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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioner.

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

RESPONDENTS' ANSWER TO THE AMCIUS BRIEF OF  
WASHINGTON ASSOCIATION OF MUNICIPAL ATTORNEYS

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ORIGINAL

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## I. INTRODUCTION

Respondents Matthew Newman and his parents, Randy and Marla Newman, submit this Answer to the Amicus Brief of Washington State Association of Municipal Attorneys (“WSAMA”). WSAMA’s argument that a corporation’s attorney-client privilege extends to all current and former employees is not supported by case law or policy. Neither *Youngs v. Peacehealth*, 179 Wn.2d 645, 653, 316 P.3d 1035 (2014), nor *Upjohn Co. v. United States*, 449 U.S. 383, 386, 390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), which WSAMA erroneously contends this Court has “adopted,” held that corporate counsel’s “client” includes *former* employees, who have no authority to bind the corporation or direct its defense. WSAMA’s reliance on the statutory obligation of indemnity under RCW 4.96.041 to assert that municipal corporations should have the right to assert a broader privilege than private entities is particularly misplaced, as it ignores the very conflicts that led the trial court to disqualify the District’s counsel in the instant case, and would give state and municipal defendants privileges and immunities unavailable to private organizations.

## II. ARGUMENT

**A. This Court's decision in *Youngs* did not address whether a corporation's attorney-privilege extends to corporate counsel's communications with former employees.**

WSAMA erroneously contends that this Court's decision in *Youngs v. PeaceHealth*, 179 Wn.2d at 653, controls the issue presented here. In *Youngs*, this Court held that the corporate attorney-client privilege may extend to "low- and mid-level employees [who] might well be the only source of information relevant to legal advice." 179 Wn.2d at 662, ¶ 25. In the medical malpractice context, the limited privilege authorized in *Youngs* furthered the policy behind the privilege that "facilitates the full development of facts essential to proper representation of the client." *Id.*, quoting *Upjohn*, 449 U.S. at 391.

The facts here dispose of WSAMA's reliance on *Youngs* because the District's counsel appeared "for the limited purpose of assisting a witness with preparing for and giving testimony." (CP 550) District counsel did not purport to undertake the investigatory role of corporate counsel in *Youngs*, and was barred from assuming the broad scope of representation that WSAMA envisions for former employees of municipal corporations in an unchallenged order. (CP 635-37)

WSAMA's fear that corporate counsel's role will be hampered in future cases is also unjustified given the issue presented for review in this case, involving statements of former employees made, not for purposes of investigation of a claim, but to prepare for the former employees' depositions long after any investigation is concluded. And this case similarly does not present any issue concerning the scope of the work product protection for statements that are used by defense counsel to formulate defense strategy. *See, e.g., Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 743-44, ¶40, 174 P.3d 60 (2007). Here, the District's counsel belatedly asserted the *corporate* privilege only after the trial court rejected the ruse of temporarily representing the former coaches for their depositions in order to block the Newmans' access to relevant and material information.

In any event, *Youngs* does not support extension of the corporate privilege to communications between corporate counsel and *former* employees, whether governmental or non-governmental. Recognizing that not every employee is corporate counsel's "client," 179 Wn.2d at 661, ¶ 24, this Court in *Youngs* adopted a "modified version of the *Upjohn* test," in the medical-malpractice context. 179 Wn.2d at 653, ¶ 6. The Court held in *Youngs* that corporate counsel's investigative communications with a *current* agent – the treating

physician employed by a corporate health care provider – were protected by the corporation’s attorney-client privilege. Regardless of the rule this Court chooses to apply to *current* employees outside the medical malpractice context, this Court would not “overrule” (WSAMA Br. 6), or even limit, *Youngs* by holding that corporate counsel’s communications with *former* employees are not shielded by the corporation’s attorney-client privilege.

Moreover, the rule proposed by WSAMA is substantially broader than that adopted in *Youngs*, where the Court rejected the notion that the corporation’s privilege extended to corporate counsel’s investigative communications with the treating physician “simply by virtue of the employer-employee relationship.” 179 Wn.2d at 670, ¶ 37. Instead, the Court held that the treating physician was corporate counsel’s “client” because the physician was an agent of the corporation, who, though lacking managerial authority to bind the corporation, was the only employee with the ability to speak concerning the treatment of the plaintiff-patient. *Youngs*, 179 W.2d at 662, ¶ 25.

The *Youngs* decision was thus consistent with *Wright by Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564

(1984), which held that plaintiff's counsel may not contact ex parte "current" employees of a corporate defendant with managing authority sufficient to give them the right to speak for or to bind the corporation, but that the prohibition did not extend to former employees, who "cannot possibly speak for the organization." 103 Wn.2d at 201. See Amicus Br. of Washington Employment Lawyers Association at 10-11. Former employees not only lack "managerial authority," but are not agents of the corporation for any purpose. That is why the *Restatement* limits the scope of the corporation's attorney-client privilege to communications between corporate counsel and current employees, excluding former employees from any claim of privilege. *Restatement (Third) of the Law Governing Lawyers* § 73(2). "[A] person making a privileged communication to a lawyer for an organization must *then* be acting as agent of the principal-organization." *Restatement*, §73, comment e (emphasis added).

**B. The former coaches' communications are not privileged under *Upjohn***

Extending the corporate attorney-client privilege to the corporation counsel's communications with former employees is not supported by *Upjohn Co. v. United States*, 449 U.S. 383, 386, 390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). *Upjohn* holds that "the

attorney-client privilege extends to corporate clients,” *Youngs*, 179 Wn.2d at 650-51, ¶ 2. But the communications at issue in *Upjohn*, investigative interviews relating to potential criminal charges involving illegal payments to foreign governments, were made with current, not former, employees, for purposes of investigating the claim and formulating the corporation’s defense strategy. That is a far cry from representing former employees for the purpose of “assisting a witness with preparing for and giving testimony” (CP 550), as District counsel did here.

Regardless of the purpose of the communications, corporate counsel’s communications with former employees would never be privileged under the “flexible test” espoused by *Upjohn*:

In finding the communications at issue in *Upjohn* to be privileged, the Court noted that (1) they were made at the direction of corporate superiors, (2) they were made by corporate employees, (3) they were made to corporate counsel acting as such, (4) they concerned matters within the scope of the employee's duties, (5) they revealed factual information “not available from upper-echelon management,” (6) they revealed factual information necessary “to supply a basis for legal advice,” (7) the communicating employee was sufficiently aware that he was being interviewed for legal purposes, and (8) the communicating employee was sufficiently aware that the information would be kept confidential. *Upjohn*, 449 U.S. at 394, 101 S.Ct. 677.

*Youngs*, 179 Wn.2d at 664, ¶ 29, n.7. Each of these factors presumes a continuing principal-agent relationship between the corporation and the person communicating with its corporate counsel.

The pre-deposition communications between the former coaches and the District's counsel fail to satisfy the threshold criteria of *Upjohn*. These communications were not "made by corporate employees" "at the direction of corporate superiors," as *Upjohn* mandates. The former coaches had no continuing obligation to the District when these communications were made. See Resp. Br. 23-24; Amicus Br. of Washington State Association for Justice Foundation 12-16. And, corporate counsel's communications were not for the purpose of giving legal advice, but to "prepare" the former coaches for deposition.

**C. Refusing to extend the corporate privilege to corporate counsel's communications with former employees does not undermine indemnity rights of former state and municipal employees.**

There is no principled distinction to be made between former employees of municipal corporations and former employees of other organizations represented by counsel in determining the scope of the corporate attorney-client privilege. WSAMA's contention that a municipal corporation's statutory obligation to indemnify former employees under RCW 4.96.041 requires a blanket shield making all

communications with governmental counsel privileged, even long after the termination of governmental employment, is supported by neither law nor public policy.

WSAMA's discourse on the prospect of individual liability of any agent – governmental or non-governmental – for acts committed in the course of employment bears little relationship to reality. The principal's vicarious liability and deeper pockets means that plaintiffs have little incentive to name an employee – let alone a former employee – as an additional defendant. *See generally*, Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857, 859 (1984) (“[T]he actual distribution of legal risks more closely approximates a unitary regime of enterprise liability than a dual regime of firm and personal liability.”). Here, of course, the former coaches whose communications with District counsel are at issue were never named as parties to the Newmans' lawsuit. Further, the District never sought to defend them, and corporate counsel purported to “appear” as their counsel “for the limited purpose of assisting a witness with preparing for and giving testimony,” and not to investigate the claim or provide critical information to prepare the District's defense. (CP 550)

In those rare circumstances where a former employee is individually named as a co-defendant, corporate counsel may jointly represent the co-defendants unless, as here, joint representation is precluded by the Rules of Professional Conduct. Under RPC 1.7 and 1.13(g), municipal corporate counsel cannot represent both the municipal corporation and a former employee if the duty to one would be materially limited by the duty to the other.

Such potential conflicts are readily apparent in the very hypothetical posited by WSAMA, where an employee, “[d]istraught over what took place,” immediately terminates his or her employment following the event giving rise to municipal liability. (WSAMA Br. 10) In that situation, where there is a clear nexus between the adverse event and the termination of employment, the interests of the former employee and the municipal corporation will most certainly be adverse. (WELA Br. 16-17)

Finally, as amicus American Civil Liberties Union of Washington points out (ACLU Br. 15-16), the right to indemnity under RCW 4.96.041 is not the only governmental interest at stake. Adoption of the sweeping privilege espoused by WSAMA would expand governmental secrecy, contrary to the express policy of the

Public Records Act, RCW ch. 42.56, and would undermine statutory protection of whistleblowers, RCW 49.60.210.

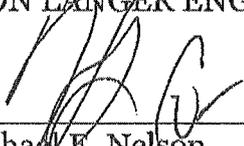
An individual plaintiff's fact witnesses are not "staff" whose communications with plaintiffs' counsel can be shielded from disclosure to a governmental defendant. By interposing a cloak of secrecy over the testimony of third party fact witnesses merely because they happen to have worked for the government, the expanded privilege sought by WSAMA would undermine the clearly expressed policy that "[a]ll local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, . . . to the same extent as if they were a private person or corporation." RCW 4.96.010.

### **III. CONCLUSION**

WSAMA's argument for a special expanded attorney/client privilege that would protect communications between governmental counsel and former governmental employees even if the same communications would not be protected between corporate counsel and former corporate employees proves too much. This Court should affirm the trial court's order denying the District's motion for a protective order.

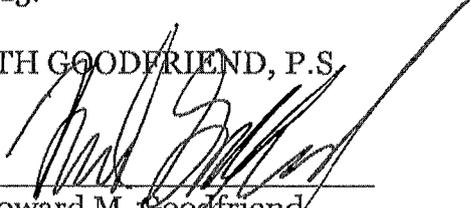
Dated this 4<sup>th</sup> day of November, 2015.

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**DECLARATION OF SERVICE**

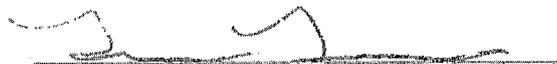
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 4, 2015, I arranged for service of Respondents' Answer to Amicus Brief of Washington Association of Municipal Attorneys, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 4<sup>th</sup> day of November,  
2015.

  
Tara D. Friesen

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Attached for filing in searchable .pdf format is Respondents' Answer to Amicus Brief of Washington Association of Municipal Attorneys, in *Newman, et al. v. Highland School District, No. 203*; Cause No. 90194-5. The attorney filing this document is Howard M. Goodfriend, WSBA No. 14355, e-mail address: [howard@washingtonappeals.com](mailto:howard@washingtonappeals.com).

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