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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.

AMENDED PETITIONER'S BRIEF

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I. Introduction

At issue in the case before this Court is the scope of the corporate attorney-client privilege, the importance and vitality of which this Court recently emphasized in *Youngs v. Peacehealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014). The underlying case arose from an injury to a high school student-athlete during a football game in 2009. Matthew Newman received serious, permanent brain injuries while playing quarterback for the Highland School District's football team.

During the resulting lawsuit, the plaintiffs' attorneys have aggressively and persistently sought to discover the communications between the Highland School District's attorneys and the coaches whose conduct is directly at issue in the case. Even though the coaches subsequently left employment with the School District, the communications between the School District's attorneys and the coaches should be protected by the School District's corporate attorney-client privilege.

This Court should take this opportunity to announce the clear rule that the attorney-client privilege extends to such conversations between counsel and former employees whose alleged negligent acts and omissions give rise to a personal injury lawsuit against their former corporate employer, which in this case is a municipal corporation school district. The

Highland School District asks this Court to reverse the trial court's decision of January 28, 2014, denying the School District's motion for a protective order.

II. Assignments of Error

1. The trial court erred in its order of January 28, 2014, by applying the incorrect legal standard relating to the attorney-client privilege and denying the Highland School District's motion for a protective order.

Issues Pertaining to Assignments of Error

1. Are communications between a school district's attorney and the coaches who have direct knowledge of the facts and circumstances giving rise to the plaintiffs' claims, and whose actions are alleged to have triggered the liability to the plaintiffs, protected by the school district's corporate attorney-client privilege, even if the coaches are no longer employed by the school district?

III. Statement of the Case

This case involves injuries that occurred during a high school football game on Friday, September, 18, 2009. Student football player Matthew Newman received a late, hard hit during the overtime period of the game, from which he developed an acute subdural hematoma causing him to experience a neurological emergency during the game. (See, CP 4 – 11). Matthew received immediate medical attention at the field and he was then

transported to the Yakima Valley Medical Center emergency room. (*Id.*) Tragically, the injury resulted in a severe, permanent brain injury, but fortunately, Matthew did not die as a result. (*Supra*).

The plaintiffs' attorneys waited nearly three years to file the lawsuit against the Highland School District. (CP at 3-11.) It is notable that the plaintiffs included as parties neither the present Highland School District coaches, nor the former coaches, even though they claim the coaches are the negligent actors for whom the School District is vicariously liable. (*Id.*) The plaintiffs' attorneys are highly experienced and tenacious, and one can only assume that the failure to sue the coaches individually was a tactical decision, not an oversight.

There are significant disputes about the facts surrounding the football practice, the game itself, and the injury. Naturally, those disputes will be decided by the jury and are not at issue here. For the purpose of understanding the case, though, it is important to know more about the nature of the plaintiffs' legal and factual assertions.

The plaintiffs claim that Matthew's injury was the result of what has been referred to as a "secondary impact syndrome." (See, generally, CP 4 – 11.) In its simplest form, the disputed syndrome involves a player who sustains a concussion, and then returns to play before the concussion is healed. Then a second head impact occurs, causing serious brain injury. The

syndrome theorizes that the damage done by the second impact is more significant than would otherwise be expected, due to the unhealed first concussion.

Although there are significant facts to the contrary, the plaintiffs claim they can show that Matthew received a concussion during practice the day before the fateful game. They further claim that the coaches knew about the concussion, but they negligently allowed Matthew to play while he still had symptoms from the concussion. In essence, the plaintiffs claim that the coaches violated the Lystedt Act, RCW 28A.600.190, which describes the method for dealing with suspected head injuries.

The plaintiffs must prove several independent facts to establish that Matthew's injury was from a "secondary impact syndrome," as opposed to a different type of closed-head injury such as a sudden, large, subdural hematoma. The plaintiffs must convince the jury that Matthew suffered a concussion during practice the day before the game; that the coaches were aware that Matthew had symptoms of a suspected concussion, and that the coaches ignored the standard of care set forth in the Lystedt Act and allowed Matthew to play in the game the following day.

The Lystedt Act requires that, if coaches are aware or suspect that an athlete is suffering from a concussion, then the athlete must not be allowed to continue to play and can only return to play after being cleared

by a trained health care provider. (RCW 28A.600.190). Consequently, the key to the plaintiffs' "secondary impact syndrome" theory against Highland School District is to vilify the coaches. Unless the plaintiffs can establish that Matthew suffered a concussion during practice the day before the game, and that the coaches knew he was suffering from concussion symptoms (both of which are contrary to significant evidence), then the plaintiffs' claims fail.

The School District will present compelling evidence that plaintiffs' negligence claims, and the evidence the attorneys contend support those claims, are simply untrue. It is highly disputed whether Matthew was injured during practice, or whether, unbeknownst to Matthew's coaches, he hurt himself while playing catch with friends after practice. Matthew's girlfriend, Lisa Sorensen, is expected to testify that she talked to Matthew the evening after practice, and Matthew told her that he Lisa that he had a headache from throwing the football after practice. Ms. Sorensen is further expected to testify that Matthew was planning to hide the injury from the coaches, because he knew that they would not let him play in the big, rival game the next day if the coaches knew or suspected he had sustained a concussion. (CP 336-346; 970-971; 985-986; 1012-1013).

The School District intends to present evidence that the coaches had no knowledge of Matthew getting any injury to his head, either during or

after practice, nor did they have any reason to suspect that Matthew suffered a concussion during practice. The intended evidence will show that the coaches had no reason to restrict him from playing in the game. It is expected that the District will show that any evidence to the contrary has either been fabricated or “suggested” to Matthew’s former teammates, who obviously would like to help Matthew as a result of his catastrophic injury.

It is anticipated that the District will be able to show that this case presents an exceedingly unfortunate injury to a nice young man, but the “facts” as presented by the plaintiffs and their attorneys are misleading and untrue.

As this Court can easily see, the knowledge and actions of the former coaches are at the center of the disputes in this case. It is undisputed that in its defense of the case, the Highland School District’s attorneys have met with the former coaches and discussed the facts and circumstances of the practice and the game. Those communications should be protected by the corporate attorney-client privilege held by the School District.

During discovery, the plaintiffs’ attorneys have aggressively sought to obtain the actual communications between the Highland School District’s attorneys and the School District’s former football coaches. (See e.g. CP 27-57). Naturally, the coaches, who are no longer employed by the School

District, are the individuals with the best knowledge of the events, and whose actions allegedly triggered the liability.

The plaintiffs served interrogatories asking for “any communications between [the coaches] and anyone employed by ... the law firm ..., relating to Matthew Newman and/or the instant lawsuit...” (CP 27-44). The plaintiffs also requested production of “all communications, in any form, between” the coaches and the School District the law firm, including “all documents or other material shared with [the coaches]... relating to this lawsuit...” (*Id.*)

The Plaintiffs also noted the third deposition of Coach Shafer and a second deposition of Coach Roy. (CP 48-57). The plaintiffs subpoenaed a list of “things to be produced,” including all emails, correspondence, cell phone records and texts between the School District’s attorneys and the coaches. (*Id.*) The plaintiffs are seeking a host of communications between the Highland School District’s attorneys and the coaches whose knowledge is at the heart of the plaintiffs’ claims. Those inquiries must not be permitted because they invade the School District’s attorney-client privilege.

The plaintiffs have deposed the former coaches, and the coaches responded to every question other than those questions that raised the subject privilege. The coaches answered all factual questions – but it is not the facts which the plaintiffs’ attorneys seek: they want the privileged

communications and mental impressions of the School District's attorneys. There can be no dispute that all of the facts known to the witnesses have been available to the plaintiffs' attorneys. It is only questions about the privileged communications that generated objections by the District.

The plaintiffs' attorneys deposed all of the coaches, and Assistant Coach Schafer has been deposed twice. The School District's counsel has discussed the facts and the other matters with the former coaches, for two purposes: (1) as the District's counsel, as part of the investigation of the facts and circumstances of the occurrences at the heart of the plaintiffs' claims; and (2) as counsel for the former coaches themselves in connection with their depositions.

The plaintiffs' attorneys have never been barred from contacting the coaches directly, other than during the specific times they were represented by counsel. At the present time, for example, the coaches are not represented by counsel, and the plaintiffs' attorneys are free to contact them.

In a separate proceeding unrelated to this motion, the trial court erroneously held that the attorneys representing the School District could no longer simultaneously represent the School District and its former coaches. (Note that the order dealt only with former employees; there was no restriction placed on simultaneously representing the District and current

employees). Although the District believes that the Court's order was incorrect, review was not taken from that order, and it is not at issue here.

At issue here are the communications during times when the coaches were not represented by counsel, but during times when the School District's attorney was investigating and defending the District itself.

A. The trial court erroneously denied the Highland School District's proper motion for a protective order, thereby setting the stage for the plaintiffs to obtain privileged communications and legal mental impressions.

In order to protect the privileged communications from being reached by the plaintiffs' attorneys, the School District asked the trial court to enter a protective order shielding the privileged communications from the plaintiffs' attorneys' reach. (CP 12-67). Unfortunately, the trial court applied the incorrect test and ruled that the communications are not privileged. The trial court's reasoning was that the privilege does not apply because the coaches had left their employment during the years following the injury. (CP 68-70).

B. The trial court initially issued a narrow, partial stay of discovery, but later declined to do so while the issue is on appeal in this Court. The trial court instead erroneously held that the School District is in contempt.

The trial court issued a partial stay of discovery protecting the communications while the matter was before the Court of Appeals. (CP 71-83; 90-91). The order stayed only the specific portion of discovery involved

in the issues on appeal: (1) all dates of communication between counsel and the Highland School District's former coaches; (2) all people involved in those communications; and (3) all dates the School District's counsel represented its former coaches.

Within approximately two weeks of the stay expiring, the plaintiffs aggressively sought contempt sanctions against both the School District and its counsel, saying that it was "two weeks after the Court denied" the School District's motion for a stay, and the District "is now in violation of the Court order of January 30, 2014, and should be held in contempt." The trial court was advised of the Supreme Court holdings in *Dike v. Dike*, 75 Wn.2d 1, 5, 448 P.2d 490 (1968) and *Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d 527, 688 P.2d 506 (1988), which tell us that parties should not be held in contempt when an attorney makes a claim for privilege in good faith; the proper course is for the trial court to stay all sanctions for contempt pending appellate review of the issue.

Surprisingly, the trial court did not follow *Dike* and *Seventh Elect Church*, and instead found the School District in contempt for not providing the communications to the plaintiffs – despite the fact that the matter remains on appeal before this Court, and despite the fact that an emergency motion for stay was then pending in this Court. Not only did the trial court refer to the present appeal as "frivolous" and hold the Highland School

District in contempt, but it also ordered the District to pay the substantial amount of \$2,500 *per day* until the discovery is provided. It is impressive to not that the severe amount of sanctions the trial court attempted impose even exceeds the trial court's statutory authority. (RCW 7.21.030).

In response to the trial court's action, the School District provided the plaintiffs with the dates of representation for the former coaches, because that information is less likely to result in irreparable harm in the litigation. The remaining communications, however, are at the very center of the issues before this Court and disclosing them could result in significant prejudice to the School District. The School District sought and obtained a partial stay of discovery from this Court, protecting the disputed communications until the matter is resolved here. (CP 84-87).

This Court is urged to provide guidance to lower courts and to clearly hold that communications such as those at issue here are protected by the corporate attorney-client privilege.

IV. Argument

A. Standard of Review.

This appeal involves the trial court's application of the scope and applicability of the attorney-client privilege. A trial court's decision to grant or deny a motion for a protective order is normally discretionary and is reviewed on the basis of abuse of discretion. (*King v. Olympic Pipeline*, 104

Wash. App. 338, 16 P.3d 45 (2001)). However, in the case of rulings made on the basis of the applicability of the attorney-client privilege to the issue before the trial court, the issue is reviewed *de-novo*. (*Dietz v. Doe*, 80 Wash. App. 785, 911 P.2d 1025 (1996), *Rev'd* 131 Wn.2d 835, 935 P.2d 611 (1997)). In a situation which was similar to the case at hand, the court stated:

We generally review discovery orders for abuse of discretion. A trial court abuses its discretion when “discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion.” Here, the trial court held that the attorney-client privilege barred discovery. The trial judge did not believe that he had any discretion to grant discovery. This ruling was based on tenable grounds if the privilege applies, and untenable grounds if it does not. Accordingly, we review the ruling *de novo* to determine whether the attorney-client privilege protects the identity of the unknown driver.

(*Id.*)(citations omitted). (See *e.g.*, *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)) (whether a party has met the requirements to establish the existence of the attorney-client privilege is reviewed *de novo*; as is the district court’s rulings on the scope of the privilege).

B. The trial court order infringes on the oldest of common law privileges, the attorney-client privilege, and it restricts the School District’s ability to develop a proper defense to the case.

The issue in this appeal – the scope of the attorney-client privilege as it applies to employees and former employees of the School District – should be viewed in light of *Upjohn v. United States*, 449 U.S. 383 (1981), the federal Ninth Circuit appellate decisions decided thereafter, as well as

the precedent and reasoning set forth in *Wright v. Group Health Hospital*, 103 Wn.2d 192, 195, 691 P.2d 564 (1984) and *Youngs v. Peacehealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014).

The plaintiffs' attorneys are very directly seeking, and the trial court intends to allow them to obtain, attorney communications with former School District employees. If the trial court's erroneous order is permitted to stand, the plaintiffs' attorneys will be allowed to obtain the details and substance of the School District's communications and mental impressions, which should be protected from disclosure.

"The attorney-client privilege is the oldest of privileges for confidential communications known to the common law." (*Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)); *Youngs v. Peacehealth*, 179 Wn.2d at 650 (citations omitted)). The purpose of the attorney-client privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." (*Upjohn*, 449 U.S. at 389). The privilege "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." (*Upjohn*, 449 U.S. at 390 (citing *Trammel v. U.S.*, 446 U.S. 40, 51 (1980); *Youngs v. Peacehealth*, 179

Wn.2d at 664). Fundamentally, the attorney-client privilege provides a client and an attorney freedom – freedom to candidly communicate, freedom to investigate and to advise, and freedom to intelligently act on that advice, without fear that the attorney’s efforts on behalf of the client will be disclosed to those with adverse interests.

In *Upjohn*, the Supreme Court established that the attorney-client privilege may apply to corporate counsel’s communications with both managerial and non-managerial employees. (*Upjohn*, 449 U.S. at 386). This Court has specifically agreed with the *Upjohn* decision that “the attorney-client privilege may in certain instances extend to lower level employees not in a ‘control group’, (citation omitted), [but advised that] the privilege extends only to protect communications and not the underlying facts.” (*Wright v. Group Health Hospital*, 103 Wn.2d 192, 195, 691 P.2d 564 (1984)). In refusing to limit the corporate attorney-client privilege to communications with a corporation’s control group the *Upjohn* court reasoned that in the “corporate context . . . it will frequently be employees beyond the control group . . . – officers and agents responsible for directing the [company’s] actions in response to legal advice – who will possess the information needed by the corporation’s lawyers.” (*Upjohn*, 449 U.S. at 391).

The *Upjohn* court further reasoned that in the corporate context, low and mid-level employees might well be the only source of information relevant to legal advice, since they can, “by actions within the scope of their employment, embroil the corporation in serious legal difficulties.” (*Upjohn*, 449 U.S. at 391). Without talking to these employees, the court reasoned, corporate counsel “may find it extremely difficult, if not impossible, to determine what happened.” (*Upjohn*, 449 U.S. at 391).

With this reasoning in mind, *Upjohn* held that a flexible, case-by-case analysis for applying the corporate attorney-client privilege must be used in determining the scope of the attorney-client privilege in the corporate context. (*Upjohn*, 449 U.S. at 396-397). This flexible approach to determining whether the attorney-client privilege extends to lower level employees was favorably endorsed by this Court in *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 202, 691 P.2d 564 (1984).

Contrary to the trial court’s ruling, in *Youngs* this Court adopted the *Upjohn* decision’s reasoning, regarding the detrimental effect upon the attorney-client relationship where a narrow view of the scope of the attorney-client privilege is sanctioned, as the trial court did in this case. (*Youngs*, 179 Wn.2d at 662). The *Youngs* court explicitly endorsed the flexible test for determining the scope of the corporate attorney-client privilege as was done in the *Wright* case. (*Id.*)

Even though the principles and reasoning set forth in the *Upjohn*, *Wright*, and *Youngs* cases surely provide the basis for extending the privilege to former employees, the facts and issues in the *Wright* and *Youngs* cases did not require this Court to determine the precise question at issue here. That is, whether the attorney-client privilege extends to attorney communications with former employees who have critical information and who would otherwise be covered by the attorney-client privilege, but who happen to have departed from employment with the corporate client prior to the time when the communications occurred.

In consideration of the *Upjohn* decision's emphasis on flexibility and the purposes underlying the attorney-client privilege, many other courts have naturally applied *Upjohn*'s test to communications with both current and former corporate employees and corporate counsel. For example, the Ninth Circuit has applied *Upjohn*'s reasoning to communication between corporate counsel and both current and former employees. (*See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, the City of Long Beach v. Standard Oil Company*, 658 F.2d 1355 n. 7 (9th Cir. 1981) *cert. denied*, 455 U.S. 990 (1982)). The Ninth Circuit reasoned that:

[a]lthough *Upjohn* was specifically limited to current employees . . . **the same rationale applies to ex-employees** (and current employees) involved in this case. **Former**

employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties.

(*Id.* (Emphasis supplied)). Several years later, in *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, the Ninth Circuit reaffirmed that “the *Upjohn* rationale necessarily extended the privilege to former corporate employees . . .” (*Admiral Ins. Co.*, 881 F.2d 1486, 1493 (9th Cir. 1989)). Again, the Ninth Circuit affirmed that “[t]he attorney-client privilege applies to communications between corporate employees and counsel, made at the direction of corporate superiors in order to secure legal advice . . . [and] [t]his ‘same rational applies to ex-employees.’” (*U.S. v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (citing *In re Coordinated*, 658 F.2d at 1361, n. 7) (emphasis supplied)). Following the same trend, the Fourth Circuit applied *Upjohn* to communications with former employees. (*See In re Allen*, 106 F.3d 582, 605-06 (4th Cir. 1997)) (holding communications between former employee and retained counsel were subject to attorney client privilege).

Like the aforementioned courts, this Court should acknowledge that the scope of the corporate attorney-client privilege includes those communications with former employees who may possess the relevant information needed by corporate counsel to advise the client with respect to

actual or potential difficulties. Such an approach is consistent with the laudable goal of extending the attorney-client privilege to a greater number of corporate employees, which was a policy consideration endorsed by this Court 30 years ago in the *Wright* case. It also is in line with the specific adoption by this Court of the *Upjohn* reasoning that “corporate counsel ‘may find it extremely difficult, if not impossible, to determine what happened’ to trigger potential corporate liability” should the attorney-client privilege not be extended to mid- and low-level corporate employees. (*Youngs*, 179 Wn.2d at 662).

C. There are compelling and logical reasons for this Court to adopt the School District’s reasoning and to provide attorney-client privilege protection in the case of former employees whose actions are at the heart of the issues in litigation.

In effect, the ruling by the trial court here sanctioned what was specifically rejected by this Court in *Youngs*, *i.e.*, the supervision by the plaintiff’s attorney of the corporate counsel’s interviews of corporate employees who have knowledge of the facts giving rise to the allegations in the *Youngs*’ complaint. The only difference here is that the trial court’s ruling will allow the plaintiffs’ attorneys in this case to learn after the fact what this Court said the plaintiffs’ attorney in *Youngs* could not learn by being in the same room. That is, the trial court’s ruling will allow the plaintiffs’ attorneys to ask detailed questions of the School District’s former

employees/coaches concerning the substance of the communications between the attorneys and its former employee/coaches – communications which were undertaken for the purpose of obtaining information that is not held by either the current Highland School District management, or by other District employees. Such information is obviously essential to the proper representation of the Highland School District.

The adoption of a test that defines the scope of the corporate attorney-client privilege based solely on whether or not a person continues to be employed at the time the communication takes place, as the trial court is attempting to allow, ignores the principles, reasoning, and holdings of the *Upjohn*, *Wright*, and *Youngs* cases. The test adopted by the trial court is not flexible and it does not recognize the stated goals underlying the attorney-client privilege. The trial court's approach is incorrect and it allows discovery of legal communications with former employees who have knowledge of the events giving rise to the plaintiffs' complaint, but who for whatever reason no longer work for the District.

The trial court's approach further allows discovery of past communications which would be privileged under 9th Circuit law. The trial court's approach does not recognize the conflict and inconsistency that a simple choice of venue creates: had this case been filed in federal court in Washington instead of state court, the communications would be protected

from discovery. The trial court ruling also created a “Hobson’s choice” for the School District’s counsel; whether it is better to engage in further communications with the former coaches and risking having those communications being discoverable, or foregoing such communications at the expense of proper preparation of the case. A corporation’s counsel should not be put in that situation, and following the natural path started by *Upjohn* will avoid such an outcome.

It is also true that the trial court’s approach discourages the former coaches from having discussions the Highland School District’s attorneys, because they now know that the trial court will not protect those communications. The trial court order will have a chilling effect, since the former coaches know their legitimate communications will have to be disclosed to the plaintiffs’ attorneys, who are claiming that the coaches were negligent. The trial court’s approach discourages frank communications about the facts giving rise to the plaintiffs’ complaint between an attorney defending a corporation and the former employees. That is particularly true with respect to former head coach Shane Roy, whose first deposition has not been completed.

Permitting inquiry into privileged communications allows the plaintiffs’ attorneys to obtain the mental impressions of the School District’s counsel, whether expressed directly to the coaches, or whether

gleaned from the types of questions asked and information sought by the School District's counsel. Further, the trial court's approach opens the door for the plaintiffs' attorneys to take attempt to depose a School District's counsel concerning communications with the District's former employees because the communications, based upon the trial court's ruling, are not protected under RCW 5.60.060(2). That approach creates the risk that ancillary issues, such as communications between a school district and former coaches, become the improper focus in a case. Allowing inquiry into such communications inhibits those goals the attorney-client privilege is designed to promote, *i.e.*, the giving of information to a corporation's attorney so that attorney can provide sound and informed legal advice as to matters that are alleged to have triggered liability.

There is no good reason to hold that a school district's attorney-client privilege, or that of any corporation, should be lost simply because an employee leaves the corporation at some point after an event occurs. Surely, such an important privilege should not be lost solely due to such vagaries.¹

¹ Coach Borland, who also has knowledge concerning relevant facts and circumstances pertaining to the plaintiffs' negligence claim, is still employed by the District. Communications with him are protected by the District's attorney-client privilege. However, if Coach Borland quits his job today, according to the trial court, any future communications with him are not privileged. That result is not "flexible," does not meet the requirement of determining privileges on a case-by-case basis, and does not further the laudable goals of the attorney-client privilege. Instead, it illustrates the fallacy of the trial court's "employment" test.

It would be contrary to the rationale and holdings of the *Upjohn*, *Wright*, and *Youngs* cases to hold that – by waiting a considerable amount of time between the alleged liability-producing acts and filing the case – the plaintiffs themselves can affect the application of the District’s privilege. By simply waiting three years to file an action, the likelihood of employees leaving the corporation increases, thereby increasing the chance of losing the privilege. Likewise, according to the trial court, the plaintiffs’ attorneys can affect the District’s attorney-client privilege by choosing not to include the former employees as individual defendants.

The trial court’s analysis fails to follow logic and it ignores one of the main purposes for having the corporate privilege. The trial court significantly impaired the School District’s freedom to act – to continue to develop its defense and, consequently, the Highland School District’s counsel “may find it extremely difficult, if not impossible, to further determine what happened.” The attorneys are restricted from having candid and forthright conversations with the coaches whose alleged negligence is at the heart of the plaintiffs’ case, so as to obtain the information bearing on liability issues and to fully advise the School District.

The School District’s attorneys have engaged in previous communications with both current and former employees, and it should be allowed to continue doing so without having those communications subject

to discovery. If the trial court's rigid view of the scope of attorney-client privilege is allowed to stand, all prior communications by the School District's counsel – which were thought to be privileged – are now subject to inquiry by the plaintiffs' attorneys. Future communications will be discoverable as well. This Court is urged to take action and resolve this critical issue.

V. Conclusion

For many valid reasons, communications between a corporation's attorneys and those employees with knowledge of the events leading to legal claims and litigation have been protected by the corporate attorney-client privilege. Although this Court has addressed similar issues, the precise factual scenario present here has not been addressed. This Court has not specifically ruled that the privilege applies to communications involving former employees whose allegedly negligent acts or omissions gave rise to personal injury litigation against the corporation.

The Court is urged to take this opportunity to close the small void through which the trial court passed, and to establish clear guidance for lower courts to follow.

RESPECTFULLY SUBMITTED this 6th day of July, 2015.

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Cc: Marks Northcraft; Andrew Biggs
Subject: RE: Newman v. Highland School District -- Supreme Court No. 90194-5

Rec'd 7/7/2015

Supreme Court Clerk's Office

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Cc: Marks Northcraft; Andrew Biggs
Subject: RE: Newman v. Highland School District -- Supreme Court No. 90194-5

Please disregard previous email. Attached is the Amended Petitioner's Brief regarding the above referenced matter.

Lilly B. Tang
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Cc: Marks Northcraft; Andrew Biggs; Lilly Tang

Subject: Newman v. Highland School District -- Supreme Court No. 90194-5

Attached for the Court's consideration, please find:

1. The Amended Petitioner's Brief; and
2. The Certificate of Service

Michelle A. Tomczak

Legal Assistant to Aaron D. Bigby and Andrew T. Biggs

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