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Washington State Supreme Court

Supreme Court No. 90194-5

APR 30 2014

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
Ronald R. Carpenter
Clerk

Appeal from the Court of Appeals – Division III

No. 32223-8 III

10961 29344 36400 25932 06027
MATTHEW A. NEWMAN, an incapacitated adult; and RANDY
NEWMAN AND MARLA NEWMAN, parents and guardians of said
incapacitated adult,

Respondent,

v.

22908 7888 11746
HIGHLAND SCHOOL DISTRICT NO. 203, a Washington State
government agency,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

The Highland School District No. 203 (“District”) asks this Court to accept review of the decision designated in Part B of this Motion.

B. DECISION

The District seeks discretionary review of the Court of Appeal’s order dated April 9, 2014, which denied the District’s motion to modify the commissioner’s ruling. See Appendix, at A20. The commissioner denied the District’s motion for discretionary review of the trial court’s decision of January 29, 2014, which denied the District’s motion for a protective order. The District’s motion for a protective order had requested protection from disclosure to the plaintiffs’ attorneys of communications between the District’s attorneys and former District employees who are the key actors with the most relevant knowledge about the facts giving rise to the plaintiffs’ lawsuit.

In *Youngs v. Peacehealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014), this Court recently accepted discretionary review of an interlocutory appeal in order to resolve the tension between the corporate attorney-client privilege and the *Loudon* rule. *Loudon v. Mhyre*, 110 Wn.2d 675 (1988). The District requests that this Court grant its petition for discretionary review to resolve the undecided issue under Washington law as to whether the corporate attorney-client privilege extends to 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.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the corporate attorney-client privilege applies to communications between the District's attorneys and certain former District employees, protecting such communications from disclosure?

2. Whether this Court should accept discretionary review under RAP 13.5(b)(2) because the Court of Appeals' denial of the District's motion to modify the Commissioner's ruling substantially alters the status quo and restricts the District's freedom to act?

3. Whether discretionary review should be granted under RAP 13.5(b)(3) because the Court of Appeals' tacit approval of the trial court's ruling allowing the plaintiffs' attorneys to obtain the substance of the communications between the District's lawyers and its former employees who have direct knowledge of the facts and circumstances giving rise to the plaintiffs' claims against the District calls for the exercise of revisory jurisdiction by this Court?

D. STATEMENT OF THE CASE

The present case involves 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). It arises from a high school football game on September 18, 2009, in which Matthew Newman received serious, permanent brain injuries while playing quarterback for the District's football team. See Appendix, at A21-A29. Three years after the football injury, the plaintiffs filed their lawsuit against the District, naming only the District, but not the coaches whose alleged acts and omissions gave rise to the plaintiffs' negligence claims against the District. *Id.* The former coaches whose alleged negligence caused Matthew Newman to be injured during the game are former head coach Shane Roy and former assistant coaches Dustin Shafer, Matt Bunday, and Thomas Hale.

The plaintiffs' attorneys have deposed all of the coaches, and assistant coach Schafer has been deposed twice. At the coaches' request, the District's counsel also represented the coaches for the purpose of their individual depositions, including meetings and preparation time related thereto. The 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.

At the depositions of the coaches, the plaintiffs' attorneys asked questions about the details and substance of the communications between the coaches and the District's counsel. Objections were made to those questions because the District believes that such communications are covered by the attorney-client privilege. The former coaches were allowed to answer all other questions asked by the plaintiffs' attorneys that pertained to the facts and circumstances allegedly giving rise to Matthew Newman's injury, as well as all other discoverable factual matters.

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, and have done so repeatedly.

In a separate proceeding unrelated to this motion, the trial court erroneously held that the District's counsel could no longer simultaneously represent the 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). See Appendix, at A30-A67. 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.

Shortly thereafter, the plaintiffs' attorneys began a direct mission seeking discovery of all communications between the District's counsel and the District's former coaches/employees. See Appendix, at A72-A87. The plaintiffs' attorneys' efforts included interrogatories and requests for production, as well as a second deposition of Coach Roy and a third deposition of Coach Shafer. See Appendix, at A95-A98. The purpose of the discovery was to obtain the communications between the coaches and the District's attorneys. See Appendix, at A89-A93.

The District moved for a protective order to block the plaintiffs' attorneys' improper discovery. See Appendix at A109-A123. It is the District's view that such discovery is barred by *Upjohn, Co. v. U.S.*, 449 U.S. 383 (1981) and later federal court cases holding that a corporation's attorney-client privilege protects communications between a corporation's counsel and certain former employees. At issue here are the communications during times when the coaches were not represented by counsel, but during times when the District's attorney was investigating and defending the District itself. *Id.*

The trial court denied the District's motion for a protective order, incorrectly finding that Washington does not follow *Upjohn* for the purposes of corporate-attorney client privilege. See Appendix, at A124-A126. The Court ordered that the District must respond to the plaintiffs'

attorneys' discovery concerning the communications between the District's attorneys and the former coaches, and that the District may not object to questions about those communications. *Id.*

The District filed a petition for discretionary review at Division III of the Court of Appeals. See Appendix, at A127-A150. The trial court issued two stays pending the outcome of the review by the Court of Appeals. See Appendix, at A151-A152 and A153-A154. On April 9, 2014, the Court of Appeals denied the District's motion for reconsideration of the Commissioner's denial of the District's petition for discretionary review. The trial court refused to again stay its order allowing discovery of the District's counsel's communications with its former coaches despite knowing that the District intended to appeal the Court of Appeals' decision to this Court. See Appendix, at A155-A156.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Washington Supreme Court may accept discretionary review of an interlocutory decision of the Court of Appeals if the Court of Appeals: (1) committed an obvious error, rendering further proceedings useless; (2) committed probable error, substantially altering the status quo or substantially limiting the freedom of a party to act; or (3) so far departed from the accepted and usual course of judicial proceedings, or

sanctioned such a departure by the trial court as to call for the exercise of revisory jurisdiction by this Court. RAP 13.5(b)(1)-(3).

This Court is urged to exercise revisory jurisdiction to review the Court of Appeals' decision denying review of the trial court decision. As set forth herein, the considerations governing acceptance of review are met in this case.

1. Interlocutory Review is Appropriate

Although “[j]udicial policy generally disfavors interlocutory appeals,” the issues presented should properly be addressed in an interlocutory appeal. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985) (citing *Maybury v. Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)). The plaintiffs’ attorneys are very directly seeking, and the trial court is allowing them to obtain, communications with former District employees that the District and other appellate courts that have addressed the identical issue believe are protected by the attorney-client privilege held by the District.

If the trial court’s erroneous order is allowed to stand as this case proceeds to trial, the harm to the District will have long-ago occurred by the time this case reaches appeal. Once the plaintiffs’ attorneys obtain the details and substance of the District’s former employees communications with the District’s attorneys and the mental impressions thereof, the bell is

rung, cannot be unrung, and the damage is done. This issue, whether certain communications are privileged, by its very nature arises midstream in a case, and it requires an interlocutory appeal.

2. The Court of Appeals Order Infringes the Oldest of Common Law Privileges, the Attorney-Client Privilege, and Restricts the District's Freedom to Act

“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); emphasis supplied); *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).

Prior to the trial court’s rulings in this case, this Court in the *Youngs* case explicitly 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 and the Court of Appeals have done in this case. *Youngs*, 179 Wn.2d at 662. The *Youngs* case also, again, 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 in the present case. That is, whether the attorney-client privilege extends to 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 rationale 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 extend the scope of the corporate attorney-client privilege specifically to include 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 extension would be 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.

In effect, the rulings by the trial court and the Court of Appeals in this case are sanctioning 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, and the Court of Appeals refusal to accept review of this ruling, now 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 District’s former employees/coaches concerning the substance of the communications between the District’s attorneys and its former employee/coaches which were undertaken for the purpose of obtaining information that is not held by either current District

management or even current District employees and that is essential to the proper representation of the 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 has ruled and as the Court of Appeals has allowed, ignores the principles, reasoning, and holdings of the *Upjohn*, *Wright*, and *Youngs* cases. The test adopted by the trial court is not flexible. It does not take into account the laudable goals underlying the attorney-client privilege and the extension of that privilege to 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.

It allows discovery of past communications which are privileged under 9th Circuit law, and which had this case been venued in Washington federal court instead of state court, would be protected from discovery. It has created a "Hobson's choice" for the District's counsel between engaging in further communications with such former employees or foregoing such communications because any such future communications will be discovered by opposing counsel.

It now discourages the giving of information to the District's lawyers by the former employees who know that communications with the

District's counsel will have to be disclosed to the plaintiffs' attorneys who are claiming that the former employees were negligent. It discourages frank communications between the District's attorney and the former employee(s) about the facts giving rise to the plaintiffs' complaint, which is particularly true with respect to former head coach Shane Roy whose first deposition has not been completed. It allows the plaintiffs' attorneys to obtain the mental impressions of the District's counsel expressed directly to the former employees or necessarily disclosed by the types of questions asked of the former employee and the information provided by the former employee in response thereto. Further, it opens the door for the plaintiffs' attorneys to take the deposition of the District's counsel concerning counsel's 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). In fact, it inhibits exactly what the laudable goals of the attorney-client privilege are designed to promote, i.e., the giving of information to the District's counsel and the giving to the District of sound and informed legal advice as to matters that may trigger potential District liability.

The District's attorney-client privilege should not be lost simply because an employee leaves employment with the District at some point after an event occurs. Surely, such an important privilege should not be

lost solely due to such vagaries.¹ Likewise, 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, the plaintiffs’ attorneys can affect the District’s attorney-client privilege by not naming the former employees as individual defendants.

The trial court’s analysis and the Court of Appeals’ failure to modify the Commissioner’s ruling simply fails to follow logic and the purpose for having the privilege. By declining to modify the commissioner’s ruling and accept review of the case, the Court of Appeals has significantly impaired the District’s freedom to act – to continue to develop its defense. Consequently, the District’s counsel “may find it

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.

extremely difficult, if not impossible, to further determine what happened” and to have **candid and forthright conversations** with the District’s former employees, whose alleged negligence is at the heart of the plaintiffs’ case, so as to obtain the information bearing on liability issues and advise the District accordingly. The District’s attorneys have already had certain communications with both current and former District employees, and it should be allowed to continue doing so without having those communications subject to discovery. Unfortunately, due to the trial court’s rigid restrictions on the scope of attorney-client privilege, prior communications by the District’s counsel with the District’s former employees, thought to be privileged, are now discoverable, and future communications will be discoverable as well. This Court is urged to take action and resolve this critical issue.

3. The Court of Appeals’ Decision Constitutes Probable Error, Substantially Alters the Status Quo, Substantially Limits the Freedom of the District to Act, and Disregards Supreme Court Precedent Such That There Is a Departure From the Usual Course of Judicial Proceedings.

The precedent of this Court clearly establishes that the attorney-client privilege may in certain instances extend to communications with lower level employees not in a control group; that a flexible test is to be used in determining to which lower level employees the attorney-client privilege extends; and that a laudable purpose of the attorney-client

privilege is to expand the scope of the attorney-client privilege in order to facilitate the full development of facts essential to proper representation of the client and encourage laymen to seek early legal assistance. *Wright v. Group Health Hosp.*, 103 Wn.2d at 195, 202; *Youngs v. Peacehealth*, 179 Wn.2d at 662. The trial court's ruling that the scope of the District's attorney-client privilege is determined solely by whether people are employed by the District when the communications occur fails to follow the precedent and reasoning set forth in the precedent of this Court. The Court of Appeals' failure to reverse the rulings of the Commissioner and the trial court constitutes probable error as it sanctions the trial court's failure to follow the precedent and reasoning of this Court as set forth in the *Wright* and *Youngs* cases, which the Court of Appeals is bound to follow. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006).

Likewise, as set forth herein, the Court of Appeals' decision allowing the trial court's ruling to stand alters the status quo because it authorizes the plaintiffs' attorneys to obtain confidential communications between the District's counsel, as well as the mental impressions thereof. The Court of Appeals' decision also has placed a chilling effect on further communication with these key former employees and has substantially limited the freedom of the District and its counsel to act by discouraging

future communications therewith based upon the fact that such communications are fully discoverable by the plaintiffs' attorneys. The Court of Appeals ruling in this regard has so far departed from the accepted and usual course of proceedings and sanctioned such a departure by the trial court that the exercise of revisory jurisdiction by this Court should be undertaken.

F. CONCLUSION

The District requests that this Court grant discretionary review under RAP 13.5(b)(2)-(3).

DATED this 29th day of April, 2014.

NORTHCRAFT, BIGBY & BIGGS, P.C.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MATTHEW A. NEWMAN, et al,)	
)	No. 32223-8-III
Respondents,)	
)	
v.)	
)	ORDER DENYING
HIGHLAND SCHOOL DISTRICT, No. 203,)	MOTION TO MODIFY
)	COMMISSIONER'S RULING
Petitioner.)	

Having considered petitioner's motion to modify the commissioner's ruling of February 13, 2014, the answer thereto, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Siddoway, Fearing, Lawrence-Berrey

DATED: April 9, 2014

FOR THE COURT:


LAUREL H. SIDDOWAY
CHIEF JUDGE

FILED

2012 SEP 13 A 10:46

KIM CATON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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 governmental agency,

Defendant.

No. 12 2 03162 1

COMPLAINT FOR PERSONAL INJURIES

Plaintiffs, Matthew A. Newman, Randy Newman and Marla Newman, allege as
follows:

I. PARTIES, JURISDICTION AND VENUE

1.1 Plaintiff MATTHEW A. NEWMAN (hereinafter referred to as "MATTHEW")
is a permanent resident of Yakima County, Washington, but is now residing, for traumatic
brain injury treatment and neurological rehabilitation purposes, at the Centre for Neuro Skills
("CNS") in Bakersfield, California. Plaintiff was born on July 5, 1992.

1 2.2 Prior to September 17, 2009, MATTHEW had suffered a concussion while
2 playing school-sponsored sports for the SCHOOL DISTRICT, but had no ongoing memory,
3 speech, personality changes, or functional impairments, and did not have any ongoing history
4 of headaches or other continuing head injury complaints, and was performing well in school.

5 2.3 The SCHOOL DISTRICT was specifically aware of MATTHEW'S history of
6 concussion, as it had been sustained while playing school-sponsored sports for said school
7 district and observed by his then-basketball coach.

8 2.4 In football practice on September 17, 2009, MATTHEW suffered a head
9 injury/concussion. MATTHEW was running back a kickoff up the left sideline. At about
10 midfield and close to the out of bounds line, he was tackled/hit by a teammate playing defense.
11 MATTHEW went down out of bounds and his helmet hit the pole-vaulting track that is a few
12 feet from and parallel to the football field, with school coaches and other teammates standing
13 nearby.

14 2.5 The football team coaches had a suspicion of or knowledge that MATTHEW
15 had a head injury/concussion and removed MATTHEW from practice drills immediately
16 thereafter. One coach walked MATTHEW to the end zone.

17 2.6 After the concussion and during practice, MATTHEW continued to suffer and
18 exhibit post-concussion symptoms, but was never fully and properly assessed during practice
19 nor referred after practice for a concussion return-to-play evaluation by a licensed healthcare
20 professional trained in the evaluation and management of head injury/concussion.

21 2.7 After MATTHEW'S concussion/head injury and removal from practice, he was
22 not returned to practice drills on September 17, 2009.

1 2.8 MATTHEW'S parents, RANDY and MARLA, were not contacted or notified of
2 the head injury/concussion incident, that MATTHEW complained of a headache, that his head
3 hurt, or that he had been removed from practice drills. No one from the SCHOOL DISTRICT
4 informed MATTHEW'S parents that he had been hurt during practice, nor did the SCHOOL
5 DISTRICT choose to discuss with RANDY and MARLA their opinions about MATTHEW'S
6 return to play following a concussion.

7 2.9 The SCHOOL DISTRICT failed to place MATTHEW'S health and safety first
8 by not requiring an evaluation of MATTHEW by a license healthcare professional who is
9 trained in the evaluation and management of concussions prior to allowing MATTHEW to
10 return to football practice or competition after his September 17, 2009 concussion/head injury.

11 2.10 The SCHOOL DISTRICT failed to obtain written clearance for return to play
12 from a licensed healthcare professional trained in the evaluation and management of
13 concussion as required by law.

14 2.11 The SCHOOL DISTRICT allowed MATTHEW to return, suit up, and play the
15 high school's football game on the next day, Friday, September 18, 2009.

16 2.12 During the football game on September 18, 2009, MATTHEW was never
17 monitored by the SCHOOL DISTRICT nor evaluated by a licensed healthcare professional
18 trained in the evaluation and management of concussion.

19 2.13 After MATTHEW'S concussion incident on September 17, 2009, he continued
20 to exhibit post-concussive symptoms.

21 2.14 Despite MATTHEW'S difficulties and ongoing symptoms, the SCHOOL
22 DISTRICT:

- 23 1. Did not withhold MATTHEW from playing in the football competition of
 September 18, 2009;

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2. Did not have MATTHEW seek the required medical evaluation and clearance for return to play by a licensed healthcare professional trained in the evaluation and management of concussions;
3. Did not obtain written clearance by a licensed healthcare professional trained in the evaluation and management of concussions; and
4. Did not follow student safety rules.

2.15 During the school's football game on Friday, September 18, 2009, MATTHEW was playing on offense and defense, involved with tackles and blocking, and incurred multiple impacts to his body and head. Toward the end of the game, MATTHEW began to complain that his legs were weak or hurting and one coach had him lie down. MATTHEW then lost consciousness and went into a coma as a result of his premature and negligent return to play.

2.16 Following MATTHEW'S collapse and coma, he was removed from the field and transported to Yakima Valley Medical Center in Yakima, Washington, where he was examined and ultimately underwent life-saving, emergency brain surgery involving a right frontoparietal and subtemporal craniectomy, removal of hematoma and decompression, and subsequent hospitalization and rehabilitation. Following this first surgery, MATTHEW required the following eight (8) surgeries:

1. October 23, 2009: (1) Evacuation of pseudomeningocele and culture, right scalp; and (2) Closure and revision of scalp wound 5 cm.
2. October 21, 2009: Craniotomy for drainage of epidural/subdural abscess.
3. November 3, 2009: Redo craniotomy for evacuation of subdural abscess.
4. November 10, 2009: Redo exposure for removal of intracranial abscess.
5. November 17, 2009: (1) Placement of lumboperitoneal shunt; (2) Removal of lumbar drain; and (3) Scalp aspiration attempted.

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2 6. November 24, 2009: Redo craniotomy for resection of abscess.

3 7. December 14, 2009: (1) Removal of lumboperitoneal shunt; and (2)
4 Removal of suture from scalp.

5 8. April 23, 2009: Bone flap replacement surgery (cranioplasty).

6 2.17 MATTHEW ultimately returned to high school with severe brain injury deficits
7 and learning disabilities.

8 2.18 MATTHEW became eligible for special education services from the District on
9 March 2, 2010 as a result of his traumatic brain injury.

10 2.19 MATTHEW and his parents were notified on December 1, 2010 that
11 MATTHEW would be exited from eligibility.

12 2.20 After being exited from eligibility for special education services, MATTHEW
13 was served under a Section 504 Accommodations Plan.

14 2.21 MATTHEW was declared fully incapacitated as to both his person and estate
15 pursuant to RCW 11.88 by the Yakima Superior Court on October 7, 2011.

16 III. INJURIES

17 3.1 As a result of the incident above-described, MATTHEW sustained serious
18 injuries to include, but not be limited to:

- 19 1. Severe traumatic brain injury consisting of an acute subdural
20 hematoma with massive brain swelling and signs of subfalcine and
21 uncal herniation and acute subdural hematoma;
- 22 2. Brain parenchymal injury including axonal shear and global
23 neurologic dysfunction;
3. Golf ball-size area of missing brain tissue from right frontal lobe
brain abscess;
4. Abnormal EEG documenting partial onset seizures requiring
medication;

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- 5. Right hemiparesis;
- 6. Right-sided tremor;
- 7. Cognitive deficits including working memory, problem solving, multi-tasking, logical reasoning, insight, attention span, impulse control and complex aspects of multi-sensory processing;
- 8. Expressive and reception language difficulties;
- 9. Highly reactive, unpredictable and socially inappropriate behavior; and
- 10. Balance difficulties.

3.2 MATTHEW'S providers or evaluators also made the following findings/diagnoses to include, but not be limited to:

- 1. Post-traumatic encephalopathy;
- 2. Hydrocephalus with shunt placement;
- 3. Diffuse brain ischemia and multiple, focal areas of infarction with specific deficits related to large areas of infarction and focal areas of encephalomalacia;
- 4. Diffuse and focal loss of brain substance with significant loss of corpus callosum fiber tracts;
- 5. Brain swelling resulting in midline shift to the left;
- 6. Uncal herniation with compression of the brainstem;
- 7. Dilation of the central fluid system resulting in dilation and enlargement of the ventricles;
- 8. Damaged thalamus tissue;
- 9. Scalp infection with abscess;
- 10. Cognitive Disorder Due to Football-Related Closed-Head Injury with Subdural Hematoma and Multiple Brain Surgeries;

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- 11. Adjustment Disorder with Depressed Mood;
- 12. Major Depressive Disorder, Single Episode, Moderate; and
- 13. Attention-Deficit Hyperactivity Disorder, NOS, Acquired Secondary to Traumatic Brain injury.

3.3 MATTHEW continues to have ongoing neurological and brain injury deficits, including but not limited to generalized neurologic deficits, cognitive, memory, attentional and educational deficits, emotional and behavioral difficulties, and motor deficits.

IV. NEGLIGENCE

4.1 MATTHEW'S above-described injuries were proximately caused by the negligence of the SCHOOL DISTRICT as alleged above.

V. DAMAGES

- 5.1 Items of damages suffered by MATTHEW are:
- a. General or "human" damages, including past and future mental and physical pain and suffering, loss of the ability to enjoy life, disability, impairment and disfigurement.
 - b. Medical costs and expenses, both past and future.
 - c. Loss of earnings and impairment of earning capacity.
 - d. Other special and general damages permitted by law that will be proved at trial.

5.2 Items of damage suffered by RANDY and MARLA are loss of consortium.
The aforesaid damages are in amounts which will be proved at the time of trial.

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VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs MATTHEW NEWMAN, and RANDY and MARLA NEWMAN, pray for their judgment against Defendant HIGHLAND SCHOOL DISTRICT NO. 203 for human and special damages in amounts to be proved at trial, together with Plaintiffs' costs and disbursements herein incurred along with prejudgment interest, and for such other relief as the Court may deem just and equitable.

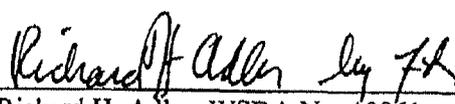
DATED this 12th day of September, 2012.

NELSON LANGER ENGLE, PLLC



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Michael E. Nelson, WSBA #6027

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Attorneys for Plaintiffs

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 JANUARY 24, 2014

20

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23

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3 (BEGINNING OF TRANSCRIPTION)

4 (Proceedings begin at 2:33 p.m.)

5 THE COURT: Okay. The Newman matter.

6 Some stickers. All right. This is Newman versus

7 Highland School District, 12-2-03162-1. And we have

8 Mr. Northcraft for the defense and -- I'm sorry -- is

9 it Biggs?

10 MR. BIGGS: Biggs, yes, Your Honor.

11 THE COURT: Biggs.

12 MR. BIGGS: I think it gets listed as

13 Briggs every here and there.

14 THE COURT: Okay. And your names

15 again?

16 MS. CARTER: Melissa Carter for the

17 plaintiffs, Your Honor.

18 MR. LERITZ: Arthur Leritz, Your

19 Honor.

20 THE COURT: Lerix?

21 MR. LERITZ: Leritz, L-e-r-i-t-z.

22 THE COURT: Leritz. Okay. What we're

23 going to do first is we are going to talk about the

24 motion for the protective order. Locate it here. I'm

25 just going to kind of work my way through starting

Page 3

I N D E X

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3 PROCEEDINGS:

4 Argument/discussion re: Protective Order 4

5 Argument/discussion re: Request for Production 10

6 Argument/discussion re: Disqualify

7 Opposing Counsel 31

8 Argument/discussion re: Motion to Disqualify 43

9 Discussion re: Scheduling procedures 54

10 Discussion/argument re: Spoliation 57

11 Discussion/argument re: Conflict of Interest 68

12 Discussion/argument re: Harassment 73

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1 with interrogatory number one.

2 Mr. Northcraft, what's the problem

3 with disclosing the date of the communication and the

4 persons involved in the communication? That doesn't

5 disclose any work product, does it?

6 MR. NORTHCRAFT: I think there's a

7 couple things wrong with that, Your Honor, at least

8 one, and if you go to our authority with respect to CR

9 26(b)(1), discovery is limited to any matter not

10 privileged, which is relevant to the subject matter

11 involved in the pending litigation and whether it

12 relates to the claim or defense of the party.

13 The date of any communications or the

14 persons involved in any communications are not

15 relevant to this -- to the issues in this case. When

16 and where or with whom I talked to -- as long as I was

17 just by myself as the lawyer for the Highland School

18 District, when I talk to somebody or -- well, there

19 wouldn't have been any other persons involved. So the

20 answer would always be no there unless it was --

21 THE COURT: So, but if the plaintiffs'

22 attorneys went to one of these witnesses that they've

23 listed they're asking the interrogatory about, if they

24 went to them, they could ask them, when did you talk

25 to Mr. Northcraft, right, and you wouldn't have any



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1 basis for somehow objecting to that, would you?

2 I mean, they can ask that question of

3 the witness, can't they?

4 MR. NORTHCRAFT: They can ask the

5 question, but it's not relevant to the case, and...

6 THE COURT: Again, we're talking about

7 the relevance in the context of discovery, which is

8 pretty darn broad.

9 MR. NORTHCRAFT: And I appreciate

10 that, Your Honor. I'm not trying to -- I think that

11 if he asks a question, well, Coach Shafer, when did

12 you meet with Coach Roy and talk about concussions,

13 perfectly relevant, but when I met with Coach Roy,

14 time, and when I met with him and what I talked to him

15 about is totally irrelevant to this case and it's

16 privileged.

17 THE COURT: I don't remember --

18 MR. NORTHCRAFT: It doesn't have to do

19 with the underlying facts of the case.

20 THE COURT: I don't remember if Coach

21 Roy is one of them who's still an employee or not.

22 MR. NORTHCRAFT: No, no, neither one

23 of them are.

24 THE COURT: Okay. Do you have any

25 authority for the proposition that the plaintiffs

Page 7

1 can't get the information from anybody about when you

2 talk to a particular witness?

3 MR. NORTHCRAFT: My authority is the

4 rule which says that you can get discovery as to

5 information that's not privileged but that is relevant

6 to the issues in the case, and when I talked to these

7 people, whether it was at 1:00 in the morning or 2:00

8 in the afternoon or whatever date is not relevant to

9 the facts of this case that's being litigated.

10 THE COURT: All right. Who's going to

11 argue this motion? Mr. Leritz?

12 MR. LERITZ: I am, Your Honor.

13 THE COURT: The other item, you're

14 asking for the details of the conversations. So you

15 want to know what the witnesses said to Mr.

16 Northcraft, right?

17 MR. LERITZ: Yes.

18 THE COURT: Okay. Now, we had another

19 hearing once where you had recorded -- you'd taken

20 recordings of witnesses and the defense wanted those

21 and you didn't want to give those up because you said

22 they're work product. How is this any different?

23 MR. LERITZ: Well, I think it is, Your

24 Honor. First of all, I think that's something that

25 certainly may lead to the discovery of admissible

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1 evidence and it's pretty common to ask witnesses,

2 outside of what actually happened in this case, who

3 did you talk to? Oh, you talked to the defense

4 attorney, or, the plaintiffs' attorney.

5 THE COURT: Uh-huh.

6 MR. LERITZ: What did you talk about.

7 THE COURT: That's different. You can

8 ask the witnesses whatever you want to ask the

9 witness, but now you're asking Mr. Northcraft to

10 disclose his notes and records and so on of what the

11 witness said. How is that different? Why is that not

12 work product?

13 MR. LERITZ: Your Honor, I think it's

14 an issue in this case, and I don't think -- we're not

15 asking for his actual notes and memoranda, his

16 personal thoughts, but I think we are entitled to know

17 about the communications that he had with these

18 witnesses, because it's become an issue now in terms

19 of improperly potentially influencing witnesses in

20 this case.

21 We've already had situations where Mr.

22 Northcraft has given lay witnesses a tape recorder to

23 tape a conversation with my office. We have instances

24 of intimidation of another witness, a former employee

25 of the school district.

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1 I think it's relevant to what did you

2 discuss with these people and what was discussed and

3 what was told to you by this attorney, because I think

4 there is some evidence that Mr. North -- which, by the

5 way, Mr. Northcraft does not deny with respect to Mr.

6 Diener -- that he may have told him something to the

7 effect of, they're trying to screw the school

8 district.

9 If those kind of conversations have

10 occurred with other witnesses, I think we're entitled

11 to know that.

12 THE COURT: And you're entitled to ask

13 those witnesses about them.

14 MR. LERITZ: I think we are, but we

15 haven't been able to do that yet.

16 THE COURT: Okay. When you say you

17 haven't been able to do that, why haven't you been

18 able to do that?

19 MR. LERITZ: Well, with respect to

20 Dustin Shafer, former coach, and former coach Shane

21 Roy, specifically with respect to coach, former Coach

22 Dustin Shafer, we haven't been able to ask those

23 questions.

24 THE COURT: Because of the claim of

25 attorney-client privilege.



Page 10

1 MR. LERITZ: Exactly. Exactly.
 2 THE COURT: Okay. With regard to
 3 interrogatory number one, the defense has to answer
 4 with regard to A and B date of the communication and
 5 persons involved in the conversation. You don't have
 6 to answer C, because I don't think the plaintiffs have
 7 shown there is a substantial need and -- what's the
 8 other -- it's undue hardship, I think, under CR
 9 24(b)(4).
 10 The request for production -- now, Mr.
 11 Lertz, when you're asking about communications, which
 12 direction are you talking about? Are you talking
 13 about -- first of all, are you talking about -- when
 14 you say they're in any form.
 15 MR. LERITZ: Uh-huh.
 16 THE COURT: I assume that doesn't mean
 17 orally, because you can't provide a copy of an oral
 18 one unless it was recorded, but you're asking for
 19 letters or emails or whatever that were sent?
 20 MR. LERITZ: Right. Emails, texts,
 21 right.
 22 THE COURT: To the witnesses.
 23 MR. LERITZ: And Your Honor, I think
 24 it's important to point out that those kind of -- that
 25 kind of information, we're specifically asking for

Page 11

1 that during the times that they were unrepresented by
 2 counsel.
 3 THE COURT: Right, right.
 4 MR. LERITZ: Which I don't think there
 5 is any dispute about. So to the extent that there
 6 were some back and forth either emails or
 7 correspondence, I think we're entitled to that.
 8 THE COURT: What about if they've
 9 taken a statement from a witness? You think you're
 10 entitled to that?
 11 MR. LERITZ: A statement, sure. If
 12 it's a printed statement of what the witness said.
 13 THE COURT: Yeah.
 14 MR. NORTHCRAFT: Sure.
 15 THE COURT: If the witness handwrote
 16 out a statement or recorded a statement, you think
 17 you're entitled to that?
 18 MR. LERITZ: Well, I don't think we
 19 are based on what the court's rule recorded statements
 20 are --
 21 THE COURT: I'm asking, again, you
 22 have to be careful what you ask for --
 23 MR. LERITZ: Right.
 24 THE COURT: -- because they're trying
 25 to get some of the same stuff from you, and the same

Page 12

1 standard's going to apply to both sides here. So be
 2 careful what you ask for.
 3 MR. LERITZ: I understand. Your
 4 Honor, I think statements -- and we've already
 5 produced statements. I think that's been already --
 6 has been going on in this case.
 7 THE COURT: Don't get past my
 8 question.
 9 MR. LERITZ: Written statements.
 10 THE COURT: So, but do you have any
 11 basis for claiming that you are entitled to written or
 12 recorded statements of witnesses taken by the defense?
 13 And again, CR 26(b)(4) seems to say that those items
 14 are only discoverable upon a showing of substantial
 15 need and undue hardship, which I don't think you've
 16 made any effort to show at this point.
 17 MR. LERITZ: We've had ample
 18 opportunity to depose witnesses already in this case,
 19 Your Honor.
 20 THE COURT: All right. So Mr.
 21 Northcraft, if you sent emails to witnesses that you
 22 do not represent, do you have any, any -- why aren't
 23 those discoverable?
 24 MR. NORTHCRAFT: They are protected by
 25 the Highland School District's attorney-client

Page 13

1 privilege.
 2 THE COURT: If you send them to
 3 somebody you don't represent, you think it's still
 4 protected?
 5 MR. NORTHCRAFT: I do, because --
 6 THE COURT: On what basis?
 7 MR. NORTHCRAFT: Well, the Upjohn
 8 case, which is a United States Supreme Court case,
 9 which talks about communications between lawyers and
 10 current corporate employees, and the Admiral Insurance
 11 case, which talks about and cites to another Ninth
 12 Circuit case that says former employees are also
 13 covered by that attorney-client privilege that exists
 14 between the client, i.e., their former employer, and
 15 the district's, in this case, lawyer, me. It's just
 16 --
 17 THE COURT: Let's be clear about the
 18 Upjohn case.
 19 MR. NORTHCRAFT: Sure.
 20 THE COURT: The Upjohn case, if you
 21 look at footnote 3, it says that although
 22 (indecipherable) argue the privilege should
 23 nonetheless apply to communications by these former
 24 employees, and then it says, neither the district
 25 court nor the Court of Appeals had occasion to address



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1 this issue. We decline to decide it without the
 2 benefit of treatment below.

3 So clearly, the Upjohn court did not
 4 decide the issue of what protection there might be
 5 with regard to former employees, so...

6 MR. NORTHCRAFT: The Upjohn case was
 7 the basis for the extension of the attorney-client
 8 privilege to former employees by the Admiral Insurance
 9 case, and that cited an earlier case. And I'd get the
 10 cite for you but I don't have it in my memory.

11 THE COURT: Well, you also cite the
 12 Wright case.

13 MR. NORTHCRAFT: That deals with
 14 different issues, Your Honor. I guess what I -- one
 15 of the things I wanted to mention while you were
 16 asking questions of Mr. Leritz was this. I've been
 17 guilty of it. I think it's easy to be guilty of it.
 18 There's a distinct difference between the
 19 attorney-client privilege and the work product. I've
 20 blended them too often, and I'm sorry that I have, but
 21 that's been my improper thinking.

22 I've now been studying the Upjohn
 23 case. I studied the Ninth Circuit cases. I've looked
 24 at Wright. I've looked at the atto -- the work
 25 product privilege. I've looked at the issue of who

Page 15

1 can be contacted and that kind of thing, and here's
 2 what the Upjohn case and the Ninth Circuit Admiral
 3 Insurance Company cases say.

4 The attorney-client privilege is
 5 absolute. There's no exceptions to it, and the
 6 Highland School District has an attorney-client
 7 privilege and it extends to current employees, i.e.,
 8 the Upjohn case, and it extends to exemployees that
 9 clearly were part of the event, and that's what this
 10 Admiral case says and it's really, it's kind of an
 11 interesting case because it certainly highlights the
 12 issues.

13 In that case, Admiral Insurance
 14 Company hired some lawyers to do an investigation that
 15 they -- their employees had engaged in security fraud.
 16 They hired the lawyers, they interviewed these
 17 employees, one of whom became an exemployee, took
 18 statements, communicated with them, got statements
 19 from them, and then when -- and I can't remember. I
 20 don't think it was the government. I think it was
 21 plaintiffs that were suing under the Securities Act or
 22 something -- they wanted to take the depositions of
 23 these former employees and the court said no.

24 Even though -- and what's interesting
 25 there is the former employees took the Fifth. So

Page 16

1 there was no way except to get these earlier
 2 transcribed statements. That was the only thing left,
 3 because they weren't going to testify about it because
 4 they were going to take the Fifth Amendment.

5 The court said no, you cannot get
 6 those communications. Those are protected by the
 7 attorney-client privilege between Admiral Insurance
 8 Company and its lawyers talking to its current and
 9 former employees. That is absolutely no different
 10 than the Highland School District, who I represent,
 11 talking to current and former employees. That is a
 12 communication, and their communications back to me are
 13 also privileged.

14 Now, they can ask as many questions as
 15 they want, as the courts clearly state, about the
 16 facts of the football game, the facts of the football
 17 practice, the facts of all everything underlying the
 18 case, but they cannot invade the attorney-client
 19 privilege that the Highland School District has with
 20 me and its current and former employees.

21 THE COURT: Do you have any authority
 22 to the effect that the Admiral Insurance case has been
 23 adopted or approved in Washington?

24 MR. NORTHCRAFT: I am not aware of any
 25 case in Washington that deals with this specific

Page 17

1 issue. The Wright case and the Sodor case, you know,
 2 they kind of beat around the bush, but they don't get
 3 to exactly this issue.

4 So the answer is no, I'm not aware of
 5 any Washington authority regarding exemployees,
 6 although the Supreme -- our state Supreme Court
 7 certainly cited Upjohn and the Wright case favorably
 8 and, you know, quoted it and all that kind of thing.

9 THE COURT: Well, and then in Wright
 10 they proceeded to take a very narrow --

11 MR. NORTHCRAFT: Yeah.

12 THE COURT: -- approach to the issue,
 13 which seems to argue against the idea that the Supreme
 14 Court of Washington would approve that rule from
 15 Admiral Insurance.

16 MR. NORTHCRAFT: Well, the ruling
 17 there -- or there was a couple of them. One, and the
 18 principal one, had to do with, you know, who could
 19 contact who, and the court in the Wright case, in our
 20 Wright case, said that there's a control group that
 21 you can't contact, the other side can't contact, then
 22 there's the noncontrol group that, free game.

23 So they never really reached the issue
 24 of current and former employees. Their decision had
 25 to do with the control group and whether or not an



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1 adverse party could contact them versus somebody
 2 that's not in the control group.
 3 THE COURT: Right. But doesn't that
 4 seem to argue in favor -- if they're saying that even
 5 if the witnesses involved are still employees of the
 6 defendant, if they're not within the --
 7 MR. NORTHCRAFT: Well, they can --
 8 THE COURT: They're not speaking
 9 agents, they can still be interviewed.
 10 MR. NORTHCRAFT: Absolutely. I'm not
 11 saying anything contrary to that. I'm saying that my
 12 communications with -- let's talk about the Wright --
 13 those low-level employees, they can't ask about that,
 14 because that's protected by the attorney-client
 15 privilege that rests with, in that case, Group Health,
 16 and in this case the Highland School District.
 17 THE COURT: Mr. Leritz, do you have
 18 any authority on this issue of whether or not there's
 19 an attorney-client privilege that protects
 20 communications between the defendant's attorneys and
 21 former employees?
 22 MR. LERITZ: Your Honor, I do, and I
 23 think Wright versus Group Health is right on point on
 24 that, where the court in that case said that since
 25 former employees cannot possibly speak for the

Page 19

1 corporation, right, the court in that case held that
 2 the rule does not apply to them, the attorney-client
 3 privilege does not apply there.
 4 THE COURT: Well, there's two
 5 different things there.
 6 MR. LERITZ: Sure.
 7 THE COURT: As Mr. Northcraft was
 8 pointing out, there's two issues. In the Wright case
 9 the issue was who were the opposing attorneys allowed
 10 to even approach and interview.
 11 MR. LERITZ: Right.
 12 THE COURT: And that's -- it never got
 13 to the question of suppose, all right, now they're
 14 able to interview nonspeaking agent employees, whether
 15 former or current employees, but they never -- they
 16 don't get to the question of, okay, you're
 17 interviewing a current employee. Can you ask the
 18 current employee about what the employer's attorney
 19 has talked to them about. I mean, that's just never
 20 addressed, is it?
 21 MR. LERITZ: I don't believe it is.
 22 Your Honor, but I think the distinction here, and the
 23 case that I think was cited by the -- I believe the
 24 Admiral case, is that City of Long Beach case versus
 25 Standard Oil Company, it's a Ninth Circuit case, and I

Page 20

1 think the distinction is in that case what Admiral is
 2 citing for is in that particular case we had current
 3 employees who spoke with counsel and gave information
 4 that was germane to the case. They then left the
 5 company.
 6 So they had those privilege
 7 communications and then they left, and at footnote 7
 8 in that case the court said, again, the
 9 attorney-client privilege is served by the certainty
 10 that conversations between the attorney and client
 11 will remain privileged after the employee leaves.
 12 In this context, we don't have
 13 privileged communication. What we have is employees
 14 who are long gone before this case, anybody here got
 15 involved.
 16 THE COURT: Right. We have different
 17 steps here.
 18 MR. LERITZ: Right.
 19 THE COURT: I mean, the initial step
 20 is in the Wright case about who do you even get to
 21 talk to. The next step is the, was it Longview case
 22 --
 23 MR. LERITZ: Yeah, it's the --
 24 THE COURT: -- where if the attorney
 25 talked to the employee while that person was still an

Page 21

1 employee, that conversation is protected. But so far
 2 I don't see any Washington authority that addresses
 3 the question of what happens if the employer's
 4 attorney talks to the former employee after the
 5 employee leaves. Is there any protection there or
 6 not.
 7 Now, the argument is that the Admiral
 8 case answers that question, but it's a Ninth Circuit
 9 case and what we don't know is what is the law of
 10 Washington on that. I'm looking for somebody to give
 11 me something that indicates how the appellate courts
 12 in Washington would address that question.
 13 Just a second. I'll get to you, Mr.
 14 Northcraft.
 15 MR. LERITZ: Well, Your Honor, I think
 16 it's Wright versus Group Health, frankly.
 17 THE COURT: Well, I disagree, because
 18 I don't think they get to the question.
 19 Mr. Northcraft, do you have anything
 20 else on that issue?
 21 MR. NORTHCRAFT: No. I'm just going
 22 to say, I'm not aware of a case, Your Honor, or I'd
 23 tell you about it. I'm only aware of the Upjohn case
 24 and the Ninth Circuit case, this Admiral Insurance
 25 case. Which also cites, by the way, in re coordinated



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1 pre-trial proceedings 658 F 2nd, 1355 Ninth Circuit
 2 1981 circ denied, et cetera.
 3 MR. LERITZ: That's the one I was
 4 referring to, Your Honor. That's the one I was
 5 referring to, right.
 6 THE COURT: Give me that cite again to
 7 the Admiral case.
 8 MR. NORTHCRAFT: Certainly, Your
 9 Honor. 881 F 2nd 1486 1989.
 10 THE COURT: Well, with regard to the
 11 request for production, clearly the defense does not
 12 have to disclose statements taken from witnesses or
 13 notes relating to statements or recordings or anything
 14 like that, because I think we're still talking about
 15 CR 26(b) (4).
 16 The issue then is, well, what about
 17 information provided by the attorneys to the
 18 witnesses, and I just don't know the answer to that
 19 question because I don't have any authority,
 20 Washington authority to tell me what to do on that.
 21 You know, I do look at the Wright case
 22 and the Wright case took a fairly narrow approach to
 23 the question of who's a party for purposes of the
 24 attorney-client privilege, which at least to me
 25 indicates the possibility that if this issue of the

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1 former employee were brought to the court's attention
 2 they may also take a narrow view of it and say once a
 3 person's a former employee, they're no longer --
 4 they're not a party, they're not an employee, there's
 5 no attorney-client relationship.
 6 I mean, why shouldn't -- I guess I'm
 7 at a loss to understand and I don't know what the
 8 thought process was for the Ninth Circuit.
 9 MR. NORTHCRAFT: Well, you'll
 10 obviously read the case, Your Honor, but the way I
 11 read it was it's just a logical extension. If those
 12 folks are the people that the lawyer has to talk to to
 13 defend his client, then there's a privilege to talk to
 14 those people because it's an attorney-client
 15 communication privilege.
 16 THE COURT: But wouldn't that same
 17 argument apply to any witness, any witness, some Joe
 18 Blow on the street --
 19 MR. NORTHCRAFT: No.
 20 THE COURT: -- as somebody who saw
 21 something, somebody you have to talk to?
 22 MR. NORTHCRAFT: No, because they're
 23 not a former employee.
 24 THE COURT: Well, but the argument you
 25 made was was if it's somebody you have to talk to.

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1 MR. NORTHCRAFT: No. Well, I'm sorry,
 2 Your Honor. Then I left out what I thought we were
 3 both talking about. I'm talking about X employees
 4 that I want to talk to to defend my client.
 5 THE COURT: Does it make a difference
 6 whether they are -- and this is one of the
 7 distinctions that was raised in either the Wright case
 8 -- I think the Wright case or the Upjohn case.
 9 Does it make a difference whether they
 10 are the -- whether the former employees are the actors
 11 whose actions or omissions allegedly created the
 12 liability on behalf of the employer versus somebody
 13 who may have just been a witness. Does it make a
 14 difference?
 15 MR. NORTHCRAFT: I don't really know
 16 the answer to that. All I know is in the facts of
 17 this case and the communications that the plaintiffs
 18 are trying to obtain in this case, the people are the
 19 excoaches and current coaches.
 20 THE COURT: Well, I'm not worried
 21 about current employees.
 22 MR. NORTHCRAFT: No, I understand.
 23 THE COURT: We're only talking about
 24 (inaudible).
 25 MR. NORTHCRAFT: I added that

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1 gratuitously, Your Honor. I understand what you're
 2 focusing on. As far as your earlier question about
 3 whether you can -- somebody can ask me to give them
 4 communications, if you look at the Wright case,
 5 headnote 1 says, the attorney-client privilege, RCW
 6 5.60.0602 provides that an attorney shall not, without
 7 the consent of his client, be examined as to any
 8 communication made by -- made by the client to him or
 9 his advice given thereon in the course of professional
 10 employment.
 11 So if, as we believe our courts would
 12 say, consistent with the Admiral case, if I've
 13 communicated with an excoach, in this case either
 14 Shafer or Roy or one of the other coaches that were
 15 part of this -- the facts supposedly giving rise to
 16 the claim against the district, they can't ask me
 17 about my communications. That's exactly what --
 18 THE COURT: (Inaudible.)
 19 MR. NORTHCRAFT: But that's what this
 20 interrogatory is doing. It's asking me to give them
 21 --
 22 THE COURT: But you got a leap there
 23 --
 24 MR. NORTHCRAFT: -- my communication.
 25 THE COURT: -- because the headnote



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1 that you read had to do with communications with the
 2 client. So the question is -- we get back to the
 3 question of are these former employees clients. If
 4 they're not, then there's no attorney-client
 5 privilege.
 6 MR. NORTHCRAFT: Well, I disagree,
 7 Your Honor. They don't have to be current employees.
 8 That's the Admiral case, and that's where we've got to
 9 keep in mind, who can, who can they talk to over
 10 there. Who can they come and talk to that's either a
 11 current or former employer -- employee. Excuse me.
 12 They can talk to anyone, current or former, that's not
 13 part of the control group.
 14 THE COURT: But what can be --
 15 MR. NORTHCRAFT: They can talk to
 16 them.
 17 THE COURT: Yeah.
 18 MR. NORTHCRAFT: But they can't get my
 19 communications that I've given to them and vice versa,
 20 but they can sure talk about the facts of the case.
 21 They can talk all about football and all about
 22 concussions and protocols and tackles and stuff.
 23 THE COURT: All right. I'm going to
 24 reserve on that question of whether or not any
 25 communications sent from defense counsel to former

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1 employees. Are any of these people people who were
 2 never employees that we're talking about here or are
 3 these just all former employees?
 4 MR. LERITZ: They're all former
 5 employees, Your Honor, with respect --
 6 THE COURT: Okay. I'm going to
 7 reserve on that issue. So I've answered the rest of
 8 A. They don't have to produce statements or notes of
 9 statements and so on. And at this point I'm reserving
 10 on this the last part here about documents or other
 11 materials shared with Josh Borland and the other
 12 people.
 13 MR. LERITZ: Can I make a quick point,
 14 Your Honor, on that?
 15 THE COURT: Go ahead.
 16 MR. LERITZ: Okay. It says here in
 17 Upjohn that the attorney-client privilege, it protects
 18 the disclosure of communications, but doesn't prevent
 19 the plaintiff from inquiring about the underlying
 20 facts.
 21 THE COURT: Right.
 22 MR. LERITZ: So to the extent that
 23 they have factual information that they've exchanged,
 24 I think we're entitled to that.
 25 I also think that we have another

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1 issue that we still need to address, because we do
 2 have some upcoming depositions in this case. Mr.
 3 Shafer's going to be deposed again on February 3rd,
 4 which is Monday, and so I just want to be clear.
 5 Based on what the court is saying, I mean, I intend to
 6 ask him -- focus on the fact that we asked for some
 7 documents that they -- he said he had and would give
 8 to us and now he's saying he doesn't want to give to
 9 us.
 10 I want to look at those documents and
 11 find out what they are, and I think I'm entitled to
 12 also ask him what he talked to Mr. Northcraft about
 13 during discovery.
 14 THE COURT: Are these the documents he
 15 referred to as the coach's handbook?
 16 MR. LERITZ: We're not really sure,
 17 Your Honor, but I think he did -- I think that's part
 18 of it, but he also said he had other notes that he
 19 kept in I think he said a bag of some sort in his
 20 closet from his coaching days at Highland, which we
 21 want to look at.
 22 THE COURT: So Mr. Northcraft, are you
 23 going to represent Mr. Shafer at his third deposition?
 24 MR. NORTHCRAFT: No. You told me I
 25 couldn't.

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1 THE COURT: Okay. Is he going to have
 2 counsel? Does anybody know?
 3 MR. NORTHCRAFT: I doubt that he's
 4 going to be there, but I'm certainly going to assert
 5 an attorney-client privilege on behalf of my client,
 6 the Highland School District, that covers my
 7 communications with him and his communications with
 8 me.
 9 THE COURT: Okay. But not with regard
 10 to the documents he may have from his coaching days?
 11 MR. NORTHCRAFT: Absolutely not.
 12 Absolutely not. That's not a communication.
 13 THE COURT: Okay. Let me finish up
 14 here. Request for production B is also the same
 15 thing. I think it's barred by 26(b)(4). So defense
 16 does not have to produce those.
 17 Now, wasn't there one other thing?
 18 MR. NORTHCRAFT: There's a coach's
 19 handbook that was asked at the very end, and frankly,
 20 Your Honor, we have talked to everybody. We're
 21 getting mixed results on that. We've never seen a
 22 coach's handbook yet. If we see one, they'll be the
 23 first to see it after us.
 24 THE COURT: Okay. Let's make sure
 25 we're not being hypertechnical here. I assume that



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1 what they're asking for is any written materials
 2 provided to the coaches relating to head injuries,
 3 concussions, headaches, anything like that. It
 4 doesn't have to be in a handbook.
 5 MR. NORTHCRAFT: Oh, no, no, no.
 6 We've given all that stuff. They have thousands of
 7 pieces of paper. We're not -- if we had a coach's
 8 handbook, if we found it, we'd have given it to them.
 9 We just can't find one, despite what seems to us, the
 10 lawyers, to be inconsistent feedback. Some think they
 11 remember it, some don't. We can't find one, honestly.
 12 If we did, they get it. I don't care.
 13 THE COURT: All right. So Mr. Leritz,
 14 do you have any reason to believe that you don't yet
 15 have all of the documents that were given to the
 16 coaches about this subject, or are you just
 17 double-checking to make sure you have everything?
 18 MR. LERITZ: Well, I have some pause
 19 for concern, Your Honor, because Mr. Shafer is
 20 unwilling now to produce those absent a subpoena,
 21 which is why we had a subpoena issued down in
 22 California for those documents, because he's refusing
 23 to produce them and he said in his deposition in
 24 September, as I recall, that those are his. Those are
 25 his notes. He doesn't want to produce them.

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1 So to the extent that they may or may
 2 not contain information that may lead to admissible
 3 discoverable evidence, we want to inquire. I think
 4 we're certainly inquired to obtain those.
 5 MR. NORTHCRAFT: Well, they are,
 6 clearly.
 7 THE COURT: That's another issue. The
 8 question is you're asking for -- from the defense
 9 counsel, you're asking for the coach's handbook or
 10 whatever it might be called and the question is, do
 11 you have some reason to believe that there are
 12 documents the school district has that they have not
 13 yet provided to you that they should provide to you in
 14 response to that or other requests for production?
 15 MR. LERITZ: No, Your Honor. I think
 16 they've produced everything that they can.
 17 MR. NORTHCRAFT: We have.
 18 MR. LERITZ: That's my understanding.
 19 THE COURT: That, I think, with the
 20 exception of that one issue about the former
 21 employees, I think that takes care of the discovery
 22 issues, doesn't it?
 23 MR. NORTHCRAFT: I think so, Your
 24 Honor.
 25 THE COURT: Okay. I again have

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1 motions from both sides to disqualify opposing
 2 counsel, and there are allegations on both sides that
 3 the other side is somehow inappropriately influencing
 4 witnesses or tampering with witnesses or whatever.
 5 So let me ask you both a question
 6 here, a hypothetical question, and it could be
 7 plaintiff, defendant, doesn't make any difference.
 8 This is just a hypothetical question.
 9 Suppose you have a witness who
 10 testifies strongly in favor of the plaintiff, and
 11 suppose there is information that the defense has
 12 indicating that that plaintiff may be strongly in
 13 favor -- or excuse me -- that witness may strongly be
 14 siding what the plaintiff because that witness feels
 15 that he or she was treated inappropriately by the
 16 defense.
 17 What are you going to do? Are you
 18 going to cross-examine and say, well, this is a fact
 19 that you're favoring the plaintiffs because of what
 20 you think I did to you or said to you or I misled you
 21 or whatever? I mean, what are you going to do?
 22 MR. BIGGS: May I, Your Honor?
 23 THE COURT: Okay.
 24 MR. BIGGS: I'll take first crack at
 25 this. I think that's a very intelligent question and

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1 it's one that we've been sort of working with for,
 2 well, the last week, trying to get this response done.
 3 What we find here and (indecipherable) that our
 4 motion, we still don't believe that disqualification
 5 is a proper sanction for anything that's gone on,
 6 whatever you may find has gone on in this case. This
 7 is not about disqualification in any event, but...
 8 THE COURT: Wait a minute. You're
 9 asking to have them disqualified.
 10 MR. BIGGS: No. Your Honor, our
 11 motion is extremely clear. Only in the event that you
 12 believe that disqualification is a proper sanction for
 13 this kind of behavior, which we do not, then we're
 14 asking for disqualification.
 15 THE COURT: So it's all or nothing?
 16 MR. BIGGS: That's right. All or
 17 nothing. Exactly right. We do not believe that
 18 disqualification is even close, not even within the
 19 ballpark of what we're talking about here. But your
 20 question, I think, may go more to trial management,
 21 you know.
 22 THE COURT: That's my concern.
 23 MR. BIGGS: Right, right. And I think
 24 the answer, we may have to deal with some of these
 25 things in motions in limine to a certain extent; that



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1 is, I think you observed before when we were here --
 2 and I'm surprised to be back, but here we are.
 3 But I think you observed before that
 4 if a witness -- if the cross-examination's going to
 5 say, well, weren't you led into this by false
 6 statements of some sort, and if the court allows that
 7 sort of questioning, then you only have two choices as
 8 I see it. Either the other side gets up and says
 9 that's false, and I can prove it's false by taking the
 10 stand, or they have to let it ride.
 11 I think those are the only two
 12 options, and where I see we're all headed here is
 13 we're going to have to let it ride. That if they want
 14 to claim that we somehow influenced Dyre in some
 15 nefarious way, then we have to live or die by that
 16 because we're not going to take the stand and talk
 17 about it, and if they want to -- if that's how they
 18 want to look at it, and if we want to say didn't Mr.
 19 Adler tell you X, Y, Z in their interview, because
 20 they're going to waive around a statement, you see.
 21 If they don't introduce the statement
 22 and that never becomes part of the trial, then this
 23 issue won't arise, but if the issue of what they said
 24 and how they said it and why they said it and how
 25 truthful they were, didn't you remember better a year

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1 ago than you remember today, these kinds of questions,
 2 didn't you remember better when Mr. Adler told you a
 3 Seattle doctor supported this okay?
 4 Now, I'm of the belief that a lot of
 5 things -- I'm not of the belief that misrepresenting
 6 yourself to a witness and pretending you're not an
 7 attorney, that does not fly, but telling a witness the
 8 defense is bad, they're going to try to twist your
 9 words around, that's okay. They can say that if they
 10 want to, and on the stand, that's not going to mean
 11 anything.
 12 When that witness is on the stand, you
 13 know, did I try to twist your words? I mean, it's
 14 like, that's ridiculous. That would be pretty, pretty
 15 bad trial conduct on my part to try to ask a witness a
 16 question like that and very dangerous and you're not
 17 going to see that.
 18 What you might see is if they start
 19 waving around a declaration and say didn't you sign
 20 this declaration and that witnesses wants to say --
 21 Forrest Kopta is a great example. He is going to say,
 22 oh, yeah, that statement's not true, and then they're
 23 going to want to say, why isn't it true, and then you
 24 see we're going down that road.
 25 So I see that the gateway here that's

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1 going to lead to the problem that you're considering
 2 is they want to introduce these statements, okay, then
 3 we're going to have that problem, or if we try to do
 4 something, you know, whatever Dyre or some kind of
 5 thing.
 6 I think that it's that we need to have
 7 some -- as the case gets ready for trial, we'll need
 8 to have some kind of sit-down and discuss what this
 9 all means, because you observed yourself if some
 10 counsel pulls something at trial that ends up making
 11 him a witness, we're all going to have a big trouble
 12 here, and I understand that completely and we will be
 13 extremely careful not to put ourselves on the witness
 14 stand.
 15 THE COURT: So how many witnesses are
 16 there that may have given written statements one way
 17 but now they say, well, no, I was lied to or I was
 18 mistaken or whatever, now they're saying something
 19 different?
 20 MR. BIGGS: Well, there are a handful
 21 that are sort of clear on that category. There are a
 22 bunch that have different versions of -- you know, the
 23 deposition testimony, of course, is more complete than
 24 what's in a statement. There are a couple that say
 25 that statement's just wrong, you know, certain

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1 aspects.
 2 Forrest Kopta says I was here, not
 3 here, I didn't see this, I did see this. You know,
 4 he's -- his testimony is very different from what he
 5 says in his statement, his supposed statement. So
 6 there are few of those kinds of witnesses.
 7 With all the other ones, you're
 8 talking about the Beaches, the likelihood is the
 9 Beaches will never even testify about anything. They
 10 don't have any knowledge about this case. Eric
 11 Diener, I suppose, could be a witness, but there's
 12 nothing about his testimony. He doesn't have a prior
 13 statement.
 14 I mean, you know, so I think the scope
 15 of the issue is really fairly small, and it primarily
 16 involves a few players.
 17 THE COURT: Okay. Who on the other
 18 side is arguing, Ms. Carter?
 19 MS. CARTER: Your Honor, yes.
 20 First thing I'd like to do is address
 21 your hypothetical question, which is a very important
 22 one. What we need to do is we need to weigh the
 23 harms. The only allegation that I have read in all of
 24 this briefing and that I'm hearing today from the
 25 defense concerning alleged improper conduct on the



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1 party of the attorneys for the plaintiffs is that when
 2 Mr. Adler conducted interviews in the summer of 2010,
 3 he did not disclose that he was an attorney.
 4 One former player has testified to
 5 that extent. Every other player has made abundantly
 6 clear, and the record is very, very clear -- in fact
 7 we've already submitted the briefing and we submitted
 8 it again -- every player knew Mr. Adler was an
 9 attorney. Every player knew that Mr. Adler also
 10 worked with Brain Injury Association of Washington,
 11 and believed he was there to discuss what had happened
 12 to Matthew and try to figure out what had happened to
 13 Matthew.
 14 THE COURT: Isn't also one of the
 15 issues that they claim that although he may have told
 16 them he was an attorney, he didn't tell them he
 17 represented the Newmans?
 18 MS. CARTER: Well, in fact he did not.
 19 As he says in his declaration he was not the attorney
 20 for the Newmans at that point. He was not retained by
 21 the Newmans for quite some time, and he outlines that
 22 in his declaration. I'm happy to refer the court to
 23 the page and number, but I know the court has read
 24 through all the briefing.
 25 So if at any time you have a question

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1 for documentation, I'm happy to provide that. But Mr.
 2 Adler did say that he was an attorney. Every single
 3 player says so in their deposition, with the exception
 4 of Forrest Kopta.
 5 Now, what does Forrest Kopta say about
 6 his statement in his deposition is, yes, I said that.
 7 We went through every line of his statement
 8 exquisitely in detail at his deposition. Not once
 9 does he point out where there is a false statement.
 10 What he says is I looked through that transcript.
 11 That's my signature. That change right there on the
 12 last page or page 5 of the 6 page transcribed
 13 statement, that's my initial, that's my change.
 14 Mr. Biggs just represented to the
 15 court that there's a handful of statements that have
 16 been changed by people who have given statements. I
 17 haven't seen any.
 18 THE COURT: I don't want to get too
 19 much into argument about what...
 20 MS. CARTER: Sure, sure.
 21 THE COURT: My hypothetical was just,
 22 again, I get back to what I said at the last hearing,
 23 which was I don't want to have a trial where we end up
 24 with the attorneys being witnesses.
 25 MS. CARTER: Right, right.

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1 THE COURT: Because right there is a
 2 reason to disqualify everybody. If either side is
 3 going to be a witness here --
 4 MS. CARTER: Yes.
 5 THE COURT: -- then let's start with
 6 new attorneys.
 7 MS. CARTER: So if I may go back to
 8 your hypothetical, Your Honor. In weighing of the
 9 harms, what is the likelihood that the attorneys for
 10 the plaintiffs could be called to testify at trial as
 11 a material witness, which is what RPC 3.7 seeks to
 12 avoid.
 13 The only likelihood at this point,
 14 from what I can see, is the one allegation from one
 15 player out of 15 who says I did not know Mr. Adler was
 16 an attorney. Now, is that enough to bring Mr. Adler
 17 to the stand to rebut it? I think not, and I think
 18 that we can handle that cross-examination just fine if
 19 it came to that point, if that's even relevant. He's
 20 already adopted his statement and the heart of the
 21 statement and the issue of did he see --
 22 THE COURT: So the bottom line is
 23 you're not concerned about it?
 24 MS. CARTER: Not concerned about that.
 25 However, I am concerned about counsel for the

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1 defendants becoming a material witness at trial based
 2 on the overwhelming evidence of misconduct that we
 3 have identified in our briefing, and it's not just
 4 limited to what did or did not Mr. Northcraft say to
 5 one witness out of 15 or 20 about his position as an
 6 attorney.
 7 This goes way beyond that. What we're
 8 looking at here is the prejudicial harm that is being
 9 forced on the plaintiffs and their inability to
 10 conduct discovery and inability to litigate this case
 11 as Professor Strait outlines in his two declarations.
 12 Three, actually, now.
 13 THE COURT: Well, and that issue will
 14 be addressed when I decide whether or not former
 15 employees --
 16 MS. CARTER: Right.
 17 THE COURT: -- are clients for
 18 purposes of communications from the attorney, because
 19 if I decide they're not and there isn't any
 20 attorney-client privilege, then you get all the stuff
 21 you want to get, right?
 22 MS. CARTER: Right. And I think it's
 23 a cumulative effect. It's not just the RPC 1.7
 24 conflict of interest in the Northcraft and his firm's
 25 representation of not only former employee but also



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1 the school district, as we've already discussed at the
 2 last hearing, but also the misconduct in the attempt
 3 to manipulate a former employee's statement by the use
 4 of a personnel file.
 5 THE COURT: Okay. You're getting
 6 beyond my question here.
 7 MS. CARTER: Sure.
 8 THE COURT: I was just curious to know
 9 what -- I mean, obviously, you had to have thought
 10 about it, what's going to happen if, if a witness
 11 says, well, he told me such and such and that's -- I
 12 think he's lying to me and that's why I think these
 13 guys are telling the truth.
 14 MS. CARTER: Right.
 15 THE COURT: You know, where does that
 16 leave you. What's going to happen.
 17 MS. CARTER: Right.
 18 THE COURT: You know, if you're
 19 confident that that's not going to happen with regard
 20 to you, that's all I'm concerned about. They're
 21 confident it's not going to happen with regard to
 22 them.
 23 MS. CARTER: Fair enough.
 24 THE COURT: If it happens to one side
 25 or another during trial, I'm not going to go easy on

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1 you.
 2 MS. CARTER: Right.
 3 THE COURT: So, you know, if it means
 4 that -- I think you're from a different law firm,
 5 aren't you?
 6 MR. BIGGS: No. We're together. They
 7 have two firms on their side.
 8 THE COURT: All right. So if it means
 9 your client has to try the case without an attorney,
 10 that's what it means. So I just want to make sure
 11 it's clear to everybody.
 12 MS. CARTER: Right.
 13 THE COURT: Okay. Let's get on to the
 14 motion, the plaintiffs' motion to disqualify. This
 15 whole scheduling issue about the trial and whether the
 16 statement completely unavailable for trial during the
 17 calendar year of 2014 is a lie, an exaggeration, a
 18 correct statement.
 19 Let me ask Mr. Northcraft, is your
 20 firm available in 2014 to try this case?
 21 MR. BIGGS: Your Honor, I can answer
 22 this motion.
 23 THE COURT: You can. All right.
 24 MR. BIGGS: This is the stupidest
 25 issue that I have to face, and my credibility has been

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1 impugned, and I want about \$5,000 of sanctions for
 2 this, Your Honor, because --
 3 THE COURT: Please just answer my
 4 question.
 5 MR. BIGGS: I just want on the record,
 6 Your Honor, I want this on the record, because I will
 7 tell you, I counted up this morning seventeen times on
 8 this exact issue, 17 times in their moving papers, the
 9 declaration of Langer and Strait, 17 times they've
 10 said that I've lied, and then they had the gall in
 11 their response paper to do it three more times. So 20
 12 times they've said that I lied.
 13 Okay. Now, whether we can
 14 characterize their letter that says we're not
 15 available for all of 2014 or not, whether that's a
 16 lie, that's really secondary. What they said was that
 17 we did not have a trial set for October 2014, and we
 18 do. It's a major shooting case involving a young
 19 child in an elementary school, and we are in trial on
 20 that Bowman case and there is no doubt about it. We
 21 are not available for another trial in October.
 22 THE COURT: What about the motion in
 23 the other case to continue a trial to that same --
 24 MR. BIGGS: That has nothing to do
 25 with me. That's a different partner in our firm. The

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1 Gehman case.
 2 THE COURT: Someone that's not
 3 involved.
 4 MR. BIGGS: He's not involved in this
 5 case.
 6 THE COURT: All right.
 7 MR. BIGGS: I can't even tell you -- I
 8 know generally what it's about. I know nothing about
 9 that case.
 10 THE COURT: But just so I can address
 11 the issue that I raised, I mean, there were -- again,
 12 always be careful with the use of the word lie,
 13 because your side's calling them liars too. So it's,
 14 you know, it's mutual here.
 15 But my question was, is anybody from
 16 your firm available to try this case in 2014?
 17 MR. BIGGS: No. This case is not
 18 going to be tried by anybody other than me and Mark
 19 Northcraft.
 20 THE COURT: Okay.
 21 MR. BIGGS: We are the attorneys that
 22 are handling this case.
 23 THE COURT: And you're completely
 24 unavailable in 2014?
 25 MR. BIGGS: No. Well, we were. I



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<p style="text-align: right;">Page 46</p> <p>1 think we now have -- actually, we are now unavailable. 2 As my letters very clearly said, we will finish the 3 Bowman case roughly mid November and I told them that 4 if we have to stuff it in there, that might work. 5 I don't think that works any longer, 6 Your Honor. I think there's another case that's been 7 slot in there, actually, for some other thing and Mr. 8 Langer even agreed. I don't know why I take that 9 telephone call with his permission, because I just 10 expected something like this to come up. 11 THE COURT: Can we talk about, 12 perhaps, a January trial date? 13 MR. BIGGS: I don't know. 14 MR. NORTHCRAFT: Your Honor. 15 THE COURT: I don't know if anybody 16 even talked about that. 17 MR. BIGGS: We talked about something 18 this spring. 19 MR. NORTHCRAFT: I have trials 20 starting on December 1st plus the Bowman case in 21 October, a school shooting case. I have the Hirsch 22 case. I have one that starts at the beginning of 23 January. I have another one that starts -- it's going 24 to get stuck in February. I'm going to -- I got one 25 that starts March 30th. I have one that was just</p>	<p style="text-align: right;">Page 48</p> <p>1 about complete unavailability, I think, perhaps an 2 exaggeration, but I think, I think the defense was 3 making it clear that it made no practical sense, 4 either because of scheduling conflicts or otherwise, 5 to have the trial in 2014. 6 MR. BIGGS: That's a good way of 7 saying it, Your Honor, yes. 8 THE COURT: So I have my concerns 9 about the Shafer depositions and the objections that 10 were made, but that also goes back to the question of 11 whether there's an attorney-client privilege with 12 former employees and I have to do some more research 13 on that. 14 Is it Diener or Diener? How does he 15 pronounce that? 16 MR. BIGGS: Diener, I believe, Your 17 Honor. 18 MS. CARTER: I believe it's Diener. 19 THE COURT: Okay. You can sit down. 20 MS. CARTER: Oh. 21 THE COURT: Mr. Northcraft, I need to 22 ask you, why did you have Mr. Diener's personnel file? 23 MR. NORTHCRAFT: For the exact same 24 reason I've stated over and over and over again. I 25 thought it might be helpful for the guy to look at his</p>
<p style="text-align: right;">Page 47</p> <p>1 assigned for April 23rd. 2 I have a three month vaca -- three 3 week vacation coming up, and this is a school case. 4 This case, school cases, I've tried enough of them to 5 know you don't do it during the summertime because 6 people are everywhere. You can't find them. 7 There's still a lot of discovery to 8 do, Your Honor, and I'm not -- this isn't just about 9 trial dates, really. This is about discovery. We 10 haven't even started on damages, the doctors and the 11 experts. Haven't even started. And getting all those 12 people scheduled? I mean, they can't even schedule 13 one guy's deposition, Shane Roy, without taking four 14 months to do it. 15 THE COURT: All right. 16 MR. NORTHCRAFT: So it's, honestly, 17 Your Honor, if there was a slot in there, fine, but 18 there isn't and they're getting -- it's getting more 19 filled up the longer they delay and the longer this 20 issue is before the -- not brought before the court, 21 and that's what we're talking about. 22 But we're into the fall of 2015 right 23 now. Not just because of trials, but because of just 24 the process of getting discovery done in this case. 25 THE COURT: All right. The statement</p>	<p style="text-align: right;">Page 49</p> <p>1 records. I don't even know what's in them. I flipped 2 through them and was kind of looking and I thought, 3 well, okay, I'll get them. If I was a former 4 employee, hadn't been there for three or four years 5 and might be asked historical questions, fine, let him 6 look at them. What's the harm in that? 7 THE COURT: So Mr. Diener hadn't asked 8 for them? 9 MR. NORTHCRAFT: No. 10 THE COURT: And the plaintiffs hadn't 11 asked for them? 12 MR. NORTHCRAFT: No. 13 THE COURT: Well, how did you get 14 them? 15 MR. NORTHCRAFT: I asked the school 16 district to give them to me, which as the declaration 17 for Mr. Anderson says, as well as the opinion from 18 Rocky Hanson, the school lawyer in -- 19 THE COURT: Rocky Jackson? 20 MR. BIGGS: No. Rocky Hanson. There 21 is a Rocky Jackson local. 22 THE COURT: Right. 23 MR. NORTHCRAFT: That's a Rocky Hanson 24 from Spokane. She does school work. She's done it 25 for 19 years, almost 20. There is no law, regulation,</p>



<p style="text-align: right;">Page 50</p> <p>1 procedure or whatever that I can't have those records 2 in my possession, and in particular, to go and show 3 them to -- why would this guy be intimidated? 4 I'm just thoroughly flabbergasted how 5 somebody could be intimidated because I brought their 6 records to him so he could look at them in case he 7 wanted to. That is absurd. I mean, and if I wanted 8 to, Your Honor, I could file a request for -- a public 9 disclosure request and get them. 10 THE COURT: But he would have to get 11 notice. 12 MR. NORTHCRAFT: He could get all the 13 kinds of notice he wants, but I'd get them. 14 THE COURT: All right. Ms. Carter, 15 anything else about the -- that was, you know, one of 16 the grounds for this motion was the Diener deposition 17 and so on. 18 MS. CARTER: Right. And Mr. Diener 19 made it pretty clear that he perceived this as an 20 attempt to manipulate or intimidate him. This is 21 someone who somebody who worked for the Highland 22 School District before Matthew Newman went there, 23 before Matthew Newman played football, before Mr. 24 Matthew Newman got hurt, and he had potential 25 information just about how the track is set up and how</p>	<p style="text-align: right;">Page 52</p> <p>1 case and prepare for trial, and as Professor Strait 2 has outlined, this is a clear violation of 4.1 and 4.3 3 and fairness to nonparties and dealing with third 4 parties. 5 And yes, there has been very real 6 harm. It seems that your -- 7 THE COURT: All right. 8 MS. CARTER: -- question to me is what 9 is the harm, and I just want to respond very quickly 10 to Your Honor with a case that's cited by the 11 defendants in response to our motion for protective 12 order. It's the Intercapital Corporation of Oregon 13 case, cited on page 42 of the defendant's brief, and 14 that case tells us that -- in that particular case, 15 there was a -- there was a conflict by defense counsel 16 in representing a current and former client. 17 The court ruled -- the trial court 18 ruled that the conflict was, quote, de minimis, 19 because no confidences were communicated and there was 20 no real harm, but that went up and the appeals court 21 said once there is an appearance of conflicting 22 interest and that conflict has been shown, prejudice 23 will be presumed, and disqualification was an 24 appropriate sanction. 25 So that's very similar to the case</p>
<p style="text-align: right;">Page 51</p> <p>1 the field is set up. 2 Why would he need to look at his 3 personnel file? It just doesn't make any sense at 4 all. And he reflected on it, he went home, he talked 5 to his wife, who worked for the school district, he 6 talked to his own teacher's rep, and he was told, 7 yeah, you need to have notice about that and he 8 thought, this guy was trying to threaten or intimidate 9 me to say something or control me somehow. He's an 10 intelligent man. 11 THE COURT: Okay. But the bottom line 12 here is if he feels somehow he was mistreated by Mr. 13 Northcraft, doesn't that actually help you? Because 14 if in fact he ends up being a witness, either 15 consciously or unconsciously, he's going to be slanted 16 toward your side. So how are you... 17 MS. CARTER: You know, it may very 18 well be, but I've answered the same question from you 19 when we were before Your Honor back in September 20 regarding Mrs. Beach, and the whole tape recording and 21 attempt to manipulate her testimony by Mr. Northcraft, 22 and the answer is the same. 23 We don't know what else is going on 24 out there and this is severely prejudicing the 25 plaintiffs' ability to conduct fair discovery in the</p>	<p style="text-align: right;">Page 53</p> <p>1 here. How can we show prejudicial harm without it 2 actually happening? We shouldn't have to wait for it 3 to happen to show it. And in this case we know that 4 at least two witnesses, nonparty witnesses, have been 5 -- an attempt to manipulate has occurred. We don't 6 know what else has gone on out there, so... 7 THE COURT: All right. So if I were 8 to disqualify defense counsel, again, does that really 9 help your clients? Because then, I mean, the new 10 counsel comes in, they're going to want to basically 11 start all over again and then you're looking at a 2016 12 trial instead of a 2015 trial. In the long run, is 13 that going to help your client? 14 MS. CARTER: I believe it will help 15 the client because there has been such a frustration 16 to access to relevant information. For instance, our 17 inability to ask Dustin Shafer very important 18 questions on his deposition. As you can see, the 19 privilege was asserted, which was improper. 20 THE COURT: Well, that's what I have 21 to decide. That's an issue I have to decide. 22 MS. CARTER: Right. So our access to 23 information has been prevented, and the threat and 24 fear of trial within a trial, which is this court's 25 very real concern, and I believe it is warranted, the</p>



<p style="text-align: right;">Page 54</p> <p>1 sideshow, taking over the meritorious issues that the</p> <p>2 jury should be permitted to deliberate on, is going to</p> <p>3 take over and extend this into a very lengthy and</p> <p>4 unnecessary trial.</p> <p>5 THE COURT: Is it --</p> <p>6 MS. CARTER: So I do believe</p> <p>7 disqualification --</p> <p>8 THE COURT: Rest assured there is not</p> <p>9 going to be a circus or a sideshow, and if it means I</p> <p>10 have to send attorneys out of the courtroom and the</p> <p>11 school district is sitting here by themselves, that's</p> <p>12 the way it's going to be. And the same applies to the</p> <p>13 plaintiff.</p> <p>14 MS. CARTER: Right.</p> <p>15 THE COURT: I mean, the allegations go</p> <p>16 both ways.</p> <p>17 MS. CARTER: Understood.</p> <p>18 THE COURT: So, you know, there's not</p> <p>19 going to be anything at trial like that, because you</p> <p>20 are all fully, fully warned --</p> <p>21 MS. CARTER: Right.</p> <p>22 THE COURT: -- that I will not</p> <p>23 hesitate to disqualify people during trial if I have</p> <p>24 to.</p> <p>25 So that's your motion. The defense</p>	<p style="text-align: right;">Page 56</p> <p>1 THE COURT: You know, that's the way</p> <p>2 we do it over here. You guys ought to come --</p> <p>3 MR. NORTHCRAFT: You know, it works</p> <p>4 different ways all the time, Your Honor. That --</p> <p>5 THE COURT: But that.</p> <p>6 MR. NORTHCRAFT: They have done to us.</p> <p>7 They did it from the very beginning in this case.</p> <p>8 THE COURT: Like I said, this applies</p> <p>9 to both sides. Nobody has clean hands here, okay?</p> <p>10 I'm only trying to decide whether somebody's hands are</p> <p>11 so dirty they can't keep going on this trial.</p> <p>12 MR. NORTHCRAFT: If you don't mind,</p> <p>13 Your Honor, can I just make one comment?</p> <p>14 THE COURT: Go ahead.</p> <p>15 MR. NORTHCRAFT: I apologize, but I</p> <p>16 have sat here for two hearings now and Ms. Carter has</p> <p>17 repeatedly impugned me, claimed I'm trying to get</p> <p>18 people to lie. There's overwhelming evidence of their</p> <p>19 inability to do discovery.</p> <p>20 Name one thing other than the</p> <p>21 assertion of the attorney-client privilege that those</p> <p>22 people haven't gotten. They've been -- every question</p> <p>23 they've ever asked they've got an answer to, every</p> <p>24 piece of interrogatory, every interrogatory, every</p> <p>25 request for production. We've given them every</p>
<p style="text-align: right;">Page 55</p> <p>1 motion, you know, we have this brouhaha about the</p> <p>2 Catherine Kopta deposition. Mr. Northcraft, just out</p> <p>3 of curiosity, before you noted the dep -- I'm trying</p> <p>4 to remember, and I apologize, it may be in here, and</p> <p>5 there was a lot of material for me to read -- did you</p> <p>6 notify the other side that you were going to want to</p> <p>7 take her deposition and ask for dates or did you just</p> <p>8 send out the notices that you're going to take the</p> <p>9 deposition?</p> <p>10 MR. NORTHCRAFT: We did. I think we</p> <p>11 just sent out the notice, but they have done that to</p> <p>12 us as well, and then we negotiated a date.</p> <p>13 THE COURT: All right.</p> <p>14 MR. NORTHCRAFT: That's --</p> <p>15 THE COURT: In the future, you're</p> <p>16 going to talk to each other first before you send out</p> <p>17 notices of deposition and you're going to promptly</p> <p>18 respond. If somebody -- if you get an email from</p> <p>19 somebody, the other side, saying, we want to take</p> <p>20 depositions of X, Y and Z, and we want to do it in the</p> <p>21 month of February or whatever. Give me your available</p> <p>22 dates. Here's my available dates. That's what you</p> <p>23 need to do and the other side needs to promptly</p> <p>24 respond.</p> <p>25 MR. NORTHCRAFT: Understood.</p>	<p style="text-align: right;">Page 57</p> <p>1 document.</p> <p>2 That what she's saying to you is just</p> <p>3 a total fabrication. There's been no prejudice in</p> <p>4 terms of discovery in this case, other than I'm going</p> <p>5 to continue to assert attorney-client privilege, which</p> <p>6 is my absolute right for my client to do that, and</p> <p>7 it's a statutory right.</p> <p>8 THE COURT: Okay. I understand that.</p> <p>9 MR. NORTHCRAFT: All right.</p> <p>10 THE COURT: Again, I'm getting this</p> <p>11 from both sides, so I --</p> <p>12 MR. NORTHCRAFT: Well, I just...</p> <p>13 THE COURT: I know. I know.</p> <p>14 MR. NORTHCRAFT: I'm so tired of her</p> <p>15 saying overwhelming prejudice. Name one.</p> <p>16 THE COURT: We're going to go on to</p> <p>17 the next issue. You make the argument about</p> <p>18 spoliation of evidence, about these recordings. Well,</p> <p>19 you assume that they're evidence, but I've just</p> <p>20 decided that similar documents are not discoverable</p> <p>21 from you. If you took -- if you took and interviewed</p> <p>22 a witness and took notes and then threw your notes</p> <p>23 away, are you guilty of spoliation of evidence?</p> <p>24 MR. BIGGS: Your Honor, there's a</p> <p>25 major distinction here, and Mr. Adler isn't here</p>



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1 today. He's an attorney. He's practiced law longer
 2 than I have. He's taken who knows how many recorded
 3 statements, and he apparently doesn't know CR 26. CR
 4 26 says, upon request, a person not a party may obtain
 5 without the required showing a statement concerning
 6 the action or a subject matter previously made by that
 7 person.
 8 Mr. Adler just filed a declaration
 9 saying I've never heard of such a thing. I've never
 10 -- I never knew that we had to give a copy of the
 11 recording to the guy who gave us the recording, and
 12 then it goes on to specifically say that for purposes
 13 of this section, a statement is blah, blah, blah, a
 14 recording.
 15 THE COURT: Right.
 16 MR. BIGGS: Now, so if the witness is
 17 entitled to have the recording or a verbatim
 18 transcript -- and by the way, they've never told us or
 19 the court whether they destroyed them or not, whether
 20 they're available or not. We know that they did not
 21 give it to Forrest Kopta, who asked for it.
 22 Spoliation. If they're destroying
 23 evidence that Forrest Kopta is entitled to have, that
 24 is spoliation. It doesn't have to be admissible
 25 evidence in court.

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1 THE COURT: Do you have any authority
 2 for that?
 3 MR. BIGGS: The Pisons case involved
 4 discovery. It didn't involve trial evidence.
 5 THE COURT: We're talking about stuff
 6 that's not discoverable.
 7 MR. BIGGS: It's not discoverable --
 8 THE COURT: You want Kopta to have it
 9 so you can get it.
 10 MR. BIGGS: Your Honor, if that's my
 11 motive, and it's not, I want Kopta to have it so Kopta
 12 feels better. He is outraged about this, and I'd
 13 rather have him have that and if he chooses to give it
 14 to me, just like the Beaches gave them what they
 15 wanted, that's fine. Okay. They can't stop that and
 16 it's not improper for me to argue on (indecipherable).
 17 They also did that very thing. They
 18 came to us and said you haven't yet given a witness a
 19 copy of their statement. Okay. Your Honor,
 20 spoliation. These people are entitled to have a
 21 verbatim copy of what they gave and we're entitled to
 22 know whether they exist or not, at a absolute minimum.
 23 I'm going to reargue about nothing here.
 24 THE COURT: So, all right. So the
 25 recordings --

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1 MS. CARTER: I'd like to respond.
 2 Yeah.
 3 THE COURT: Have any recordings been
 4 destroyed?
 5 MS. CARTER: Not to my knowledge, Your
 6 Honor. But what I would like to --
 7 THE COURT: Wait a minute. You knew
 8 this was an issue.
 9 MS. CARTER: Right.
 10 THE COURT: You had to have checked.
 11 MS. CARTER: What I would like to
 12 respond to, and I will respond to that as well, is
 13 first of all, they're not entitled to it. The court's
 14 already ordered that this is privileged information.
 15 THE COURT: I understand that.
 16 MS. CARTER: Now, the actual recording
 17 that took place in the summer of 2010 was before I
 18 personally worked for the firm and I was not
 19 personally at that meeting.
 20 Mr. Adler has provided a declaration
 21 where he provides exquisite detail about how it was
 22 recorded and how it was transcribed.
 23 Mr. Kopta testified in questions from
 24 Mr. Northcraft at his deposition, under oath: Does
 25 your statement appear to be rearranged in any way?

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1 Mr. Kopta: I can't remember.
 2 Question by Mr. Northcraft: Do you
 3 think things you said were cut out of the transcript?
 4 Kopta: I don't remember.
 5 And then Mr. Northcraft advises Mr.
 6 Kopta -- and this is in November. This is two months
 7 after you ruled that this information was privileged.
 8 Mr. Northcraft advised a nonparty, you have the right
 9 under our Washington civil rules to get a copy of the
 10 original audio tape. That is not what the civil rules
 11 say. The civil rules say you can have your statement,
 12 which Mr. Kopta had, reviewed and signed, and adopted
 13 in his deposition.
 14 So they're asking --
 15 THE COURT: The rule refers to
 16 recordings too, does it not?
 17 MS. CARTER: It says statement right
 18 in the rule.
 19 MR. BIGGS: Statement is defined.
 20 THE COURT: Doesn't it define
 21 statement to include recordings?
 22 MS. CARTER: Sure. But he was
 23 provided with a statement. And what I'd like to do,
 24 Your Honor, is read from[sic] you an exchange between
 25 Your Honor and Mr. Biggs from the hearing on September



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<p style="text-align: right;">Page 62</p> <p>1 27th, and this was at page 30.</p> <p>2 You asked Mr. Biggs: You may</p> <p>3 interview a witness and, as you say, the attorney may</p> <p>4 prepare a statement from the interview, the grammar's</p> <p>5 correct, the spelling's correct, and so on.</p> <p>6 Mr. Biggs said -- Mr. Biggs said:</p> <p>7 Right.</p> <p>8 The court then said: And then the</p> <p>9 witness reads it and signs it and says yes, you know,</p> <p>10 that's my testimony.</p> <p>11 Mr. Biggs says: Right.</p> <p>12 The court: Is there anything wrong</p> <p>13 with that?</p> <p>14 Mr. Biggs: No.</p> <p>15 THE COURT: Right.</p> <p>16 MS. CARTER: And that's exactly what</p> <p>17 happened. As Mr. Adler says in his declaration, as</p> <p>18 Mr. Kopta confirms at his deposition. So I'm not sure</p> <p>19 why we're wasting the court's time talking about the</p> <p>20 actual audio recording, which has already been ruled</p> <p>21 privileged by this court on September 27th.</p> <p>22 THE COURT: Well, there is a separate</p> <p>23 question. Which rule is that? Is that 20 --</p> <p>24 MR. BIGGS: Your Honor, I have it here</p> <p>25 for you. Thank you.</p>	<p style="text-align: right;">Page 64</p> <p>1 briefing --</p> <p>2 THE COURT: Ms. Carter, Ms. Carter, I</p> <p>3 understand the argument, but it's the use of the word</p> <p>4 or there. It says, you know, a statement is and it's</p> <p>5 a list of things that the statement is.</p> <p>6 MS. CARTER: Right.</p> <p>7 THE COURT: What I don't know is</p> <p>8 whether when above it says that upon request a person</p> <p>9 not a party may obtain, without the required, et</p> <p>10 cetera, a statement. Now, if they gave a recorded</p> <p>11 statement and if they are provided with a transcript</p> <p>12 of the recorded statement, does that satisfy the rule</p> <p>13 or not. I don't know.</p> <p>14 MR. BIGGS: Your Honor, just so it's</p> <p>15 --</p> <p>16 THE COURT: Is there any authority one</p> <p>17 way or the other?</p> <p>18 MR. BIGGS: Let me say that if there</p> <p>19 is verification, and I mean under oath verification by</p> <p>20 a certified transcriptionist, that says this is -- you</p> <p>21 know, in other words, court reporters do these sorts</p> <p>22 of things and they say, I listened to the tape and</p> <p>23 this is the exact transcription, I'm okay with that.</p> <p>24 I'm okay with that, but it's not some attorney saying,</p> <p>25 here, I cleaned it up for you.</p>
<p style="text-align: right;">Page 63</p> <p>1 THE COURT: Hmm. Interesting thing</p> <p>2 about the rule is it uses -- when it talks about</p> <p>3 statement is a stenographic, mechanical, electrical or</p> <p>4 other recording or transcription thereof, which is</p> <p>5 substantially verbatim recital. Does that mean if</p> <p>6 there is a recording, you can give a transcription of</p> <p>7 the recording instead of the recording?</p> <p>8 MR. BIGGS: Your Honor, when we did,</p> <p>9 for example, our recording that was just submitted</p> <p>10 with this -- of our telephone conversation between Mr.</p> <p>11 Langer and me, we had our transcriptionist verify that</p> <p>12 it was a verbatim, and you'll see the grammar and</p> <p>13 everything in that statement is awkward, as those</p> <p>14 things are.</p> <p>15 What this rule says, I think, without</p> <p>16 a doubt, is if you do not produce the actual</p> <p>17 mechanical version you have to give a transcription</p> <p>18 that is exact. Not something you've edited, not</p> <p>19 something you've cleaned up, the actual exact</p> <p>20 transcription.</p> <p>21 THE COURT: All right.</p> <p>22 MS. CARTER: Let's look at section A.</p> <p>23 It says, a written statement signed or otherwise</p> <p>24 adopted or approved by the person making it. Now, Mr.</p> <p>25 Kopta said in his deposition, and it's attached to the</p>	<p style="text-align: right;">Page 65</p> <p>1 THE COURT: So this problem can be</p> <p>2 just completely avoided if you just give a copy of the</p> <p>3 recording to Mr. Kopta, can't it?</p> <p>4 MS. CARTER: Which has already been</p> <p>5 ruled to be mental impressions of counsel. Whether</p> <p>6 requested by --</p> <p>7 THE COURT: Whoa, whoa, whoa. This is</p> <p>8 a different question. If they ask for it, they can't</p> <p>9 have it, just like you asked for statements from them,</p> <p>10 I said you can't have those.</p> <p>11 MS. CARTER: Right.</p> <p>12 THE COURT: But if the witnesses who</p> <p>13 gave those statements asks for them, they better give</p> <p>14 them to those, and if those witnesses happen to give</p> <p>15 you those statements, that's their right. That's</p> <p>16 what's going on. That's what's going on here.</p> <p>17 MS. CARTER: Right.</p> <p>18 THE COURT: Mr. Kopta isn't here</p> <p>19 arguing about that.</p> <p>20 MS. CARTER: Right. And you'll notice</p> <p>21 if you look at the actual request during his</p> <p>22 deposition, because it's attached to the briefing, and</p> <p>23 he actually really had no interest in even asking for</p> <p>24 this information. It was through the prodding of Mr.</p> <p>25 Northcraft, where he said, you have a right to get it</p>



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<p style="text-align: right;">Page 66</p> <p>1 should you, and Mr. Kopta said, for what.</p> <p>2 THE COURT: Okay. If Mr. Kopta isn't</p> <p>3 getting what he's asked for, it's up to him to seek a</p> <p>4 remedy. He's not a party here. He's got a right to</p> <p>5 it, but the rule doesn't say anything about, well,</p> <p>6 who's got a right on behalf of Mr. Kopta.</p> <p>7 MR. NORTHCRAFT: That's really not</p> <p>8 what we're talking about here. We're talking about</p> <p>9 spoliation of evidence. We'd like her to answer the</p> <p>10 question as to whether they've destroyed the tapes or</p> <p>11 not.</p> <p>12 THE COURT: And I'm still going to get</p> <p>13 to that because she hasn't answered the question yet.</p> <p>14 You're right. Sit down.</p> <p>15 MR. NORTHCRAFT: I'd like --</p> <p>16 THE COURT: No. Please sit down.</p> <p>17 MR. NORTHCRAFT: I do have one other</p> <p>18 thing.</p> <p>19 THE COURT: Please, sit down. I'll</p> <p>20 get back to you.</p> <p>21 MR. NORTHCRAFT: I will, Your Honor.</p> <p>22 I have one other thing.</p> <p>23 THE COURT: I'll get back to you.</p> <p>24 MR. NORTHCRAFT: Okay. Get back to</p> <p>25 me. Thank you.</p>	<p style="text-align: right;">Page 68</p> <p>1 THE COURT: All right. Find out and</p> <p>2 let them know.</p> <p>3 MS. CARTER: Fair enough.</p> <p>4 THE COURT: It has to be, this is the</p> <p>5 -- it's not just to the best of my knowledge. It's</p> <p>6 you need to find out.</p> <p>7 MR. BIGGS: And Your Honor, that goes</p> <p>8 for all the statements, right, I mean?</p> <p>9 THE COURT: All the recorded</p> <p>10 statements.</p> <p>11 MR. BIGGS: Yeah. Thank you.</p> <p>12 MS. CARTER: Your Honor, I believe the</p> <p>13 court has already ruled that those were privileged.</p> <p>14 THE COURT: I'm not saying you have to</p> <p>15 give them the statements. I'm just saying that you</p> <p>16 have to tell them whether or not you still have the</p> <p>17 recordings.</p> <p>18 MS. CARTER: Okay. But they're not</p> <p>19 discoverable.</p> <p>20 THE COURT: I'm not ruling that</p> <p>21 they're discoverable.</p> <p>22 MS. CARTER: Just seeking</p> <p>23 clarification on that.</p> <p>24 THE COURT: I've said that before.</p> <p>25 Okay. Conflict of interest. You make</p>
<p style="text-align: right;">Page 67</p> <p>1 THE COURT: Besides, it's Mr. Biggs</p> <p>2 who's arguing this motion, not you.</p> <p>3 MR. NORTHCRAFT: But this is something</p> <p>4 that she's alleged against me.</p> <p>5 THE COURT: Well, again, there's</p> <p>6 allegations going back and forth.</p> <p>7 MR. NORTHCRAFT: Well, this is a good</p> <p>8 one.</p> <p>9 THE COURT: So getting back to the</p> <p>10 question of have any of the recordings been destroyed.</p> <p>11 I need an answer to that. Yes or not, not to my</p> <p>12 knowledge.</p> <p>13 MS. CARTER: Right. Well, I do not</p> <p>14 have personal knowledge to that, Your Honor.</p> <p>15 THE COURT: Who does?</p> <p>16 MS. CARTER: What I can tell you is</p> <p>17 that we've got the declaration of Mr. Adler where he</p> <p>18 discusses how the transcription went about after it</p> <p>19 was recorded. I know that a digital recorder was</p> <p>20 used. I know that it was sent to a transcriptionist</p> <p>21 and that the transcribed statement, as he states under</p> <p>22 oath here, was presented to Mr. Kopta.</p> <p>23 I do not have personal knowledge on</p> <p>24 where the whereabouts are of the contents of the</p> <p>25 digital transcription.</p>	<p style="text-align: right;">Page 69</p> <p>1 the argument, Mr. Biggs, that the plaintiff attorneys</p> <p>2 have a conflict of interest because they're</p> <p>3 representing the parents on a loss of consortium</p> <p>4 claim. Really, you're making that argument?</p> <p>5 MR. BIGGS: Your Honor, yes.</p> <p>6 THE COURT: Because if that's the law,</p> <p>7 then all these cases where there's a car accident and</p> <p>8 one spouse is injured and the same attorney represents</p> <p>9 the two spouses.</p> <p>10 MR. BIGGS: Not if the driver is</p> <p>11 alleged to be at fault. That's an entirely different</p> <p>12 situation. That you actually just gave the classic</p> <p>13 example of a conflict. The wife, not at fault. The</p> <p>14 kids in the back seat, not at fault. The other</p> <p>15 driver, partially at fault. This driver, partially at</p> <p>16 fault, and that is the classic conflict situation and</p> <p>17 here we have both parents having, you know, potential</p> <p>18 liability as well as their kid.</p> <p>19 THE COURT: So if the boy -- what's</p> <p>20 his name? Matthew?</p> <p>21 MR. BIGGS: Matthew, yes.</p> <p>22 THE COURT: -- is found to be 50</p> <p>23 percent at fault, that reduces -- does that reduce --</p> <p>24 that reduces the loss of consortium claim, doesn't it?</p> <p>25 MR. BIGGS: I believe so, Your Honor.</p>



<p style="text-align: right;">Page 70</p> <p>1 THE COURT: So where is the conflict?</p> <p>2 Because their interests are unified, aren't they?</p> <p>3 MR. BIGGS: Well, it has to do with,</p> <p>4 for example, whether or not Matthew has independent</p> <p>5 counsel that's telling him whether he should be</p> <p>6 chasing his parents or not for their own -- if they</p> <p>7 have reckless conduct, which is essentially what</p> <p>8 they're accusing the school district of, and if</p> <p>9 there's such a thing, you know, gross misconduct and</p> <p>10 there's no parental immunity and they should be</p> <p>11 claiming against the parent.</p> <p>12 THE COURT: Is there an allegation</p> <p>13 from the defense that the parents have any fault in</p> <p>14 this?</p> <p>15 MR. BIGGS: Yes. Yes, the parents</p> <p>16 knew that --</p> <p>17 THE COURT: Is that one of the</p> <p>18 allegations in your answer?</p> <p>19 MR. BIGGS: Well, I don't know if it's</p> <p>20 in the answer.</p> <p>21 THE COURT: Is it alleged?</p> <p>22 MR. BIGGS: But it's very clear</p> <p>23 through all the pleadings we've submitted throughout,</p> <p>24 which is, if -- if you remember the story here and how</p> <p>25 they're sort of putting this together, they're saying</p>	<p style="text-align: right;">Page 72</p> <p>1 THE COURT: But is it a problem for</p> <p>2 the litigation?</p> <p>3 MR. BIGGS: I think, Your Honor,</p> <p>4 actually, you sort of touched on a good point here and</p> <p>5 that is, Mr. Dussault, who is a represented fellow</p> <p>6 who, you know, deals with disability claims and so</p> <p>7 forth, and they submitted his declaration, and</p> <p>8 refreshingly he says, I don't even know anything about</p> <p>9 any of this except this one little area. And I have</p> <p>10 represented him independently and I still do.</p> <p>11 Well, this is the first we ever heard</p> <p>12 of that. In other words, he has not been active, as</p> <p>13 far as I can tell, in any respect in this case, but if</p> <p>14 Matthew truly has independent representation, you</p> <p>15 know, not driven by the parents, but independent</p> <p>16 representation, then we already have the solution.</p> <p>17 You know, that's what, that's what would be required.</p> <p>18 Whether he's a specially appointed GAL</p> <p>19 or not, as long as he's in that role, I suppose that</p> <p>20 serves the purpose, but the parents are the guardians,</p> <p>21 the parents have money at stake in this litigation.</p> <p>22 They're not independent.</p> <p>23 THE COURT: All right. Well, that's</p> <p>24 an issue that these attorneys need to think about and</p> <p>25 perhaps talk to Professor Strait about and it -- but I</p>
<p style="text-align: right;">Page 71</p> <p>1 he got hurt at practice.</p> <p>2 THE COURT: Right.</p> <p>3 MR. BIGGS: It was obvious to the</p> <p>4 coaches, blah, blah, blah. It was obvious the next</p> <p>5 day he's, you know, doing this in school. Then it was</p> <p>6 obvious to the parents. The parents went to meetings,</p> <p>7 the parents know that that sort of thing might show a</p> <p>8 concussion.</p> <p>9 So yes, there are claims. There is</p> <p>10 going to be an empty chair for the parents in terms</p> <p>11 of, you know, the school district offset.</p> <p>12 THE COURT: You have an empty chair</p> <p>13 that's occupied by the parents? They're parties.</p> <p>14 MR. BIGGS: Well, that -- actually,</p> <p>15 yes, the answer to that is yes. We just did that in a</p> <p>16 trial last year.</p> <p>17 THE COURT: All right. Let me get</p> <p>18 back to the practical question. Any time somebody</p> <p>19 says, well, the other side has a conflict or whatever,</p> <p>20 what you're saying is that there ought to be more</p> <p>21 attorneys on the other side. Is that really, again,</p> <p>22 in your client's best interest or is that their</p> <p>23 problem? If they have a conflict of interest, they</p> <p>24 may have a disciplinary problem.</p> <p>25 MR. BIGGS: Right.</p>	<p style="text-align: right;">Page 73</p> <p>1 think it's their problem, because either -- because I</p> <p>2 don't think it affects, I mean, as a matter of fact,</p> <p>3 as I said, it may be adverse to your side to have more</p> <p>4 attorneys involved on other side, but I think it's</p> <p>5 their problem.</p> <p>6 MR. BIGGS: Well, Your Honor, I guess</p> <p>7 I have to agree in the sense that it doesn't harm us.</p> <p>8 It can in terms of trial management and it can in</p> <p>9 terms of settlements and that sort of thing, but as we</p> <p>10 stand here today, I think you're correct.</p> <p>11 THE COURT: All right.</p> <p>12 MS. CARTER: Do you need me to address</p> <p>13 that, Your Honor?</p> <p>14 THE COURT: No.</p> <p>15 MS. CARTER: Okay.</p> <p>16 THE COURT: What's the issue about you</p> <p>17 argue that the plaintiffs have harassed a third party?</p> <p>18 There's this whole issue about Emily Sorenson and</p> <p>19 Coach Shafer, I think.</p> <p>20 MR. BIGGS: Shafer, yes.</p> <p>21 THE COURT: But who's being harassed?</p> <p>22 Is it the coach, is it Emily Sorenson, is it somebody</p> <p>23 else, when you talk about harassment of a third party?</p> <p>24 MR. BIGGS: Well, Your Honor, again,</p> <p>25 this is the really -- it's in the context of they're</p>



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1 claiming that there was a crime committed. Okay.
 2 That's what they are -- that's what they're claiming,
 3 that Emily Sorenson, who is of the age of consent.
 4 First of all, they're dragging her
 5 through the mud, saying there was a sexual
 6 relationship, when there wasn't, okay, and think could
 7 easily confirm that just like we did by calling her
 8 and asking her. But so they're dragging her through
 9 the mud saying she had a sexual relationship with a
 10 coach who was not legally able to do that with her
 11 while he was a coach.
 12 Okay. That's what they're saying,
 13 that's what they're claiming. So that affects both
 14 her and Dustin Shafer, and they're accusing him of a
 15 crime, although they know better. They know that it
 16 didn't happen during that time period, but they're --
 17 or they're at least reckless not knowing when it was,
 18 because once he was no longer a school employee, she's
 19 of age, he's of age, no problem. If he's a school
 20 employee, it's a problem, even though she's of age.
 21 So that's what the issue is there.
 22 It's criminal. They're alleging a crime.
 23 THE COURT: So why does the issue of
 24 Emily Sorenson come up?
 25 MS. CARTER: I'll tell you why it's

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1 very clearly relevant and it goes to one thing.
 2 Dustin Shafer's credibility. Dustin Shafer testified
 3 at his deposition what he believed to be the return to
 4 play standard had he known that Matthew possibly
 5 sustained a head injury from this tackle. He got the
 6 standard wrong. He's the coach that's there right
 7 when this tackle occurs. His actions, his credibility
 8 are crucial to this case.
 9 He then went on to say that he did not
 10 -- under oath, he did not have a relationship with a
 11 student at the time, who happened to be the older
 12 sister of Matthew Newman's girlfriend and a
 13 cheerleader, a student at the school while he was a
 14 coach.
 15 During a break with Mr. Northcraft, he
 16 had a conversation with him in the parking lot, came
 17 back after the break --
 18 MR. NORTHCRAFT: Your Honor, at this
 19 point, this is a utter falsity.
 20 MS. CARTER: I'm telling you why it's
 21 relevant, Your Honor. After the break, he came in and
 22 said, I would like to clear something for the record.
 23 His transcript is attached to Mr. Langer's
 24 declaration, Exhibit 12, to the declaration of Fred
 25 Langer.

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1 He says: I would like to clear
 2 something up. I acted out of embarrassment. I did
 3 have a relationship with Emily Shafer.
 4 And so Mr. Leritz asked him: So when
 5 you told me earlier you did not have a relationship
 6 with her, that was a lie:
 7 He said: Yes.
 8 Obviously, his ability to tell the
 9 truth, his proclivity to lie is absolutely crucial to
 10 this case and his credibility is the only thing that
 11 we're after.
 12 THE COURT: I seriously question
 13 whether that's going to be admissible. I haven't
 14 researched it, obviously, but when you're talking
 15 about prior wrongful acts or whatever, you know, it
 16 seems pretty far removed from the case.
 17 MS. CARTER: What we're talking, it
 18 just goes to his voracity.
 19 THE COURT: All right. Well, I assume
 20 you've done the research and you're going to be able
 21 to convince me that somehow that information ought to
 22 be admissible.
 23 MS. CARTER: Sure. And I do suspect
 24 it will be a motion in limine.
 25 THE COURT: All right. Well,

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1 obviously that needs to be addressed before we go to
 2 trial.
 3 MS. CARTER: Sure.
 4 THE COURT: All right. I feel like
 5 I'm in the middle between the Palestinians and the
 6 Israelis. I'm going to take a look at this issue
 7 about attorney-client privilege with regard to former
 8 employees. That's the issue that concerns me the
 9 most. If I decide there is no such privilege, then
 10 that solves a lot of problems about, you know, what
 11 Mr. Shafer was told and when he was told.
 12 If he's not -- if there's not an
 13 attorney-client privilege, I have -- I mean, if that
 14 isn't there, I have serious concerns about the
 15 representation by Mr. Northcraft of Mr. Shafer at
 16 these depositions. I've always been very seriously
 17 troubled by that. It just seems like a really bad
 18 idea, because it opens up the door to a whole lot of
 19 accusations that, you know, can't be made if that
 20 isn't done. But I will take a look at that.
 21 I need to have you make sure that you
 22 provided to the clerk your email addresses and I will
 23 email to you as soon as I can a decision on whether or
 24 not there's an attorney-client privilege for former
 25 employees. And at this point I'm not disqualifying



<p style="text-align: right;">Page 78</p> <p>1 anybody.</p> <p>2 Again, I don't know if that -- my mind</p> <p>3 will change on that based upon my research, but I</p> <p>4 still have grave concerns about keeping this trial on</p> <p>5 track and keeping focused on the facts of the case and</p> <p>6 I don't want the case to be tried based upon the</p> <p>7 credibility of the attorneys and I guarantee you</p> <p>8 that's not going to happen, and like I said, we're</p> <p>9 going to make sure none of those issues come before</p> <p>10 the jury.</p> <p>11 Mr. Northcraft, anything else?</p> <p>12 MR. NORTHCRAFT: Thank you, Your</p> <p>13 Honor. One other thing, and it's just a practical</p> <p>14 one. You've told me and you ordered me not to</p> <p>15 represent Mr. Shafer. I keep getting the feeling from</p> <p>16 comments by counsel over there as well as some of your</p> <p>17 own that I'm still doing that. That's not true.</p> <p>18 THE COURT: I know you're not still</p> <p>19 doing it. My concern is should you have done it in</p> <p>20 the first place.</p> <p>21 MR. NORTHCRAFT: Well, that is where</p> <p>22 you and I disagree.</p> <p>23 THE COURT: Well, let me do the</p> <p>24 research on it.</p> <p>25 MR. NORTHCRAFT: I understand. So I</p>	<p style="text-align: right;">Page 80</p> <p>1 weekend.</p> <p>2 MR. NORTHCRAFT: Thank you, Your</p> <p>3 Honor. You too.</p> <p>4 FEMALE VOICE: All rise.</p> <p>5 (End of proceedings at 3:57 p.m.)</p> <p>6 (END OF TRANSCRIPTION)</p>
<p style="text-align: right;">Page 79</p> <p>1 just want you to know, I will be there. I'll be</p> <p>2 representing the Highland School District, which is my</p> <p>3 absolute right to do.</p> <p>4 THE COURT: Uh-huh.</p> <p>5 MR. NORTHCRAFT: And I will be</p> <p>6 interposing objections to communication questions.</p> <p>7 THE COURT: Well, his deposition is</p> <p>8 scheduled for the 3rd?</p> <p>9 MR. LERITZ: Yes, Your Honor.</p> <p>10 MR. NORTHCRAFT: Shane Roy's is coming</p> <p>11 up this Friday, I think, so it's going to come sooner</p> <p>12 than that. I'm sure they'll ask the same questions.</p> <p>13 THE COURT: I will see if the court</p> <p>14 administrator will give me a little extra time to work</p> <p>15 on this issue so that I can get you a decision before</p> <p>16 you have any depositions.</p> <p>17 MR. NORTHCRAFT: Thank you, Your</p> <p>18 Honor.</p> <p>19 MR. LERITZ: Thank you.</p> <p>20 MS. CARTER: Thank you.</p> <p>21 THE COURT: Make sure she has your</p> <p>22 email addresses.</p> <p>23 MR. LERITZ: Very good.</p> <p>24 MR. BIGGS: Okay.</p> <p>25 THE COURT: All right. Have a nice</p>	<p style="text-align: right;">Page 81</p> <p>1 TRANSCRIPTION CERTIFICATE</p> <p>2</p> <p>3 I, CHERYL J. HAMMER, the undersigned</p> <p>4 Certified Court Reporter in and for the state of</p> <p>5 Washington, do hereby certify:</p> <p>6 That the foregoing transcript was</p> <p>7 transcribed under my direction; that the transcript is</p> <p>8 true and accurate to the best of my knowledge and</p> <p>9 ability to hear the audio; that I am not a relative or</p> <p>10 employee of any attorney or counsel employed by the</p> <p>11 parties hereto; nor am I financially interested in the</p> <p>12 event of the cause.</p> <p>13</p> <p>14 WITNESS MY HAND this 21st day of March</p> <p>15 2014.</p> <p>16</p> <p>17</p> <p>18 <i>Cheryl J. Hammer</i></p> <p>19</p> <p>20</p> <p>21 CHERYL J. HAMMER</p> <p>22 Certified Court Reporter</p> <p>23 CCR No. 2512</p> <p>24 <i>chammer@yomreporting.com</i></p> <p>25</p>



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Honorable Blaine G. Gibson
Hearing Date: January 24, 2014 at 2:00 p.m.

FILED
JAN 16 2014

KIM M. EATON, YAKIMA COUNTY CLERK

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

**DECLARATION OF JENNA WOLFE IN
SUPPORT OF DEFENDANT HIGHLAND
SCHOOL DISTRICT'S CROSS MOTION TO
DISQUALIFY PLAINTIFFS' COUNSEL**

DATE OF HEARING: January 24, 2014
TIME OF HEARING: 2:00 p.m. (special setting)
ASSIGNED JUDGE: Honorable Blaine G. Gibson

I, JENNA WOLFE, declare as follows:

1. I am over the age of 18 and competent to testify to the matters herein. I am an attorney with the firm of Northcraft Bigby and Biggs and my office represents the Highland School District in the above captioned matter.

2. Attached hereto as **Exhibit 1** is a true and correct copy of excerpts from the transcript of the September 27, 2013, hearing.

**DECLARATION OF JENNA WOLFE IN SUPPORT OF
DEFENDANT HIGHLAND SCHOOL DISTRICT'S
CROSS MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL - 1**
w:\newman\pld\def's cross motion to disqualify.wolfe.decl

NORTHCRAFT, BIGBY & BIGGS, P.C.
819 Virginia Street / Suite C-2
Seattle, Washington 98101
tel: 206-623
fax: 206-623

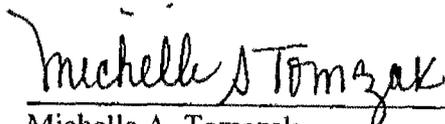
CERTIFICATE OF SERVICE

I, Michelle A. Tomczak, hereby certify under penalty of perjury under the laws of the state of Washington that on January 15, 2014, I filed with the Court via Federal Express the original of the foregoing and served a copy via email upon:

Richard H. Adler
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SIGNED in Seattle, Washington on January 15, 2014.



Michelle A. Tomczak
Legal Assistant
michelle.tomczak@northcraft.com

EXHIBIT

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

MATTHEW 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 governmental agency,

Defendant.

Case No.: 12-2-03162-1

PLAINTIFFS' **THIRD**
INTERROGATORIES AND REQUESTS
FOR PRODUCTION TO HIGHLAND
SCHOOL DISTRICT NO. 203

TO: Highland School District;

AND TO: Mark Northcraft - Northcraft, Bigby & Biggs, PLLC - its attorney

These interrogatories are being served on you in accordance with Rules 26, 33, 34 and 37 of the Civil Rules for Superior Courts for the State of Washington and applicable Local Rules for the Superior Court of Yakima County, you will please answer the following interrogatories separately and fully under oath within thirty (30) days of the date of service of these interrogatories upon you. Failure to completely answer these interrogatories within 30 days may subject you to penalties under the applicable Court Rules. Answers should be returned to the offices of Nelson Langer Engle, PLLC, at their address appearing on each page of these interrogatories.

These interrogatories are to be treated as continuing. If information is not available within the 30-day time limit, you must answer each interrogatory as fully as possible within the time limit and furnish additional information when it becomes available. If there are any additions, deletions, or changes in the answers or information provided at any time prior to trial, you are specifically requested to so immediately inform this Plaintiffs' counsel. If additional information is discovered between the time of making these answers and the time of

1 trial, these interrogatories are directed to that information, and answers should be timely
2 supplemented. If such information is not timely furnished, the undersigned will move at the
time of trial to exclude from evidence any information requested and not furnished.

3 These interrogatories are directed to the above-named party and to its attorneys, and the
4 answers shall include all information known to said party or parties and their attorneys and the
Washington Schools Risk Management Pool.

5
6 **REQUESTS FOR PRODUCTION**

7 In accordance with CR 34, Rules for Superior Court, Plaintiffs further requests that
8 Defendant produce the documents designated herein for inspection and copying at the offices
of Nelson Langer Engle, PLLC, 1015 NE 113th Street, Seattle, Washington, at a mutually
9 agreed upon time within thirty (30) days of the date of service of these requests.

10 **PRIVILEGE**

11 If in responding to, or failing to respond to, these interrogatories and these requests for
12 production, you invoke or rely upon any privilege of any kind (including the work product
13 doctrine), state specifically the nature of the privilege; the basis upon which you invoke, rely
upon or claim it, including any statutory or decisional reference; and identify all documents or
14 other information, including contacts, and communications which you believe to be embraced
by the privilege invoked.

15 **DEFINITIONS AND INSTRUCTIONS**

16 1. You: "You" means either or all of the parties to whom these interrogatories are
17 addressed, and your attorneys, agents, employees, officers, representatives, adjusters,
investigators, the Washington Schools Risk Management Pool, and any other person who is in
possession of, or who has obtained information on your behalf.

18 2. Document or documentation: The term "document" means information stored
19 in any form; any written, recorded or graphic matter, however produced or reproduced; and
copies and drafts thereof. Without limiting the foregoing, "document" means information
20 stored in any form; any written, recorded or graphic matter, however produced or reproduced;
and copies and drafts thereof. Without limiting the foregoing, "document" includes
21 correspondence; telegrams; memoranda; reports; notes; drafts; minutes; contracts; agreements;
books; records; vouchers; invoices; diaries; logs; calendar notes; computer printouts; memory
22 programs; information stored in any data processing or word processing system, in whatever
form; back-up materials of any kind; card files; press clippings; newspapers or newsletters;
23 sworn or unsworn statements of employees; lists; audits; tables of organization; deposit slips;
monthly or other periodic statements; ledgers; journals; notices; affidavits; court papers;
appointment books; minutes or records of conferences or telephone calls; brochures; receipts;

1 written reports or opinions of investigators or experts; status reports; drawings; charts;
2 photographs; negatives; X-rays/radiological studies/contrast and other imaging studies; and
3 tape recordings and video recordings within your possession, or subject to your control, or of
4 which you have knowledge, or to which you now have or have had access, or of which any of
5 your agents, attorneys, accountants, or consultants have knowledge. A comment or notation
6 appearing on any document, not a part of the original test, is to be considered as a separate
7 "document."

8
9 3. Contact: The term "contact," in either the present or past tense, means
10 conversations; telephone calls; conferences; physical presence; and correspondence.

11 4. Communication: "Communication" means any correspondence, contact,
12 discussion or exchange between any two or more persons. Without limiting the foregoing,
13 "communication" includes all documents, telephone conversations, any means of transmitting a
14 message, face-to-face conversations, meetings, and conferences.

15 5. Person: "Person" means, without limitation, any natural person, partnership,
16 corporation, unincorporated association, joint venture, trust, labor union or any other form of
17 business, social or legal entity.

18 6. State in detail, or describe in detail: "State in detail" or "describe in detail"
19 means provide a narrative statement of description, phrased in specifics, of the facts or matters
20 to which the interrogatories have a reference, including, but not limited to: identification of all
21 persons conversations; transactions; events; agreements; recommendations and documents
22 necessary or desirable to make such statement or description complete; and specification of the
23 dates and times of all occurrences.

7. Identify, identification, or identity: "Identify," "identification," or "identity,"
means:

A. When referring to a natural person, state his full name; his present or
last-known address and phone number; his present or last-known business position; and, if
different, his business position at the time to which the interrogatory or your response to the
interrogatory has reference; and, a brief description of the responsibilities of such position.

B. When referring to a document, state its title and date; identify the author
or person who prepared it and any signatories to it; give the type of document (e.g., letter,
memorandum, invoice); its present location and custodian; a summary of its contents, or
principal terms and provisions; the identity of its addresses and all other persons receiving it or
copies of it. If the document so identified was, but is no longer, in your possession, custody or
control, state what disposition has been made of it. Attach a copy of it to your response to
these interrogatories.

C. When referring to a person other than a natural person, set forth:

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1. Full and lawful name, and all other names or styles used, at any time, and for any purpose whether or not registered.
2. Type of entity (i.e., partnership, division, corporation.)
3. Present business address and telephone, or last known business address and telephone.
4. Registered office and name and address of registered agent.
5. States and foreign countries where qualified to do business.
6. All business addresses and telephones in this state.
7. State and date of incorporation.
8. Name and address of Washington agent for service of process.
9. Name, principal office, state and date of incorporation, and name of chief executive officer of:
 1. Any controlling corporation;
 2. Any subsidiary corporation.
10. Name and address of all persons owning a controlling interest, and a description of the extent of such interest.
11. Identify its present partners, principals, officers, directors, and managing agents, and, if different, its partners, principals, officers, directors and managing agents at the time to which the interrogatory of your response to the interrogatory has reference.

D. When referring to an act, event, transaction, occasion or instance, including an oral agreement, communication, statement, recommendation or representation:

1. State its date and place of occurrence (or if a telephone call is involved, so state and provide the location of all parties to such telephone call and identify the person who initiated it);
2. Identify each person participating therein;
3. For each such person participating therein identify all persons that s/he represented or purported to represent;

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- 4. Describe in detail all circumstances leading up to or surrounding it;
- 5. Describe in detail what transpired or was said; and,
- 6. Identify all documents summarizing, recording, reflecting, reporting, or containing a reference to it.

8. "Each" includes the word "every" and "every" includes the word "each." "Any" includes the word "all" and "all" includes the word "any." "And" includes the word "or" and "or" includes the word "and."

9. Terms in the plural include the singular and terms in the singular include the plural.

10. The masculine form of any noun or pronoun includes the feminine and neuter form.

11. Each paragraph and subparagraph of the following interrogatories should be construed independently, and no other paragraph or sub-paragraph shall be referred to or relied on for the purpose of limiting its scope.

12. If your answer to any interrogatory is "N/A" or "Not Applicable," describe in detail your reasons for making such reply.

13. In reply to any interrogatory, do not merely state "See attached records" unless you have no additional memory of the matters referred to in the interrogatory. If you have any additional memory of the relevant events, describe it in detail.

14. Separately for each interrogatory, identify:

A. All sources of information and all documents and communications maintained by you, or by any other person, upon which you relied in making such response, or which records or refers to any of the matters referred to in such response, and

B. The person or persons most familiar with the facts requested as well as those whom you consulted in preparing your response to such interrogatories.

15. Documents produced in response to Plaintiff's requests pursuant to CR 34 should be expressly identified by reference to the interrogatory to which they pertain.

16. Health Care Provider: "Health Care Provider" is to be given its statutory definition (RCW 7.70.020).

17. Copy: "Copy" means an "original" or a "duplicate," where "original" and "duplicate" are given the definitions in Rule 1001 of the Rules of Evidence.

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If the space provided for each answer is not adequate, please complete your answer on additional sheets of paper and attach these additional sheets to your answers.

THESE INTERROGATORIES AND REQUESTS FOR PRODUCTION ARE INTENDED TO APPLY TO INFORMATION AND MATERIALS KNOWN TO OR IN THE POSSESSION OF THE NAMED PARTY, WASHINGTON SCHOOLS RISK MANAGEMENT POOL, THEIR ATTORNEY, AND THEIR LIABILITY INSURER, IF ANY.

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2 **INTERROGATORIES**

3 **INTERROGATORY NO. 1:** During the time period when unrepresented by counsel, with
4 regard to any communications between **Josh Borlund** and anyone employed by or on behalf of
5 the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant
6 lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle
7 Tomczak and Lilly Tang, please indicate:

- 8 a. The date of said communication;
- 9 b. The persons involved in the conversation;
- 10 c. The details of the conversation.

11 **ANSWER:**

12 **REQUEST FOR PRODUCTION NO. A:** During the time period when
13 unrepresented by counsel, please produce copies of all communications, in any form, between
14 **Josh Borlund** and anyone employed by or on behalf of the law firm of Northcraft, Bigby &
15 Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to*
16 Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang. Also
17 produce all documents or other materials shared with **Josh Borlund** for his review relating to
18 this lawsuit and/or Matthew Newman.

19 **RESPONSE:**

20 **REQUEST FOR PRODUCTION NO. B:** During the time period when
21 unrepresented by counsel, please produce any statements or declarations, written, recorded or
22 in any other format, from **Josh Borlund** relating to Matthew Newman and/or this lawsuit.

23 **RESPONSE:**

INTERROGATORY NO. 2: During the time period when unrepresented by counsel, with
regard to any communications between **Matt Bunday** and anyone employed by or on behalf of
the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant
lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle
Tomczak and Lilly Tang, please indicate:

- 1 a. The date of said communication;
2 b. The persons involved in the conversation;
3 c. The details of the conversation.

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6 **ANSWER:**

7 **REQUEST FOR PRODUCTION NO. C:** During the time period when
8 unrepresented by counsel, please produce copies of all communications, in any form, between
9 **Matt Bunday** and anyone employed by or on behalf of the law firm of Northcraft, Bigby &
10 Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to*
11 Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang. Also
12 produce all documents or other materials shared with **Matt Bunday** for his review relating to
13 this lawsuit and/or Matthew Newman.

14 **RESPONSE:**

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16 **REQUEST FOR PRODUCTION NO. D:** During the time period when
17 unrepresented by counsel, please produce any statements or declarations, written, recorded or
18 in any other format, from **Matt Bunday** relating to Matthew Newman and/or this lawsuit.

19 **RESPONSE:**

20 **INTERROGATORY NO. 3:** During the time period when unrepresented by counsel, with
21 regard to any communications between **Justin Burton** and anyone employed by or on behalf of
22 the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant
23 lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle
Tomczak and Lilly Tang, please indicate:

- a. The date of said communication;
b. The persons involved in the conversation;
c. The details of the conversation.

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REQUEST FOR PRODUCTION NO. E: During the time period when unrepresented by counsel, please produce copies of all communications, in any form, between **Justin Burton** and anyone employed by or on behalf of the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang. Also produce all documents or other materials shared with **Justin Burton** for his review relating to this lawsuit and/or Matthew Newman.

RESPONSE:

REQUEST FOR PRODUCTION NO. F: During the time period when unrepresented by counsel, please produce any statements or declarations, written, recorded or in any other format, from **Justin Burton** relating to Matthew Newman and/or this lawsuit.

RESPONSE:

INTERROGATORY NO. 4: During the time period when unrepresented by counsel, with regard to any communications between **Eric Diener** and anyone employed by or on behalf of the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang, please indicate:

- a. The date of said communication;
- b. The persons involved in the conversation;
- c. The details of the conversation.

ANSWER:

REQUEST FOR PRODUCTION NO. G: During the time period when unrepresented by counsel, please produce copies of all communications, in any form, between **Eric Diener** and anyone employed by or on behalf of the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to*

1 Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang. Also
2 produce all documents or other materials shared with Eric Diener for his review relating to this
lawsuit and/or Matthew Newman.

3 **RESPONSE:**

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6 **REQUEST FOR PRODUCTION NO. H:** During the time period when
unrepresented by counsel, please produce any statements or declarations, written, recorded or
7 in any other format, from Eric Diener relating to Matthew Newman and/or this lawsuit.

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8 **RESPONSE:**

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10 **INTERROGATORY NO. 5:** During the time period when unrepresented by counsel, with
regard to any communications between **Thomas Hale** and anyone employed by or on behalf of
11 the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant
lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle
12 Tomczak and Lilly Tang, please indicate:

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- a. The date of said communication;
- b. The persons involved in the conversation;
- c. The details of the conversation.

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ANSWER:

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REQUEST FOR PRODUCTION NO. I: During the time period when
unrepresented by counsel, please produce copies of all communications, in any form, between
19 **Thomas Hale** and anyone employed by or on behalf of the law firm of Northcraft, Bigby &
Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to*
20 Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang. Also
produce all documents or other materials shared with **Thomas Hale** for his review relating to
21 this lawsuit and/or Matthew Newman.

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RESPONSE:

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1 **REQUEST FOR PRODUCTION NO. J:** During the time period when
2 unrepresented by counsel, please produce any statements or declarations, written, recorded or
in any other format, from **Thomas Hale** relating to Matthew Newman and/or this lawsuit.

3 **RESPONSE:**

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5 **INTERROGATORY NO. 6:** During the time period when unrepresented by counsel, with
6 regard to any communications between **Shane Roy** and anyone employed by or on behalf of
the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant
7 lawsuit, including *but not limited* to Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle
Tomczak and Lilly Tang, please indicate:

- 8 a. The date of said communication;
9 b. The persons involved in the conversation;
10 c. The details of the conversation.

11 **ANSWER:**

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13 **REQUEST FOR PRODUCTION NO. K:** During the time period when
14 unrepresented by counsel, please produce copies of all communications, in any form, between
Shane Roy and anyone employed by or on behalf of the law firm of Northcraft, Bigby & Biggs
15 relating to Matthew Newman and/or the instant lawsuit, including *but not limited* to Mark
Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang. Also produce all
16 documents or other materials shared with **Shane Roy** for his review relating to this lawsuit
and/or Matthew Newman.

17 **RESPONSE:**

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19 **REQUEST FOR PRODUCTION NO. L:** During the time period when
20 unrepresented by counsel, please produce any statements or declarations, written, recorded or
in any other format, from **Shane Roy** relating to Matthew Newman and/or this lawsuit.

21 **RESPONSE:**

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INTERROGATORY NO. 7: During the time period when unrepresented by counsel, with regard to any communications between **Dustin Shafer** and anyone employed by or on behalf of the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang, please indicate:

- a. The date of said communication;
- b. The persons involved in the conversation;
- c. The details of the conversation.

ANSWER:

REQUEST FOR PRODUCTION NO. M: During the time period when unrepresented by counsel, please produce copies of all communications, in any form, between **Dustin Shafer** and anyone employed by or on behalf of the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang. Also produce all documents or other materials shared with **Dustin Shafer** for his review relating to this lawsuit and/or Matthew Newman.

RESPONSE:

REQUEST FOR PRODUCTION NO. N: During the time period when unrepresented by counsel, please produce any statements or declarations, written, recorded or in any other format, from **Dustin Shafer** relating to Matthew Newman and/or this lawsuit.

RESPONSE:

INTERROGATORY NO. 8: During the time period when unrepresented by counsel, with regard to any communications between all former **Highland School District coaches, former assistant coaches, or former football personnel other than those named above** and anyone employed by or on behalf of the law firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly Tang, please indicate:

- 1 a. The date of said communication;
2 b. The persons involved in the conversation;
3 c. The details of the conversation.

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6 **ANSWER:**

7 **REQUEST FOR PRODUCTION NO. O:** During the time period when
8 unrepresented by counsel, please produce copies of all communications, in any form, between
9 all former Highland School District coaches, former assistant coaches, or former football
10 personnel other than those named above and anyone employed by or on behalf of the law
11 firm of Northcraft, Bigby & Biggs relating to Matthew Newman and/or the instant lawsuit,
12 including *but not limited to* Mark Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak
13 and Lilly Tang. Also produce all documents or other materials shared with all former
14 Highland School District coaches, former assistant coaches, or former football personnel
15 other than those named above for their review relating to this lawsuit and/or Matthew
16 Newman.

17 **RESPONSE:**

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20 **REQUEST FOR PRODUCTION NO. P:** During the time period when
21 unrepresented by counsel, please produce any statements or declarations, written, recorded or
22 in any other format, from all former Highland School District coaches, former assistant
23 coaches, or former football personnel other than those named above relating to Matthew
Newman and/or this lawsuit.

RESPONSE:

REQUEST FOR PRODUCTION NO. Q: With regard to Defendant's response to
Plaintiffs' Second Request for Admission dated June 27, 2013 *to wit:* Objection is made to this
Request on the basis that the term "Coaches' Handbook" is not defined, and the term is subject
to multiple reasonable interpretations. It is admitted that, at the time of the subject incident, the
Highland School District did not use a document titled "Coaches' Handbook", please produce

1 all documentation used by or referred to by Highland School District coaches, assistant coaches
2 and athletic directors in lieu of a Coaches' Handbook containing any information regarding
player safety, injury and concussion management.

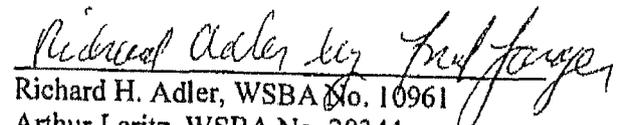
3 **RESPONSE:**

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7 DATED this 19th day of December, 2013.

8 NELSON BLAIR LANGER ENGLE, PLLC

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10 
11 Fred P. Langer, WSBA #25932
Michael E. Nelson, WSBA #6027

12 ADLER GIERSCH, PS

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14 Richard H. Adler, WSBA No. 10961
15 Arthur Leritz, WSBA No. 29344
Melissa D. Carter, WSBA No. 36400

16 Attorneys for Plaintiffs
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VERIFICATION

I, _____, declare:

That I am the _____ for Defendant Highland School District No. 203, the Defendant in the above-entitled matter to whom these **THIRD** interrogatories and requests for production are addressed; that I have read the foregoing answers to interrogatories and responses to requests for production, know the contents thereof, and believe the same to be true.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on _____, 2014, at _____, Washington.

Title: _____
Defendant

CERTIFICATION

The undersigned attorney for Highland School District No. 203, Defendant, has read the foregoing **THIRD** Interrogatories and Requests for Production to Highland School District and Answers/Responses thereto, and they are in compliance with CR 26(g).

Date
Mark S. Northcraft, WSBA No. 7888
Attorney for Defendant

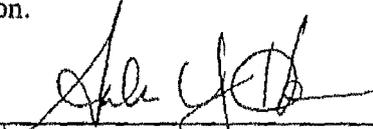
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CERTIFICATE OF SERVICE

I, Sabrina Y. Home, hereby certify that on or before the date set forth below, I served the above-referenced document on the interested parties in this action in the manner described below and addressed as:

Mark S. Northcraft, Esq. Andrew Biggs, Esq. Northcraft, Bigby & Biggs, PLLC 819 Virginia Street, Suite C-2 Seattle, WA 98101-4421 mark_northcraft@northcraft.com marks_northcraft@northcraft.com andrew_biggs@northcraft.com	
<input type="checkbox"/> ABC Messenger <input type="checkbox"/> First Class mail postage prepaid <input checked="" type="checkbox"/> Email	

I declare under penalty of perjury under the laws of the State of Washington this 19th day of December, 2013, at Seattle, Washington.



Sabrina Y. Home

EXHIBIT

2

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) Ered P. Langer (WSBA #25932) - Nelson Blair Langer Ende, PLLC 1015 NE 113th Street, Seattle, WA 98125 TELEPHONE NO. 206-623-7520 FAX NO 206-622-7068 E-MAIL ADDRESS SabrinaH@NBLELaw.com ATTORNEY FOR (Name) Plaintiffs Matthew A. Newman, et al.	FOR COURT USE ONLY
Court for county in which discovery is to be conducted: Superior Court SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Bernardino STREET ADDRESS 303 West 3rd Street MAILING ADDRESS CITY AND ZIP CODE: San Bernardino, CA 92415 BRANCH NAME	
Court in which action is pending: State of Washington - Superior Name of Court: Yakima County Superior Court STREET ADDRESS 128 N. 2nd Street MAILING ADDRESS CITY, STATE, AND ZIP CODE: Yakima, WA 98901 COUNTRY: USA	
PLAINTIFF/PETITIONER: Matthew A. Newman, et al. DEFENDANT/RESPONDENT: Highland School District No. 203	CALIFORNIA CASE NUMBER (if any assigned by court)
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS IN ACTION PENDING OUTSIDE CALIFORNIA	CASE NUMBER (of action pending outside California) 12-2-03162-1

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):
 Dustin Shafer, 14492 Hurricane Lane, Helendale, CA 92342; 509-952-3087

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

Date: January 23, 2014 Time: 11:00 a.m. Address: 11750 Dunja Road, Victorville, CA 92392

- a As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
- b You are ordered to produce the documents, electronically stored information, and things described in item 3.
- c This deposition will be recorded stenographically through the instant visual display of testimony and by audiotape videotape.
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1551, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents, electronically stored information, and things to be produced and any testing or sampling being sought are described as follows (if electronically stored information is required, the form or forms in which each type of information is to be produced may be specified): See attachment 3.

Continued on Attachment 3 (use form MC-025).

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

Continued on Attachment 4 (use form MC-025).

5. Attorneys for the parties to this action or parties without attorneys are (name, address, telephone number, and name of party represented):

See attachment 5

Continued on Attachment 5 (use form MC-025).

PLAINTIFF/PETITIONER: Matthew A. Newman, et al. DEFENDANT/RESPONDENT: Highland School District No. 203	CASE NUMBER:
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6. Other terms or provisions from out-of-state subpoena, if any (specify).

Continued on Attachment 6 (use form MC-025).

7. If you have been served with this subpoena as a custodian of consumer or employee records under Code of Civil Procedure section 1985.3 or 1985.6 and a motion to quash or an objection has been served on you, a court order or agreement of the parties, witnesses, and consumer or employee affected must be obtained before you are required to produce consumer or employee records.

8. At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: DEC 04 2013



[Handwritten Signature]
(SIGNATURE OF PERSON ISSUING SUBPOENA)

SHANNON PRATT

SHANNON PRATT

(TYPE OR PRINT NAME)

DEPUTY CLERK

(TITLE)

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS

1. I served this Deposition Subpoena for Personal Appearance and Production of Documents, Electronically Stored Information, and Things in Action Pending Outside California by personally delivering a copy to the person served as follows:

a. Person served (name):

b. Address where served:

c. Date of delivery:

d. Time of delivery

e. Witness fees and mileage both ways (check one):

(1) were paid. Amount: \$ _____

(2) were not paid.

(3) were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (specify): \$ _____

f. Fee for service: \$ _____

2. I received this subpoena for service on (date):

3. I also served a completed Proof of Service of Notice to Consumer or Employee and Objection (form SUBP-025) by personally delivering a copy to the person served as described in 1 above

4. Person serving:

a. Not a registered California process server

b. California sheriff or marshal

c. Registered California process server

d. Employee or independent contractor of a registered California process server

e. Exempt from registration under Business and Professions Code section 22350(b)

f. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(For California sheriff or marshal use only)

I certify that the foregoing is true and correct

Date:

(SIGNATURE)

(SIGNATURE)

SHORT TITLE: Newman, et al. v. Highland School District	CASE NUMBER: 12-2-03162-1
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ATTACHMENT (Number): 3*(This Attachment may be used with any Judicial Council form.)*

1. All emails, correspondence, cell phone call records and texts to and from attorneys and non-attorneys at the firm of Northcraft, Bigby & Biggs, including but not limited to and from attorneys Mark Northcraft and Andrew Biggs;
2. All documents and information provided to you to review in preparation for your depositions on March 15, 2013 and September 16, 2013;
3. All emails, texts, social media correspondence of any sort (including but not limited to messages on Facebook and Twitter) to and from Shane Roy, Justin Burton, Josh Borland, Matt Bunday, Thomas Hale or Kelly Thorson regarding Matthew Newman and/or the facts relating to this lawsuit from September 17, 2009 to the present;
4. All emails, social media correspondence of any sort, texts or other communications with any of the Highland High School football team student athletes from the 2009-2010 football team from September 17, 2009 to the present regarding Matthew Newman and/or the facts relating to this lawsuit;

For the 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013 Highland School District school years produce the following information, whether in document, electronic, video or any other type of format:

5. Any and all documents relating to concussion guidelines;
6. Any and all documents relating to return to play protocol;
7. Any and all documents relating to emergency action plans, including signed acknowledgment of emergency action plans by any staff members or coaches during that school year;
8. Any and all football coach's handbook / playbook / notebooks or player's handbook / playbook / notebook of rules, standards, guidelines, memos, policies, expectations, offensive plays, and/or defensive plays provided by the Highland School District to its football coaches and/or provided by Highland School District and/or its coaches or its student-athletes;
9. Any and all documents from the Highland School District, its school board, its Superintendent, its Athletic Directors, or its Coaches to one another or to student athletes at the school about its rules or standards for return to play after a suspected concussion or event which could cause a concussion;
10. Any and all documents from the Highland School District, its school board, its Superintendent, its Athletic Directors, or its Coaches to one another or to student athletes at the school about concussion education;
11. Any and all documents from the Highland School District, its school board, its Superintendent, its Athletic Directors, or its Coaches to one another or to the parents or legal guardians of its student athletes at the school regarding concussion education;

(If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.)

Page 1 of 2*(Add pages as required)*

SHORT TITLE Newman, et al. v. Highland School District No. 203	CASE NUMBER: 12-2-03162-1
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ATTACHMENT (Number) 3*(This Attachment may be used with any Judicial Council form.)*

12. Any and all videos that Highland School District provided to its coaches and Athletic Department to be reviewed by its coaches and Athletic Department regarding concussion and/or sports safety;
13. Videos that Highland School District provided to its coaches and Athletic Department to be shown to student athletes regarding concussion and/or sports safety;
14. Any other educational materials, articles, rules, standards, guidelines, memos, policies, expectations, etc., the Highland School District provided to its coaches or the Athletic Department regarding concussion and/or sports safety, etc.; and
15. Any and all documents by and between the Highland School District, its school board, its Superintendent, its Athletic Directors and/or coaches and any contracted Athletic Trainers concerning concussion education and awareness, return to play protocol and guidelines and/or sports safety; and
16. Any and all videos taken by Highland School District representatives, employees or agents of Highland School District coaches reading the warning label on the back of football helmets to Highland School District student athletes.

(If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.)

Page 2 of 2
(Add pages as required)

SHORT TITLE: Newman, et al. v. Highland School District No. 203	CASE NUMBER 12-2-03162-1
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ATTACHMENT (Number): 5*(This Attachment may be used with any Judicial Council form.)*

ATTORNEYS FOR PLAINTIFFS:

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 Fred P. Langer
 Nelson Blair Langer Engle, PLLC
 1015 NE 113th Street
 Seattle, WA 98125
 (206) 623-7520
 MichaelN@NBLELaw.com
 FredP@NBLELaw.com

Richard H. Adler, Esq.
 Arthur Leritz, Esq.
 Melissa D. Carter, Esq.
 Adler Giersch, PS
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 Seattle, WA 98109-4619
 (206) 682-0300
 RAdler@adlergiersch.com
 ALeritz@adlergiersch.com
 MDCarter@adlergiersch.com

ATTORNEYS FOR DEFENDANT:

Mark S. Northcraft, Esq.
 Andrew T. Biggs, Esq.
 Northcraft, Bigby & Biggs, PLLC
 819 Virginia Street, Suite C-2
 Seattle, WA 98101-4421
 (206) 623-0229
 mark_northcraft@northcraft.com
 andrew_biggs@northcraft.com

(If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.)

Page 1 of 1*(Add pages as required)*

EXHIBIT

3

Issued by the
**SUPERIOR COURT FOR THE STATE OF WASHINGTON
YAKIMA COUNTY**

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 governmental agency,

Defendant.

CAUSE NO.: 12-2-03162-1

**SUBPOENA FOR CONTINUATION OF VIDEO
DEPOSITION DIRECTED TO: SHANE ROY**

(CR 30(b)(8)(A))

TO: Shane Roy
757 N. Cedar Street
Colville, WA 99114-9471

YOU ARE COMMANDED to appear in the Superior Court of the State of Washington at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a VIDEO DEPOSITION in the above case.

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

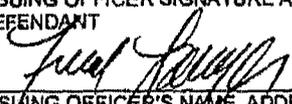
PLACE OF DEPOSITION City Hall 170 S. Oak Colville, WA 99114	DATE AND TIME January 31, 2014 @ 10:00 a.m.
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YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or tangible things at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
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YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)  Attorney for Plaintiffs	DATE January 4, 2014
---	-------------------------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Fred P. Langer, Nelson Blair Langer Engle, PLLC, 1015 NE 113th Street, Seattle, WA 98125; (206) 623-7520; WSBA #25932
Michael Nelson, Nelson Blair Langer Engle, PLLC, 1015 NE 113th Street, Seattle, WA 98125 (206) 623-7520; WSBA 6027

PROOF OF SERVICE

DATE		PLACE	
SERVED			
SERVED ON (PRINT NAME)		MANNER OF SERVICE	
SERVED BY (PRINT NAME)		TITLE	

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the State of Washington that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ DATE/PLACE

SIGNATURE OF SERVER

ADDRESS OF SERVER

CR 45, Sections (c) & (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce and all other parties, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance;
- (ii) fails to comply with RCW 5.56.010 or subsection (c)(2) of this rule;
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden, provided that, the court may condition denial of the motion upon a requirement that the subpoenaing party advance the reasonable cost of producing the books, papers, documents, or tangible things.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

CERTIFICATE OF SERVICE

I, Sabrina Y. Horne, hereby certify that on the date set forth below, I served the above-referenced document on the interested parties in this action in the manner described below and addressed as:

Mark S. Northcraft, Esq. Andrew T. Biggs, Esq. Northcraft, Bigby & Biggs, PLLC 819 Virginia Street, Suite C-2 Seattle, WA 98101-4421 <u>mark_northcraft@northcraft.com</u> <u>marks_northcraft@northcraft.com</u> <u>andrew_biggs@northcraft.com</u> <input type="checkbox"/> ABC Messenger <input type="checkbox"/> First Class mail postage prepaid <input checked="" type="checkbox"/> Email	
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I declare under penalty of perjury under the laws of the State of Washington this ^{8th} day of January, 2014, at Seattle, Washington.



Sabrina Y. Horne

EXHIBIT

4

Judge Blaine G. Gibson

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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 HIGHLAND SCHOOL
DISTRICT'S SECOND SET OF
INTERROGATORIES TO PLAINTIFFS
RANDY AND MARLA NEWMAN AND
ANSWERS THERETO**

TO: Randy Newman and Marla Newman, Plaintiffs

AND TO: Fred P. Langer, Michael E. Nelson, Richard H. Adler, Arthur Leritz, and Melissa Carter,
Attorneys for Plaintiffs

In accordance with Civil Rules 26, 33, and 34, please answer the following Interrogatories fully,
under oath, within thirty (30) days of the date of service upon you. These Interrogatories are continuing

**DEFENDANT HIGHLAND SCHOOL DISTRICT'S SECOND
SET OF INTERROGATORIES TO PLAINTIFFS RANDY AND
MARLA NEWMAN AND ANSWERS THERETO - 1**

NORTHCRAFT, BIGBY & BIGGS, P.C.
819 Virginia Street / Suite C-2
Seattle, Washington 98101
tel: 206-623-0229
fax: 206-623-0234

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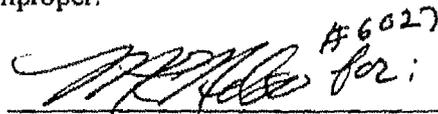
I. INTERROGATORIES

IN CONNECTION WITH ANSWERING THESE INTERROGATORIES, PLEASE REFER TO THE DEFINITIONS SET FORTH ABOVE, INCLUDING BUT NOT LIMITED TO THE DEFINITION OF "IDENTIFY."

INTERROGATORY NO. 18: Describe with particularity the knowledge and information you expect to elicit from Dustin Shafer in his third deposition and why this knowledge and information was not obtained during Mr. Shafer's first and second depositions.

ANSWER:

Objection. Plaintiffs object to the Interrogatory as it violates CR 26(b), seeks mental impressions of counsel, violates the attorney-client privilege, is not reasonably calculated to lead to the discovery of admissible evidence and is otherwise improper.

 #6027
for:

Melissa D. Carter, WSBA #36400

Without waiving said objection and subject to the same, Plaintiffs state:

As Defendant is aware, the Court concluded on September 27, 2013 that Plaintiffs were indeed prejudiced by Defendant's attorneys' decision to represent the Highland School District and coaches employed by the Defendant School District concurrently. See attached the Transcript from the September 27, 2013 hearing at 74:7-81:25; 117:15-120; 143:1-145:25, attached hereto as *Exhibit 1*. See also the Court Order dated September 27, 2013, attached hereto as *Exhibit 2*.

CERTIFICATION OF ATTORNEY

We are the attorneys for Plaintiffs in this matter, and we hereby certify that we have read the foregoing Defendant Highland School District's Second Set of Interrogatories to Plaintiffs Randy and Marla Newman, and the answers thereto, and believe that the same are in compliance with CR 26(g).

DATED this 14th day of January, 2014.

NELSON BLAIRE LANGER ENGLE, PLLC



Fred P. Langer, WSBA #25932
Michael E. Nelson, WSBA #6027
Attorneys for Plaintiffs

ADLER GIERSCH, PS



Richard H. Adler, WSBA #10961
Arthur Leritz, WSBA #29344
Melissa D. Carter, WSBA #36400
Attorneys for Plaintiffs

DEFENDANT HIGHLAND SCHOOL DISTRICT'S SECOND SET OF INTERROGATORIES TO PLAINTIFFS RANDY AND MARLA NEWMAN AND ANSWERS THERETO - 7

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tel: 206-623-0229
fax: 206-623-0234

EXHIBIT

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SUPERIOR COURT OF WASHINGTON, YAKIMA COUNTY

MATTHEW A. NEWMAN, an)
 incapacitated adult; and RANDY)
 NEWMAN AND MARLA NEWMAN,)
 parents and guardians of said)
 incapacitated adult,) No. 12-2-03162-1
)
 Plaintiff(s),)
)
 vs.)
)
 HIGHLAND SCHOOL DISTRICT NO.)
 203, a Washington State)
 government agency,)
)
 Defendant (s).)



TRANSCRIPT OF PROCEEDINGS

HEARING

BEFORE THE HONORABLE JUDGE BLAINE G. GIBSON

SEPTEMBER 27, 2013

RECORDING TRANSCRIBED BY: ANDREA D. FAUBION, CCR 2843



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1 the rules that apply to the judges say if a judge
2 perceives there's been an ethical violation, the judge
3 can take an appropriate action. Now, what an
4 appropriate action is doesn't really say.

5 MR. BIGGS: Right.

6 THE COURT: And maybe that's simply
7 reporting somebody to the bar association, whatever,
8 but it -- again, my concern here is that we have a
9 timely, efficient, and fair trial. And what I'm trying
10 to figure out is how do we work our way through this
11 whole mess and get to that goal.

12 MR. BIGGS: Your Honor --

13 THE COURT: Let me finish what I --

14 MR. BIGGS: Yes.

15 THE COURT: -- where I was going with
16 this thing.

17 MR. BIGGS: I'm sorry.

18 THE COURT: Okay. I'll back up on
19 saying there's a conflict. What I'm going to say is
20 what I said before. It was a really bad idea to
21 represent those because of exactly what has happened,
22 because it opens up counsel to arguments that -- that,
23 in fact, you used the privilege to disguise or -- or to
24 cloud what -- whatever it was that transpired between
25 you and the witnesses. With a witness who you don't



1 represent, the other attorney can say, well, what did
2 this attorney talk to you about, what did he tell you.
3 And by saying, well, I represent this, then you -- then
4 you prevent that and you open yourself up to that
5 argument. And by opening yourself up to that argument,
6 you hurt your client, the school district. So that's
7 my concern.

8 So I'm -- what I am going to say is,
9 Mr. Northcraft, you and your firm are not going to
10 represent any more witnesses in this case. I'm
11 prohibiting you from representing any witnesses in this
12 case.

13 If they want to have independent counsel,
14 they're free to get independent counsel. And I suppose
15 if -- if the insurance company wants to provide
16 independent counsel for them, that's their decision.
17 I'm not saying they can't do that, but your firm's not
18 going to do it.

19 MR. NORTHCRAFT: Right. And I
20 completely understand, Your Honor. And I don't have
21 anything more to say about what I was thinking than
22 I've already told you.

23 THE COURT: And I understand that. And
24 I understand that --

25 MR. NORTHCRAFT: But I do have one thing



1 where allegations come up that employees were somehow
2 intimidated --

3 MR. BIGGS: Sure.

4 THE COURT: -- led to believe that if
5 they didn't testify a certain way, then their jobs
6 might be at -- at issue and so on.

7 And so given where we are, you might be -- you
8 might be well-advised to see if you could get somebody
9 else to represent them so that simply nobody can make
10 those allegations. That's -- that's a suggestion. I'm
11 not ordering it.

12 MR. BIGGS: That's why I asked the
13 question, just to make sure where you are.

14 THE COURT: So I'm denying the motion to
15 disqualify Mr. Northcraft. I've expressed my concerns.
16 I think there are potential ethics issues here. I
17 don't know what the truth is. I don't think I need to
18 decide the truth on those issues, because they're
19 peripheral to the case that I'm trying to get resolved
20 here.

21 If somebody feels ethics rules have been
22 violated, they're free to report somebody to the bar
23 association. That's up to -- that's up to the people
24 involved.

25 I can -- I don't know what else I can say



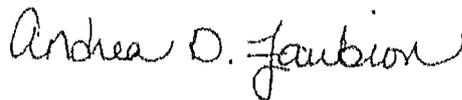
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TRANSCRIPTION CERTIFICATE

I, ANDREA D. FAUBION, the undersigned Certified Court Reporter, pursuant to RCW 5.28.010 authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify:

That the foregoing transcript was transcribed under my direction; that the transcript is true and accurate to the best of my knowledge and ability to hear the audio; that I am not a relative or employee of any attorney or counsel employed by the parties hereto; nor am I financially interested in the event of the cause.

WITNESS MY HAND AND DIGITAL SIGNATURE this 20th day of October, 2013.



ANDREA D. FAUBION,
Washington State Certified Court Reporter, #2843
afaubion@yomreporting.com



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Judge Blaine G. Gibson
Hearing Date: 1/24/14
Hearing Time: 2:00 p.m.

F I L E D
JAN 16 2014

KIM M. EATON, YAKIMA COUNTY CLERK

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 HIGHLAND SCHOOL
DISTRICT'S MOTION FOR A PROTECTIVE
ORDER**

I. RELIEF REQUESTED

Defendant Highland School District respectfully requests that this Court issue a protective order relating to the Interrogatory question specified below, and relating to specific lines of questioning anticipated in the continued depositions of coaches Mr. Shafer and Mr. Roy.

II. STATEMENT OF FACTS

The Court will surely recall that the parties extensively briefed and argued the issues surrounding the application of the work product doctrine as part of previous motions to this Court. Following that

**DEFENDANT HIGHLAND SCHOOL DISTRICT'S
MOTION FOR A PROTECTIVE ORDER - 1**
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NORTHCRAFT, BIGBY & BIGGS, P.C.
819 Virginia Street / Suite C-2
Seattle, Washington 98101
tel: 206-623-0229
fax: 206-623-0234

1 argument and the resulting order, the plaintiffs have renewed their efforts to obtain information that is
2 protected. However, unlike the previous motions, the basis for protecting the information is different:
3 the information is protected by the attorney-client privilege that exists between the Highland School
4 District and its attorneys. As is more fully described below, that privilege serves to bar inquiries relating
5 to certain types of communications between the School District's counsel and non-parties.

6 On December 19, 2013, the plaintiffs' counsel served the Plaintiffs Third Interrogatories and
7 Requests for Production to Defendant Highland School District. (Declaration of Jenna M. Wolfe in
8 Support of Defendant Highland School District's Motion for a Protective Order , hereinafter "Wolfe
9 Decl.", Ex. 1 at 16). The interrogatories and requests for production follow the same pattern. (Id.).

10 **INTERROGATORY NO. 1:** During the time period when
11 unrepresented by counsel, with regard to any communications between
12 **Josh Borlund** and anyone employed by or on behalf of the law firm of
13 Northcraft, Bigby & Biggs[, P.C.] relating to Matthew Newman and/or the
14 instant lawsuit, including *but not limited to* Mark Northcraft, Aaron Bigby,
15 Andrew Biggs, Michelle Tomczak and Lilly Tang, please indicate:

- 13 a. The date of said communication;
- 14 b. The persons involved in the conversation;
- 15 c. The details of the conversation.

15 **ANSWER:**

16 **REQUEST FOR PRODUCTION NO. A:** During the time period when
17 unrepresented by counsel, please produce copies of all communications, in
18 any form, between **Josh Borlund** and anyone employed by or on behalf of
19 the law firm of Northcraft, Bigby & Biggs[, P.C.] relating to Matthew
20 Newman and/or the instant lawsuit, including *but not limited to* Mark
21 Northcraft, Aaron Bigby, Andrew Biggs, Michelle Tomczak and Lilly
22 Tang. Also produce all documents or other material shared with **Josh
23 Borlund** for his review relating to this lawsuit and/or Matthew Newman.

21 **RESPONSE:**

22 **REQUEST FOR PRODUCTION NO. B:** During the time period when
23 unrepresented by counsel, please produce any statements or declarations,

24 **DEFENDANT HIGHLAND SCHOOL DISTRICT'S**
25 **MOTION FOR A PROTECTIVE ORDER - 2**
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819 Virginia Street / Suite C-2
Seattle, Washington 98101
tel: 206-623-0229
fax: 206-623-0234

1 written, recorded or in any other format, from **Josh Borlund** relating to
2 Matthew Newman and/or this lawsuit.

3 **RESPONSE:**

4 (Wolfe Decl., Ex. 1 at 7:2-18). The other interrogatories and requests for production follow the same
5 pattern but apply to Matt Bunday; Justin Burton; Eric Diener; Thomas Hale; Shane Roy; Dustin Shafer;
6 and all former Highland School District coaches, former assistant coaches, or former football personnel
7 other than those named above. (Id., Ex. 1). The final request for production breaks pattern, and asks for
8 the coaches' handbook. (Id., Ex. 1 at 13-14).

9 Around the same time, the plaintiff's counsel noted the third deposition of Dustin Shafer. (Id.,
10 Ex. 2). Dustin Shafer's third deposition was noted for January 23, 2014. (Id.). Attached as Attachment
11 3 to the Deposition Subpoena was a list of "things to be produced." (Id., Ex 2). Attachment 3 included
12 16 entries, including requests for "[a]ll emails, correspondence, cell phone call records and texts to and
13 from attorneys and non-attorneys at the firm of Northcraft, Bigby & Biggs[, P.C.], including but not
14 limited to and from attorneys Mark Northcraft and Andrew Biggs." (Id., Ex. 2 at 3). Finally, the
15 plaintiff's counsel noted a second deposition for Shane Roy. (Id., Ex. 3).

16 It is clear that the plaintiffs intend to address a host of communications between the School
17 District's attorneys and the coaches who are at the heart of the plaintiffs' claims. Not only do their most
18 recent round of discovery requests ask for the communications between the School District's attorneys
19 and the former coaches, including Dustin Shafer and Shane Roy, but also, when asked the purpose of a
20 third deposition of Dustin Shafer, the plaintiffs' counsel objected on the grounds of work product. (Id.,
21 Ex. 4 at 6:9-10). Those inquiries must not be permitted.

22 **III. STATEMENT OF ISSUES**

- 23 1. Whether the communications between the former employees of Highland School District
24 and the law firm of Northcraft, Bigby & Biggs, P.C. are privileged when both the

24 **DEFENDANT HIGHLAND SCHOOL DISTRICT'S**
25 **MOTION FOR A PROTECTIVE ORDER - 3**
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1 corporate employees who communicated with counsel, regarding the scope of their
2 corporate duties, helping the corporation's attorney formulate legal advice, prohibiting
3 questioning about those communications during discovery?

- 4 2. Whether the requested documents are protected by work product, when they were
5 prepared in anticipation of litigation, they contain attorney mental thoughts and
6 impressions, and the plaintiffs' counsel have had ample opportunity to depose the
7 formers coaches – some of them twice – regarding the training they received and the
8 events that unfolded?

9 IV. EVIDENCE RELIED UPON

- 10 1. The Declaration of Jenna M. Wolfe in Support of Defendant Highland School district's
11 Motion for a Protective Order with exhibits attached; and
12 2. The pleadings and files herein.

13 V. ARGUMENT AND AUTHORITY

14 On September 27, 2013, this Court addressed the issue of whether the School District's attorneys
15 should simultaneously represent any former employees of the Defendant Highland School District.
16 Finding that there was at least an appearance of a potential conflict of interest, the Court answered that
17 question in the negative. (Id., Ex. 5 at 133:18-19; 137:14-24). The Court did not, however, consider the
18 scope of the attorney-client privilege between the Highland School District and its attorneys, and what
19 affect that might have on the issues at hand.

20 The School District's counsel have fully complied with the Court's decision and they have not
21 represented the coaches or any other former employees in any way. Because the plaintiffs' attorneys
22 have made it abundantly clear that they intend to invade other privileged areas, the School District had
23 no option but to file this motion and ask the Court to rule on the issue of the School District's attorney-
24 client privilege. The School District asserts its attorney-client privilege over the communications
25 between its counsel and its former employees, and attorney work-product doctrine also protects all

26 **DEFENDANT HIGHLAND SCHOOL DISTRICT'S**
27 **MOTION FOR A PROTECTIVE ORDER - 4**
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1 tangible statements and communications because they contain the mental impressions of the School
2 District's counsel.

3 Considering the ample amount of protection offered by attorney-client privilege and the work-
4 product doctrine, counsel for Highland School District were already preparing this motion for protective
5 order when the plaintiffs' counsel filed their renewed motion to disqualify. Fortuitously, they can be
6 heard and argued on the same day at the same hearing.

7 Discovery is limited to "any matter, **not privileged**, which is relevant to the subject matter
8 involved in the pending action, whether it relates to the claim or defense of the party seeking discovery
9 or to the claim or defense of any other party . . ." (CR 26(b)(1)(emphasis supplied). Therefore, a party
10 is not entitled to discovery of information from privileged sources. (*See Dana v. Piper*, 173 Wn. App.
11 761, 295 P.3d 305, *review denied*, 308 P.3d 642 (2013)). During discovery, a party may file a protective
12 order. (CR 26(c)).

13 Upon motion by a party or by the person from whom discovery is sought,
14 and for good cause shown, the court in which the action is pending or
15 alternatively, on matters relating to a deposition, the court in the county
16 where the deposition is to be taken may make any order which justice
17 requires to protect a party or person from annoyance, embarrassment,
18 oppression, or undue burden or expense, including one or more of the
19 following: (1) **that the discovery not be had**; (2) that the discovery may
20 be had only on specified terms and conditions, including a designation of
21 the time or place; (3) that the discovery may be had only by a method of
22 discovery other than that selected by the party seeking discovery; (4) **that**
23 **certain matters not be inquired into, or that the scope of the discovery**
24 **be limited to certain matters**; (5) that discovery be conducted with no
25 one present except persons designated by the court; (6) that the contents of
a deposition not be disclosed or be disclosed only in a designated way; (7)
that a trade secret or other confidential research, development, or
commercial information not be disclosed or be disclosed only in a
designated way; (8) that the parties simultaneously file specified
documents or information enclosed in sealed envelopes to be opened as
directed by the court.

1 (CR 26(c) (emphasis supplied)). Here, the Defendant Highland School District moves this Court for a
2 protective order that either discovery not be had or that certain matters not be inquired into. The good
3 cause for the protective order is that the discovery sought is privileged, protected by attorney-client
4 privilege, and it is work-product, containing defense counsel's mental thoughts and impressions.

5 A. Defendant Highland School District's Attorney-Client Privilege

6 "The attorney client privilege is the oldest of the privileges for conditional communications
7 known to the common law.'" (*Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (citations omitted)). "Its
8 purpose is to encourage full and frank communications between attorneys and their clients and thereby
9 promote broader public interests in the observance of the law and administration of justice. (*Id.*).

10 Over thirty years ago, the United States Supreme Court in *Upjohn Co. v. U.S.* addressed the issue
11 of the proper scope of the attorney-client privilege in the corporate context (and of course, the School
12 District is a municipal corporation). (*Upjohn*, 449 U.S. 383). In *Upjohn*, the Supreme Court held that
13 the communications between a corporate defendant's employees and counsel were protected by the
14 attorney-client privilege. (*Id.*). Specifically, "privilege applies to communications by any corporate
15 employee, regardless of position when the communications concern matters within the scope of the
16 employee's corporate duties and the employee is aware that the information is being furnished to enable
17 the attorney to provide legal advice to the corporation." (*Admiral Ins. Co. v. U.S. Dist. Court for Dist. of*
18 *Arizona*, 881 F.2d 1486, 1492 (9th Cir. 1989) (explaining the holding in *Upjohn*, 449 U.S. 383)).

19 In arriving at their decision, the Supreme Court noted that the relevant necessary information
20 does not only relate to high-level employees and directors, but it may be available from anyone, from
21 top level executives to non-management. (*Upjohn*, 449 U.S. at 391). In the corporate context,
22 "employees beyond the control group as defined by the court below - - 'officer and agents . . .
23 responsible for directing [the company's] actions in response to legal advice' - who will possess the

24 **DEFENDANT HIGHLAND SCHOOL DISTRICT'S**
25 **MOTION FOR A PROTECTIVE ORDER - 6**
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1 information needed by the corporation's lawyers." (*Id.*). Therefore the "[m]iddle-level and lower-level
2 employees can, by actions within the scope of their employment, embroil the corporation in serious legal
3 difficulties..." (*Id.*). It is well-understood that, as legal entities, corporations act through all their
4 employees, and not just the upper echelon of management. In the context of addressing how a
5 corporation's attorney can properly prepare for and defend the corporation in litigation, the court noted
6 that "it is only natural that these [middle and lower level] employees would have the relevant
7 information needed by corporate counsel if he is adequately to advise the client with respect to actual or
8 potential difficulties." (*Id.*). Such information is protected from discovery by the attorney-client
9 privilege available to the corporation.

10 In *Upjohn*, for example, "[i]nformation, not available from upper-echelon management, was
11 needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign
12 laws, currency regulations, duties to shareholders, and potential litigations in each of these areas."(*Id.* at
13 394). The at issue communications were questionnaires from the corporate counsel to various
14 employees regarding an internal investigation into "questionable payments." (*Id.* at 386-87). The
15 questionnaires sought "detailed information concerning such payments," were categorized as highly
16 confidential, and sent directly to corporate counsel. (*Id.*). Those communications – questionnaires –
17 "concerned matters within the scope of the employees' corporate duties, and the employees themselves
18 were sufficiently aware that they were being questioned in order that the corporation could obtain legal
19 advice." (*Id.* at 394). The communications were covered by attorney-client privilege, because they were
20 made pursuant to explicit confidentiality instructions, which were "[c]onsistent with the underlying
21 purposes of the attorney-client privilege." (*Id.* 395). The communications in *Upjohn* between the lower
22 level employees and corporate counsel were "protected against compelled disclosure." (*Id.*)

1 The attorney-client privilege specifically protects the disclosure of *communications* (*Id.*) but it
2 does not prevent the plaintiffs from inquiring about the underlying *facts* of the case. (*Id.*). According to
3 the Supreme Court “[t]he client cannot be compelled to answer the question, ‘what did you say or
4 write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge, merely
5 because he incorporated a statement of such fact into his communications with his attorney.” (*Id.* at 396
6 (citation omitted)) (emphasis added).

7 Within a year of *Upjohn*, the Ninth Circuit made the logical leap and extended the *Upjohn*
8 rational from only shielding communications with current employees, to include former corporate
9 employees as well. (*Admiral Ins. Co.*, 881 F.2d at 1493 (citing *In re Coordinated Pretrial Proceedings*
10 *In Petroleum Products Antitrust Litigation, the City of Long Beach v. Standard Oil Company*, 659 F.2d
11 1355 (9th Cir. 1981) *cert. denied*, 455 U.S. 990 (1982))). Specifically, “[f]ormer employees, as well as
12 current employees, may possess the relevant information needed by corporate counsel to advise the
13 client with respect to actual or potential difficulties.” (*Id.* (citing *Coordinated*, 659 F.2d at 1361 n. 7)).

14 Shortly thereafter, *Upjohn* was adopted by the Washington Supreme Court. (*Wright v. Group*
15 *Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984)). The Washington Supreme Court reiterated the
16 *Upjohn* rule in regards to an attorney’s communications with a corporation’s current and former
17 employees. (*Wright*, 103 Wn.2d at 194-95). In *Wright*, the Washington Supreme Court held “[t]he
18 attorney-client privilege, RCW 5.60.060(2), provides that an attorney shall not, without the consent of
19 his client, be examined to any *communications* made by the client to him or his advice thereon in the
20 course of professional employment.” (*Id.* at 194-95). The court opined that “[w]hile the attorney-client
21 privilege may in certain instances extend to lower level employees not in a “control group,” . . . the
22 privilege extends only to protect communications and not the underlying facts.” (*Id.* at 195 (citing
23 *Upjohn*, 449 U.S. 383)). The Washington Supreme Court reaffirmed the Supreme Court’s distinction

24 **DEFENDANT HIGHLAND SCHOOL DISTRICT’S**
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1 between communications and facts, stating that a client cannot be compelled to answer the question
2 “What did you say or write to the attorney?”. (*Id.* at 195). Although the Supreme Court in *Wright* held
3 that the attorney-client privilege did not apply to the case, because the attorney sought to discover facts
4 incident to the lawsuit and not privileged corporate confidences, the *Upjohn* rule was recognized and
5 followed in Washington. (*Id.*).

6 Well-known legal commentator Mr. Karl B. Tegland has also discussed the implications of the
7 *Upjohn* decision in Washington. In the Fifth Edition of Washington Practice Evidence Law and
8 Practice, Chapter 5, Privileges, Mr. Tegland includes a discussion of “Communications to which
9 privilege applies – Corporate clients.” (5 Karl B. Tegland, Washington Practice: Evidence Law and
10 Practice § 501.13, at 152-54 (5th ed. 2007)). To summarize, he states

11 The corporate employees who communicated with counsel cannot be
12 questioned about those communications during formal discovery, or on an
13 informal *ex parte* basis. Under some circumstances, however, the same
employees may be questioned about the underlying facts (as opposed to
being questioned specifically about communications with counsel).

14 (*Id.* at 153-54 (citations omitted)). Simply, Washington recognizes that corporate attorney-client
15 privilege may extend to communications between the corporation’s counsel and its employees, including
16 former employees. (*See also Wright*, 103 Wn.2d 192).

17 Here, the Defendant Highland School District asserts attorney-client privilege over the
18 communications between its legal representatives – the law firm of Northcraft, Bigby & Biggs, P.C. —
19 and its former employees. The communications are privileged, because they satisfy the rule set forth in
20 *Upjohn* and its progeny. To reiterate, the attorney-client privileges applies to communications between
21 any corporate employee or former employee when those communications concern (1) matters within the
22 scope of the employee’s corporate duties; and (2) the employee is aware that the information is being
23 furnished to enable the attorney to provide the corporation with legal advice. (*Admiral Ins. Co.*, 881 F.2d

24 **DEFENDANT HIGHLAND SCHOOL DISTRICT’S**
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1 1486, 1492 (9th Cir.1989) (explaining the holding in *Upjohn*, 449 U.S. 383); *see also U.S. v. Graf*, 610
2 F.2d 1148 (reiterating that “a corporation’s privilege extends to the communications between corporate
3 employees and corporate counsel ‘made at the direction of corporate superiors in order to secure legal
4 advice’ (citations omitted)); *see also U.S. v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996)(stating “[t]he
5 attorney-client privilege applies to communications between corporate employees and counsel, made at
6 the direction of corporate superiors in order to secure legal advice. . . [t]his ‘same rationale applies to the
7 ex-employees.’” (citing *In re Coordinated Pretrial Proceedings, etc.*, 658 F.2d 1355, 1361 n. 7 (9th
8 Cir.1981))).

9 The communications at issue concern matters within the scope of each former coach’s corporate
10 – school -- duties. As a football coach, the former employees’ duties included communication with the
11 team, managing practices and games, and being on the lookout for concussions. The events surrounding
12 Matthew Newman’s injuries and any communications with their former employer’s attorney involving
13 his injuries fall squarely within the scope of the former coaches’ school duties.

14 Additionally, at the time of the communications, the former employees were aware that Mark
15 Northcraft specifically requested the information to provide the Defendant Highland School District
16 with legal advice and a complete defense against the plaintiffs’ inaccurate and insupportable claims.
17 Mr. Northcraft represented the school district and interviewed former coaches to determine what the
18 coaches knew, and what happened leading up to Matthew Newman’s injury.

19 The plaintiffs’ counsel does not even try to hide the fact that the recent discovery is an attempt to
20 get at the communications between the coaches and the Defendant’s counsel. (Wolfe Decl., Ex. 1, Ex. 2,
21 Ex. 3). Consequently, this Court should grant a protective order, preventing the plaintiffs’ counsel from
22 inquiring into the communications between the Defendant’s former employees and counsel, because
23 those communications are protected by attorney-client privilege.

24 **DEFENDANT HIGHLAND SCHOOL DISTRICT’S**
25 **MOTION FOR A PROTECTIVE ORDER - 10**

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1 B. Work Product Protection Attorney Mental Thoughts and Impressions

2 Not only are the communications between the former coaches and defense counsel protected by
3 attorney-client privileges, but they also contain defense counsels' mental thoughts and impressions and
4 are protected by the work-product protection available to the School District.

5 In *Hickman*, the Supreme Court “‘rejected an attempt without purported necessity or
6 justification, to secure written statements, private memoranda and personal recollections prepared or
7 formed by an adverse party’s counsel in the course of his legal duties.’” (*Upjohn*, 449 U.S. at 398
8 (describing *Hickman v. Taylor*, 329 U.S. 495, 510 (1947))). In *Hickman* and reemphasized by *Upjohn*,
9 the court noted that “‘it is essential that a lawyer work with a certain degree of privacy’ and reasoned
10 that if discovery of the material sought [mental thoughts and impressions] were permitted ‘much of what
11 is now put down in writing would remain unwritten . . . [and] an attorney’s thoughts . . . would not be
12 his own.’” (*Id.* at 398 (citing *Hickman*, 329 U.S. at 511)). Naturally, “[f]orcing an attorney to disclose
13 notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal
14 the attorney’s mental processes.” (*Id.* at 399 (citing *Hickman*, 329 U.S. at 516-17)). In fact, “[a]ny notes
15 written by the attorney would be in his or her own language and permeated with his or her inferences.”
16 (*See Soter v. Cowles*, 162 Wn.2d 716, 737, 174 P.3d 60 (2007) (citing *Hickman*, 329 U.S. at 399-400)).
17 Numerous courts, including the Washington Supreme Court, have reaffirmed the “‘strong public policy’
18 underlying the work product doctrine.” (*Id.* (citations omitted)).

19 “Washington’s Civil Rule (CR) 26(b)(4) governs discovery of materials generated in preparation
20 for trial, codifying the work product protection . . .” (*Soter*, 162 Wn.2d at 733). Pursuant to CR 26(b)(4)
21 *Trial Preparation Materials* . . . “a party may obtain discovery of documents and tangible things
22 otherwise discoverable under subsection(b)(1) of this rule and prepared in anticipation of litigation . . .
23 only upon a showing that the party seeking discovery has substantial need of the materials in the

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1 preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent
2 of the materials by other means.” (CR 26(b)(4)). Federal cases are persuasive guidance in the realm of
3 work product, because CR 26(b)(4) “is nearly identical to Fed.R.Civ.P 26(b)(3).” (*Soter*, 162 Wn.2d at
4 739 (citations omitted)). Therefore, the Supreme Court in *Upjohn* and *Hickman* serve as “persuasive
5 guidance as to the application of [the] comparable state [work product] rule.” (*Id.*).

6 The Washington Supreme Court in *Soter* discusses whether “an attorney’s or a member of the
7 legal team’s notes from oral interviews constitute opinion work product that is almost always exempt
8 from discovery.” (*Id.* at 740). After analyzing the advisory committee notes, analysis of other prominent
9 commentators, and the analysis underlying the holdings in *Hickman* and *Upjohn*, commentators
10 concluded that “the mental impressions of an attorney or other representative of a party *and* notes or
11 memoranda prepared by the lawyer from oral communications should be **absolutely protected unless**
12 **the lawyer’s mental impressions are at issue.**” (*Id.*). In 1998, the Supreme Court adopted this
13 analysis, holding (1) mental impressions of an attorney are **absolutely protected** unless they are at
14 issue; (2) notes or memoranda prepared by an attorney from oral communications is **absolutely**
15 **protected**, unless the attorney’s mental impressions are directly at issue; (3) factual written statements
16 and other tangible items are subject to disclosure only upon the showing of substantial need and lack of
17 substantial equivalent without undue hardship.¹ (*Soter*, 162 Wn.2d at 740 (citations omitted))(emphasis
18 added). “Only in rare circumstances, for example when the attorney’s mental impressions are directly at
19 issue, can an attorney or legal team member’s notes reflecting oral communications be revealed.” (*Id.*)

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21
22 ¹ Although the analysis was specifically in the context of a public records request, it was not limited to public records
23 requests. (*Soter*, 62 Wn.2d at 740 (citations omitted)).

1 The bottom line is that work product “protects *documents* and tangible things prepared in anticipation of
2 litigation, and it protects those documents that tend to reveal an attorney’s thinking almost absolute.”
3 (*Id.* at 742).

4 In *Soter*, the Washington Supreme Court held that “all the notes taken by the attorneys or other
5 members of a legal team when interviewing witnesses constitute opinion work product that will be
6 revealed only in rare circumstances . . .” (*Id.* at 744). In *Soter*, the school district refused to produce 75
7 records on the grounds of work product and attorney-client privilege. (*Id.* at 723). The court held work
8 product applied, because “[t]he vast majority of the records requested in this case [were] handwritten
9 notes created by either the school district’s attorneys or by Prescott, the investigator hired by the
10 attorneys in anticipation of litigation.” (*Id.* at 743). Therefore, the “notes reflect[ed] the attorneys’ and
11 investigator’s thoughts regarding client and witnesses interviews.” (*Id.* at 743). In fact, much of the
12 notes were regarding conversations between the attorney and the investigator about witness interviews.
13 (*Id.*). Therefore, the comparing the sets of notes revealed “what information the attorney deemed
14 deemed particularly important, and conversely, what the attorney did not find important enough to
15 record.” (*Id.* at 744). The notes were protected on the grounds of work product, because they included
16 the attorney’s mental impressions. (*Id.*).

17 In this case, the interrogatories and requests for production ask for documents protected by the
18 work-product doctrine. The requested communications reveal the mental impressions of Highland
19 School District’s counsel, reflecting the thoughts and impressions for client and witness interviews, and
20 containing the attorney’s own language and permeated with his or her inferences. (*Upjohn*, 449 U.S.
21 383; *Hickman*, 329 US. 495; *Soter*, 162 Wn.2d at 737). For example, Mr. Northcraft’s conversations
22 with both Dustin Shafer and Shane Roy, contain Mr. Northcraft’s own language, are permeated with his
23 own inferences, and reflect his thoughts and impressions -- as they occur -- of the two coaches.

24 **DEFENDANT HIGHLAND SCHOOL DISTRICT’S**
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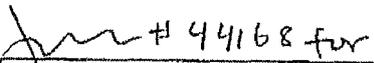
1 (Upjohn, 449 U.S. 383; Hickman, 329 US. 495; Soter, 162 Wn.2d at 737). Such opinion work product -
2 mental impressions - enjoys almost absolute privilege in Washington.

3 **VI. CONCLUSION**

4 The Defendant Highland School District respectfully requests that this Court grant a protective
5 order, protecting the Defendant Highland School District's former employee's conversations with its
6 own counsel under attorney-client privilege, and protecting the tangible documents and all
7 communications requested by plaintiffs' counsel that contain mental impressions and reflections under
8 work product. The plaintiffs' attempts to obtain the mental impressions of the School District's counsel,
9 and their attempts to invade the attorney-client privilege must be rejected.

10 DATED this 15th day of January, 2014.

11 NORTHCRAFT, BIGBY & BIGGS, P.C.

12  # 44168 for
13 Mark S. Northcraft, WSBA #7888
14 Andrew T. Biggs, WSBA #11746
15 Attorneys for Defendant Highland School District

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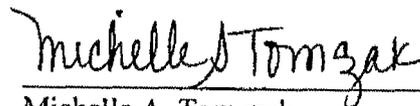
1 CERTIFICATE OF SERVICE

2 I, Michelle A. Tomczak, hereby certify under penalty of perjury under the laws of the state of
3 Washington that on January 15, 2014, I filed with the Court via Federal Express the original of the
4 foregoing and served a copy via email upon:

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19 

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24 DEFENDANT HIGHLAND SCHOOL DISTRICT'S
25 MOTION FOR A PROTECTIVE ORDER - 15
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

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 governmental
agency

Defendant.

NO. 12-2-03162-1

Court's Decision on Issue of Possible
Attorney-Client Privilege with Former
Employees of Defendant, and Other
Discovery Matters

In discovery, plaintiffs sought disclosure of communications between defense counsel and former employees made after the employment ended and not during the time defense counsel claims to have represented the former employees for purposes of their depositions. The defense claims all such communications are protected by the attorney-client privilege, relying on *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486 (1989). That case is distinguishable from the present case in that the employees in *Admiral Ins.* were interviewed by counsel for the employer

1 while they were still employed. They were then terminated after the
2 interviews. In the present case, the communications at issue all occurred
3 long after the employees had left the employer.

4 There is language in *Admiral Ins.* that may make it appear as though
5 the privilege always extends to former employees. For example, the
6 *Admiral Ins.* opinion quotes as follows from *In re Coordinated Pretrial*
7 *Proceedings*, 658 F.2d 1355 (9th Cir.1981) cert. denied, 455 U.S. 990, 102
8 S.Ct. 1615, 71 L.Ed.2d 850 (1982):

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

12 *Id.* at 1361 n. 7. However, the very next sentence makes it clear that the
13 *Coordinated Pretrial Proceedings* court is referring to communications that
14 occurred before the employment of the witnesses was terminated:

15 Again, the attorney-client privilege is served by the certainty that
16 conversations between the attorney and client will remain privileged
17 after the employee leaves.

18 *Id.* (Emphasis added).

19 The *Coordinated Pretrial Proceedings* opinion does not directly
20 address the issue at hand. Neither does *Admiral Ins.* Defendant also relies
21 on *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d
22 584 (1981), but that opinion is expressly limited to communications that
23 occurred while the witness was still employed. *Id.* at Fn 3. Furthermore,
24 Washington does not follow *Upjohn. Wright by Wright v. Group Health*
25 *Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984).

1 The defense has not cited any authority supporting the claim of an
2 attorney-client privilege protecting post-employment communications
3 between defense counsel and former employees of the defendant.

4 Therefore, the defendant must answer the discovery requests about those
5 communications that were made when defense counsel did not represent
6 the former employees for purposes of their depositions. Defense counsel
7 may not object to deposition questions about those communications based
8 upon a claim of attorney-client privilege. Defense counsel must also
9 disclose exactly when defense counsel represented each former employee.

10 This ruling does not change the prior ruling regarding discoverability
11 of attorney work product, such as statements taken from witnesses.

12 Apparently, at least some of the former employees will be deposed
13 again, and they will not be represented by defense counsel. If defense
14 counsel wishes to interpose any objections, other than routine objections
15 that would be waived if not made, such as form of the question, defense
16 counsel must explain the objection fully, and it must relate to the rights of
17 the school district, not the witness. Defense counsel shall not provide legal
18 advice to such witnesses, either before or during the depositions.

19
20
21 Dated this 28th day of January, 2014.
22
23

24 /s/ _____
25 BLAINE G. GIBSON
Superior Court Judge

NO. 32223-8-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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

Plaintiffs/ Respondent,

v.

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

Defendant/Petitioner,

Appeal from Superior Court of Yakima County

DEFENDANT'S MOTION FOR DISCRETIONARY REVIEW

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<i>U.S. v. Chen</i> 99 F. 3d 1495 (9 th Cir. 1996)	13

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A. IDENTITY OF PETITIONER

The Highland School District No. 203 ("District") asks this Court to accept review of the decision designated in Part B of this Motion.

B. DECISION

On January 24, 2014, Yakima Superior Court Judge, the Honorable Blaine Gibson, provided a partial oral decision regarding the District's Motion for a Protective Order. While refraining from fully ruling on the Defendant Highland School District's Motion for a Protective Order, Judge Gibson ruled that the District's counsel must disclose to the Plaintiffs' attorneys: (1) all dates of communication between counsel and the District's former coaches; (2) all people involved in those communications; and (3) all dates the District's counsel represented the District's former coaches. (See Appendix, at A-104).

On January 28, 2014, Judge Gibson provided the attorneys with the Court's Decision on Issue of Possible Attorney-Client Privilege with Former Employees of Defendant, and Other Discovery Matters ("Attorney-Client Privilege Decision"). (See Appendix, at A-103-105). The Court's Attorney-Client Privilege Decision denied the District's Motion for Protective Order. (Id.). Pursuant to this Order, as well as the Court's ruling on January 24, 2014, the Plaintiffs' counsel is allowed to ask the District's

former employees about their communications with the District's retained counsel, and the District's counsel is restrained from objecting to such questions on the grounds of attorney-client privilege. (Id.). The Court's Attorney-Client Privilege Decision also required the District's counsel to disclose exactly when they represented each former employee. (Id.). A copy of the decision is in Appendix at A-103-105.

C. ISSUES PRESENTED FOR REVIEW

1. In finding that Washington does not follow *Upjohn*, did the trial court commit obvious error when, in *Youngs v. Peacehealth*, the Washington Supreme Court explicitly acknowledged having adopted the reasoning from *Upjohn* regarding corporate attorney-client privilege?
2. In holding that the corporate attorney-client privilege does not apply to communications between former employees whose alleged negligent actions gave rise to the plaintiffs' claims against the District and the District's corporate counsel, did the trial court commit probable error by allowing the plaintiffs' attorneys to inquire into the District's attorney's communications with the District's aforementioned former employees?

D. STATEMENT OF THE CASE

On September 18, 2009, the Plaintiff, Matthew Newman, received serious permanent brain injuries while playing football in a high school football game. (See Appendix, at A-20-28). Three years later, Matthew Newman, who is an incapacitated adult, and his parents, Randy and Marla

Newman, who are his guardians, filed this lawsuit. (Id.). The Highland School District is the only named defendant. (Id.).

In those three years, some of Matthew Newman's former football coaches left the District and found employment elsewhere. (See Appendix, at A-111-12, A-211, A-215-16). For example, Matthew Newman's head football coach, Shane Roy, no longer works for the District. (See Appendix, at A-215-16). Similarly, assistant football coach, Dustin Shafer, no longer works for the District. (See Appendix, at A-111-12). Although Shane Roy and Dustin Shafer were employees of the District at the time of the injury, at the time of their conversations with the District's retained counsel, they no longer worked for the District. (See Appendix, at A-111-12; A-211, A-215-15).

During discovery, both Shane Roy and Dustin Shafer have been deposed. (See Appendix, at A-106-262). Shane Roy was deposed once. (Id. at A-203-62). Dustin Shafer was deposed twice. (Id. at A-106-202). For the purposes of their depositions and at the requests of the deponents, the District's counsel also represented them individually. (Id. at A-111, A-185, A-203). Naturally, the District's counsel objected when the Plaintiffs' counsel asked questions about the communications between the former coaches and District's counsel during the depositions. (Id. at A-111, A-189-90, A-229).

In a separate proceeding, the trial court held that the Districts' counsel was not allowed to represent former employees of the District for the purpose of their depositions. (See Appendix, at A-82). The order applies only to former employees. (See Appendix, at A-263).

Thereafter, the Plaintiffs' counsel propounded discovery seeking communications between the District's counsel and the District's former employees. (See Appendix, at A-48-63). They also noted the third deposition of Dustin Shafer and a second deposition Shane Roy, intending to ask about the communications between the deponents and the District's retained counsel. (See Appendix, at A-65-74).

Prompted by the discovery requests and depositions, the District filed a Motion for a Protective Order. (See Appendix, at A-29-43). Via the motion, the District's counsel asked the trial court, on the grounds of corporate attorney-client privilege, to protect the communications between the District's counsel and former coaches, for those periods of time during which the District's counsel did not represent the former employees for the purpose of their depositions. (Id.). The trial court denied the Motion for Protective Order. (See Appendix, at A-103-105). The trial court held that Washington does not follow *Upjohn* and ruled that the District's counsel must answer the discovery requests about the communications that were made when the District's counsel did not represent the former coaches for

the purposes of their depositions. (Id.). The trial court further ruled that the Districts' counsel may not object to deposition questions about those communications based on the attorney-client privilege afforded the District. (Id.).

Because the depositions of Shane Roy and Dustin Shafer were noted for within a week of the Court's Decision on the Issue of Possible Attorney-Client Privilege with Former Employees of Defendant, and Other Discovery Matters, the District's counsel moved to Shorten Time for Hearing Highland School District's Motion for Partial Stay of Discovery. (See Appendix, at A-85-88). On January 30, 2014, the District's Motion to Shorten Time was granted, and the trial court granted Defendant Highland School District's Motion for Partial Stay of Discovery. (See Appendix, at A-89-99). The partial stay of discovery, which stays discovery into communications between the District's retained counsel and former employees, expires on February 13, 2014, at 5:00 p.m. (Id. at A-98-99). Unless this Court either grants the District's Emergency Motion for Partial Stay of Trial Court Discovery Proceedings or accepts discretionary review during this two week time period, the Plaintiffs' counsel will have access the communications between the District's retained counsel and former employees as of February 13, 2014, at 5:00 p.m. (Id.).

It is clear from the record that the discovery dispute giving rise to the District's Notice of Discretionary Review, this Motion for Discretionary Review, and the District's Emergency Motion for Stay of the trial court's order is solely about the Plaintiffs' attorneys' attempts to obtain communications between the District's counsel and the District's former coaches, whose alleged acts and omissions give rise to the Plaintiffs' lawsuit against the District. It also is clear from the record that the Plaintiffs' counsel has never been prevented from discovering the facts of this case. Mr. Roy and Mr. Shafer have been deposed in this case a total of three times so far, and at no time has the District's counsel ever objected to the Plaintiffs' counsel asking questions about the facts of the case. (See Appendix, A-106 – 262). However, the District's counsel has consistently objected to questions and discovery seeking the disclosure of communications between counsel for the District and the former coaches. (Id. at A-111, A-189-90, A-229).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may accept discretionary review if the trial court has either “committed obvious error which would render further proceedings useless,” “committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act,” or “so far

departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court.” (RAP 2.3(b)(1) – (3)). The Court should accept review for these multiple reasons, as well as the fact that the legal issue presented for review is one of first impression in the State of Washington regarding the oldest of the common law privileges.

1. Corporate Attorney-Client Privilege: The Trial Court Committed Obvious Error By Holding Washington Does Not Follow *Upjohn*.

The trial court took a narrow view of corporate attorney-client privilege and committed obvious error by holding that Washington does not follow *Upjohn*. In *Upjohn Co. v. U.S.*, however, the United States Supreme Court specifically rejected the “narrow ‘control group test’” for corporate-attorney client privilege. (*Upjohn Co. v. U.S.*, 449 U.S. 383, 397 (1981)). The Supreme Court extended the attorney-client privilege to include communications from all types of employees, because “[i]n the corporate context . . . [the provider of information] . . . will frequently be employees beyond the control group as defined by the court below – ‘officers and agents . . . responsible for directing [the company’s] actions in response to legal advice’ – who will possess the information needed by the corporations’ lawyers.” (*Id.* at 391). The Supreme Court recognized that [m]iddle-level and indeed lower-level-employees can, by actions within the

scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have relevant information needed by corporate counsel . . .” (*Id.*). The Supreme Court held that the attorney-client privilege may apply to communications between the corporation’s counsel and control group, as well as mid-level and lower-level corporate employees. (*Id.* at 397). By rejecting the narrow control-group test for attorney-client privilege, the Supreme Court opined that it was not “consistent with ‘the principles of common law as ... interpreted ... in the light of reason and experience,’ Fed. Rule Evid. 501, [that] govern the development of law in this area.” (*Id.*).

As a result of *Upjohn*, the corporate attorney-client privilege “protects the disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. . .” (*Id.* at 395). Specifically,

[t]he protection of privilege extends only *communications* and not facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communications to his attorney.

(*Id.* at 395-96 (citing *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (q2.7) (E.D. Pa. 1962)). The Supreme Court reasoned that “[d]iscovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary.” (*Id.* at 396 (citing *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, concurring))).

Thirty years ago, the Washington Supreme Court acknowledged *Upjohn*. (*Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984)). In *Wright*, the Washington Supreme Court reiterated that “[t]he attorney-client privilege, RCW 5.60.060(2), provides that an attorney shall not, without the consent of his client, be examined as to any *communication* made by the client to him, or his advice given thereon, in the course of professional employment.” (*Id.* at 194-95). “[T]he attorney-client privilege may in certain instances extend to lower level employees not in a ‘control group.’” (*Id.* at 195 (citing *Upjohn*, 449 U.S. 383)). However, “[t]he privilege only extends to protect communications and not the underlying facts.” (*Id.*). In his incorrect ruling that *Upjohn* is not followed in Washington, Judge Gibson incorrectly interpreted *Wright*.

Five days before the Court’s Attorney-Client Privilege Decision, the Washington Supreme Court explicitly adopted the *Upjohn* reasoning regarding corporate attorney-client privilege. (*Youngs v. Peacehealth*, No. 87811-1, 2014 WL 265568 (Wash. Sup. Ct. Jan. 23, 2014). Specifically,

the Washington Supreme Court held that “[t]o protect the values underlying both physician-patient and attorney-client privileges, we adopt a modified version of the *Upjohn* test in this context.” (*Id.* at *2, ¶ 6).

In *Youngs*, the question before the Court was “whether *Loudon v. Mhyre*, 110 Wn.2d 675, 677, 756 P.2d 138 (1988), which prohibits defense counsel in a personal injury case from communicating ex parte with plaintiff’s nonparty treating physician, applies to such physicians when they are employed by a defendant.” (*Id.* at *1, ¶ 1). “Specifically, [the Washington Supreme Court was] asked whether *Loudon* bars ex parte communications between a physician and his or her employer’s attorney where the employer is a corporate and named defendant whose corporate attorney-client privilege likely extends to the physician, at least to certain subjects.” (*Id.*). In reaching its decision, the Washington Supreme Court reaffirmed that “[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to common law.” (*Id.* * 1, ¶ 2). “Then United States Supreme Court’s decision in *Upjohn*... holds that corporate attorney-client privilege extends to corporate clients. This remains the law today.” (*Id.* (citing *Wright*, 103 Wn.2d 192, 202)(emphasis added).

In sum, this Court should accept discretionary review, because the trial court obviously erred by failing to recognize that the Washington Supreme Court has for over thirty years recognized that *Upjohn* determines the scope of corporate attorney-client privilege. This obvious error could render future proceedings useless, because it guts the District's attorney-client privilege and allows the Plaintiffs' counsel to have access privileged information. Not only is this obvious error by the trial court, but also, the superior court has "so far departed from the accepted course of judicial proceedings" that the rulings "call for review by the appellate court." (RAP 2.3(b)(3)). The trial court deviated from the accepted course of judicial proceedings, because it failed to recognize the existence of the District's corporate attorney-client privilege.

2. **Corporate Attorney-Client Privilege: The Trial Court Committed Probable Error by Failing to Extend *Upjohn* to Protect Communications Between the District's Former Employees and the District's Retained Counsel.**

Although *Upjohn* only addressed communications with current employees, Chief Justice Burger recognized that corporate attorney-client privilege involves the communications with both current and former employees.

the Court should make it clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment.

(*Id.* at 402 (Burger, concurring)). Since Chief Justice Burger's concurrence both federal and state courts have applied corporate attorney-client privilege to communications with former employees. However, Washington has yet to rule on the issue of corporate attorney-client privilege and communications with former employees. Therefore, this Motion for Discretionary Review raises an issue of first impression.

Shortly after the *Upjohn* opinion, the Ninth Circuit protected attorney-client communications between corporate counsel and both current and former employees. (*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 rationale 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)). Clearly, the Ninth Circuit applies the *Upjohn* rationale to both current and former corporate employees.

Jurisdictions besides the Ninth Circuit have also naturally extended *Upjohn* to communications with former employees. For example, the Fourth Circuit held that communications between a former employee and outside counsel were protected by attorney-client privilege. (*In re Allen*, 106 F.3d 582, 605 – 607 (4th Cir. 1997)). In *In re Allen*, Barbara Allen, Esquire, was retained by the state Attorney General’s office as an independent consultant. (*Id.* at 598). She investigated “a situation of possible document mismanagement and confidentiality/security breaches.”

(*Id.*). At the end of her investigation, she was to provide a written report that included findings and recommendations. (*Id.*). The investigation was to be performed within her “capacity as a lawyer.” (*Id.*). She was Special Counsel to the Attorney General for purposes of the investigation.” (*Id.*).

As Special Counsel, she interviewed employees, including former Chief Deputy Attorney General Fran Hughes. (*Id.*). “Although Hughes served as a member of the Attorney General’s Office during the time frame relevant to the activities Allen investigated, Hughes was not employed by the Office at the time of her interview with Allen.” (*Id.* at 605). The Fourth Circuit held that the *Upjohn* analysis, which determines which employees fall within the scope of privilege, “applies equally to former employees.” (*Id.* at 606). To support their holding, the Fourth Circuit held:

the Attorney General’s Office employed Hughes during the time period in question and she possessed information relevant to Allen’s investigation. Allen interviewed Hughes at the direction of her client, in order to provide legal advice to her client. Moreover, Allen needed the information that Hughes could provide in order to develop her legal analysis for her client. Consequently, Allen’s notes and summary of her interview with Fran Hughes . . . are protected. . .

(*Id.*). As demonstrated by *In re Allen*, the important issue regarding former employees is not whether the person is still an employee when the communication between the former employee and corporate counsel occurs.

Instead the question is whether the former employee was the kind of employee who was at the center of the actions from which liability is asserted – was he an employee whose actions coincide with the alleged wrongdoing?

Washington's own Supreme Court has yet to specifically address the issue of whether corporate attorney-client privilege applies to communications with former employees. Although in *Wright v. Group Health Hosp.*, the Washington Supreme Court adopted the law set forth in the *Upjohn* opinion, the court did not decide the issues before it on the grounds of privilege. The court cited *Upjohn* with approval, in the context of whether a represented corporation's "current and former employees are 'clients' of the law firm for the purpose of attorney-client privilege." (*Id.* at 194) (emphasis added). The Washington Supreme Court recognized that RCW 5.60.060(2) provides that attorneys shall not be questioned with the consent of their client, be examined as to any *communications* made by the client to him, or advice given thereon in the course of professional employment. (*Id.* at 194-95). Simultaneously, the Washington Supreme Court also cited the *Upjohn* opinion with approval, stating "[w]hile the attorney-client privilege may in certain instances extend to lower level employees not in a 'control group,' . . . the privilege extends only to protect

communications and not the underlying facts.” (*Id.* at 195). Then the court repeated the distinction noted by the *Upjohn* Court:

“[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”

(*Id.* (citing *Upjohn*, at 395-96). After acknowledging the *Upjohn* Court’s distinction, the Washington Supreme Court distinguished *Wright* from *Upjohn*. (*Id.*). The Court explained in *Upjohn* the “communication” was the correspondence – *communications* -- between the corporation’s counsel and employees, whereas in *Wright*, the plaintiff’s attorney sought to interview Group Health Employees to discover *facts* of the incident and not corporate confidences. (*Id.*). Consequently, the court held that attorney-client privilege did not bar the plaintiff’s attorney from interviewing the Group Health’s employees. (*Id.*).

Therefore, the Washington Supreme Court adopted the *Upjohn* rule of corporate attorney-client privilege in the context of communications with corporate employees. However, the facts presented in *Wright* did not require the Court to actually apply the rule to former employees. Given the

Wright opinion, the next logical step in corporate attorney-client privilege is to protect the communications between corporate counsel and former employees who were working for the corporation at the time of the alleged wrong doing and who satisfy the *Upjohn* Court's test.

The timing of the conversation between employees and retained corporate counsel should not affect the existence of the corporate attorney-client privilege. The timing of the conversation should be irrelevant, because *Upjohn* itself "implies a limiting principle." (*Youngs*, *8, ¶ 29).

This principle follows from *Upjohn's* central policy concern, which is to facilitate frank communication about alleged wrongdoing. The *Upjohn* Court sought to protect counsel's ability to "ascertain the factual background" of a "legal problem," and it rejected the narrow "control group" test because that test would frustrate the lawyer's *investigative* abilities. [*Upjohn*, 449 U.S. at 390] ("[The control group test] overlooks the fact that 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.*")

(*Youngs*, at *8, ¶ 29). Therefore, the employee's status as either a current or former employee at the time of the communications with corporate counsel should be immaterial, because at the time of the "alleged wrongdoing" the individual was a corporate employee. (*Id.*). For privilege to attach, it is important that the employee be employed by the corporation

at the time of the alleged wrongdoing. Those employees have the information that provides “factual background” and enables the attorney “to give [the corporation] sound and informed advice.” (*Id.*)

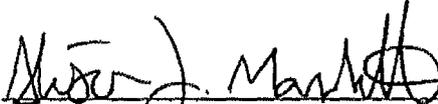
Here, the former coaches were employees of the District at the time of the alleged wrongdoing. Accordingly, this Court should accept discretionary review, because the trial court erred by failing to recognize that corporate attorney-client privilege extends to communications with both current and former employees. Specifically, it extends to communications with former employees who have the factual background that enables the District’s attorney to give the District sound and informed legal advice. If those communications are not privileged, then the District’s ability to prepare for trial and investigate the alleged wrongdoing is greatly limited.

F. CONCLUSION

The District respectfully requests that the Court of Appeals accept discretionary review, pursuant to RAP 2.3(b)(1)-(3), of the entirety of the the Court’s oral ruling from January 24, 2014, and the entirety of the Court’s Decision on Issue of Possible Attorney-Client Privilege with Former Employees of Defendant, and Other Discovery Matters.

RESPECTFULLY SUBMITTED this 6th day of February, 2014.

NORTHCRAFT, BIGBY & BIGGS, P.C.

 #46477 for
Mark S. Northcraft, WSBA #7888
Andrew T. Biggs, WSBA #11746
Attorneys for Defendant/Petitioner

FILED
COUNTY CLERK

Honorable Blaine G. Gibson

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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,

v.

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

Defendant.

No. 12-2-03162-1

~~[PROPOSED]~~ ORDER GRANTING
DEFENDANT HIGHLAND SCHOOL
DISTRICT'S MOTION FOR PARTIAL
STAY OF DISCOVERY

DATE OF HEARING: January 30, 2014
TIME OF HEARING: 9:00 a.m.
ASSIGNED JUDGE: Honorable Blaine G. Gibson

This matter having come before this Court upon Defendant Highland School District's
Motion to Stay, the Court having reviewed the pleadings, court records, and file materials herein,
including:

1. Defendant Highland School District's Motion for Partial Stay of Discovery;
2. Declaration of Kirk A. Ehlis in Support of Defendant's Motion for Partial Stay of
Discovery;
3. _____;
4. _____;

**[PROPOSED] ORDER GRANTING DEFENDANT HIGHLAND
SCHOOL DISTRICT'S MOTION FOR PARTIAL STAY OF
DISCOVERY - 1**

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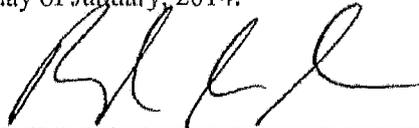
NORTHCRAFT, BIGBY & BIGGS, P.C.
819 Virginia Street / Suite C-2
Seattle, WA 98101
tel: 206.623.0229
fax: 206.623.0234

1 The Court, having considered the above materials from Defendant and Plaintiffs on January
2 1-30, 2014,

3 ACCORDINGLY, IT IS ORDERED THAT the Defendant Highland School District's
4 Motion for Partial Stay of Discovery is GRANTED;

5 IT IS FURTHER ORDERED THAT THIS ORDER EXPIRES
6 2-13-14 AT 5:00 PM.

7
8 DONE IN OPEN COURT this 30 day of January, 2014.

9 
10 _____
11 HONORABLE BLAINE G. GIBSON

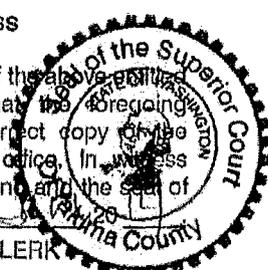
12 PRESENTED BY:

13 MENKE JACKSON BEYER, LLP

14 
15 Kirk A. Ehlis, WSBA #22908
16 Attorney for Defendant Highland School District

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20 STATE OF WASHINGTON } ss
21 COUNTY OF YAKIMA

22 I, Kim M. Eaton, Clerk of the Superior Court, do hereby certify that the foregoing
23 instrument is a true and correct copy of the original now on file in my office. In witness
24 whereof, I hereunto set my hand and the seal of
25 said court this 30 day of January, 2014.

26
27 
28 Kim M. Eaton, CLERK
29 By  Deputy

[PROPOSED] ORDER GRANTING DEFENDANT HIGHLAND
SCHOOL DISTRICT'S MOTION FOR PARTIAL STAY OF
DISCOVERY - 2

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Judge Blaine G. Gibson

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SUPERIOR COURT
YAKIMA CO. WA

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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

~~PROPOSED~~ ORDER GRANTING
DEFENDANT HIGHLAND SCHOOL
DISTRICT'S SECOND MOTION FOR
PARTIAL STAY OF DISCOVERY

DATE OF HEARING: March 7, 2014
TIME OF HEARING: 2:30 p.m. (Special Setting)
ASSIGNED JUDGE: Honorable Blaine G. Gibson

THIS MATTER having come before this Court upon Defendant Highland School District's
Motion for Partial Stay of Discovery, the Court having reviewed the pleadings, court records, and file
materials herein, including:

1. Defendant Highland School District's Second Motion for Partial Stay of Discovery;
2. Declaration of Kirk A. Ehlis in Support of Defendant Highland School District's Second
Motion for Partial Stay of Discovery;

///

~~PROPOSED~~ ORDER GRANTING DEFENDANT HIGHLAND
SCHOOL DISTRICT'S SECOND MOTION FOR PARTIAL STAY
OF DISCOVERY - 1

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NORTHCRAFT, BIGBY & BIGGS, P.C.
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Seattle, Washington 98101
tel: 206-623-0229
fax: 206-623-0234

1 3. PLAINTIFFS RESPONSE TO DEFENDANTS
2 SECOND MOTION ;

3 4. _____ ;

4 5. _____ ;

5 6. _____ ;

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9 The Court, having considered the above materials from Defendant and Plaintiffs on March 7,
10 2014,

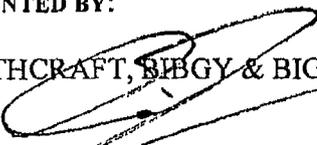
11 ACCORDINGLY, IT IS ORDERED THAT Defendant Highland School District's Second
12 Motion for Partial Stay of Discovery is GRANTED. The stay shall be in effect until ^{9:00 AM} completion of the
13 APRIL 14, 2014 appellate proceedings. This stay is limited to issues bearing on the (alleged) attorney-client privilege
14 between former employees and the School District's counsel.

15 ~~IT IS FURTHER ORDERED~~ that _____
16 _____
17 _____

18 DONE IN OPEN COURT this 7 day of March, 2014.

19 
20 HONORABLE BLAINE G. GIBSON

21 PRESENTED BY:

22 
23 NORTHCRAFT, BIGBY & BIGGS, P.C.

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

[PROPOSED] ORDER GRANTING DEFENDANT HIGHLAND
SCHOOL DISTRICT'S SECOND MOTION FOR PARTIAL STAY
OF DISCOVERY - 2

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The Hon. Blaine Gibson

Hearing Date: April 14, 2014

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Time: 1:30 p.m.

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SUPERIOR COURT
YAKIMA CO. WA

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
governmental agency,

Defendant.

NO. 12-2-03162-1

ORDER DENYING
DEFENDANT'S MOTION FOR
REQUEST FOR THIRD STAY OF
DISCOVERY

This Court, being fully apprised at oral argument and having reviewed the following:

1. Defendant's Motion for Request for Third Stay of Discovery;
2. Declaration of Andrew Biggs in Support;
3. Plaintiffs' Response to Defendant's Motion for Request for Third Stay of
Discovery;
4. Declaration of Melissa D. Carter in Support

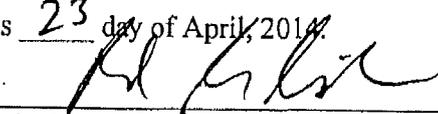
ORDER DENYING DEFENDANT'S REQUEST FOR THIRD
STAY OF DISCOVERY - 1

ADLER GIERSCH, P.S.
Attorneys at Law
333 Taylor Avenue North
Seattle, WA 98109
Tel (206) 682-0300
Fax (206) 224-0102

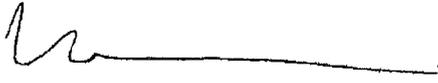
1
2 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's
3 Motion for Request for Third Stay of Discovery is DENIED.

4 IT IS FURTHER ORDERED that the parties shall confirm the court's availability
5 for a 10/5/15 trial setting, and they agree to submit a separate Order Setting Trial Date and
6 Civil Case Schedule consistent with the Court's availability in the fall of 2015.

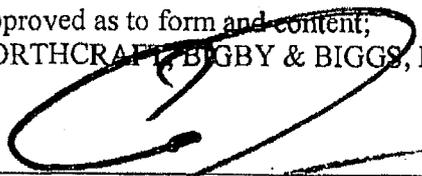
7
8 DONE IN OPEN COURT this 23 day of April, 2014.

9
10 
The Honorable Blaine Gibson
Yakima County Superior Court Judge

11
12
13 Presented by:
14 **ADLER GIERSCH PS**

15 
16 _____
Melissa D. Carter, WSBA #36400
17 Attorneys for Plaintiffs

18 Approved as to form and content;
19 **NORTHCRAFT, BIGBY & BIGGS, P.C.**

20 
21 _____
Andrew Biggs, WSBA#
22 Attorneys for Defendant

23
24
25
26 ORDER DENYING DEFENDANT'S REQUEST FOR THIRD
STAY OF DISCOVERY - 2

ADLER GIERSCH, P.S.
Attorneys at Law
333 Taylor Avenue North
Seattle, WA 98109
Tel (206) 682-0300
Fax (206) 224-0102

APR 30 2014

Ronald R. Carpenter
Clerk

Supreme Court No. _____

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.
Mark S. Northcraft, WSBA #7888
Andrew T. Biggs, WSBA #11746
819 Virginia Street, Suite C-2
Seattle, WA 98101
Telephone: (206) 623-0229
Facsimile: (206) 623-0234
Attorneys for Petitioner
mark_northcraft@northcraft.com
andrew_biggs@northcraft.com

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 April 29, 2014, I caused the original and one copy of: (1) Motion for Discretionary Review; and (2) this Certificate of Service to be sent to the Clerk of the Court of the Washington Supreme Court, *via Federal Express*, with copies thereof served *via email* on the following:

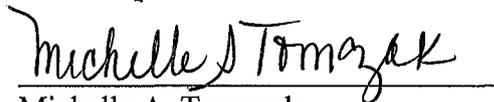
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jamien@nblelaw.com

On April 29, 2014, I caused copies of: (1) Motion for Discretionary Review; and (2) this Certificate of Service to be sent *via Federal Express*, to:

The Court of Appeals
Division III
500 North Cedar Street
Spokane, WA 99201-1905

DATED this 29th day of April, 2014, in Seattle, Washington.



Michelle A. Tomczak