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Supreme Court No. 90194-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Appeal from the Court of Appeals – Division III

No. 32223-8 III

Yakima County Superior Court Cause No. 12-2-03162-1

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

Respondent,

v.

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

Petitioner.

**HIGHLAND SCHOOL DISTRICT NO. 203'S ANSWER TO THE
BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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I. INTRODUCTION

In its Objection to the Motion of American Civil Liberties Union of Washington to File Amicus Curiae Brief, the District argued the Amicus Curiae American Civil Liberties Union of Washington (“ACLU”) improperly interjected new issues into the District’s appeal and attempted to expand the existing issues beyond the scope of the District’s appeal. The District relies and incorporates the arguments of its Objection, and out of an abundance of caution, answers the ACLU’s Amicus Curiae Brief as follows.

II. ARGUMENT

For the reasons briefed in its Amended Petitioner’s Brief, Petitioner’s Reply Brief, and Answer to the Brief of Amicus Curiae Washington Association of Justice Foundation, the District requests that this Court adopt a flexible modified version of the *Upjohn* test to determine the application of the corporate attorney-client privilege to communications between corporate counsel and former corporate employees. In regard to many of the issues raised by the ACLU, the District addressed those issues in its Answers to the Amicus Briefs of the Washington State Association for Justice Foundation and the Washington Employment Lawyers Association. Instead of readdressing those issues here, the District relies upon those briefs.

A. Corporations – Closely Held, Publicly Traded, and Municipal – Are Entitled to Enjoy the Benefit of Attorney-Client Privilege

Thirty four years ago, the United States Supreme Court recognized the existence of the corporate attorney-client privilege. (*Upjohn v. U.S.*, 449 U.S. 383 (1981)). Thirty one years ago, this Court first approvingly cited to *Upjohn* and the existence corporate attorney-client privilege. (*Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.3d 564 (1984)). One year ago, this Court expressly adopted a modified version of the *Upjohn* test for corporate attorney-client privilege and *Upjohn*'s reasoning, including its limiting principles. (*Youngs v. Peacehealth*, 179 Wn.2d 645 (2014)). Corporations are entitled to the benefit of the attorney-client privilege.

Corporations enjoy the benefit of the privilege, because “[t]he law treats all parties equally whether they are [corporations] . . . or individuals.” (WPI 1.07). Local governmental entities are no different, and they are entitled to benefit from the corporate attorney-client privilege. Under RCW 4.96.010, the government is entitled to be treated the exact same as a private party. (RCW 4.96.010). “[I]f a government is found to have engaged in tortious conduct under applicable substantive law, which may or may not be different for government than for private parties, then the government will be liable for such tortious conduct ‘to the same extent

as if [it] were a private person or corporation.” (*Locke v. City of Seattle*, 162 Wn.2d 474, 481, 172 P.3d 705 (2007)(citations and internal quotations omitted)). “All governmental entities . . . shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present . . . employees . . . to the same extent as if they were a private person or corporation.” (RCW 4.96.010(1)(emphasis added)). Because private persons, corporations, and government defendants are entitled to the same treatment, they are all are entitled to the benefits of the attorney-client privilege.

The right to access the courts does not destroy the individual, corporate, or government’s right to the attorney-client privilege. The ACLU admits corporate counsel, including corporate counsel representing municipal corporations, are entitled to work without intrusion by opposing counsel. The ACLU admits “[i]t is essential that lawyers representing our public agencies work with a certain degree of privacy free from unnecessary intrusion, in order to assemble information, sift what they consider to be relevant from irrelevant facts, prepare legal theories, and plan strategy without undue inference . . .” (Brief of Amicus Curiae American Civil Liberties Union at 10, No. 90194-5 (Review Granted August 26, 2014)(quoting *Soter v. Cowles Pub’g Co.*, 162 Wn.2d 716, 748-49, 174 P.3d 60 (2007))).

Contrary to the ACLU's arguments, the corporate attorney-client privilege is not restricted to the initial investigative stages of a lawsuit, but instead "exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice." (*Youngs*, 179 Wn.2d at 645, 664)(citing *Upjohn*, 449 U.S. at 383, 390)). The privilege exists throughout the entire duration of the relationship. The fact that the party is a corporation does not mean the privilege is limited to only the investigative part of the lawsuit.

At no point does the District assert it cannot be liable for tortious conduct. (Amicus Brief at 11). Instead, the District argues that just like any other litigant, it is entitled to the benefits of the corporate attorney-client privilege. In *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 758 P.2d 968 (1988), the District's duties to its students, the public policy behind tort liability, and the acts of the territorial Legislature of 1869 are not at all relevant to the issue on appeal. The issue on appeal is whether the District's corporate attorney-client privilege extends to former employees, when the former employees have direct knowledge of the event or events triggering the litigation and/or engaged in the conduct giving rise to the litigation.

B. The Issue of Government Transparency Is Not Part of This Appeal

Neither party raised or briefed any issue of government transparency, yet the ACLU interjects the issue into this case. The District requests this Court disregard the issue and not consider it as part of the appeal. Should this Court believe that the issues of government transparency are pertinent to whether the corporate attorney-client privilege applies to the corporation's counsel's communications with former corporate employees, then the District requests that this Court issue an order that the issue be properly briefed by both the respondent and the District. However, should this Court consider the issue, government transparency does not nullify the corporation's right to an attorney-client privilege.

The Public Records Act largely undermines the ACLU's arguments. The ACLU repeats that the public has the right to access government records, and in support of that proposition, the ACLU cites to the Public Records Act. The ACLU neglects to mention the Public Records Act's exceptions. Those exceptions include RCW 42.56.290, which exempts the disclosure of "[r]ecords that are relevant to a controversy to which an agency is a party but which records would not be

available to another party under the rules of pretrial discovery for causes pending in the superior courts . . .” If the records are protected by the attorney-client privilege, then they are not subject to production under the Public Records Act. “A ‘controversy’ is litigation or anticipated litigation.” (*Block v. City of Gold Bar*, --- Wn. App. ---, 355 P.3d 266 (2015)(citing *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 732, 174 P.3d 60 (2007))). “This exemption includes attorney work product and attorney-client privilege.” (*Id.* at 277-78 (citing *Soter*, 162 Wn.2d at 734)). Consequently, at the expense of complete transparency, the Public Records Act protects the attorney-client privilege and exempts it from disclosure.¹

“The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” (*State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). Therefore, in Washington, the statutes are the best barometer of the Legislature's intent. RCW 4.96.020 requires that government defendants be treated the exact same as individual or corporate litigants, meaning the government is entitled to

¹ The ACLU also relies on the Open Public Meetings Act. Similar to the Public Records Act, the Open Public Meetings Act includes an attorney-client privilege exception. (*See* RCW 42.30.110; *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586, 30 P.3d 474 (2001)).

corporate attorney-client privilege. The Public Records Act and the Open Public Meetings Act carve out exceptions for disclosing attorney-client privilege, indicating that protecting the attorney-client privilege was, in some cases, more important than the government transparency. Here, the Legislature intended for government defendants to be treated like individual or corporate defendants, and in some circumstances, the Legislature intended to protect attorney-client privilege at the expense of complete government transparency or public disclosure.

The ACLU raises the issues of whistleblowers. This appeal is not about whistleblowers. The facts of this case involve the former employees having the knowledge regarding the conduct triggering the alleged corporate liability. Consequently, this Court should refrain from addressing the whistleblower issue and corporate attorney-client privilege as applied to former employees, because Washington courts do not issue advisory opinions. (*Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994)).

It appears that in the case of government defendants, the ACLU argues that the existence of the privilege impedes discovery and the public is entitled to a near absolute right to unlimited discovery. As evidenced by Washington's very own statutes, RCW 4.96.010, RCW 42.56.290, RCW 42.30.110, such contentions are not correct. Even if the ACLU's position

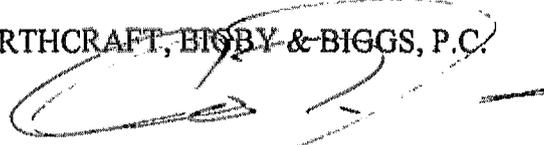
was correct, then this Court should consider eliminating all privileges. RCW 4.96.010 requires government defendants to be treated the same as individuals and corporations. If the government is not entitled to the corporate attorney-client privilege, then neither corporations nor individuals should be entitled to an attorney-client privilege.

III. CONCLUSION

The District requests this Court refrain from addressing the issues of government transparency and hold that in this context, a modified version of the *Upjohn* test determines the application of the corporate attorney-client privilege to communications between corporate counsel and former corporate employees.

RESPECTFULLY SUBMITTED this 4^h day of November, 2015.

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CERTIFICATE OF SERVICE

I, Michelle A. Tomczak, declare under penalty of perjury of the state of Washington, that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of Northcraft, Bigby & Biggs, P.C., located at 819 Virginia Street, Suite C-2, Seattle, WA 98101.

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DATED this 4th day of November, 2015, in Seattle,
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Attached for the Court's consideration, please find:

1. Highland School District No. 203's Answer to the Brief of Amicus Curiae American Civil Liberties Union of Washington;
2. Highland School District No. 203's Answer to the Brief of Amicus Curiae Washington Employment Lawyers Association; and
3. Highland School District No. 203's Answer to the Brief of Amicus Curiae Washington State Association for Justice Foundation.

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