NO. 90194-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

vs.

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

Petitioner.

BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
(360) 487-8501 (fax)
dan.lloyd@cityofvancouver.us

Milton Rowland, WSBA No. 15625
Foster Pepper, PLLC
422 W. Riverside Ave. Ste. 1310
Spokane, WA 99201-0302
(509) 777-1610
(509) 777-1616 (fax)
rowlm@foster.com

Counsel for Amicus Curiae
Washington State Association of Municipal Attorneys

TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES

PAGE(S)

PAGE(S)

STATUTES

RULES

LOCAL ORDINANCES

I. INTRODUCTION

The present case focuses on whether and when communications between a municipal corporation's attorney and former employees whose conduct is the reason why the municipality is being sued are protected by the attorney-client privilege. Under normal circumstances, whether the privilege attaches generally depends on whether the individual subjectively, but still reasonably, believes that the attorney represents her or him. *See Dietz v. Doe*, 131 Wn.2d 835, 843-44, 935 P.2d 611 (1997). But the position advanced by Plaintiffs/Respondents in this case eschews this inquiry altogether, instead focusing not on whether a belief of confidentiality is present, but rather what the former employee currently lists as a source of income on his or her tax return.

Plaintiffs/Respondents ask this Court to adopt a *per se* rule that prohibits application of the attorney-client privilege when a corporation's counsel communicates with an individual whose actions are the basis for litigation solely because that individual is no longer employed by the corporation. In addition, Respondents attempt to resurrect an argument long since rejected, namely that the privilege applies only to communications with "speaking agents." Adopting that test would, for the reasons expressed below, result in abandoning case law decided just last year. *Stare decisis* demands more fidelity to precedent.

The approach that this Court should adopt, and one that remains faithful to Washington law, is the approach adopted by Wyoming: namely that an adverse party may have *ex parte* contact with former employees, but those individuals can still have privileged communications with their former employer's corporate counsel provided the traditional elements for recognizing the privilege are present.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

WSAMA is a non-profit organization of municipal attorneys who represent Washington's 281 cities and towns. WSAMA members represent municipalities throughout the state. Its members routinely represent local governments like in litigation. Therefore WSAMA has a strong interest in this Court's continued protection of the attorney-client privilege in the municipal context.

III. STATEMENT OF THE CASE

As applied to this case, the facts for purposes of the issue on review are relatively straightforward. Matthew Newman sustained serious injuries while playing football, and claims that his injuries resulted from the alleged negligence of his coaches, all of which were (at the time) employed by Defendant/Petitioner Highland School District. Whether Newman's allegations have merit is not at issue before this Court.

What is at issue is the discoverability of conversations between the coaches whose conduct is alleged to be the basis of liability and attorneys retained to defend against those allegations. The trial court's principal reason against recognizing the privilege is that at the time of the communications, the coaches had previously ceased working for the District. CP at 70.

IV. ISSUE PRESENTED

Whether the fact that an employee, whose negligence is alleged to be the basis of a public entity's liability, has ceased employment with that entity is, by itself, reason to deny recognition of the attorney-client privilege as to communications between an attorney representing the entity and that former employee.

V. ARGUMENT

The trial court rejected application of the attorney-client privilege in this case based on two reasons. First, it assumed that this Court previously rejected *United States v. Upjohn Co.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) in *Wright ex rel. Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984). CP at 69-70. Second, it expressed a *per se*, blanket rule that "post-employment communications between defense counsel and former employees of the defendant" can never be privileged. CP at 70. Because these two bases are legally

incorrect, the trial court abused its discretion thus warranting reversal. *Wash. State Phys. Ins. Exch. & Ass'n v. Fisons*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (a trial court abuses its discretion when it hinges its decision "on an erroneous view of the law").

A. The corporate attorney-client privilege is not limited to communications with those with speaking authority.

It is not surprising that Respondents have placed a great deal of weight on *Wright*. But Respondents read more into *Wright* than what is actually there. At issue in that case was whether a corporation could "prohibit [all of] its current employees from conducting ex parte interviews with plaintiffs' attorneys." *Id.* at 193. Critically, there was "no communication" that the hospital (or anyone) claimed to be privileged; rather, the defendant there sought to preclude a plaintiff's ability "to discover *facts* incident to the alleged medical malpractice, not privileged corporate confidences." *Id.* at 195 (italics in original). *Wright* does not hold, even in the slightest, that *communications* between an involved employee—past or present—and a corporation's counsel are subject to open discovery simply because of the employee's past or present rank within the corporation's organizational structure.

The next issue in *Wright* examined whether "current and former employees are 'parties' within the meaning of" the predecessor to current

RPC 4.2.[1] In concluding that non-speaking agent employees were not "parties," this Court emphasized that "*the policies* represented by these two rules [the attorney-client privilege and the disciplinary rule prohibiting *ex parte* contact] *are different*." *Wright*, 103 Wn.2d at 202 (first italics in original, second italics added). Rather, the Court stressed, "[a] corporate employee who is a 'client' under the attorney-client privilege is not necessarily a 'party' for purposes of the disciplinary rule." *Id.* Stated another way, a corporate employee can be a "client" for purposes of the attorney-client privilege, even though an adverse attorney may ethically engage in *ex parte* communications with him or her.

For this reason, it is a mistake to conclude that Washington has rejected *Upjohn*. *Contra* CP at 70. In that case, a corporation conducted an investigation by having all employees answer a questionnaire for the corporation's purpose of obtaining legal advice from the corporation's attorney. *Upjohn*, 449 U.S. at 386-87. The Supreme Court rightfully rejected the federal government's efforts to question employees *about those communications*, recognizing that "the employees themselves were

[1] Notably, the earlier version of the rule precluding a lawyer from "communicat[ing] ... on the subject of the representation with a party he [or she] knows to be represented by a lawyer." CPR DR 7-104(A)(1), *quoted in Wright*, 103 Wn.2d at 196. Rule of Professional Conduct 4.2 is broader than its predecessor, prohibiting ex parte contact with any "*person* the lawyer knows to be represented by another lawyer in the matter." RPC 4.2 (emphasis added).

sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Id.* at 374.

What is notable is that five days *before* the trial court's ruling stating that Washington does not follow *Upjohn*, this Court expressly embraced *Upjohn*'s underlying principles. *Youngs v. Peacehealth*, 179 Wn.2d 645, 662-63, 316 P.3d (2014). *Youngs* held that communications by a corporation's counsel with treating physicians could be considered privileged. *Id.* at 663-64. Specifically, the Court said:

> corporate defense counsel may have privileged ex parte communications with a plaintiff's nonparty treating physician only where the communication meets the general prerequisites to application of the attorney-client privilege, the communication is with a physician who has direct knowledge of the event or events triggering the litigation, and the communications concern *the facts of the alleged negligent incident.*

Id. at 664 (italics in original). If conversations with a plaintiff's treating physician can, in certain circumstances, be considered privileged, then it is outright incorrect to conclude that *Wright* flatly rejects any application of the privilege outside the "speaking agent" context.

Yet that is exactly what Respondents propose in this case. Adoption of their position would inexorably require this Court to overrule *Youngs*. But the principle of *stare decisis* commands that this Court adhere to a previous holding absent "a clear showing that an established rule is incorrect and harmful." *Waremart, Inc. v. Progressive Campaigns,*

Inc., 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (citation and internal quotation marks omitted). This is a "substantial burden" that Respondents have not even attempted to make, meaning that *Youngs* cannot and should not be abandoned. *Id.*

Despite *Youngs*, the trial court based its rejection of the District's position that "Washington does not follow *Upjohn*." CP at 69. As discussed above, this is simply not true, meaning the trial court based its decision on an incorrect view of the law. That is an abuse of discretion, which alone warrants reversal. *Fisons*, 122 Wn.2d at 339.

Furthermore, there is no principled reason why *Upjohn*'s rationale should not apply in Washington. Certainly, nothing should prohibit the Respondents from questioning the coaches about what happened the day Newman was injured at the football game, or what events preceding the game may have given rise to an actionable claim of negligence. *Accord Youngs*, 179 Wn.2d at 665 ("the attorney-client privilege protects communications, but not the facts underlying those communications"). Even if the coaches disclosed those *facts* to the District's counsel, the attorney-client privilege would not limit the plaintiffs' ability to learn about those *facts* at deposition. But it is a different thing entirely to compel disclosure of what *was said* to counsel.

B. A blanket, *per se* ruling that the attorney-client privilege never applies to communications with former employees would unreasonably interfere with the municipality's statutory obligation to defend former employees who might sued at some point in the future.

The trial court's rejection of the attorney-client privilege was also premised a great deal on the fact that the coaches had ceased employment at the time the disputed communications occurred. *See* CP at 70 ("The defense has not cited any authority supporting the claim of an attorney-client privilege protecting *post-employment communications* between defense counsel and former employees of the defendant.") (emphasis added). This reasoning is deeply flawed, for it assumes two tenets, neither of which is true. First, it presumes that an attorney-client relationship cannot develop unless and until the former employee is named as a defendant in a lawsuit. Second, it assumes that once an individual ceases employment, he or she will never need legal representation for actions occurring during the earlier employment, meaning any conversation taking place after the individual leaves public employment need not remain confidential.

Washington rejects these precepts, particularly in the context of municipal corporations employing individuals. As this Court has recognized, municipal corporations like school districts, cities, and towns may begin preparing to defend against an anticipated claim as soon as the

event occurs, even if a tort claim is not filed until years later. *E.g.*, *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 732, ¶ 25, 174 P.3d 60 (2007). Concomitant with this ability to begin preparing a defense early, a "local governmental entity" is statutorily obligated to provide not only indemnification, but also "defense of the action" when such is "brought against any *past* or present officer, employee or volunteer of [that] local governmental agency." RCW 4.96.041(1) (emphasis added).[2] The only prerequisite is that the "act[] or omission[]" occurred "while [the individual was] performing or in good faith purporting to perform his or her official duties." *Id.* Because that is the case, the individual is entitled to a defense at the expense of the local government, *regardless* of whether the individual remains so employed. Pursuant to RCW 4.96.041(2), various municipalities throughout the state have enacted by ordinance procedures that require individuals to request defense and indemnification long before a tort claim is ever filed.[3] And when a lawsuit is filed, it sometimes takes months or years for a plaintiff to decide that he or she desires to name the individual as a defendant, and the law then entitles the plaintiff to add that individual "freely [as] justice so requires." CR 15(a).

---

[2] As this Court has recognized in the insurance context, the duty to defend is entirely separate and distinct from the duty to indemnify. *E.g.*, *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

[3] *E.g.*, TACOMA MUNICIPAL CODE § 1.12.920 (requiring employees to notify City Attorney "of an accident or occurrence, as soon thereafter as practical" as a condition of representation); VANCOUVER MUNICIPAL CODE § 2.46.050(1) (same).

It is not hard then to imagine a scenario in which the purpose and function of the attorney-client privilege could be readily abused under the test embraced by the trial court, if this Court were to adopt it. A municipal employee engages in an act that causes injury to a third person (whether the act was negligent is beside the point and would be decided later). Distraught over what took place, the employee resigns, determined to find a new start. The municipality, and for that matter, former employee, still realize that the injured party intends to sue. The municipality hires an attorney and, pursuant to RCW 4.96.041 and the applicable ordinance, affords a defense to the former employee. The attorney then conducts a thorough investigation in preparation for the inevitable civil action, which includes a lengthy conversation with the involved individual, now a former employee, about the case. Under the usual test, this conversation would remain privileged. *See Dietz*, 131 Wn.2d at 843 (an attorney-client relationship exists if conduct "'is such that individual subjectively believes such a relationship exists'" and that subjective belief is reasonable based on the surrounding circumstances) (quoting *In re Disciplinary Proceeding Against McGlothlen,* 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)).

A year later, the injured person files a tort claim, and 62 days later, a lawsuit, but names only the municipality citing principles of *respondeat superior*. *Cf. Rahman v. State*, 170 Wn.2d 810, 815, ¶ 7, 246 P.3d 182

(2011). Under the trial court's test below, and the test advanced by Respondents here, the conversation between the municipality's lawyer and the alleged tortfeasor is not privileged, solely by reason of the fact that the former employee changed jobs prior to the communication. And under the trial court's test, the former employee is then forced to divulge the details of that confidential communication in a deposition, which could include risks of litigation, settlement authority, and defense strategy. One month after the deposition, the plaintiff successfully seeks the trial court's leave to name the former employee as a defendant, because that leave is "freely given." CR 15(a). Regardless of why the plaintiff waited to name the former employee, that individual is now a defendant. And though that defendant once communicated in confidence with a lawyer regarding the incident that is the basis for the lawsuit, the details of that conversation once thought to be private are now very much public. In sum, the object of the attorney-client privilege is destroyed.

One could certainly argue that the foregoing hypothetical is very much a reality here. The Plaintiffs/Respondents allege[4] that the Defendant school district's coaches (i.e., "employee[s]") negligently allowed Matthew Newman to play in a football game after sustaining a concussion during an earlier practice that had yet to resolve, and that this decision

[4] WSAMA realizes that these allegations are hotly disputed. *See* Pet'r's Br. at 8.

(among others) constituted negligence that proximately caused injury. *See* CP at 3-11. Even the District seemingly acknowledges the allegation that the coaches' "actions allegedly triggered the liability." Pet'r's Br. at 10.

Certainly in theory, the Plaintiffs/Respondents could, on remand, seek the trial court's leave to add the coaches as defendants. Simply because of Matthew's age, the statute of limitations did not start running until July 5, 2012. *See* CP at 3; RCW 4.16.190(1). In addition, it might be argued that the statute of limitations does not run at all in light of Matthew's current mental disability. RCW 4.16.190(1). Thus, it might be argued that adding the coaches as defendants would be timely even if the amendment did not relate back to the date of the original filing. *Cf.* CR 15(c); *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 477, 238 P.3d 1107 (2010). Whether the amendment is timely or not is irrelevant, as the applicability of the attorney-client privilege has never been held to be dependent, even in part, on whether a valid defense such as the statute of limitations applies.

As such, the coaches would now be defendants in a lawsuit and conversations they gave to counsel under the belief that they were private would now be fair game to their adversaries, solely because of who, at the time of the conversation, employed them. Faithful application of the attorney-client privilege demands more.

C. This Court should embrace the test that permits *ex parte* contact with former employees but precludes inquiry into privileged communications as striking the proper balance between protecting the attorney-client privilege and permitting informal fact-finding.

As discussed above, *Wright* correctly concluded that the inquiry into acceptable *ex parte* contact with a corporation's employees is distinct from whether a particular communication with corporate counsel is privileged. On the issue of *ex parte* contact, courts have struggled for the better part of three decades as to the best approach. For example, one such variation was first embraced by the New York Court of Appeals in *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990), in which that state's highest court concluded that the bar on *ex parte* communications extended not only to speaking agents but also "corporate employees whose acts or omissions in the matter under inquiry." *Id.* at 1035.

Wyoming considered the issue in *Strawser v. Exxon Co.*, 843 P.2d 613 (Wyo. 1992), and held that plaintiffs' counsel could have *ex parte* contact with a corporate defendant's former employees, but barred inquiry during those contacts into matters otherwise protected by the attorney-client privilege. *Id.* at 622 (quoting *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 903-04 (E.D. Pa. 1991)). In other words, communications with a former employee may remain privileged if all other elements are satisfied, but nothing precludes the corporation's

adversary from communicating directly with the former employee, even on an *ex parte* basis, on non-privileged matters.

WSAMA submits that the approach adopted in Wyoming should be the law of Washington. Under that test, a plaintiff and his or her lawyer have every right to contact former employees and interview them *ex parte*. This is consistent with *Wright*. However, it also recognizes that a corporate attorney may need to communicate with a former employee whose conduct is at the very heart of potential, threatened, or actual litigation. As *Youngs* correctly stated, "depriving counsel of the ability to communicate confidentially with a client damages the privilege just as much as disclosing a prior communication does." *Youngs*, 179 Wn.2d at 663. And this holds especially true when preparing an employee—former or current—to be deposed on the record whether his or her conduct amounted to liability for the corporate defendant.

VI. CONCLUSION

As referenced above, former employees whose conduct is at the heart of a lawsuit have every incentive and obligation to fully cooperate with a municipal corporation's counsel, which necessarily requires open and honest communication. Indeed, that is the very object of the privilege: "to allow the client to communicate freely with an attorney without fear of compulsory discovery." *Dietz*, 131 Wn.2d at 842.

The trial court here compelled disclosure of communications based upon a mistaken view of Washington law, which by definition amounts to an abuse of discretion. Reversal is appropriate.

The Court's decision in this case must reflect a corporate counsel's ability to communicate freely with all employees—including those no longer employed—whose conduct is at the heart of a lawsuit against that lawyer's client. Adopting Wyoming's approach does just that.

RESPECTFULLY SUBMITTED on October 2, 2015.

/s/ Daniel G. Lloyd
Daniel G. Lloyd, WSBA #34221
Assistant City Attorney
Attorney for *Amicus Curiae*
WSAMA
City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
(360) 487-8501 (fax)
dan.lloyd@cityofvancouver.us

/s/ Milton Rowland
Milton Rowland, WSBA #15625
Attorney for *Amicus Curiae*
WSAMA
Foster Pepper, PLLC
422 W. Riverside Ave. Ste. 1310
Spokane, WA 99201-0302
(509) 777-1610
(509) 777-1616 (fax)
rowlm@foster.com

CERTIFICATE OF SERVICE

I certify that on the date referenced below, I served via e-mail (per written consent received) a copy of the foregoing document to each and every attorney of record herein, as identified below:

Richard H. Adler
Adler Giersch, PS
333 Taylor Ave. N.
Seattle, WA 98109
radler@adlergiersch.com

Fred P. Langer
Michael E. Nelson
Nelson Blair
Langer Engle, PLLC
12055 15th Ave. NE
Seattle, WA 98125
Fredl@nbelaw.com
miken@nbelaw.com

Howard M. Goodfriend
Smith Goodfriend, P.S.
1619 8th Ave. N.
Seattle, WA 98109
howard@washingtonappeals.com
cate@washingtonappeals.com

Mark S. Northcraft
Andrew T. Biggs
819 Virginia Street, Ste. C-2
Seattle, WA 98101
marks_northcraft@
northcraft.com
andrew_biggs@
northcraft.com

DATED on October 2, 2015.

/s/ Daniel G. Lloyd

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney, City of Vancouver
Attorney for *Amicus Curiae* WSAMA
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 / (360) 487-8501 (fax)
dan.lloyd@cityofvancouver.us

OFFICE RECEPTIONIST, CLERK

To: Lloyd, Dan
Cc: rowlm@foster.com; howard@washingtonappeals.com; cate@washingtonappeals.com; radler@adlergiersch.com; miken@nbelaw.com; fredl@nbelaw.com; marks_northcraft@northcraft.com; andrew_biggs@northcraft.com; alison_markette@northcraft.com
Subject: RE: Newman v. Highland School District, No 90195-5 - Brief of Amicus Curiae WSAMA

Received on 10-02-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----
From: Lloyd, Dan [mailto:Dan.Lloyd@cityofvancouver.us]
Sent: Friday, October 02, 2015 11:19 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: rowlm@foster.com; howard@washingtonappeals.com; cate@washingtonappeals.com; radler@adlergiersch.com; miken@nbelaw.com; fredl@nbelaw.com; marks_northcraft@northcraft.com; andrew_biggs@northcraft.com; alison_markette@northcraft.com
Subject: Newman v. Highland School District, No 90195-5 - Brief of Amicus Curiae WSAMA

Dear Mr. Carpenter:

On behalf of the Washington State Association of Municipal Attorneys, please find attached for filing:

1. Motion for Leave to File Amicus Curiae Brief 2. Proposed Amicus Curiae Brief of the Washington State Association of Municipal Attorneys.

Case name: Newman v. Highland School District Case No.: 90194-5

All parties have consented to electronic service, and they are copied on this email. Thank you for your attention to the foregoing.

Sincerely,

Daniel G. Lloyd, WSBA No. 34221
dan.lloyd@cityofvancouver.us
(360) 487-8500

Daniel G. Lloyd | Assistant City Attorney

CITY OF VANCOUVER, WASHINGTON
City Attorney's Office / Civil Division
Physical address: 415 W. 6th Street, Vancouver, WA 98660 Mailing address: PO Box 1995, Vancouver, WA 98668
P: (360) 487-8500 | D: (360) 487-8520 | F: (360) 487-8501 | TTY: (360) 487-8602