Case No. 05-24-00813-CV

In the Fifth Court of Appeals – Dallas Division

TEXAS PUBLIC POLICY FOUNDATION,

Plaintiff-Appellant,

v.

HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

On Appeal from the 14th Judicial District Court Dallas County, Texas
Cause No. DC-23-01161 – The Honorable Eric Moyé Judge Presiding

---

BRIEF OF APPELLEE
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT

Meredith Prykryl Walker
WALSH GALLEGOS KYLE
ROBINSON & ROALSON P.C.
105 Decker Court, Suite 700
Irving, Texas 75062
214.574.8800
214.574.8801 (facsimile)
mwalker@wabsa.com

Attorneys for Appellee Highland Park Independent School District

RECORD REFERENCES

For consistency, Defendant-Appellee Highland Park Independent School District (HPISD or the District) will refer to the record on appeal in the same manner as Plaintiff-Appellant Texas Public Policy Foundation (TPPF): "[Volume Number].RR.[Page Number]" refers to the three-volume Reporter's Record and "CR.[Page Number]" refers to the Clerk's Record.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND RULES

OTHER SOURCES

STATEMENT OF THE CASE

Nature of the Case: This lawsuit involves an attempt to use the Texas Public Information Act to obtain a report that is protected by the attorney-client privilege.

Course of Proceedings: TPPF filed an Original Petition for Writ of Mandamus on January 23, 2023. (CR.12-702). HPISD filed its Answer on March 1, 2023. (CR.703-705).

HPISD file its Motion for Summary Judgment on February 8, 2024. (CR.734-763). TPPF filed a Motion for Summary Judgment and Response to the District's Motion for Summary Judgment on April 5, 2024. (CR.764-806).

On April 11, 2024, the trial court granted TPPF's motion for in camera review. On April 15, 2024, the trial court informed TPPF and HPISD that it had "completed its *in camera* review of the Whitley-Penn Report and affirms the retention of same by [HPISD] based upon the privilege as invoked." (CR.834, 852; 2.RR.6).

On April 30, 2024, after a bench trial, the trial court issued a final judgment denying TPPF's Application for a Writ of Mandamus. (CR.845-846).

Trial Court Disposition: On April 30, 2024, the trial court entered a final written order denying TPPF's application for a Writ of Mandamus. (CR.845-846). The trial court issued findings of fact and conclusions of law on May 20, 2024. (CR.850-854). TPPF appealed on July 3, 2024. (CR.859).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this matter as the Court's analysis would not be significantly aided by oral argument. This case involves a straightforward application of Texas law. Appellant's suggestions otherwise stem from assertions of fact that are not fact and a misreading of the law. However, if the Court requests oral argument in this matter, HPISD intends to participate in oral argument and requests that the District be allowed to do so.

ISSUES PRESENTED

Issue One:

The trial court correctly determined HPISD did not waive the attorney-client privilege protecting the Whitley-Penn Report.

Issue Two:

TPPF failed to preserve any error for appeal regarding the trial court's evidentiary rulings.

Issue Three:

The trial court correctly determined the entirety of the Whitley-Penn Report is protected by the attorney-client privilege.

STATEMENT OF FACTS

HPISD retained the law firm of Thompson & Knight LLP (the Law Firm)[1] for the rendition of legal services regarding an attorney investigation of certain allegations involving the District's Seay Tennis Center. (CR.742-743, 850-851). Specifically, the Law Firm was retained to opine on legal issues involved in the Seay Tennis Center's operations, including employees' handling of the financial operations of the Seay Tennis Center. (CR.742-743, 851).

Because the lawyer providing the advice is not an accountant and does not have a financial background, and because providing legal advice to the District required knowledge of a number of financial and accounting issues, the Law Firm engaged Whitley-Penn—an accounting and consulting firm—to assist the attorney in the investigation. (CR.742-743, 850-851). The attorney considered Whitley-Penn's assistance with analyzing the Seay Tennis Center's internal controls and other accounting procedures and issues as necessary for him to be able to provide legal advice to the District. (CR.742-743, 850-851).

The Law Firm's engagement letter, dated August 6, 2019, outlined that the Law Firm—not HPISD directly, as TPPF asserts—was retaining accounting firm

[1] The law firm of Thompson & Knight LLP subsequently merged with the law firm of Holland & Knight as of August 1, 2021. (CR.742, 850-851).

Whitley-Penn "to assist [the Law Firm] with an attorney investigation of certain allegations," which is in furtherance of the Law Firm's rendition of legal services to the District. (CR.746, 851). Upon the completion of Whitley-Penn's report (the WP Report), Whitley-Penn provided the WP Report to the Law Firm. (CR.743, 851). The WP Report was a communication from Whitley-Penn to attorney Bryan Neal (Attorney Neal) only. (CR.743, 851). Attorney Neal used the WP Report to complete his investigation into the allegations regarding the Seay Tennis Center and to provide legal advice to HPISD. (CR.743, 851).

Neither the WP Report, nor the contents of the WP Report, have been shared with any non-party, with the exception of certain other attorneys and support staff at the Law Firm, as well as the Attorney General in connection with responding to TPPF's request under the Texas Public Information Act (and the trial court in its in camera review, of course). (CR.743, 851). At the time the Law Firm provided the legal advice to HPISD, it did not provide a copy of the WP Report to anyone at HPISD. (CR.743, 851). The WP Report has not been produced for public viewing. (CR.852). At all times, the WP Report has been maintained confidentially. (CR.852). There has been no voluntary disclosure or consent to disclosure of any significant part of the WP Report. (CR.852).

On March 29, 2021, Michael White, the District's then Assistant Superintendent for Business Services sent an email regarding the Seay Tennis Center

(the STC Email). (CR.852; 2.RR.19-20; 3.RR.3). The STC Email stated that "there is no mismanagement occurring, there is no malfeasance occurring, and there are no funds being misdirected or mismanaged." (CR.852; 3.RR.3). The STC Email did not disclose the contents of the WP Report, or the legal advice provided by Attorney Neal, as it described the current conditions of the Seay Tennis Center—not what the WP Report addressed. (CR.852; 3.RR.3).

TPPF submitted a request for a copy of the WP Report pursuant to the Texas Public Information Act. (CR.757-758, 852) In response, the District sought an opinion from the Attorney General that the WP Report was not subject to disclosure under the Texas Public Information Act because it was protected by the attorney-client privilege. (CR.752-758, 852). The Texas Attorney General subsequently determined the entirety of the WP Report was not subject to disclosure under the Texas Public Information Act as the WP Report was protected by the attorney-client privilege. (CR.760-763, 852).

SUMMARY OF THE ARGUMENT

HPISD engaged Attorney Neal to provide legal advice regarding the Seay Tennis Center. Attorney Neal engaged Whitley-Penn (*i.e.*, a lawyer's representative) to assist him in providing legal advice. Attorney Neal relied on the WP Report to render legal advice to the District. It follows that the trial court correctly held that the entirety of the WP Report is protected by the attorney-client privilege. Indeed, Attorney Neal was acting as an attorney and providing legal advice to the District based on the WP Report, which renders the entirety of the WP Report privileged under relevant case law.

Moreover, the STC Email did not waive the privilege that attached to the entirety of the WP Report. The STC Email did not reveal the contents of the WP Report or discuss any of the conclusions in the WP Report. Instead, the STC Email plainly and unambiguously communicated the District did not have any current concerns regarding the Seay Tennis Center. TPPF's argument otherwise is based entirely on its refusal to read the plain text of the email for what it is.

Regardless, during the trial, TPPF failed to take any steps to request that the trial court include the WP Report in the record on appeal or otherwise address the

trial court's evidentiary rulings through an offer of proof or bill of exception, thereby leaving this Court with no error to review on appeal.

ARGUMENT AND AUTHORITIES

A. Standard of Review.

This Court reviews the trial court's findings of fact for legal and factual sufficiency of the evidence under the same standards applied to the review of jury verdicts.[2] Importantly, the Court must "defer to unchallenged findings of fact that are supported by some evidence."[3] Additionally, because "the trial court has no discretion in determining what the law is or applying the law to the facts," this Court "review[s] the trial court's conclusions of law de novo."[4] The Court may "uphold the trial court's judgment, even if [it] determine[s] a conclusion of law is erroneous, if the judgment can be sustained on any legal theory supported by the evidence."[5]

B. Texas Public Policy Foundation's "Statement of Facts" is not supported by the record on appeal.

In its Statement of Facts, TPPF provides the Court with "Background" information that it supports with "tinyurl.com" links to various news articles and reports. (Appellant Brief, p.7, PDF p.15). The factual allegations TPPF supports with

[2] *Inwood Nat'l Bank v. Wells Fargo Bank, N.A.*, 463 S.W.3d 228, 234-35 (Tex. App.—Dallas 2015, no pet.) (citing *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991)).
[3] *Id.* at 235 (citing *Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014)).
[4] *Id.* (citing *Ponderosa*, 437 S.W.3d at 523; *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002)).
[5] *Id.* (citing *Marchand*, 83 S.W.3d at 794).

these "tinyurl.com" links, as well as the information contained in the links, is not properly before the Court and cannot be considered on appeal.[6] Indeed, the only evidence that is properly before the Court is the evidence contained in the record on appeal.[7] It follows that the Court should disregard any factual allegations proffered by TPPF that are not properly supported by the record.

C. The trial court correctly determined that the Highland Park Independent School District did not waive the attorney-client privilege.

Over a year after HPISD's attorney provided the District with legal advice based on the WP Report, Michael White, the District's then-Assistant Superintendent for Business Services, sent the STC Email. (CR.852; 2.RR.19-20; 3.RR.3). Therein, Mr. White referenced the investigation into the Seay Tennis Center and noted "the District took all steps it believed were appropriate" to revamp the Seay Tennis Center and its management structure. (3.RR.3). Mr. White then went on to explain,

> [t]he changes with Seay began almost a year ago and have been in place for some time now. From our perspective, we have fully, finally, and properly addressed any needed significant organizational or management changes. We are **managing** the Center in a way that we

[6] *See Cantu v. Horany*, 195 S.W.3d 867, 870 (Tex. App.—Dallas 2006, no pet.) (appellate court cannot consider documents cited in party's brief and attached as appendices if they are not formally included in record on appeal); *Hildebrand v. Hildebrand*, No. 01-18-00933-CV, 2020 WL 4118023, at *5 n.5 (Tex. App—Houston [1st Dist.] July 21, 2020, no pet.) (mem. op.) ("Appellate courts may not consider extraneous evidence that is not in the record on appeal and that was not before the trial court when it made its decision.").

[7] *Univ. of Tex. Sys. v. Carter*, No. 05-07-00592-CV, 2008 WL 484178, at *2 (Tex. App.—Dallas Feb. 25, 2008, pet. denied) (mem. op.) (declining to consider a transcript and affidavit not included in the record on appeal).

> are comfortable is best for the District. As always, there may be adjustments made as we become more accustomed to the new structure, but as of now we believe we are where we need to be. Further, to address some of the comments in your earlier emails, there is no mismanagement **occurring**, there is no malfeasance **occurring**, and there are no funds **being** misdirected or mismanaged.

(CR.852; 3.RR.3) (emphasis added). A fundamental understanding of the English language reflects Mr. White communicated that there were no present concerns regarding the Seay Tennis Center given the use of the present participle forms of the verbs "occur" and "be."[8] TPPF's entire argument rests on its own misreading of the unambiguous email.

The STC Email also did not disclose the contents of the WP Report or the legal advice provided by Attorney Neal. (CR.852; 3.RR.3). More to the point, therein, Mr. White did not state whether the WP Report reflected mismanagement, whether the WP Report reflected malfeasance, or whether the WP Report reflected a misdirection of funds. Instead, as the trial court aptly noted,

> [o]n its face, the four corners of the document . . . do not say "The [WP] Report says," or "As noted in the [WP] Report," or "as established by the investigation which is comprehensibly described in the [WP] Report." It doesn't say anything like that.

(2.RR.13). Nor can TPPF credibly argue that the STC Email describes what the WP

[8] *See* Merriam-Webster Dictionary, Definition of Present Participle, at https://www.merriam-webster.com/dictionary/present%20participle (last accessed Sept. 27, 2024); *See* Monmouth University Tutoring & Writing Services, Participles, at https://www.monmouth.edu/resources-for-writers/documents/participles.pdf/ (last accessed Sept. 27, 2024).

Report found or what the WP Report stated because Mr. White has not even seen the WP Report himself; rather, he "had discussions with legal counsel about the conclusions [legal counsel] drew from the [WP] [R]eport." (2.RR.27; CR.851-852). It follows that the STC Email did not and could not waive the privilege attached to the WP Report. TPPF's arguments to the contrary are not grounded in reality or the facts before the Court.

1. The Highland Park Independent School District's Board of Trustees holds the attorney-client privilege.

In arguing for release of the WP Report, TPPF focuses on Mr. White's role as the Assistant Superintendent for Business Services when he sent the STC Email. (Appellant Brief, pp.16-18, PDF pp.24-26). But the fact that Mr. White was acting as the Assistant Superintendent for Business Services at that time does not transfer the management and oversight of HPISD to him. Indeed, Texas law places the management and oversight of an independent school district exclusively within the hands of the Board of Trustees, which acts as a body corporate.[9] HPISD's Board of Trustees may "sue and be sued" and, as such, the attorney-client privilege attaches to the Board of Trustees as a whole.[10] It follows that only the HPISD Board of Trustees has the authority to waive the attorney-client privilege.[11]

---

[9] *See* TEX. EDUC. CODE § 11.051.
[10] *See id.* at §§ 11.051, 11.151(a); TEX. R. EVID. 503(a)(1).
[11] *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985) (recognizing that "[T]he power to waive the corporate attorney-client privilege rests with the corporation's management); *In re Halter*, No. 05-98-01164-CV, 1999 WL 667288, at *3 (Tex. App.—Dallas

While the District Superintendent may have "charged" Mr. White "with direct oversight of the Seay Tennis Center," this in no way addresses the attorney-client privilege that attaches to the Board or otherwise reflects that the Board of Trustees delegated to Mr. White the ability to waive the Board's attorney-client privilege. (3.RR.3). More to the point, being "in charge" of a particular area of a school district does not equate to having the power and authority to waive the attorney-client privilege. If this were the case, every communication by a District employee that potentially implicated a privileged conversation would be subject to a waiver argument.

Regardless, TPPF's sword and shield argument fails because nothing in the record on appeal reflects HPISD gave "Mr. White authority to make statements about the contents of the WP Report to assuage public opinion." (Appellant Brief, p.17, PDF p.25). Mr. White's own testimony reflects that he has not seen the WP Report and, it follows, that he did not know and still does not know the contents of the WP Report. (2.RR.27; CR.851-852). At most, Mr. White was privy to Attorney Neal's conclusions regarding the investigation, which were used to revamp the Seay Tennis Center's practices. (2.RR.27; 3.RR.3; CR.851-852). Mr. White then communicated that, as of the time of his email, there were no current concerns

Aug. 27, 1999, orig. proceeding) ("When a corporation is the client, the attorney-client privilege belongs to the corporation."); *Galli v. Pittsburg Unified Sch. Dist.*, No. C 09–3775 JSW, 2010 WL 4315768, *4 (N.D. Cal. Oct. 26, 2010) (only the school district's board may waive privilege).

regarding the Seay Tennis Center, as clearly reflected in the four-corners of the STC Email. (3.RR.3). It follows that the Court should uphold the trial court's finding that the STC Email did not waive the attorney-client privilege.

2. Michael White's email did not reveal any part the contents of the Whitley-Penn Report.

TPPF asserts the trial court "held that Mr. White did not waive the privilege because he did not disclose the full contents of the [WP] Report, he merely shared its alleged conclusions." (Appellant Brief, p.18, PDF p.26). TPPF's statement entirely misrepresents the trial court's finding of fact on this matter, which explicitly states as follows:

> On March 29, 2021, Mike White, the District's then Assistant Superintendent for Business Services sent an email regarding the Tennis Center. The email stated that "there is no mismanagement occurring, there is no malfeasance occurring, and there are no funds being misdirected or mismanaged. **The email did not disclose the contents of the [WP] Report, or the legal advice provided by Attorney Neal.**

(CR.852) (emphasis added). TPPF then goes on to misstate the contents of the STC Email because nowhere does Mr. White state what the WP Report concluded nor could he as evidenced by his testimony at trial reflecting he was only aware of the WP Report and did not know its contents. (Appellant Brief, p.19, PDF p.27; 2.RR.27; 3.RR.3). The Court should disregard TPPF's futile attempt to expand the STC Email beyond its four-corners accordingly.

Moreover, what TPPF fails to address for the Court is that the trial court

reviewed the WP Report *in camera*, reviewed the evidence on file with the trial court, and held that the WP Report "is subject to the attorney client privilege and not subject to production under the Texas Public Information Act." (CR.846; 2.RR.6). The trial court then took testimony at trial regarding TPPF's sole waiver argument and, in conjunction with its review of the WP Report *in camera*, determined the STC Email did not waive HPISD's attorney-client privilege. (2.RR.28). TPPF then failed to ask the Court to order that the WP Report be included in the trial record, thereby leaving nothing for this Court to review on appeal.

3. Michael White's email did not discuss the contents and conclusions of the Whitley-Penn Report.

TPPF asserts the District failed to rebut the claim of waiver as it failed to present evidence "that Mr. White was not discussing the contents of the [WP] Report." (Appellant Brief, p.28, PDF p.20). But this is exactly what the evidence before the Court reflects, which TPPF once again misstates. To that end, TPPF claims the STC Email states "that there had been 'an investigation . . . with expert assistance' and that there was 'no mismanagement' and 'no malfeasance occurring' at the Center, and that 'no funds are being misdirected or mismanaged.'" (Appellant Brief, p.20, PDF p.28). This jumbled recitation does not accurately reflect the actual contents of the STC Email. (3.RR.3).

While the Court is more than capable of reading the STC Email and comparing it to TPPF's representations, it bears noting that the "expert assistance"

Attorney Neal received related to "reviewing all of the types of documentation that you mention," which is consistent with Attorney Neal's affidavit reflecting he is not an accountant and utilized Whitley-Penn to analyze the Seay Tennis Center's internal controls and accounting procedures so that he could give legal advice to the District. (CR.743, 851; 3.RR.3). Moreover, at no time did Mr. White ever state "**that there was** 'no mismanagement' and 'no malfeasance occurring'" as asserted by TPFF. (Appellant Brief, p.20, PDF p.28) (emphasis added). Rather, the STC Email states "**there is** no mismanagement occurring, **there is** no malfeasance occurring, and **there are** no funds being misdirected or mismanaged." (3.RR.3).

TPPF criticizes HPISD's insistence on analyzing the STC Email with proper grammatical constructs, arguing "[t]he fact that [Mr. White] said 'occurring' rather than 'occurred' does not change the fact that he was discussing the content of the [WP] Report." (Appellant Brief, p.21, PDF p.29). To the contrary, the statement "**there is** no mismanagement occurring, **there is** no malfeasance occurring, and **there are** no funds being misdirected or mismanaged" conveys an entirely different meaning than if the STC Email had stated "no mismanagement occurred, no malfeasance occurred, and there were no funds being misdirected or mismanaged." (3.RR.3).

Moreover, the Court should not overlook that TPPF's argument in this regard is based off a misstatement of the STC Email. (Appellant Brief, p.20, PDF p.28;

3.RR.3). Indeed, had the STC Email used the word "was" (as represented by TPPF) instead of the word "is" (the actual word in the STC email), then Mr. White's word choice would have been immaterial as "was occurring" and "occurred" convey the same meaning. But the STC Email does not speak to the past or the WP Report—it speaks to the current state of the Seay Tennis Center. The Court should disregard the mental gymnastics required to make any other determination and uphold the trial court's holding that the STC email did not discuss the contents and conclusions of the WP Report.

4. Texas Public Policy Foundation failed to preserve any alleged error at trial.

The Texas Rules of Evidence and the Texas Rules of Appellate Procedure set forth the mechanism for parties to preserve error on appeal when the trial court excludes evidence at a bench trial.[12] More specifically, a party must make an offer of proof or file a bill of exception.[13] Here, TPPF failed to undertake any effort to preserve any alleged error and, as such, this Court cannot determine whether the trial court made any rulings that constitute reversible harm.[14] More specifically, while TPPF asserts the trial court prevented it from putting on evidence at trial, TPPF did not make an offer of proof or file a bill of exception addressing the alleged

[12] *See* TEX. R. EVID. 103(a); TEX. R. APP. P. 33.2; *Stephens v. Stephens*, No. 02-23-00081-CV, 2024 WL 4233118, at *2 (Tex. App.—Fort Worth Sept. 19, 2024, no pet. h.).
[13] TEX. R. EVID. 103(a); TEX. R. APP. P. 33.2.
[14] *Stephens*, 2024 WL 4233118, at *2.

evidentiary exclusions. (Appellant Brief, pp.10-11, 13, 21-23, PDF pp.18-19, 21, 29-31). TPPF, likewise, failed to ask the Court to order that the WP Report be included in the record on appeal despite including the WP Report on its exhibit list at trial. (CR.819).

As the Fort Worth Court of Appeals recently explained,

> [i]f evidence is excluded at a bench trial, to preserve error, the party must make an offer of proof. "To preserve error adequately and effectively, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility." "The offer of proof serves primarily to enable the reviewing court to assess whether excluding the evidence was erroneous and, if so, whether the error was harmful." An offer of proof allows the trial court to reconsider its ruling in light of the proffered evidence.
>
> * * *
>
> In an appeal, an appellate court cannot decide whether evidence was improperly excluded unless the evidence is included in the record for review, and the only way the excluded evidence will be included in the record is if the complaining party made an offer of proof or a bill of exception.
>
> * * *
>
> Without an offer of proof or bill of exception, even if we were to conclude that the trial court improperly excluded evidence based on its July 2021 sanction order, we would have no means of determining whether the January 2023 judgment contained reversible harm.[15]

It follows that TPPF failed to preserve any alleged error on appeal regarding the trial court's evidentiary rulings. (Appellant Brief, pp.21-23, PDF pp.29-31).

[15] *Id.* (internal citations omitted).

D. The trial court correctly determined that the Whitley-Penn Report is not subject to disclosure.

TPPF argues, alternatively, that "the Court should require HPISD to disclose at least a part of the [WP] Report under the Texas Public Information Act" because, in TPPF's estimation, at least a portion of the WP Report is subject to disclosure. The District once again notes, however, that TPPF failed to request that HPISD submit the WP Report as evidence before the trial court leaving nothing for this Court to review on appeal. HPISD nevertheless addresses TPPF's arguments, none of which alter the trial court's correct conclusion that the WP Report is privileged and not subject to disclosure.

1. The entirety of the Whitley-Penn Report is protected by the attorney-client privilege.

TPPF argues the WP Report is not protected by the attorney-client privilege because the privilege does not extend to an investigation "conducted by the forensic accountants at Whitley-Penn." (Appellant Brief, p.26, PDF p.34). TPPF's argument, however, entirely misses the mark because HPISD retained Attorney Neal to provide it with legal advice regarding legal issues related to the operation of the Seay Tennis Center. (CR.742-743, 851). Attorney Neal, in turn, retained Whitley-Penn to assist him in investigating potential legal concerns related to the financial and accounting aspects of the Seay Tennis Center's operations. (CR.742-743, 851).

This is exactly what Texas Rule of Evidence 503(b) contemplates when

setting forth what is protected by the attorney-client privilege—"[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client . . . between the client's lawyer and the lawyer's representative."[16] It follows that the Court can disregard TPPF's supporting case law as it is inapposite to the facts before the Court.

To that end, TPPF starts with the assertion that the "attorney-client privilege 'does not apply to communications between a client and an attorney where the attorney is employed in a non-legal capacity, for instance as an accountant, escrow agency, negotiator, or notary public.'" (Appellant Brief, p.25, PDF p.33). But the evidence in the record on appeal reflects HPISD retained Attorney Neal to provide legal advice regarding legal concerns surrounding the Seay Tennis Center. (CR.742-743, 851). Indeed, TPPF did not adduce any evidence at trial reflecting the District retained Attorney Neal in a non-legal capacity. It follows that the attorney-client privilege extends to communications between Attorney Neal and Whitley-Penn.[17]

TPPF relies heavily on a decision from the Texarkana Court of Appeals, holding the attorney-client privilege does not apply if the attorney is acting in a non-

[16] *See* TEX. R. EVID. 503(b)(1)(B).
[17] *See id.*

legal capacity, such as an insurance investigator.[18] While *Farmers* is irrelevant because it does not address the situation here—an attorney retained for legal services who engages an accounting firm (*i.e.*, a lawyer's representative) to assist with providing legal advice—the appellate court's subsequent discussion of what is privileged entirely undercuts TPPF's arguments as it recognized communications "concerning legal strategy, assessments, and conclusions" are covered by the privilege.[19] And TPPF can direct the Court to no evidence in the record on appeal disputing Attorney Neal's role as legal counsel providing legal advice to HPISD.

TPPF next directs the Court to a federal district court case holding "the critical inquiry is not whether the investigation was conducted at the behest of a lawyer, but whether any particular communication in connection with that investigation facilitated the rendition of legal advice to the client."[20] Again, the evidence in the record on appeal reflects Attorney Neal retained Whitley-Penn to assist him in providing legal advice to HPISD. (CR.742-743, 851). The trial court reviewed the WP Report and determined the attorney-client privilege applied accordingly. TPPF, however, did not introduce any evidence contravening Attorney Neal's assertions and failed to take the steps necessary to preserve any alleged error by seeking

[18] *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana Feb. 18, 1999, rehearing overruled).
[19] *Id.* at 341.
[20] *Seibu Corp. v. KPMG LLP*, No. 3-00-CV-1639-X, 2002 WL 87461, at *3 (N.D. Tex. Jan. 18, 2002).

admission of the WP Report in the record on appeal.

The facts before the Court are analogous to the Austin Court of Appeals decision in *Harlandale*, wherein the appellate court found the attorney-client privilege protected the entirety of the attorney's report.[21] In reaching this conclusion, the appellate court noted as follows:

> Having reviewed the totality of the circumstances surrounding Harlandale's retention of Pou, we conclude that Harlandale proved as a matter of law that an exception to disclosure applies to Pou's entire report and that the district court's implied finding that Pou was acting in a dual role cannot stand. Harlandale's retention of Pou closely resembles the retention of outside counsel by the West Virginia Attorney General's Office in *In re Allen*. In that case, the West Virginia Attorney General hired an attorney named Barbara Allen to investigate possible document mismanagement and confidentiality breaches and to prepare a written report of her findings. A government "watchdog" organization sought disclosure of the communications, including the draft report, arguing that because Allen had acted as an investigator rather than an attorney, the communications at issue were not made for the purpose of securing legal services.
>
> Relying on the seminal case of *Upjohn Co. v. United States*, the Fourth Circuit rejected the watchdog organization's argument, reasoning that an attorney's investigation may constitute a legal service and thus may be encompassed by the privilege. The court declared that the relevant inquiry was not whether Allen was retained to conduct an investigation, but rather, whether the investigation was related to the rendition of legal services. After examining the record, and in particular a retention letter sent by the Attorney General to Allen, the court concluded that Allen was retained to conduct an investigation using her legal expertise; therefore, the court held that the attorney-client privilege protected all communications between Allen and the Attorney General's office.[22]

[21] *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 333 (Tex. App.—Austin 2000, pet. denied).
[22] *Id.* at 334.

This is the exact situation presented to the Court here. The WP Report was a communication to an attorney by a lawyer's representative. That situation is squarely within Texas Rule of Evidence 503(b) and cloaks the entire WP Report with the privilege.

Indeed, the Texas Attorney General relied on the *Harlandale* decision in finding HPISD "demonstrated applicability of the attorney-client privilege to the submitted information" (*i.e.*, the WP Report). (CR.762). And what TPPF again overlooks in briefing its issues on appeal is the definition of a lawyer's representative under the Texas Rules of Evidence specifically includes "an accountant who is reasonably necessary for the lawyer's rendition of professional legal services."[23] As Attorney Neal explained, retaining Whitley-Penn was necessary to provide HPISD with legal advice because he did not have a financial background. (CR.742-743, 851). Attorney Neal then used the WP Report to provide the District with legal advice. (CR.742-743, 851). This is the exact situation where the attorney-client privilege applies and, as such, the trial court correctly determined the WP Report is protected by the privilege in its entirety.

The *Harlandale* decision also addresses TPPF's overly played doomsday scenarios wherein applying the attorney-client privilege to the WP Report "would

[23] TEX. R. EVID. 503(a)(4)(B).

result in a vast expansion of attorney-client privilege and give future governmental bodies a blueprint for avoiding scrutiny." (Appellant Brief, p.28, PDF p.36). To that end, the appellate court specifically "recognize[d] the legitimate concerns of the [Texas Public Information] Act as well as those of the attorney-client privilege," before noting the requestor had "available effective means of finding out the details it seeks through interviews with the witnesses."[24] This is particularly relevant here because TPPF intended to call Jason Holland to the stand during trial, who is "the tennis coach whose resignation letter lead in part to the investigation."[25] (2.RR.14). In other words, TPPF indisputably has available to it the effective means of obtaining information from the witnesses Whitley-Penn interviewed.

Moreover, contrary to TPPF's assertions, HPISD has never claimed the WP Report is privileged because it was "shared with" the District's attorneys.[26] (Appellant Brief, p.12, PDF p.20). Instead, as set forth herein, HPISD asserts the WP Report is privileged because it is a communication between Attorney Neal (*i.e.*, the District's attorney) and Whitley-Penn (*i.e.*, a lawyer's representative).[27] This is another misstatement made by TPPF in an effort to ignore the actual facts before the Court and paint a scenario that simply does not exist. The Court should uphold the

[24] *Harlandale*, 25 S.W.3d at 335.
[25] TPPF ultimately declined to call Mr. Holland and called Mr. White instead. (2.RR.17-19).
[26] TPPF specifically states "HPISD has refused to turn over the Report, claiming attorney client privilege because the Report was also shared with its attorneys." (Appellant Brief, p.12, PDF p.20).
[27] TEX. R. EVID. 503(b)(1)(B).

trial court's application of the attorney-client privilege to the entirety of the WP Report accordingly.[28]

2. Texas Public Policy Foundation failed to preserve any alleged error at trial.

TPPF asserts that even if portions of the WP Report are protected by the attorney-client privilege, the Court "would still have to reverse the District Court's decision because at least some of the content within the report is purely factual information that must be disclosed." (Appellant Brief, p.30, PDF p.38). Once again, TPPF failed to preserve this alleged error on appeal as it did not seek to have the WP Report admitted by the District as an exhibit at trial or otherwise make an offer of proof or file a bill of exceptions.[29] It follows that there is no error for the Court to review on appeal.

Regardless, TPPF's argument does not support overturing the trial court's determination that the WP Report is protected by the attorney-client privilege in its entirety. Indeed, asserting HPISD simply needs to "redact actual legal advice from the completed report" reflects that TPPF fails to even grasp the purpose of the WP Report. (Appellant Brief, p.32, PDF p.40). Attorney Neal engaged Whitley-Penn to

[28] TPPF also discusses the Texas Supreme Court's decision in *Franklin*. (Appellant Brief, p.29-30, PDF pp.37-38). *See Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273 (Tex. 2023). HPISD relied on *Franklin* to establish that Whitley-Penn is a lawyer's representative under the Texas Rules of Evidence. (CR.737-739). The trial court found Whitley-Penn is a lawyer's representative and TPPF does not dispute that finding on appeal. (CR.854).
[29] *See* TEX. R. EVID. 103(a); TEX. R. APP. P. 33.2; *Stephens*, 2024 WL 4233118, at *2.

assist him in rendering legal advice to HPISD. (CR.742-743, 850-851). Whitley-Penn, as a lawyer's representative, created the WP Report to assist Attorney Neal in providing legal advice. (CR.742-743, 850-851). Attorney Neal then relied on the entirety of the WP Report to provide HPISD with legal advice. (CR.742-743, 850-851).

This is not, as TPPF asserts, analogous to attorney fee bills, wherein some of the information is protected by the attorney-client privilege (*e.g.*, the substance of privileged communications), while other portions of the bill are not covered (*e.g.*, communications with opposing counsel and the fees charged). Rather, Attorney Neal was acting in his capacity as an attorney and Whitley-Penn assisted Attorney Neal with providing legal advice as a lawyer's representative—as expressly contemplated under the Texas Rules of Evidence—to the District.[30] The entire WP Report was a communication from that representative to Attorney Neal. Attorney Neal relied on the entirety of the WP Report to provide the District with legal advice.[31]

In other words, as the trial court determined in its *in camera* review, the entirety of the WP Report is protected by the attorney-client privilege because there is nothing to parse out. This in no way undermines the Texas Public Information Act as TPPF is free to interview the same individuals Whitley-Penn spoke with and

[30] TEX. R. EVID. 503(a)(4)(B).
[31] *See Farmers*, 990 S.W.2d 341.

conduct its own investigation. But TPPF is not entitled to the WP Report because releasing it to the public would directly contradict Texas Rule of Evidence 503(b) by releasing a representative-to-attorney communication. It also is tantamount to releasing Attorney Neal's conclusions, assessments, and legal strategy given his reliance on the WP Report to provide HPISD—his client—with legal advice. The trial court determined the attorney-client privilege applied to the entirety of the WP Report. The Court should uphold the trial court's determination accordingly.

E. Prayer.

The Court should overrule TPPF's points of error, thereby upholding the trial court's order finding the entirety of the WP Report is protected from disclosure by the attorney-client privilege.

Respectfully submitted,

By: /s/Meredith Prykryl Walker
Meredith Prykryl Walker
State Bar No. 24056487

WALSH GALLEGOS KYLE
ROBINSON & ROALSON P.C.
105 Decker Court, Suite 700
Irving, Texas 75062
214.574.8800
214.574.8801 (facsimile)
mwalker@wabsa.com

Attorneys for Appellee Highland Park Independent School District

CERTIFICATE OF SERVICE

The undersigned certifies that on September 27, 2024, the foregoing Brief was submitted to the office of the Clerk for Fifth Court of Appeals. The undersigned further certifies that copies of the foregoing Brief were submitted to counsel of record through the Court's electronic filing system.

Robert Henneke
Chance Weldon
Christian Townsend
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701

/s/ Meredith Prykryl Walker
Meredith Prykryl Walker

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of TEX. R. APP. P. 9.4(i)(2)(B) as the brief contains 6800 words total, including the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

2. This brief complies with the typeface requirements of TEX. R. APP. P. 9.4(e) as the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times Roman font for the body of the brief and 12-point Times Roman font for footnotes.

/s/ Meredith Prykryl Walker
Meredith Prykryl Walker

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Meredith Walker on behalf of Meredith Walker
Bar No. 24056487
mwalker@wabsa.com
Envelope ID: 92549116
Filing Code Description: Brief Not Requesting Oral Argument
Filing Description: Brief Not Requesting Oral Argument
Status as of 9/27/2024 3:11 PM CST

Associated Case Party: Texas Public Policy Foundation

Name	BarNumber	Email	TimestampSubmitted	Status
Yvonne Simental		ysimental@texaspolicy.com	9/27/2024 2:56:09 PM	SENT
Robert Henneke		rhenneke@texaspolicy.com	9/27/2024 2:56:09 PM	SENT
Christian Townsend		ctownsend@texaspolicy.com	9/27/2024 2:56:09 PM	SENT
Chance DWeldon		cweldon@texaspolicy.com	9/27/2024 2:56:09 PM	SENT

Associated Case Party: Highland Park Independent School District

Name	BarNumber	Email	TimestampSubmitted	Status
Meredith Walker	24056487	mwalker@wabsa.com	9/27/2024 2:56:09 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Anjela Young		ayoung@wabsa.com	9/27/2024 2:56:09 PM	SENT
Cynthia Osborne		cosborne@wabsa.com	9/27/2024 2:56:09 PM	SENT
Jerome Patterson		jpatterson@wabsa.com	9/27/2024 2:56:09 PM	SENT
Meredith Walker		mwalker@wabsa.com	9/27/2024 2:56:09 PM	SENT
Crystal Hernandez		chernandez@wabsa.com	9/27/2024 2:56:09 PM	SENT