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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.

PETITIONER'S REPLY BRIEF

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 ORIGINAL

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I. Introduction

The issue before this Court is: Does the corporate attorney-client privilege extend to communications with corporate employees who were the central actors in the situation leading to a lawsuit, but who have since left the corporation's employ? As is more fully described elsewhere, similar questions have been answered by this Court, and the Ninth Circuit has answered the question affirmatively, but the precise question here remains unanswered in Washington. This Court accepted review so that the issue could be resolved for the benefit of the parties and all others facing similar circumstances.

Notwithstanding the importance of the issue before this Court, the plaintiffs have attempted to sidestep the issue by, in effect, asking this Court to avoid this opportunity to give guidance where it is clearly needed. The Court is urged to decline the plaintiffs' invitation and, instead, to decide the immediate and important question about the application of the corporate attorney-client privilege.

II. Statement of the Case

The issue before this Court is not factually-intensive. In fact, there are only a few facts that need to be considered, and they are not in dispute.

1. It is undisputed that the former coaches' and the Athletic Director's alleged actions or inactions form the basis for much of the case;
2. The coaches and Athletic Director were employed by the School District at the time of the incidents;
3. The School District is a municipal corporation; and
4. The coaches and Athletic Director left the School District's employ in the years since the alleged incidents.

The question involving the application of the corporate attorney-client privilege can be resolved based on the few undisputed facts noted above. All of the other facts provided by the parties are actually ancillary to the issues here, and they only offer the court background about the types of facts in dispute in the case.

In their most recent brief, the plaintiffs persist with a one-sided recitation of what they hope the jury will accept as the "facts" of the case. Even while acknowledging that the facts relating to the circumstances leading to Matthew Newman's very unfortunate injury are in dispute, the plaintiffs continue with factual allegations that are – at best – one sided. For example, in the very first sentence of the first page of the brief, the plaintiffs make the statement that, "Matthew suffered a concussion during practice, an injury witnessed by his coach." (Brief of Resp. at 1) Of course, it will

be for the jury to determine whether the trial evidence actually shows that (1) Matthew received a concussion during practice; and (2) whether any coach suspected that a concussion had occurred.

Indeed the plaintiffs' nine-page "restatement" of the facts is replete with examples of what the plaintiffs present as factual conclusions – when what is offered is merely a one-sided presentation of issues of fact. When the jury is finally allowed to hear the witnesses testify, they will see a picture that is far different from what the plaintiffs here present. Although the School District believes that the Court does not need to resolve the corporate attorney-client communication issue on the basis of the disputed facts, the School District feels it must respond to the plaintiffs' incorrect and misleading factual assertions.

The jury will learn, for example, that one of the plaintiffs' star witnesses, Billie Gellerson, recanted his deposition testimony that the coaches knew about any injury to Matthew at practice. (CP 198-199) The jury will also learn about the clear and unprompted deposition testimony of Matthew's former girlfriend, Lisa Sorensen, that Matthew developed a headache from hitting his head on something while playing ball with his football friends **after practice**. Ms. Sorensen will explain to the jury that Matthew very clearly and directly told her that he was going to hide his headache from the coaches because he knew he **would be benched** if they

learned that he got a headache from a blow to the head. (CP 336-346; 970-971; 985-986; 1012-1014) In short, it is safe to say that the plaintiffs have taken great liberties with the facts, and they are expected to do so at trial. It will be the jury's job to determine the reliability of many of the plaintiffs' witnesses, and to fairly assess the plaintiffs' strained version of what happened.

The plaintiffs also spent considerable time discussing what they described as the School District's conspiracy theory. It is quite ironic that the plaintiffs chose that course, when that was one of the topics about which the plaintiffs complained when they received the School District's opening brief. The plaintiffs asked this Court to instruct the School District to file an amended brief, and the School District did so. Now, the plaintiffs have raised one of the very issues to which they previously objected: the extent to which the plaintiffs' attorneys misrepresented themselves to the players, and the extent to which the plaintiffs' attorneys carefully and methodically planted "facts" in the heads of the young players.

Because the plaintiffs have re-raised the issue in their brief, the Court is reminded of the issues about which the plaintiffs previously complained (for brevity the internal citations are omitted):

The coaches had no knowledge of Matthew getting any injury to his head, either during or after practice. ... **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.

In fact, one of the players who was carefully coached and interviewed by the plaintiffs’ attorneys testified at his deposition that the coaches knew Matthew suffered a headache during practice. That player has since specifically recanted his testimony that the coaches knew Matthew had a headache.

Another of the players who was “interviewed” by one of the plaintiffs’ attorneys has since directly accused that attorney of misleading him. The attorney misled the player about the attorney’s identity, and the attorney told the player that he was a brain surgeon doing medical research. The player was angry when he learned that the person who introduced himself as a medical researcher was actually a lawyer representing the plaintiffs for the purpose of bringing a lawsuit against the Highland School District. That same player testified that the written statement prepared by the plaintiffs’ attorneys following the meeting does not represent what the player actually told the “brain surgeon.” Not surprisingly, and in violation of Civil Rule 26(b)(4), the audio recording of this player’s statement has been destroyed by the plaintiffs’ attorneys, so there is now no way to compare what the player actually said with the written statement created by the plaintiffs’ attorneys.

Other players interviewed by that same attorney have also testified that the attorney misrepresented himself, telling the players that he was a person doing medical research, and that he was working with the Seahawks to help prevent future catastrophic football brain injuries.

(CP 807-834) (emphasis added). The plaintiffs urged this Court to limit the School District’s discussion to those issues that were directly related to the action below, and the legal issues that directly pertain to this appeal. The

School District attempted to do so in response to this Court's directive, yet the plaintiffs have now come forward with those very issues in their own brief. The Court is urged to disregard all of the immaterial and disputed facts raised by the plaintiffs.

The Court accepted this case for review of what is essentially a legal issue: Should the corporate attorney-client privilege extend to former employees whose alleged negligent acts and omissions give rise to a personal injury lawsuit against their former corporate employer? The School District believes that this Court did not accept review so that it could accept the plaintiffs' invitation to get bogged down in disputed factual issues surrounding liability claims.

III. Argument

A. The Plaintiffs' Claim that the Attorney-Client Privilege Was Waived, Is Without Merit.

The corporate attorney-client privilege issue before this Court was first argued in the trial court, and then at the Court of Appeals. (CP 68-70) Thereafter, a petition for review was filed with this Court, and the plaintiffs filed their response. (Defendant's Motion for Discretionary Review filed 2-6-14; Plaintiffs' Response to Motion for Discretionary Review filed 2-11-14) Nowhere in those multiple pleadings before the trial court, the Court of Appeals, and this Court will one find any argument that the School District somehow "waived" its corporate attorney-client privilege. Now, for the first

time, the plaintiffs have attempted to dodge the sole issue before this Court by claiming that the attorney-client privilege was somehow waived.

It is notable that, while attention is given to the legal standards governing waiver, the plaintiffs did not even attempt to cite to any portion of the record to support their waiver argument. Indeed, there is nothing in the record to support such a claim. This Court should not consider issues raised for the first time on appeal, and issues for which there is no support in the record. For good reasons, the Supreme Court generally declines review of questions not raised at the trial court or before the Court of Appeals. (*State v. Laviollette*, 118 Wash.2d 670, 826 P.2d 684 (1992)). One reason for the rule is to ensure that an appellant “ha[s] an opportunity to elect to stand on his theory or apply to the court to amend his theory and present some other one.” (*Peoples Nat’l Bank v. Peterson*, 82 Wash.2d 822, 830, 514 P.2d 159 (1973)). By declining review of issues not raised before a lower appellate court, the Supreme Court also encourage parties to raise issues before the Court of Appeals, thereby ensuring the “benefit of developed arguments on both sides and lower court opinions squarely addressing the question.” (*Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 1534, 118 L.Ed.2d 153 (1992)).

However, even if the Court wishes to allow the plaintiffs to raise a waiver issue at this point – despite any support in the record – the argument

fails. The fact is that the School District's counsel appeared as counsel for the individual coaches for limited purposes. Despite the plaintiffs' protestations to the contrary, it is often the case that an attorney representing a corporate entity also represents individuals from within the corporate ranks. As an example, an attorney can represent both a school district and a teacher, counselor, or principal in an action. A single attorney can represent both a municipal parks department and a logger or arborist accused of negligently cutting a tree that causes injury. There is no automatic conflict of interest, such a practice is not uncommon, and there was no conflict of interest between the interests of the former coaches and the District in this matter.

More importantly, the issue of whether or not the School District's counsel appropriately represented the former coaches and the School District itself is not before this Court. The trial court did not find that a conflict of interest existed, but still ordered that – going forward – the coaches need to have separate counsel if they choose to have counsel at all. (CP 68-70) The plaintiffs continue to raise this specious issue for the purpose of trying to tar the School District and its counsel, but the matter has never been briefed or otherwise developed on appeal. Suffice it to say, the School District did not act improperly in any way, and those claims will not be addressed further here.

What is clear is that during the time preceding the coaches' depositions, and during the depositions, they were represented by counsel. All communications with that counsel are privileged. Appropriate attorney-client privilege objections were raised on behalf of the client-coaches.

It was only after that representation of coaches ceased that the plaintiffs embarked on their quest to obtain information about communications between the School District's counsel and the former coaches – for periods of time during which the coaches were not represented by counsel. (CP 27-57) As soon as that activity began, and at every later instance in which the plaintiffs attempted to invade the corporate attorney-client privilege, the School District's privilege was raised. There was no delay, and there was no waiver.

Immediately following the trial court's finding that the corporate attorney-client privilege did not apply in the present circumstances, the appeal process was begun. It was clear to the School District's counsel that the trial court erred, and that the matter ultimately needed to be addressed by this Court. Even in the face of the trial court's finding that the appeal was "frivolous," and even facing sanctions from the trial court despite the fact that the matter had been raised for review by this Court, the School District consistently raised and preserved the corporate attorney-client issue. For the plaintiffs to argue that the issue was waived is not only

inaccurate and unsupportable, but it appears to be yet another effort to deflect this Court's attention from the real issue before it. The Court should soundly reject the plaintiffs' waiver argument.

B. It Is Both Proper and Appropriate for this Court to Look to Federal Court Decisions for Guidance in this Matter.

The plaintiffs have vigorously argued that this Court need not follow federal law. To be clear, the School District does not argue that this Court has any obligation to do so. Rather, the School District urges this Court to adopt the approach that has been developed from *Upjohn* (499 U.S. 383 (1981)) through the more modern Ninth Circuit cases, which provide helpful guidance.

As the Court has certainly experienced in the past, there are numerous circumstances in which a case is removed from state court to federal court; *i.e.*, on the basis of diversity or a federal claim. If a party or a claim is dismissed by the federal court months or years after removal, thereby destroying diversity or resolving the federal issue, the case is remanded to state court. While there can certainly be differing standards applied in the federal court and the state court, if the two court systems use differing standards for applying the corporate attorney-client privilege, very troublesome issues can arise.

As an example, while a case is in federal court, a corporation's attorney can freely communicate with former employees, and those communications are covered by the attorney-client privilege. The attorney, for example, may freely share strategies, information, documents, and a great deal of other privileged information with the former employee, without the threat of having those communications be open to discovery by the opposing counsel. However, if the case were to be remanded to state court, which then applied different standards for former employees, immediately upon remand, the formerly privileged communications would become discoverable.

Good public policy favors consistency between the courts with regard to the attorney-client issues raised in this appeal. To do otherwise can easily defeat the purpose of having such a privilege.

As we know from *Upjohn* and many other cases, 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 plaintiffs have taken a very narrow and artificial view of the privilege, intimating that it only applies to the initial investigation of the facts of an incident. The privilege is obviously much broader, and it exists to protect the free flow of information between the corporation's

attorney and those covered by the privilege – the 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 later be disclosed to those with adverse interests. (See, e.g. *Upjohn*, 449 U.S. at 390, *Youngs v. Peacehealth*, 179 Wn.2d at 664).

C. This Court Has Previously Embraced Many of the Concepts Used by Federal Courts, and It Should Do So in this Instance. A Corporation’s Attorney-Client Privilege Is Not Limited to Communications with Speaking Agents.

The corporate attorney-client privilege is not limited to speaking agents, as the plaintiffs suggest. In *Upjohn*, the Supreme Court established that the corporate attorney-client privilege can apply to communications with both managerial and non-managerial employees, which would obviously include people who are not corporate speaking agents. (*Upjohn*, 449 U.S. at 386). Since *Upjohn*, this Court has specifically agreed with the Supreme Court’s reasoning 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)).

The *Upjohn* court understood that the privilege is not limited to speaking agents because, in the “corporate context . . . it will frequently be employees beyond the control group who will possess the information needed by the corporation’s lawyers.” (*Upjohn*, 449 U.S. at 391). That court acknowledged that 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). That is precisely the situation at hand: it is the coaches on the field, not the superintendent, for example, whose actions are being criticized, and whose on-field actions allegedly led to the injury. Communications with those non-speaking agents must also be protected. That approach was favorably endorsed by this Court in *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 202, 691 P.2d 564 (1984).

More recently in *Youngs*, this Court explicitly adopted the *Upjohn* court’s reasoning that a detrimental effect upon the attorney-client relationship will exist if a narrower view of the scope of the attorney-client privilege is allowed. (*Youngs*, 179 Wn.2d at 662). The plaintiffs’ very narrow view of the privilege is not consistent with either the spirit or the direct language announced by Washington courts. The plaintiffs have not provided any legitimate support for the claim that the corporate attorney-

client privilege is limited to speaking agents, and the Court should reject that archaic argument.

D. The Question Before this Court Is Whether a Corporation's Attorney-Client Privilege Extends to Certain Types of Employees, Even After Their Employment Ends.

As was more fully briefed in the Amended Petitioner's Brief, case law provides the basis for extending the corporate attorney-client privilege to former employees, but the facts and issues in the *Wright* and *Youngs* cases did not require this Court to determine the precise question before this Court. That is, whether the corporate attorney-client privilege extends to communications with former employees whose actions allegedly gave rise to the injury about which complaint is made but, who happen to have departed from employment with the corporation prior to the time when the communications occurred. That question should be answered in the affirmative.

It should be emphasized that having the privilege cover former employees, such as the District's former coaches and former athletic director, does not bar the plaintiffs from obtaining the facts of the incident. As was made clear in *Wright*, adverse parties remain free to speak with the former employees, and the factual knowledge held by those employees is fully open to discovery. (*Wright* at 195). What is not permitted – and what

is specifically sought here by the plaintiffs, and which was improperly obtained by the plaintiffs' attorneys from the former athletic director over the objection of the District's counsel -- is the content of the communications between the former employees and the corporation's attorneys.

As can be seen throughout the various pleadings in the record here, the plaintiffs' attorneys have vigorously sought to obtain the actual communications between the former employees and the School District's counsel. They now make the insupportable argument that "deposition preparation" is different from "investigation" of an incident, and that the attorney-client privilege applies only to the former. The plaintiffs argue that "[t]he attorney-client privilege should never shield such pre-deposition communications, which," in their own words "may either consciously or unconsciously affect a fact witness's testimony." (Brief of Resp. at 25)

Perhaps the plaintiffs are urging this Court to open the doors of discovery to all pre-deposition communications with every person, whether represented by counsel or not. The School District would be quite surprised indeed if the plaintiffs were offering to allow discovery of their own pre-deposition meetings with their clients, on the basis that their private communications with their clients "may either consciously or unconsciously affect" their clients' testimony. Not only is it nearly

impossible to distinguish “pre-deposition” communications from other communications, but more significantly, it would be wholly improper to allow an opponent to have access to the attorneys’ thoughts as revealed in protected communications.

The plaintiffs’ approach also ignores *Upjohn’s* emphasis on flexibility and the purposes underlying the attorney-client privilege, and it ignores the many decisions that have applied *Upjohn’s* test to communications with both current and former corporate employees and counsel. (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) (although *Upjohn* was specifically limited to current employees, the same rationale applies to ex-employees)); (*Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1493 (9th Cir. 1989) (the *Upjohn* rationale necessarily extended the privilege to former corporate employees); *U.S. v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996)) (the attorney-client privilege applies to communications between former corporate employees and counsel); (*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)).

It is both appropriate and natural for this Court to confirm that the scope of the corporate attorney-client privilege includes communications with former employees who possess the relevant information needed by the corporation's counsel to advise the client with respect to actual or potential difficulties. As is noted previously, that outcome would be consistent with the laudable goal of extending the corporate 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, and confirmed in *Youngs*, 179 Wn.2d at 662.

The plaintiffs' claims that the substance of the communications between the coaches and School District's counsel should be discoverable are based on the implicit accusation that the School District's counsel has behaved in some sort of improper manner. Those types of claims have been present throughout this case, and they are false. The plaintiffs' attorneys' fictitious claims are, perhaps, based on their own belief that it is acceptable to go to any lengths to attempt to smear and discredit opposing counsel and witnesses or as a means of somehow justifying their own improper "interview" conduct as revealed in the players' deposition testimony.

This Court should not fashion its decision on fictions or suppositions. This is the opportunity for the Court to answer the remaining question relating to a corporation's attorney-client privilege. The test should

not be based solely on whether or not a person continues to be employed at the time the communication takes place, because that approach ignores the principles, reasoning, and holdings of the *Upjohn*, *Wright*, and *Youngs* cases. Such an approach leaves any attorney defending a corporation in the unenviable position of trying to determine whether to engage in further communications with former employees, or forego any communications because those communications might later be discovered by opposing counsel.

Surely, it is not the intent of the attorney-client privilege, nor the courts trying to fashion a just approach, to create a chilling effect on attorneys. Likewise, permitting counsel to discover the thoughts, opinions, and mental impressions of the opposing counsel is not the goal. Frank communications should be encouraged, not discouraged, and the parties should not be able to control the outcome by simply waiting until employees leave the corporation's employ so that (previously protected) communications become discoverable. A wise and enlightened approach does not shield information from the opposing counsel's reach; all of the facts of the incident continue to be discoverable. It is only the communications with the legal counsel that must remain outside of the reach of opposing counsel.

E. The Plaintiffs' Request for Attorney's Fees Is Unsupported and an Award of Attorney's Fees Is Not Appropriate in This Case.

The plaintiffs claim that they are entitled to an award of attorney's fees for responding to the present appeal. That request should be denied.

The basis for the request for attorney's fees is "for successfully resisting the District's claim of privilege and compelling legitimate discovery ... and ... because the District remains in contempt of the trial court's order compelling discovery...." (Brief of Resp. at 33) The plaintiffs also claim that they have incurred "enormous expense" and that the trial was "delayed for years." (*Id.*) Actually, quite the opposite is the case. The plaintiffs waited nearly the entire three year statutory period to bring their claims, and they then waited a significant amount of time before obtaining a trial date. (CP 3-11) It was also their own tactics in the trial court, including requiring the School District to obtain multiple stays while this matter was pending, that caused delay and expense. And, as this Court is aware, the most recent stay of the case was solely necessitated by the plaintiffs' attorneys' refusal to comply with this Court's directive in the initial stay. (Pet.'s Motion to Completely Stay Proceeding; Order dated 4-1-15)

As this Court will surely note, the plaintiffs failed to properly document any of the facts they claim support the request for fees, and it is

impossible for the School District to properly respond on that basis. Truly, the request for attorney's fees in connection with a wholly justified, good faith appeal, appears to be one more example of the plaintiffs attempting to gain advantage through heavy-handed, misleading factual claims.

The real issue here is whether the School District's appeal was done in good faith. The trial court disagreed with the School District's position, and entered an oral ruling of contempt when the School District declined to provide the arguably privileged information. Then, when the Supreme Court issued a stay of discovery, the plaintiffs persisted with trying to get the trial court to sanction the School District. The trial court declined, saying that it could not take any action while the matter was stayed by this Court. Still, the plaintiffs pretend that the sanctions are in place.¹

The trial court was fully advised of the law restricting a finding of contempt and awarding sanctions while a proper appeal is being pursued by a party, but the trial court refused to acknowledge that law. It has long been held that an attorney has a dual role – he is both an advocate for his client and an officer of the court. (*Dike v. Dike*, 75 Wn.2d 1, 5, 448 P.2d 490 (1968)). “Neither duty can be meaningfully considered independent from

¹ The trial court expressly stated that it had no authority to enter an order on its oral contempt ruling, nor to vacate it or modify the ruling, due to this Court's stay. (*See*, 5-30-14 RP, at A33).

the other.” (*Id.* at 6.) “The lawyer’s duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession...” (*Id.*)(citing Henry S. Drinker, *Legal Ethics* (1953), p. 75 (quoting *People ex rel. Attorney General v. Beattie*, 137 Ill. 553, 574, 27 N.E. 1096 (1891))).

As here, if a trial court orders an attorney to produce information that the attorney believes is protected by a privilege, the attorney has two alternatives, and if he chooses the first alternative, he may have acted unethically. The attorney can choose:

- (1) to obey the court and disclose the information; or
- (2) to disobey the court and appeal the resulting contempt citation to a higher court.

(*Id.* at 15.) “If the attorney chooses the first alternative (disclosing the information) when, in fact, the desired information is privileged, there is authority for the proposition that the attorney has acted improperly, if not unethically.” (*Id.*)

Nearly 50 years ago, the Washington Supreme Court soundly disapproved of finding an attorney in contempt for refusing to reveal arguably privileged information while the matter was on appeal. (*Dike, Supra*).

“An attorney is entitled to consideration of a claimed privilege not to disclose information which he honestly regards as confidential and should not stand in danger of imprisonment for asserting respectfully what he considers to be lawful rights. ... [S]ubstantial justice would demand that he be given ... an opportunity for review by an appellate court before depriving him of his liberty with the resulting ignominy.”

(Dike, Supra, at 16.)

The Washington Supreme Court again confirmed that it is not appropriate to hold an attorney in contempt under the circumstances presented here. (*See Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d 527, 688 P.2d 506 (1988)). In *Seventh Elect Church of Israel*, the trial court ordered a law firm to answer questions that the firm believed were protected by attorney-client privilege. (*Id.* at 530-31.) The court ruled that the firm was in contempt, and the firm sought review. One of the issues on review was whether “an attorney [may] be found in contempt for refusing to disclose information arguably within the scope of attorney-client privilege prior to appellate resolution of the issue?” (*Id.* at 531.) The Washington Supreme Court decisively answered “no” and vacated the finding of contempt against the law firm, saying “[w]hen 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.” (*Id.* at 536.)

The restriction against finding an attorney or party in contempt holds, even if the assertion of the privilege being is later determined to have been incorrect. In both *Dike* and *Seventh Elect Church*, the Supreme Court ultimately decided against the parties raising the privileges, but vacated the findings of contempt. (*Seventh Elect*, 102 Wn.2d. at 536; *Dike*, 75 Wn.2d at 16).

In response to the plaintiffs' motion for contempt and sanctions, the School District made clear to the trial court that it had an obligation to preserve the privilege until the matter was fully resolved on appeal:

The School District understands that the plaintiffs want the information, and the School District understands that this Court ruled that the information is discoverable. Naturally, if the Supreme Courts rules against the School District, or if review is denied, then the District will fully and properly respond to the discovery requests. In the meanwhile, it is not appropriate to find the School District in contempt. The School District's attorneys have made a good faith claim of attorney-client privilege and sought appellate review of the issue. That review includes both the contents of communications and the dates of representation.

(5/9/14 RP 31-35; 44-47; A39-A52 – *Petitioner to Supplement its Designation of Clerk's Papers*)

Irrespective of the trial court's knowledge of the foregoing authorities, the trial court was insistent on finding the School District in contempt for pursuing its appeal rights. The only way that was possible, in light of Washington law, was to find that the appeal was "frivolous." The

court made such a verbal finding. However, the trial court was certainly incorrect; this appeal is not frivolous, as evidenced by Ninth Circuit law extending the privilege to former corporate employees, by this Court's pronouncements and holdings in the aforementioned cases, and by this Court's acceptance of discretionary review to decide the issue. For the plaintiffs to suggest otherwise is wholly disingenuous. The plaintiffs' request for attorney's fees should be denied.

IV. Conclusion

The matter before this Court is of high importance, not only to the present parties, but also to many other attorneys who deal with litigation involving claims against corporations and their employees. The Court should disregard the plaintiffs' attempts to deflect the Court's attention from the material issues, and it should take this opportunity to announce a clear rule. For the reasons set forth in the District's briefing, this Court should hold that the School District's counsel's communications with the former coaches, and other similarly-situated former employees, are privileged.

RESPECTFULLY SUBMITTED this 4th day of September, 2015.

NORTHCRAFT, BIGBY & BIGGS, P.C.

Mark S. Northcraft, WSBA #7888
Andrew T. Biggs, WSBA #11746
Attorneys for Petitioner Highland School District

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In the Matter of:

MATTHEW A. NEWMAN

vs.

HIGHLAND SCHOOL DISTRICT NO. 203

VERBATIM REPORT OF PROCEEDINGS

May 30, 2014

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1 SUPERIOR COURT OF WASHINGTON IN AND FOR YAKIMA COUNTY

2

3 MATTHEW A. NEWMAN, an)

4 incapacitated adult; and RANDY)

5 NEWMAN and MARLA NEWMAN,)

6 parents and guardians of said)

7 incapacitated adult,)

8 Plaintiffs,)

9 vs.) 12-2-03162-1

10 HIGHLAND SCHOOL DISTRICT NO.)

11 203, a Washington State)

12 government agency,)

13 Defendant.)

14

15 VERBATIM REPORT OF PROCEEDINGS

16 BEFORE THE HONORABLE

17 BLAINE GIBSON

18

19 MAY 30, 2014

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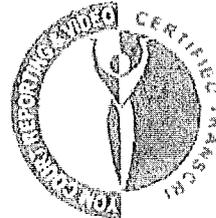
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A P P E A R A N C E S

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(BEGINNING OF TRANSCRIPTION)

(Proceedings begin at 4:19 p.m.)

THE COURT: This is Judge Gibson. Who do I have on the line?

MR. NELSON: Good afternoon, Judge Gibson. Mike Nelson for plaintiffs.

MR. BIGGS: This is Andrew Biggs for the Highland School District.

FEMALE VOICE: And I'm currently trying to connect with Jamie.

THE COURT: All right. There was one other person named Jamie, that was maybe...

MR. NELSON: Oh, that's my legal assistant, and she's here with me, Your Honor.

FEMALE VOICE: Oh. I'll hang up then.

THE COURT: All right. Okay. For the record, this is Newman versus Highland School District, 12-2-03162-1.

Counsel, for future reference, if somebody tries to put you in the docket at 2:00 or 2:30 on a Friday, you might want to suggest doing it later, because the Friday docket can often be long and contentious.



1 MR. NELSON: That's an excellent idea.
2 We'll remember that.

3 THE COURT: So I apologize for making
4 you wait, but I had a courtroom full of people who
5 needed my attention. So first is the issue of the
6 order -- the wording of the order on the partial
7 summary judgment motion.

8 And Mr. Nelson, what's wrong with the
9 language suggested by the defense, in that last
10 paragraph?

11 MR. NELSON: Well, I'll tell you what,
12 Your Honor. I hope I don't get my wings as an
13 advocate clipped for this, but I like their form of
14 order and I like their order. I'm going to suggest
15 that we add four words to it and call it a deal.

16 THE COURT: All right. Now you've
17 made Mr. Biggs suspicious. Go ahead.

18 MR. NELSON: If you go to the last
19 full sentence it reads, the school district's RCW
20 4.22.015 defenses other than. I was saying to put
21 after -- I suggest or I propose to put after the
22 defenses, and CR 8, parentheses, small C, closed
23 parentheses, defenses, because that's what I was
24 talking about mine and they're really one and the
25 same. So you get the same effect by that.



1 So it would now read, the school
 2 district's RCW 4.22.015 defenses and CR 8(c) defenses,
 3 other than. It would all read just exactly the same.

4 THE COURT: Mr. Biggs, any problem
 5 with that?

6 MR. BIGGS: No, Your Honor.

7 THE COURT: I will make that change.
 8 Okay. I have made that change and signed the order.

9 And Mr. Biggs, may I simply indicate
 10 on here that this was presented by you by telephone?

11 MR. BIGGS: Sure. Yeah. That's fine,
 12 Your Honor.

13 THE COURT: Let me make sure that I...
 14 Okay. This is I'm using one here that does not have
 15 the word proposed on it. So I have signed that order.

16 Let me just say on the issues of the
 17 contempt order, reading what was issued by the supreme
 18 court it says that all proceedings in the superior
 19 court relating to discovery that inquires about the
 20 circumstances or content of communications between the
 21 attorneys representing the district in this matter and
 22 the district's former football head coach or former
 23 assistant coaches are temporarily stayed pending
 24 further order of the court.

25 I'm reading that possibly



1 conservatively and indicating that since the contempt
2 issue relates to those communications, I don't think I
3 can enter an order at all either way at this time.
4 Anybody disagree with that?

5 MR. NELSON: I will, Your Honor, in
6 this respect. We carefully looked at the supreme
7 court's order, and as you saw, we spent quite a bit of
8 time in drafting our proposed order, and what the
9 court found in oral argument when we were last in to
10 see you were the two aspects. One, they didn't
11 provide the name and dates as you required in your
12 bench order of 28 January 2014, and also provided in
13 that same order, they didn't provide the answers to
14 the interrogatories and request for production.

15 Now, those were limited to periods of
16 nonrepresentation, and maybe that wouldn't be included
17 in the supreme court's order, but I'm being liberal in
18 this respect and including that.

19 So the only thing that we're
20 addressing in our order at this time is we're saying
21 that there is a contempt for refusal to provide the
22 dates of representation, which is not anything that's
23 privileged, as we all know, and everything else is
24 reserved exactly as we specified in paragraph three of
25 the order until we hear from the supreme court.



1 And that was the differentiation that
2 Melissa Carter and I came to working quite some time
3 with the court's ruling and the supreme court's order
4 of May 13, 2014.

5 THE COURT: Mr. Biggs.

6 MR. BIGGS: Your Honor, I think that
7 is a very disingenuous and incorrect argument.
8 Quoting, as you did, the supreme court said that
9 relating to the circumstances or conduct -- or I'm
10 sorry -- content of communications. That is a very,
11 very broad phrase.

12 And Mr. Nelson, I don't know if he's
13 read the appellate pleadings or not, because they very
14 clearly talk about the very issue that he just said
15 isn't included on appeal, and it is on appeal, and the
16 issue of the times of communications was specifically
17 mentioned on appeal.

18 So I don't know why Mr. Nelson says it
19 wasn't; it was, and that's what we asked to have
20 stayed and the supreme court granted that stay and
21 said we have a debatable issue of law.

22 So I don't know. Your Honor, to me
23 there's only two things that can be done here. If you
24 feel that you cannot act at all, then I think we have
25 to vacate what happened before, because that's all



1 still on the record, or we have to deny their motion
2 because of these issues. I think those are the only
3 two options that are available.

4 MR. NELSON: Or the third option is as
5 I proposed in my order form, is to reserve.

6 MR. BIGGS: Your Honor, they are
7 suggesting a finding of contempt. That is not
8 reserving the issue.

9 THE COURT: The fourth option is to do
10 nothing, which is what I'm going to do. I read that
11 order from the supreme court as indicating that I
12 can't do anything that relates to any of these issues,
13 and I think a finding of contempt and any kind of
14 order, all of it relates to the issues that are on
15 appeal.

16 So I'm declining to do anything at
17 this point on this issue and we're just going to wait
18 and see what the supreme court does and then we'll
19 sort it out later.

20 MR. BIGGS: Okay. Thank you, Your
21 Honor.

22 THE COURT: So anything else?

23 MR. NELSON: That makes perfect --
24 that makes perfect sense, and I think we'll just leave
25 it at that. If your clerk would be kind enough to



1 send us a conformed copy of the order on summary
 2 judgment, we've got that, and otherwise we'll all
 3 abide by or wait for the supreme court's ruling in
 4 July.

5 THE COURT: Well, I can't make any
 6 promises on behalf of the clerk. The clerk doesn't
 7 actually work for me. I guess she has the paperwork
 8 there.

9 FEMALE VOICE: That they provided us.

10 THE COURT: Okay. You have -- she's
 11 telling me you have provided the appropriate fee and
 12 so on. So I guess she's taking care of that as we
 13 speak. All right. Counsel, have a nice weekend.

14 MR. NELSON: Thank you.

15 MR. BIGGS: Thank you, Your Honor.

16 THE COURT: Goodbye.

17 MR. NELSON: You too. Bye bye.

18 FEMALE VOICE: Bye bye.

19 THE COURT: Go off the record.

20 FEMALE VOICE: We are adjourned and
 21 off the record.

22 (End of proceedings at 4:28 p.m.)

23 (END OF TRANSCRIPTION)

24

25



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ability to hear the audio; that I am not a relative or
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parties hereto; nor am I financially interested in the
event of the cause.

WITNESS MY HAND this 13th day of August
2014.



CHERYL J. HAMMER
Certified Court Reporter
CCR No. 2512
chammer@yomreporting.com



<p>--ooo-- 3:1</p>	<p>7:24 add 4:15 addressing 6:20</p>	<p>behalf 9:6 bench 6:12</p>	<p>communicatio ns 5:20 6:2 7:10, 16</p>	<p>deal 4:15 debatable 7:21</p>
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<p>2 2014 6:12 7:4 28 6:12 2:00 3:22 2:30 3:23</p>	<p>ahead 4:17 Andrew 3:9 answers 6:13 apologize 4:3 appeal 7:15,17 8:15</p>	<p>bye 9:17,18 C call 4:15 care 9:12 carefully 6:6 Carter 7:2 change 5:7,8 circumstances 5:20 7:9 clerk 8:25 9:6 clipped 4:13 closed 4:22 coach 5:22 coaches 5:23</p>	<p>contempt 5:17 6:1,21 8:7,13 content 5:20 7:10 contentious 3:25 copy 9:1 Counsel 3:21 9:13 court 3:5,13,18 4:3, 16 5:4,7,13, 18,19,24 6:9, 25 7:5,8,20 8:9,11,18,22 9:5,10,16,19</p>	<p>deny 8:1 differentiation 7:1 disagree 6:4 discovery 5:19 disingenuous 7:7 district 3:10,20 5:21 district's 4:19 5:2,22 docket 3:22,24 drafting 6:8</p>
<p>4 4.22.015 4:20 5:2 4:19 3:4 4:28 9:22</p>	<p>appellate 7:13 argument 6:9 7:7 aspects 6:10 assistant 3:16 5:23 attention 4:5 attorneys 5:21</p>	<p>clerk 8:25 9:6 clipped 4:13 closed 4:22 coach 5:22 coaches 5:23</p>	<p>court's 6:7,17 9:3 courtroom 4:4 CR 4:22 5:2</p>	<p>district 3:10,20 5:21 district's 4:19 5:2,22 docket 3:22,24 drafting 6:8</p>
<p>8 4:22 8(c) 5:2</p>	<p>begin 3:4 BEGINNING 3:3</p>	<p>clerk 8:25 9:6 clipped 4:13 closed 4:22 coach 5:22 coaches 5:23</p>	<p>court's 6:7,17 9:3 courtroom 4:4 CR 4:22 5:2</p>	<p>E effect 4:25 end 9:22,23 enter 6:3 excellent 4:1</p>
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<p style="text-align: center;">F</p> <p>fee 9:11</p> <p>feel 7:24</p> <p>FEMALE 3:11,17 9:9, 18,20</p> <p>finding 8:7,13</p> <p>fine 5:11</p> <p>football 5:22</p> <p>form 4:13 8:5</p> <p>found 6:9</p> <p>fourth 8:9</p> <p>Friday 3:23,24</p> <p>full 4:4,19</p> <p>future 3:21</p> <hr/> <p style="text-align: center;">G</p> <p>Gibson 3:5,8</p> <p>Good 3:7</p> <p>Goodbye 9:16</p> <p>granted 7:20</p> <p>guess 9:7,12</p>	<p style="text-align: center;">H</p> <p>hang 3:17</p> <p>happened 7:25</p> <p>head 5:22</p> <p>hear 6:25</p> <p>Highland 3:10,19</p> <p>Honor 3:16 4:12 5:6, 12 6:5 7:6,22 8:6,21 9:15</p> <p>hope 4:12</p> <hr/> <p style="text-align: center;">I</p> <p>idea 4:1</p> <p>Included 6:16 7:15</p> <p>including 6:18</p> <p>Incorrect 7:7</p> <p>indicating 6:1 8:11</p> <p>inquires 5:19</p> <p>Interrogatories 6:14</p> <p>issue 4:5 6:2 7:14, 16,21 8:8,17</p> <p>issued 5:17</p>	<p>issues 5:16 8:2,12,14</p> <hr/> <p style="text-align: center;">J</p> <p>Jamie 3:12,14</p> <p>January 6:12</p> <p>Judge 3:5,7</p> <p>Judgment 4:7 9:2</p> <p>July 9:4</p> <hr/> <p style="text-align: center;">K</p> <p>kind 8:13,25</p> <hr/> <p style="text-align: center;">L</p> <p>language 4:9</p> <p>law 7:21</p> <p>leave 8:24</p> <p>legal 3:15</p> <p>liberal 6:17</p> <p>limited 6:15</p> <p>long 3:24</p> <p>looked 6:6</p> <hr/> <p style="text-align: center;">M</p> <p>made</p>	<p>4:17 5:8</p> <p>make 5:7,13 9:5</p> <p>makes 8:23,24</p> <p>making 4:3</p> <p>matter 5:21</p> <p>Melissa 7:2</p> <p>mentioned 7:17</p> <p>Mike 3:8</p> <p>mine 4:24</p> <p>motion 4:7 8:1</p> <hr/> <p style="text-align: center;">N</p> <p>named 3:14</p> <p>needed 4:5</p> <p>Nelson 3:7,8,15 4:1,8, 11,18 6:5 7:12,18 8:4,23 9:14,17</p> <p>Newman 3:19</p> <p>nice 9:13</p> <p>nonrepresenta tion 6:16</p>	<p style="text-align: center;">O</p> <p>option 8:4,9</p> <p>options 8:3</p> <p>oral 6:9</p> <p>order 4:6,14 5:8,15, 17,24 6:3,7,8, 12,13,17,20, 25 7:3 8:5,11, 14 9:1</p> <hr/> <p style="text-align: center;">P</p> <p>p.m. 3:4 9:22</p> <p>paperwork 9:7</p> <p>paragraph 4:10 6:24</p> <p>parentheses 4:22,23</p> <p>partial 4:6</p> <p>pending 5:23</p> <p>people 4:4</p> <p>perfect 8:23,24</p> <p>periods 6:15</p> <p>person 3:14</p> <p>phrase 7:11</p> <p>plaintiffs 3:8</p>
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Judge Blaine G. Gibson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

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

Plaintiffs,

vs.

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

Defendant.

No. 12-2-03162-1

**DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR FINDING OF
CONTEMPT AND FOR ENTRY OF TERMS**

DATE OF HEARING: May 9, 2014
TIME OF HEARING: 2:30 p.m. (Special Setting)
ASSIGNED JUDGE: Honorable Blaine G. Gibson

I. INTRODUCTION

Within two short weeks after this Court denied the School District's motion for a stay, the matter was raised up to the Supreme Court by way of a motion for discretionary review. A motion for an emergency stay was also filed at the Supreme Court. The Supreme Court has not yet ruled on the stay. However, days after being served with both the motion for discretionary review, and a mere half-hour after being served with the motion for a stay at the Supreme Court, the plaintiffs served a motion for contempt on the School District. The motion lacks any legal support and must be denied.

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II. STATEMENT OF FACTS

As the Court knows, the issue of the relationship of the attorney-client privilege to discovery being attempted by the plaintiffs has been in dispute. The plaintiffs have persistently tried to get information that the School District firmly believes is protected by the attorney-client privilege. A motion and a petition are presently before the Supreme Court. At specific issue in the present motion are two items: (1) the additional depositions of two former coaches, and (2) disclosure of the dates during which those former coaches were represented by counsel.

In December 2013, the plaintiffs propounded discovery requesting the content and dates of those communications with the former coaches. *See* Declaration of Melissa Carter in Support of Plaintiffs' Motion for Contempt ("Carter Decl."), at Ex. 1. Notably, the plaintiffs did not – as they continually claim – request the dates of representation, but only the dates of actual communications.¹ Each interrogatory and request begins with the phrase "During the time period when unrepresented by counsel" *Id.* In response to the discovery, the School District has consistently objected on the grounds of the School District's own attorney-client privilege (as opposed to that held by the former coaches). This Court denied the School District's motion for a protective order² and ordered the School District's attorneys to respond to the discovery requests. *See* Carter Decl., at Ex. 2.

In order to protect the privilege, the School District has diligently moved the case through the appellate system. At the School District's request, this Court granted a narrow stay of discovery. *See* Carter Decl., at Ex. 4. Meanwhile, the School District filed a motion for discretionary review at Division III of the Court of Appeals, which was denied by the Commissioner, and later by the three-judge panel. *See* Carter Decl., at Ex. 5. This Court granted an additional stay while the matter was

23 ¹ This is certainly a small point, but one which bears on the accuracy of the plaintiffs' representations here.

24 ² *See* Declaration of Counsel (hereinafter "Counsel Decl."), at Ex. A.

1 before the Court of Appeals. *See* Carter Decl., at Ex. 6 and Ex. 7. This Court then denied a stay while
2 the matter was before the Supreme Court; leaving the School District to seek a stay at that Court. *See*
3 Counsel Decl., at Ex. B. The School District promptly moved for discretionary review and for an
4 emergency stay at the Supreme Court. *See* Counsel Decl., at Ex. C and Ex. D. Even after being served
5 with the petition for discretionary review, and after being served with the motion for a temporary stay at
6 the Supreme Court, the plaintiffs took their consistently-aggressive approach of asking this Court to
7 bypass the Supreme Court and to issue a contempt citation.

8 The School District's position has never wavered. It has consistently asserted that both the
9 contents of the communications between the School District's attorneys and the former coaches, and the
10 dates of representation, are protected by the School District's corporate attorney-client privilege. *See*,
11 Counsel Decl., at Ex. C, pp. 5-6; Ex. H, pp. 1-2. The very topics before this Court in the present motion
12 (the dates of representation and the contents of the communications) are the issues pending appellate
13 review.

14 Even before the motion for discretionary review at the Supreme Court, the plaintiffs were aware
15 that School District intension to do so; there is no surprise here. During the hearing on its recent motion
16 for partial stay, the School District voiced its intent to seek discretionary review. *See* Counsel Decl., at
17 Ex. B, pp. 1-2. The plaintiffs filed their motion in an abusive attempt to misuse the Court's powers, and
18 as is more thoroughly described below, the motion should be denied.

19 It is also interesting to note that, while the plaintiffs are quick to file a motion for what they
20 claim is contempt, they have acted in the very same manner. They have refused to fully respond, under
21 oath, to discovery requests regarding the existence of the recorded statements of witnesses, and they
22 have yet to follow this Court's order to set a trial date.

23 In December 2013, the School District propounded requests for admissions, asking the plaintiffs
24 to admit that they had destroyed various recorded statements. *See* Counsel Decl., at Ex. E. The plaintiffs

1 objected. *Id.* This Court ordered the plaintiffs disclose whether the statements had been destroyed. *See*
2 Counsel Decl., at Ex. F.

3 9 THE COURT: So getting back to the
4 10 question of have any of the recordings been destroyed.
5 11 I need an answer to that. Yes or no, not to my
6 12 knowledge.

7 13 MS. CARTER: Right. Well, I do not
8 14 have personal knowledge to that, Your Honor.

9 15 THE COURT: Who does?

10 16 MS. CARTER: What I can tell you is
11 17 that we've got the declaration of Mr. Adler where he
12 18 discusses how the transcription went about after it
13 19 was recorded. I know that a digital recorder was
14 20 used. I know that it was sent to a transcriptionist
15 21 and that the transcribed statement, as he states under
16 22 oath here, was presented to Mr. Kopta.

17 23 I do not have personal knowledge on
18 24 where the whereabouts are of the contents of the
19 25 digital transcription.

20 THE COURT: All right. Find out and
21 2 let them know.

22 3 MS. CARTER: Fair enough.

23 4 THE COURT: It has to be, this is the
24 5 -- it's not just to the best of my knowledge. It's
25 6 you need to find out.

26 7 MR. BIGGS: And Your Honor, that goes
27 8 for all the statements, right, I mean?

28 9 THE COURT: All the recorded
29 10 statements.

30 *Id.*, Ex. F, at 67:9-68:10. It was not until two months after the Court ordered that the information must
31 be revealed that the plaintiffs responded that the recordings were destroyed, but they did so in a letter,
32 not in sworn responses to discovery. *See*, Counsel Decl., at Ex. G. To this date, the plaintiffs have
33 failed to supplement their discovery responses.

34 Similarly, this Court ordered the plaintiffs to coordinate with the School District's counsel and
35 set the trial date. *See* Counsel Decl., at Ex. B, pp. 9-10.

1 MC: Thank you, your honor. And one question on the the trial
2 date note, do we need to file a motion to note the trial date
3 to get the date secured the the proper method that the court
4 chooses for that I'm not sure.

5 JUDGE: Well, first first talk to Maria in the court administrator's
6 office to see what dates are available in October of 2015.
7 And um Mr. Biggs, your firm's available to try it in
8 October 2015 right?

9 AB: Yes, your honor, we suggested October 5 as a proposed
10 date.

11 JUDGE: Ok uh Ms. Carter, talk to Maria. Uh see if that works. And
12 um I think you had proposed a scheduling order with an
13 earlier trial date on it, why don't you just send the
14 scheduling order to uh Mr. Biggs with with the new trial
15 date on it assuming that Maria says it's clear?

16 MC: Ok.

17 JUDGE: But you you will need to note it for trial and whatever else
18 the court rules require. I don't remember.

19 MC: Yeah.

20 *Id.*, at pp. 9-10. The plaintiffs have yet to send a proposed scheduling Order to the School District's
21 counsel, or to file a motion to note the case for trial.

22 The Court should require the plaintiffs to properly respond to discovery, and to note the case for
23 trial, as instructed.

24 III. STATEMENT OF ISSUES

- 25 1. Should a court deny a motion for contempt, pending appellate review of the issue, when a
party's attorney has made a good faith claim of attorney-client privilege?
2. Should a court deny a motion for contempt, pending appellate review, when the plaintiffs
failed to demonstrate that they would be subjected to significant prejudice by waiting for
the Washington Supreme Court's decision?
3. Should this Court refuse to consider the motion for contempt when the plaintiffs failed to
comply with the Civil Rules and conduct a discovery conference?
4. Should this Court sanction the plaintiffs for failing to supplement their discovery
responses pursuant to this Court's order?

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IV. EVIDENCE RELIED UPON

1. The Declaration of Counsel with exhibits attached; and
2. The pleadings and files herein.

V. ARGUMENT AND AUTHORITY

1. **Contempt is Not a Proper Remedy When a Good Faith Attorney-Client Privilege is Raised, and the Matter is on Appeal.**

It is agreed that a Washington court has contempt powers, originating from statute. A contempt order is proper to address:

- (a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;
- (b) Disobedience of any lawful judgment, decree, order, or process of the court;
- (c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or
- (d) Refusal, without lawful authority, to produce a record, document, or other object.

RCW 7.21.010(1)(a)-(d) . Here, the School District has not engaged in disorderly, contemptuous, or insolent behavior towards this Court; it has not interrupted the due course of a trial or other judicial proceedings, and it has not intentionally disrespected this Court. Rather, the School District has pursued a remedy on appeal. Filing an appeal is neither insolence nor disobedience, and it is not grounds for contempt.

“A civil contempt sanction is coercive and remedial...” *King v. Dept. of Social and Health Services*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). “The purpose of a civil contempt sanction is to coerce future behavior that complies with a court order.” *Id.* at 800. Clearly, contempt is not designed to punish or coerce an attorney’s good faith objection on the grounds of an attorney-client privilege. Here,

1 civil contempt is not appropriate because the information the plaintiffs seek is arguably protected by the
2 attorney-client privilege. Pending the completion of appellate review, it would be inappropriate to
3 reveal the potentially privileged information. Doing so would result in an untenable situation if the
4 Supreme Court were to agree with the School District's position.³ The appeal involves the application of
5 the School District's corporate attorney-client privilege to both the contents of the communications
6 between the School District's attorneys and its former coaches and the dates of the representation of
7 those former coaches.

8 **2. Washington Law Holds that Contempt Proceedings are Not Appropriate When a**
9 **Good Faith Privilege Objection Has Been Raised and the Matter is Being Addressed**
10 **by the Appeals Court.**

11 It has long been held that an attorney has a dual role—he is both an advocate for his client and an
12 officer of the court. *Dike v. Dike*, 75 Wn.2d 1, 5, 448 P.2d 490 (1968). “Neither duty can be
13 meaningfully considered independent from the other.” *Id.* at 6. “The lawyer’s duty is of a double
14 character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and
15 honorable dealing to the judicial tribunals before whom he practices his profession...” *Id.* (citing Henry
16 S. Drinker, *Legal Ethics* (1953), p. 75 (quoting *People ex rel. Attorney General v. Beattie*, 137 Ill. 553,
17 574, 27 N.E. 1096 (1891))).

18 As here, if a trial court orders an attorney to produce information that the attorney believes is
19 protected by a privilege, the attorney has two alternatives, and if he chooses the second alternative, he
20 may have acted unethically. The attorney can choose:

- 21 (1) to obey the court and disclose the information; or (2) to disobey the
22 court and appeal the resulting contempt citation to a higher court.

23
24 ³ See, e.g. Counsel Decl., at Ex. C, pp. 5-6; Ex. H, pp. 1-2.

1 *Id.* at 15. "If the attorney chooses the first alternative (disclosing the information) when, in fact, the
2 desired information is privileged, there is authority for the proposition that the attorney has acted
3 improperly, if not unethically." *Id.*

4
5 Nearly 50 years ago, the Washington Supreme Court soundly disapproved of finding an attorney
6 in contempt (and throwing him in jail) for refusing to reveal the information while the matter is on
7 appeal. *Dike, Supra.*

8 "An attorney is entitled to consideration of a claimed privilege not to disclose
9 information which he honestly regards as confidential and should not stand in danger of
10 imprisonment for asserting respectfully what he considers to be lawful rights. ...
[S]ubstantial justice would demand that he be given ... an opportunity for review by an
appellate court before depriving him of his liberty with the resulting ignominy."

11 *Dike, Supra*, at 16.

12 And again, nearly 30 years ago, the Washington Supreme Court confirmed that it is not
13 appropriate to hold an attorney in contempt under the circumstances presented here. *See Seventh Elect*
14 *Church in Israel v. Rogers*, 102 Wn.2d 527, 688 P.2d 506 (1988). In *Seventh Elect Church of Israel*, the
15 trial court ordered a law firm to answer questions that the firm believed were protected by attorney-
16 client privilege. *Id.* at 530-31. The court ruled that the firm was in contempt, and the firm sought
17 review. One of the issues on review was whether "an attorney [may] be found in contempt for refusing
18 to disclose information arguably within the scope of attorney-client privilege prior to appellate
19 resolution of the issue?" *Id.* at 531. The Washington Supreme Court decisively answered "no" and
20 vacated the finding of contempt against the law firm, saying "[w]hen an attorney makes a claim for
21 privilege in good faith, the proper course is for the trial court to stay all sanctions for contempt pending
22 appellate review of the issue." *Id.* at 536.

23 The restriction against finding an attorney or party in contempt holds, even if the assertion of the
24 privilege being is later determined to have been disallowed on appeal. In both *Dike* and *Seventh Elect*

1 *Church*, the Supreme Court ultimately decided against the parties raising the privileges, but vacated the
2 findings of contempt. *Seventh Elect*, 102 Wn.2d. at 536; *Dike*, 75 Wn.2d at 16.

3 The School District understands that the plaintiffs want the information, and the School District
4 understands that this Court ruled that the information is discoverable. Naturally, if the Supreme Courts
5 rules against the School District, or if review is denied, then the District will fully and properly respond
6 to the discovery requests. In the meanwhile, it is not appropriate to find the School District in contempt.
7 The School District's attorneys have made a good faith claim of attorney-client privilege and sought
8 appellate review of the issue. That review includes both the contents of communications and the dates
9 of representation.

10 As was noted above, when the plaintiffs served their motion for contempt on the School District,
11 they already knew that the School District had sought appellate review at the Supreme Court. The
12 plaintiffs had been served with the motion for discretionary review at the Supreme Court days before
13 they filed their motion for contempt, and they were served with the District's motion to stay (at the
14 Supreme Court) before they filed their motion for contempt.⁴ They knew that the subject matter of their
15 motion for contempt was the issue pending appellate review. Regardless of their knowledge of the
16 appeal and readily available Washington case law instructing a trial courts to stay contempt proceedings
17 pending appellate review, they filed their motion. Consequently, their motion is inappropriate and
18 should be denied as premature.

19 Attorneys have the obligation to inform the court of the law bearing on the issues raised in a
20 motion, whether the law is favorable or unfavorable. RPC 3.3(a)(3). Legal argument based on
21

22
23 ⁴ The motion for discretionary review was filed and served on April 29, 2014, and the motion for a stay was served on May 1,
24 2014, a half hour before the plaintiffs filed the present motion for contempt. See Counsel Decl., at Ex. I and Ex. J.

1 knowingly false representation of law constitutes dishonesty toward the tribunal. RPC 3.3, note 4. Here,
2 one can reach one of two different conclusions about the plaintiffs' lack of advising the court of the law
3 bearing on this issue: (1) they were sloppy and they failed to research the law, or (2) they were aware
4 that the law does not support contempt findings in the situation at hand, but they declined to advise the
5 court of the law. In either event, the plaintiffs caused the School District to expend a significant amount
6 of time and effort to defend against a frivolous motion, and they should be assessed terms for causing
7 that unnecessary use of time and money.

8 It is quite notable that the plaintiffs claim that the refusal to disclose the dates of representation
9 has been at issue for months, but the reality is revealed in their own pleadings:

10 **"it is now April 30, 2014, two weeks after the Court denied the Defendant's ... request**
11 **for a stay. ... The defendant is now in violation of the Court order of January 30, 2014,**
12 **and it should be held in contempt.**

13 Motion for Contempt at 4:5 (emphasis added). The discovery issues at hand have been on appeal since
14 the time they were addressed by the trial court, and the discovery was stayed until two weeks ago. It is
15 only since the Court's stay expired that this issue has been ripe, and while it is on appeal, contempt
16 sanctions do not lie.

17 The plaintiffs also claim that the attorneys should be held in contempt for not cooperating with
18 setting the further depositions of two former coaches. However, In order to bring a motion under CR 26-
19 CR 37, the parties must engage in a discovery conference. *See* CR 26(i). "The primary purposes of CR
20 26(i) are to minimize the use of judicial resources during discovery and to encourage professional
21 courtesy between counsel." *Amy v. Kmart of Washington LLC*, 153 Wn. App. 846, 853, 223 P.3d 1247
22 (citing 4 Karl B. Tegland, *Washington Practice: Rules Practice CR 26 at 12-13 (4th ed. 2001)*). CR
23 26(i) states that "[t]he court will not entertain any motion or objection with respect to rules 26 through
24 37 **unless counsel has conferred with respect to the motion or objection...CR 26(i)(emphasis**

1 added). "Discovery disputes are not limited to motions for orders to compel or motions for protective
2 orders... CR 26(i) is applicable to any motion or objection with respect to CR 26 through 37." *Amy*, 153
3 Wn. App. at 863. The plaintiffs did not meet and confer with respect to their motion for sanctions. The
4 rules clearly state that a conference must be held in person or by telephone prior to filing a discovery
5 motion, and that the court will not entertain a discovery motion in the absence of such a conference. In
6 their zeal to get this court to hold the School District's attorneys in contempt, the plaintiffs failed to
7 follow the most basic rules. More importantly, however, is the fact that Washington law does not
8 support finding an attorney in contempt when he is asserting a good faith privilege, and when an appeal
9 is being pursued (see above discussion).

10 **3. Denying the Motion Will Not Result in Prejudice to the Plaintiffs.**

11 The plaintiffs cannot demonstrate how they will be substantially prejudiced by waiting for the
12 Supreme Court's decision regarding whether or not it will accept discretionary review. The plaintiffs
13 may subpoena both Mr. Shafer's and Mr. Roy's documents relating to coaching and the accident. They
14 may depose both coaches regarding the content of the documents. *See*, Counsel Decl., at Ex. B. During
15 the course of this discovery dispute, the plaintiffs have been able to file a motion for summary judgment
16 on the merits of this case. The School District has been able to depose both Mr. and Mrs. Newman. The
17 remaining depositions are primarily damages experts and the plaintiffs' family members. Neither
18 damages experts nor are the plaintiffs' family affected by the issue of whether the School District's
19 attorney-client privilege attaches to the communications and dates of representation of the former
20 coaches.

21 Finally, the Court will notice that, even though the plaintiffs have frequently made accusations
22 that the School District has not cooperated with setting a trial date (which accusations are untrue), the
23 Court set down a clear directive that the plaintiffs must confer with the court administrator and set the
24

1 case for trial. The selected date is October 5, 2015. In the weeks since the Court's direction to do so, the
2 plaintiffs have neither contacted the School District's counsel nor proposed a trial schedule around the
3 date selected by the court. *Id.*, at pp. 9-10. Nearly a month after the Court's oral order, the plaintiffs
4 have yet to act upon the Court's order.

5 **4. The Plaintiffs Are In Contempt For Failing To Supplement Their Discovery**
6 **Responses Pursuant To This Court's Order**

7 Although the Washington law clearly opposes such an action, if this Court is inclined to entertain
8 the plaintiffs' motion for contempt, then the Court should also consider the plaintiffs to be in contempt.
9 This Court should sanction the plaintiffs for failing to supplement their responses to the School
10 District's requests for admission pursuant to Court order. *See*, Counsel Decl., at Ex. F, 67:9-68:10.

11 Under CR 26(e),

12 A party who has responded to a request for discovery with a request that
13 was complete when made is under no duty to supplement his responses to
14 include information thereafter acquired, except:

14 ...

15 (2) A party is under a duty seasonably to amend a prior response if he
16 obtains information upon the basis of which:

17 (A) He knows the response was incorrect when made; or

18 (B) He knows that the response though correct when made is no
19 longer true and the circumstances are such that the failure to
20 amend the response is in substance a knowing concealment.

21 CR 26(e)(2). The Court ordered the plaintiffs to reveal whether the recorded statements have been
22 destroyed, and the plaintiffs have a duty to seasonably supplement discovery. The plaintiffs are in
23 violation of a court order, they have willfully failed to supplement the discovery requests, and they
24 should be sanctioned appropriately.

25 ///

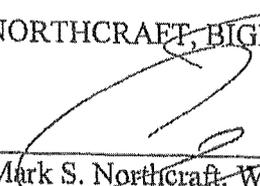
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VI. CONCLUSION

Two weeks after the stay expired, the plaintiffs sped to this Court in an effort to circumvent the motions pending at the Supreme Court. They filed their motion for contempt with knowledge that the School District was seeking review, and they failed to notify this Court of that fact. The plaintiffs further failed to cite controlling law to this Court, presumably in an effort to sway the Court into making an improper ruling. The Court should soundly deny the motion and award compensatory terms to the School District for having to defend against the improper motion.

RESPECTFULLY SUBMITTED this 8th day of May, 2014.

NORTHCRAFT, BIGBY & BIGGS P.C.



Mark S. Northcraft, WSBA #7888
Andrew T. Biggs, WSBA #11746
Attorneys for Defendant

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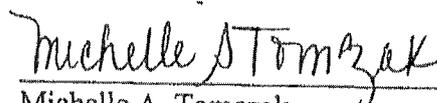
CERTIFICATE OF SERVICE

I, Michelle A. Tomczak, hereby certify under penalty of perjury under the laws of the state of Washington that on May 8, 2014, I served a copy of the foregoing *via email* upon:

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SIGNED on this 8th day of May, 2014, in Seattle, Washington.



Michelle A. Tomczak

Supreme Court No. 90194-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Appeal from the Court of Appeals, Division III

No. 32223-8-III

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,

CERTIFICATE OF SERVICE

NORTHCRAFT, BIGBY & BIGGS, P.C.
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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.

On September 4, 2015, I caused the (1) Petitioner's Reply Brief; and (2) this Certificate of Service to be sent to the Clerk of the Court of the Washington Supreme Court, *via email* to supreme@courts.wa.gov with copies thereof served *via email* on counsel for the plaintiffs:

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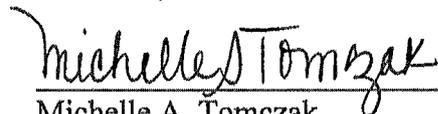
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Michelle A. Tomczak

OFFICE RECEPTIONIST, CLERK

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Cc: Marks Northcraft; Andrew Biggs; Lilly Tang
Subject: RE: Newman v. Highland School District -- Supreme Ct. Cause No. 90194-5 -- Petitioner's Reply Brief

Received on 09-04-2015

Supreme Court Clerk's Office

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Subject: Newman v. Highland School District -- Supreme Ct. Cause No. 90194-5 -- Petitioner's Reply Brief

Attached for the Court's consideration, please find:

1. Petitioner's Reply Brief;
2. Certificate of Service; and
3. Defendant's First Supplemental Designation of Clerk's Papers

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