District counsel told a former coach that the Newmans and their lawyers were trying to "screw" the District. (CP 857-58), District counsel told a former player's parent that school "programs might suffer" because of the Newmans' lawsuit (CP 484), convincing her to record a meeting with the Newmans' attorneys and send District counsel the recording. (CP 663, 857-58).

When Matthew's lawyers questioned the former coaches about the District's attempts to pressure witnesses to conform their testimony to the District's theory, the District attempted to bar the Newmans from discovering the content of its counsel's discussions with the former coaches in advance of their depositions. In pursuit of this strategy, the District's lawyer purported to "appear" for the former coaches "for this matter and in particular this deposition so all . . . conversations are privileged." (CP 227-28)<sup>2</sup> The District's counsel "appeared" for assistant coach Shafer, as well as former head coach Roy (CP 522), former assistant coach Bunday (CP 525), former assistant coach Hale (CP 528), and current District employees Thorson (CP 531) and Borland. (CP 534) The District's counsel maintained that the attorney-client relationship between District counsel and Shafer continued to shield counsel's communications with Shafer over the subsequent six months while Shafer's deposition was continued. (CP 641-42, 1132)

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<sup>2</sup> The District's position regarding the former coaches' status varied to conform to the District's litigation strategy. For instance, when the Newmans served a subpoena on the District's counsel seeking the playbook and related documents that Shafer had retained (CP 229-32), the District successfully argued that Shafer was not obligated to produce those documents absent personal service because Shafer was a "non-party witness," no longer employed by the District and *not* represented by the District's counsel. (CP 251-53, 266-67)

In an order that is not challenged on appeal, Yakima Superior Court Judge Blaine Gibson (“the trial court”) ordered on September 27, 2013, that the District’s counsel “may not represent non-employee witnesses in the future.” (CP 635-37) The trial court determined that the potential for a conflict under RPC 1.7(a)(2) (concurrent representation) was sufficiently grave to preclude continued joint representation of what the District itself characterized (CP 788) as “non-employee witnesses:”

It was a really bad idea to represent those because of exactly what has happened because it opens up counsel to arguments that -- that, in fact, you used the privilege to disguise or -- or to cloud what -- whatever it was that transpired between you and the witnesses. With a witness who you don't represent, the other attorneys can say, well, what did this attorney talk to you about, what did he tell you. And by saying, well, I represent this, then you -- then you prevent that and you open yourself up to that argument. And by opening yourself up to that argument you hurt your client, the school district. So that's my concern.

(CP 787)

While the District criticizes the trial court’s reasoning, it has not appealed this decision, mischaracterizing the disqualification order as a “separate proceeding unrelated to this [discovery] motion.” (Pet. Br. 8) Nothing could be further from the truth. The “current motion” arises directly from the District’s continued refusal

to allow discovery of its counsel's communications with the former coaches after the trial court's September 2013 ruling.

On December 19, 2013, the Newmans renewed their efforts to discover communications between the District's counsel and its former coaches, limiting their request to communications occurring "during the period of time when unrepresented by counsel." (CP 37-44) In particular, the Newmans sought "all documents or other materials shared with" each of the former coaches for their review that related to the Newmans' lawsuit. (CP 37-44) The District again refused to provide the requested discovery, taking the position for the first time that its counsel's communications with the former employees, after termination of employment and while unrepresented by counsel, were protected by the *District's* corporate attorney-client privilege. (CP 14-21)

The trial court, on January 29, 2014, rejected the claim that the District's privilege encompassed the communications of its counsel with the former coaches. (CP 81-83) This Court accepted review on August 26, 2014.

#### IV. ARGUMENT

- A. **This Court reviews the trial court's discovery order for abuse of discretion, deciding *de novo* only the meaning of the term "client" under Washington's attorney-client privilege.**

The trial court's discovery order compelling disclosure is reviewed for abuse of discretion. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 693, ¶11, 295 P.3d 239 (2013). As the party asserting that the attorney-client privilege bars disclosure of relevant evidence, the District has "[t]he burden of establishing the existence of such a privilege." *Calbom v. Knudtzon*, 65 Wn.2d 157, 166, 396 P.2d 148 (1964).

Washington's attorney-client privilege bars disclosure "as to any communication made by the client to [his or her attorney], or [the attorney's] advice given thereon in the course of professional employment." RCW 5.60.060(2)(a). This Court decides *de novo* only the meaning of the term "client" in Washington's attorney-client privilege statute. *See State v. Martin*, 137 Wn.2d 774, 788-89, 975 P.2d 1020 (1999) (interpretation of "confession" in statutory priest-penitent privilege). This Court reviews the trial court's assessment of facts and circumstances concerning the nature of the communications at issue under the far more deferential abuse of

discretion standard. *See Cedell*, 176 Wn.2d at 692-93, ¶ 7, 702, ¶ 22 (remanding for trial court assessment of facts).

Because the scope of the attorney-client privilege in a proceeding in the Superior Court of the state of Washington is governed exclusively by Washington law, *see Agster v. Maricopa County*, 422 F.3d 836, 839 (9<sup>th</sup> Cir.), *cert. denied*, 546 U.S. 958 (2005), the District's reliance on federal law to delineate the scope of the Washington attorney-client privilege is misplaced. *See* Federal Rule of Evidence 501 ("in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.") Under Washington law, the trial court correctly held that former employees were not the "client" of the District's counsel under RCW 5.60.060(2)(a), and that the facts and circumstances of the communications made when the former coaches were no longer employed by the District and unrepresented by counsel rendered the attorney-client privilege inapplicable.

**B. The former coaches' communications with the District's counsel were not privileged because a corporation's attorney-client privilege extends only to current agents of the corporation who have authority to speak for the corporation.**

The trial court correctly held that the attorney-client privilege does not apply to corporate counsel's communications with former

employees. Where, as here, a corporation is a party to a lawsuit, only those corporate employees who have “speaking authority” to bind the corporation are deemed to be the corporation itself, and only their communications with the corporation’s counsel should be protected by the attorney-client privilege. *See Wright by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 200-01, 691 P.2d 564 (1984). This Court should affirm the trial court’s rejection of the privilege because the former assistant coaches – fact witnesses to Matthew’s injury – are not speaking agents of the District.

In *Wright*, this Court held that the disciplinary rule prohibiting counsel from contacting an adverse party that is represented by counsel did not bar plaintiff’s counsel from engaging in *ex parte* interviews with current and former Group Health employees concerning their knowledge of the plaintiff’s injury as a Group Health patient.<sup>3</sup> The Court reasoned that the non-speaking agents were not the adverse “party” absent their authority to bind Group Health:

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<sup>3</sup> RPC 4.2, which now governs *ex parte* contact with a represented party, is not appreciably different from former DR 7-104(A)(1), the rule interpreted in *Wright*. The current Rules of Professional Conduct recognize that *Wright* governs “[w]hether and how lawyers may communicate with employees of an adverse party.” Washington Comment [10] to RPC 4.2 (2006).

Since we hold an adverse attorney may . . . interview *ex parte* nonspeaking/managing agent employees, it was improper for Group Health to advise its employees not to speak with plaintiffs' attorneys. An attorney's right to interview corporate employees would be a hollow one if corporations were permitted to instruct their employees not to meet with adverse counsel.

*Wright*, 103 Wn.2d at 202-03. Because “former employees cannot possibly speak for the corporation,” there was no bar to interviewing them. *Wright*, 103 Wn.2d at 201.<sup>4</sup>

In *Wright*, this Court acknowledged that the attorney-client privilege applies to communications with “clients,” who may not necessarily be “parties.” 103 Wn.2d at 202. The Court in *Wright* was not required to decide whether the corporate attorney-client privilege barred the plaintiffs from *ex parte* interviews with its current and former employees because “[p]laintiffs’ attorney seeks to interview Group Health employees to discover *facts* incident to the alleged medical malpractice, not privileged corporate confidences.” 103 Wn.2d at 195 (emphasis in original). But the policies relied upon to reach the decision in *Wright* should guide the Court’s decision here. This Court should now hold that a corporation’s attorney-client

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<sup>4</sup> This is also the rule in many other jurisdictions, often reached in reliance on this Court’s decision in *Wright*. See generally cases collected at *Right of attorney to conduct ex parte interviews with former corporate employees*, 57 A.L.R. 5<sup>th</sup> 633 (originally published 1998).

privilege does not shield its counsel's communications with former employees who are not its speaking agents at the time of the communications because those former employees are neither parties nor the "clients" of the corporation's counsel.

In equating the corporate "party" to those employees who could bind the corporation, this Court in *Wright* relied on a policy of "keeping the testimony of employee witnesses freely accessible to both parties." 103 Wn.2d at 200. The Court noted that the purpose of the prohibition on unmediated communications was not "to protect a corporate party from the revelation of prejudicial facts," but "to preclude the interviewing of those employees who have the authority to bind the corporation." *Wright*, 103 Wn.2d at 200.

Similarly, the purpose of the attorney-client privilege is to protect the client's interest in the free flow of communications and advice, not to shield relevant information from discovery. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004). Because the attorney-client privilege hinders "production of all relevant facts," undermining the "efficient and early resolution of claims," *Cedell*, 176 Wn.2d at 698, ¶ 16, this Court has "strictly limited" application of the privilege "to the purpose for which it

exists.” *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968); *Pappas v. Holloway*, 114 Wn.2d 198, 203-04, 787 P.2d 30 (1990).

Consistent with these principles, the former coaches are not the District counsel’s “clients” for purposes of the attorney-client privilege because their statements do not bind the District. The former coaches have no continuing duty to the District. They do not participate in strategy concerning the District’s defense, and no longer work under the direction of those who do. Their statements to and any advice they receive from the District’s counsel following the termination of their employment do not implicate the client’s informed decision how best to defend itself in litigation.

The fact that the former coaches “are the individuals with the best knowledge of the events” (Pet. Br. 5) is not a controlling or even relevant consideration in determining whether they are the “client” to whom the privilege applies. Like the former employees in *Wright*, the former coaches are fact witnesses whose actions and observations are relevant to the District’s liability, and whose sole obligation in a deposition is to speak the truth, unhindered by any obligation to either party. If it has any relevance, the fact these former employees have the “best knowledge of the events” is a reason that the source of their recollections should be freely discoverable, as

even a speaking agent's testimony about the *facts* leading to litigation is not protected by a claim of privilege. (Argument § C, *infra*).

Limiting the corporation's attorney-client privilege to counsel's communications with current corporate employees with speaking authority to bind the corporation has the benefit of establishing a bright line rule that is easily applied and consistent with *Wright* and other rules applicable to corporate agency. These rules recognize that the corporation is not a natural person, and can only act through those agents that are clothed with authority to bind the corporation. For instance, ER 801 prohibits admission of the hearsay statements of non-speaking employees as admissions of the corporate party.<sup>5</sup> If an individual cannot bind the corporation, and can be interviewed *ex parte* by counsel adverse to the corporation,

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<sup>5</sup> The Washington courts have narrowly defined those employees who can be considered a corporation's "speaking agent." See, e.g., *Blodgett v. Olympic Sav. & Loan Ass'n*, 32 Wn. App. 116, 126, 646 P.2d 139 (1982) (carpenter was not speaking agent whose admission would bind contractor); *Ryder v. Port of Seattle*, 50 Wn. App. 144, 155, 748 P.2d 243 (1987) (Port of Seattle employee who made claimed statement in meeting with union members was not "speaking agent" of Port); *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 168, 758 P.2d 524 (1988) (employee who said that she had been given responsibility for handling plaintiff's case was not speaking agent who could bind Nordstrom to statement that store detectives were being retrained as a result of the incident); *Ensley v. Mollmann*, 155 Wn. App. 744, 752-53, ¶ 12, 230 P.3d 599 (no evidence that bartender was expressly authorized to speak on behalf of tavern about patron's state of intoxication in dramshop case), *rev. denied*, 170 Wn.2d 1002 (2010).

the corporation itself can have no reasonable basis to assume that its lawyers' discussions with that individual will remain confidential.

Contrary to the District's argument, this Court has never held that the corporate attorney-client privilege applies to shield all of corporate counsel's communications with any lower-level employee, and has never expressly adopted the "flexible test" espoused by the U.S. Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 386, 390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) as the standard for shielding communications between corporate counsel and the corporation's employees. *Youngs v. Peacehealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014), the only Washington case relied upon by the District, does not support its position that all communications by corporate counsel with any former employee are protected by the privilege.

In *Youngs*, the Court held that corporate counsel may engage in privileged *ex parte* contacts with a plaintiff's treating provider employed by counsel's corporate client, rejecting plaintiff's argument that unmediated communications were barred by the physician-patient privilege. Without expressly adopting *Upjohn's* "flexible test" as the standard for delineating the corporate privilege in

Washington,<sup>6</sup> this Court in *Youngs* cited *Upjohn's* policy of allowing the corporate entity to obtain "sound and informed advice" in holding that "corporate defense counsel may have privileged ex parte communications with a plaintiff's nonparty treating physician who has direct knowledge of the event or events triggering litigation, and the communications concern *the facts of the alleged negligent incident.*" 179 Wn.2d at 664, ¶ 29 (emphasis is original).

This Court in *Youngs* then limited the scope of privileged *ex parte* discussions with treating physicians to those directly related to the physician's treatment of the plaintiff. The Court thus effectively limited the attorney-client privilege consistent with the *Wright* speaking agent rule, enabling the corporation to shield only communications with those who had authority to bind the corporate health care provider regarding the treatment provided to the plaintiff.

The District asserts that this Court should both adopt the *Upjohn* test and extend it to former employees in order to avoid the "conflict and inconsistency" that would result were state and federal

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<sup>6</sup> The Court noted that it had previously "cited *Upjohn* favorably" in *Wright* and in *Sherman v. State*, 128 Wn.2d 164, 190, 905 P.2d 355 (1995). *Youngs*, 179 Wn.2d at 651, n.2. The Court also noted, however, that *Upjohn* did not "trump" other values. *Youngs*, 179 Wn.2d at 652, ¶ 5.

courts to apply different standards in delineating the scope of the corporate attorney client privilege. (Pet. Br. 19) The District's criticism of applying different rules and standards in state and federal courts ignores established principles of federalism. *See Dept. of Revenue v. Estate of Poehlmann*, 63 Wn. App. 263, 265 n.2, 818 P.2d 616 (1991) (rejecting as "contrary to the basic nature of our federal system" contention that the State "cannot play by different rules than the federal government.")<sup>7</sup> Indeed, the Federal Rules of Evidence expressly directs that state, not federal, law governs privilege where "state law supplies the rule of decision," Fed. R. Evid. 501, contemplating that the federal and state standards may be different.

This Court subjects litigants in a Washington superior court to different rules than those applicable in a federal district court all the time. For instance, Washington excludes from the definition of hearsay "a statement by a party's agent or servant acting within the scope of the authority to make the statement for the party." ER 801(d)(2)(iv). This limitation on admissibility of employees'

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<sup>7</sup> Other states have expressly rejected *Upjohn* in limiting the scope of the corporate privilege with respect to communications by current corporate employees. *See, e.g., Snider v. Superior Court*, 113 Cal. App. 4<sup>th</sup> 1187, 7 Cal. Rptr. 119, 136 (2003).

statements to only “speaking agents” is far “narrower than the corresponding federal rule.” Tegland, 5B *Wash. Practice: Evidence Law and Practice* § 801.47 (5<sup>th</sup> Ed. 2007). The District’s suggestion that this case must be decided under federal privilege law is without merit.

The District’s reliance on *Upjohn* falters on a more threshold ground, however, because even a federal court would not be bound by *Upjohn* to extend the privilege to the post-employment communications at issue here. The *Upjohn* Court expressly declined to address whether corporate counsel’s communications with former employees of the corporation would be covered by the attorney-client privilege. 449 U.S. at 394 n.3. *See also* 449 U.S. at 403 (Burger, C.J., concurring in part) (privilege should attach only where “an employee or former employee speaks *at the direction of the management* with an attorney regarding conduct or proposed conduct within the scope of employment.”) (emphasis added). And at least one federal district court has held that most communications with former employees are not privileged because they do not differ in any “relevant way from counsel’s communications with another third party witness.” *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000). *See* Susan J. Becker, *Conducting Informal Discovery of A*

*Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 Md. L. Rev. 239, 264 (1992) ("flexible test" under *Upjohn* does not extend "the privilege to communications between corporate counsel and anyone who possesses factual information that the attorney finds helpful in advising the corporation.").

The federal cases cited by the District do not support its position regarding pre-deposition communications between a former employee and corporate counsel. For instance, as the trial court noted (CP 83), the Ninth Circuit adopted the reasoning of *Upjohn* to hold "conversations will remain privileged after the employee leaves," not that discussions with former employees were privileged when they first occurred after the employee no longer worked for the corporation, in *In Re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (emphasis added) (cited at Pet. Br. 16-17). Similarly, in anticipation of litigation the corporation's senior management directed the two current officers most familiar with questioned transactions to answer questions from the corporation's counsel while they were still employees in *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1489, 1492-93 (9<sup>th</sup> Cir. 1989) (cited at Pet. Br. 17).

Where, as here, a corporate defendant attempts to foreclose discovery of communications between its counsel and an individual who is not employed by counsel's client, and therefore has no authority to bind that client, the purposes of shielding relevant information under the guise of protecting the client's interest in freely sharing information and obtaining candid advice is not at issue. This Court should affirm the trial court's order that communications between former employees and the District's counsel are not protected by the District's attorney-client privilege.

**C. Shielding the former coaches' pre-deposition communications with the District's counsel does not further the purposes of the attorney-client privilege.**

Even were the Court to adopt a different standard than *Wright's* "speaking agent" rule for assertion of a corporate attorney-client privilege under these circumstances, it should nonetheless hold that the District's privilege does not extend to sessions with corporate counsel to "prepare" a former employee for a deposition. The attorney-client privilege should never shield such pre-deposition communications, which may either consciously or unconsciously affect a fact witness's testimony. The purposes of the privilege – to develop facts essential to the defense of a corporate client – is not furthered by shielding communications with former employees that

are not conducted for an investigative purpose. The public interest in the truth-finding process, as well as a litigant's interest in testing the factual basis for a witness's statements, trumps any corporate interest in shaping a former employee's testimony to conform to its theory of the case.

In *Youngs*, this Court cited favorably the policy behind the *Upjohn* Court's refusal to limit the privilege to only those in the corporate "control group," because employees outside the control group "might well be the only source of information relevant to legal advice," and the determination of "what happened" may be inextricably related to the legal advice that counsel gives his or her client. 179 Wn.2d at 662, ¶ 25. The policy favoring a litigant's freedom to investigate and formulate a theory of the case is inapplicable to pre-deposition conferences between corporate counsel and former employees – particularly, where as here, they may reveal evidence that corporate counsel helped shape the witness's recollection in a manner consistent with the corporate defendant's theory of the case.

The District ignores that both *Upjohn* (allegations of illegal payments to foreign government) and *Youngs* (medical malpractice) involved corporate counsel's internal investigations of allegations of

wrongdoing “to investigate claims and prepare for litigation” *before* a lawsuit was even filed. 179 Wn.2d at 651-52, ¶ 4. The policy relied upon by the *Upjohn* Court – “to facilitate frank communication about alleged wrongdoing” – cannot justify extending the corporation’s attorney-client privilege to communications with former employees not for the purpose of investigating the corporation’s liability, but solely to “prepare” the former employee for a deposition conducted long after that investigation has occurred.

Pre-deposition witness preparation – “woodshedding” – may bear directly on the credibility of a witness’s testimony. As a consequence, even those courts that apply the flexible test of *Upjohn* to some former employees’ communications with corporate counsel do not protect as privileged pre-deposition communications that are made not for the purpose of investigation, but to “refresh” the witness’s recollection. Thus, if corporate counsel “informed [the witness] of facts developed during the litigation, such as testimony of other witnesses, of which [the witness] would not have had prior or independent personal knowledge, such communications would not be privileged, particularly given their potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously.” *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 40 (D.

Conn. 1999).<sup>8</sup> Just as the District was free to pursue extensive discovery of communications between plaintiffs' lawyers and former teammates or other fact witnesses, in aid of the District's "conspiracy" theory, the District's own efforts to influence the testimony of fact witnesses should not be protected by the attorney-client privilege.<sup>9</sup>

*Upjohn* itself supports this distinction between investigation and witness preparation. The factors cited by *Upjohn* as indicative of whether the privilege should apply focus on the nexus between corporate counsel's confidential factual investigation and the legal

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<sup>8</sup> See also *Schaffrath v. Hamburg Twp.*, 2009 WL 56031, at \*2 (E.D. Mich. 2009) (pre-deposition communications with former employee not privileged; citing concern that witness "was 'refreshed' on his prior statements . . . and/or 'briefed' on what the other witnesses had testified to, . . . and may have induced him to conform his testimony to the other witnesses in the case who had already been deposed."); *U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554 (E.D. Pa. 2004); *Winthrop Resources Corp. v. Commscope, Inc. of N.C.*, 2014 WL 5810457 (W.D.N.C. 2014).

<sup>9</sup> The trial court properly recognized this in ruling on plaintiff's motion for an order protecting their counsel's work product generated in interviewing Matthew's teammates. (9/27/13 RP 16-18: "I want you . . . to stop and think about what you're arguing about, because we're going to get to the question of was it appropriate for Mr. Northcraft to suddenly represent these . . . people who didn't work for the school district and what the reason for that was and how that was handled.") The District has not argued that its counsel's records of its communications with the former coaches are protected work product under CR 26(b)(4).

advice that counsel supplies to his or her corporate client.<sup>10</sup> For instance, in *Upjohn* current employees were directed to cooperate in the investigation by their superiors, and were told that corporate counsel's investigation was highly confidential. 449 U.S. at 394-95. Their statements were made in their capacity as corporate employees while the corporation was preparing its legal strategy and before any litigation was pending.

Here, by contrast, the District's pre-deposition meetings with the former coaches were not undertaken to shape the District's legal strategy in responding to a potential claim, as they occurred long after the District investigated "what happened." The District had already obtained "the facts of the alleged negligent incident," when in late 2012 and early 2013 its liability insurer's investigator

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<sup>10</sup> Under *Upjohn*, the communications at issue are privileged if:

- (1) they were made at the direction of corporate superiors,
- (2) they were made by corporate employees, (3) they were made to corporate counsel acting as such, (4) they concerned matters within the scope of the employee's duties, (5) they revealed factual information "not available from upper-echelon management," (6) they revealed factual information necessary "to supply a basis for legal advice," (7) the communicating employee was sufficiently aware that he was being interviewed for legal purposes, and (8) the communicating employee was sufficiently aware that the information would be kept confidential.

449 U.S. at 394; quoted in *Youngs*, 179 Wn.2d at 664, n.7.

interviewed these former coaches along with Matthew's former teammates. (CP 591, 1186, 1311)

Those investigative statements were provided to the Newmans. But the District resisted discovery of equally important information – statements by the District's counsel to the former coaches that were critical of this lawsuit and the Newmans' motives, including "all documents or other materials shared with" the former coaches in advance of their depositions that related to the Newmans' claim. (CP 37-44) The Newmans sought these materials because the District's counsel may have influenced the former coaches' testimony just as they sought to influence the testimony of other important fact witnesses. (CP 484: school "programs might suffer" because of the Newmans' lawsuit; CP 857-58: the Newmans and their lawyers were trying to "screw" the District)

The Newmans should be entitled to establish at trial that the former coaches' testimony was influenced by these pre-deposition meetings, just as they could impeach the testimony of any other witness offered by the District – and just as the District will attempt to elicit evidence that the testimony of witnesses was influenced by plaintiffs' counsel. The trial court's order rejecting the District's privilege claim properly allows the jury to resolve this credibility

dispute. (CP 83) This Court should hold that the District's attorney-client privilege does not encompass the pre-deposition communications at issue here and affirm.

**D. The District waived any privilege by failing to assert it at the earliest opportunity.**

This Court should not countenance the District's ever-shifting arguments to shield its attempt to influence witnesses – efforts that became relevant because the District itself claims a “conspiracy” to create a claim against it. Even if the District's privilege might have applied to a former employee, this Court should hold that the District waived it by failing to assert the corporate privilege until after the trial court had rejected its argument that the District's counsel had an attorney-client relationship with the former coaches.

Not only the client, but the client's attorney, when “authorized to speak and act for the client,” may waive the attorney-client privilege. *Dietz v. Doe*, 131 Wn.2d 835, 850, 935 P.2d 611 (1997). The privilege is waived not only by disclosure to third parties, but where it is asserted in bad faith. *See Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 700, ¶ 19, 295 P.3d 289 (2013). The privilege also may be waived where, as here, a party fails to assert it at the earliest possible opportunity when objecting to discovery. *See Burlington Northern & Santa Fe Rwy. Co. v. U.S. Dist. Court*, 408

F.3d 1142, 1149-50 (9<sup>th</sup> Cir. 2005) (waiver of privilege by failing to assert it for five months after discovery request), *cert. denied*, 546 U.S. 939 (2005); *In re Honeywell Intern., Inc. Securities Litigation*, 230 F.R.D. 293, 298-300 (S.D.N.Y. 2003) (rejecting “belated assertion” of work product privilege when corporation had previously relied on attorney-client privilege).

The District did not claim that its own corporate privilege protected its counsel’s communications with the former coaches until after the trial court rejected its attempt to have its attorney simultaneously represent the former coaches “for purposes of [their] deposition.” This Court should reject the District’s shifting attempts to avoid discovery and hold that the District waived the attorney-client privilege.

**E. The Newmans should be awarded their attorney fees.**

The Newmans have been put to enormous expense, and their trial delayed for years, by the District’s refusal to comply with the trial court’s order rejecting the District’s shifting arguments related to the attorney-client privilege. The trial court found the District in contempt for failing to follow its order four months after it was entered. (5/9/14 RP 53) Neither the trial court’s failure to reduce its contempt order to writing nor this Court’s subsequent stay purged

the District of contempt. *See State v. Erickson*, 66 Wash. 639, 120 Pac. 104 (1912) (party chargeable with notice of order, and guilty of contempt if disobeyed, prior to formal entry from time of its oral announcement in open court), *aff'd sub nom. Carlson v. State of Washington*, 234 U.S. 103 (1914).

The Newmans are entitled to their attorney fees for successfully resisting the District's claim of privilege and compelling legitimate discovery under CR 26(c), CR 37(a)(4), and RCW 7.21.030(3) and .070, because the District remains in contempt of the trial court's order compelling discovery under RCW 7.21.010(1)(b) and (d). *See Johnston v. Beneficial Management Corp.*, 26 Wn. App. 671, 677, 614 P.2d 661 (1980), *rev'd on other grounds*, 96 Wn.2d 708, 638 P.2d 1201 (1982); *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 502-03, 903 P.2d 496 (1995), *rev. denied*, 129 Wn.2d 1010 (1996). This Court should award the Newmans their fees on appeal, RAP 18.1(a), or direct the trial court to award them those fees on remand.

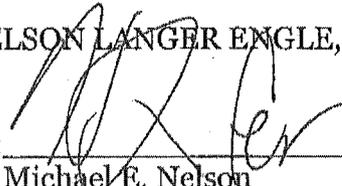
## V. CONCLUSION

The former coaches' communications with the District's counsel were not privileged because a corporation's attorney-client privilege extends only to current agents of the corporation who have

authority to speak for the corporation. Shielding the former coaches' pre-deposition communications with the District's counsel would not further the purposes of the attorney-client privilege. The District in any event waived any privilege by failing to assert it at the earliest opportunity. This Court should affirm and award plaintiffs their fees and costs.

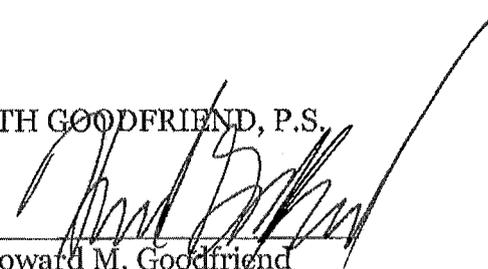
Dated this 5th day of August, 2015.

NELSON LANGER ENGLE, PLLC

By: 

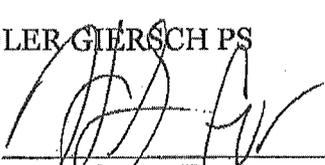
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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 5, 2015, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 5<sup>th</sup> day of August, 2015.

  
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Attached for filing in pdf format is a Brief of Respondents, in *Newman v. Highland School District*, Cause No. 90194-5. The attorney filing these documents is Howard M. Goodfriend, WSBA No. 14355, email address: [howard@washingtonappeals.com](mailto:howard@washingtonappeals.com).

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