IN THE SUPREME COURT OF IOWA

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SUPREME COURT NO. 16-0775
WOODBURY COUNTY NO. LACV160570

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OLIVER FENCEROY, Plaintiff-Appellee,

vs.

GELITA USA, INC., TOM HAIRE, AND JEFF TOLSMA,
Defendants-Appellants

And

BOB KERSBERGEN and JEREMY KNEIP, Defendants.

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APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY, IOWA
THE HONORABLE JEFFREY A. NEARY

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# APPELLEE'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases*** ***Page***

***Statutes***



***Other***

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

## ROUTING STATEMENT

Iowa Rule of Appellate Procedure 6.1101(2)

## I. STANDARD OF REVIEW AND PRESERVATION OF ERROR.

*Countryman v. McMains,* 381 N.W.2d 638, 640 (Iowa 1986)

*Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009)

*Pollock v. Deere & Co.,* 282 N.W.2d 735, 738 (Iowa 1979)

*Williams v. Dubuque Racing Ass'n*, 445 N.W.2d 393, 394 (Iowa Ct. App. 1989)

**Statutes**

Iowa Court Rule 32:3.7

**Other**

None.

## II. ON APPEAL, THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER SHOULD BE UPHELD, AND PLAINTIFF SHOULD BE ALLOWED TO TAKE THE DEPOSITION OF COUNSEL.

### A. INTRODUCTION.

*Allen v. Lindeman*, 148 N.W.2d 610, 615 (Iowa 1967)

*Brandon v. West Bend Mut. Ins. Co.,* 681 N.W.2d 633, 642 (Iowa 2004)

*Chidester v. Needles,* 353 N.W.2d 849, 852 (Iowa 1984)

*Harding v. Dana Transport, Inc.,* 914 F.Supp. 1084, 1102-3 (D.N.J. 1996)

*Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990)

*Squealar Feeds v. Pickering*, 530 N.W.2d 678,684 (Iowa 1995)

**Statutes**

Iowa Code § 622.10(2)

Iowa Court Rule 32:3.7

Iowa Rule of Civil Procedure 1.504(1)

**Other**

None.

### B. DEFENDANTS' WAIVER DUE TO THE ASSERTION OF THE *FARAGHER-ELLERTH* AFFIRMATIVE DEFENSE, AND USE OF COUNSEL'S INVESTIGATION IN SUPPORT OF SAID DEFENSE.

*Bierman v. Marcus,* 122 F.Supp. 250, 252 (D.N.J.1954)

*Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3d Cir. 1994)

*Chivers v. Cent. Noble Cmty. Schs.,* 1:04–CV–00394, 2005 U.S. Dist. LEXIS 16057 (N.D.Ind. Aug. 4, 2005)

*E.E.O.C. v. Outback Steakhouse of FL, Inc.,* 251 F.R.D. 603, 611 (D. Colo. 2008)

*Faragher v. City of Boca Raton,* 524 U.S. 775, 807, 118 S.Ct. 2275, 2293, 141 L.Ed.2d 662, 689 (1998); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633, 655 (1998)

*Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 744 (Iowa 2003)

*Garfinkle v. Arcata National Corp.,* 64 F.R.D. 688 (S.D.N.Y.1974)

*Giordano v. William Paterson College of New Jersey*, 804 F.Supp. 637 (D.N.J. 1992)

*Glenmede Trust Company v. Thompson,* 56 F.3d 476 (3d Cir.1995)

*Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1094-96 (D.N.J. 1996)

*Handgards, Inc. v. Johnson & Johnson,* 413 F.Supp. 926, 929 (N.D.Cal.1976)

*Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990)

*Lopez v. Aramark Unif. & Career Apparel, Inc.,* 426 F. Supp. 2d 914, 948 (N.D. Iowa 2006)

*Musa-Muaremi v. Florists' Transworld Delivery, Inc.,* 270 F.R.D. 312, 317–19 (N.D. Ill. 2010)

*Pray v. New York City Ballet Co.,* 1997 WL 266980 (S.D.N.Y. 1997)

*Steiner v. Showboat Operating Company*, 25 F.3d 1459 (9th Cir. 1994)

*Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, 2009 WL 1543651, at *12 (N.D. Ind. June 2, 2009)

*Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981)

*Volpe v. US Airways, Inc.*, 184 F.R.D. 672 (M.D. Fla. 1998)

*Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 68 Cal.Rptr.2d 844 (2d Dist. 1997)

**Statutes**

None.

**Other**

None.

### C. DEFENDANTS' WAIVER DUE TO THEIR TESTIMONY REGARDING THE INVESTIGATION.

*Chidester v. Needles,* 353 N.W.2d 849, 852 (Iowa 1984)

*Kantaris v. Kantaris,* 169 N.W.2d 824, 830 (Iowa 1969)

*Miller v. Cont'l Ins. Co.,* 392 N.W.2d 500, 504–05 (Iowa 1986)

*State v. Cole,* 295 N.W.2d 29, 35 (Iowa 1980)

**Statutes**

Iowa Code § 622.10

**Other**

J. Wigmore, *Evidence* § 2327 at 636 (McNaughton rev. 1961)

### D. DEFENDANTS' WAIVER DUE TO THE PRESENCE OF THIRD PARTIES.

*State v. Craney*, 347 N.W.2d 668, 677-78 (Iowa 1984)

*State v. Flaucher*, 223 N.W.2d 239, 241 (Iowa 1974)

**Statutes**

None.

**Other**

Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan.L.Rev. 455, 463–64 (1962)

Saltzburg, *Communications Falling Within the Attorney-Client Privilege,* 66 Iowa L.Rev. 811, 816 (1981)

### E. THE *SHELTON* TEST FROM THE EIGHTH CIRCUIT IS NOT PERTINENT TO THIS APPEAL.

*Miller v. Cont'l Ins. Co.,* 392 N.W.2d 500, 504–05 (Iowa 1986)

*Shelton v. Am. Motors*, *Inc.*, 805 F.2d 1323 (8th Cir. 1986)

**Statutes**

None.

**Other**

None.

## ROUTING STATEMENT

Plaintiff-Appellee does not object to Defendants-Appellants' Routing Statement to the extent that it states that it would be appropriate for the Iowa Supreme Court to retain the case under Iowa Rule of Appellate Procedure 6.1101(2) due to the present case involving issues of first impression.

## STATEMENT OF THE CASE

Plaintiff-Appellee does not object to Defendants-Appellants' Statement of the Case.

## STATEMENT OF FACTS

As noted in Defendants-Appellants' (hereinafter "Defendants" collectively, or referred to individually as needed) Statement of Facts, Plaintiff Oliver Fenceroy (hereinafter "Plaintiff") was employed by Gelita USA, Inc. for approximately 37 years. (Petition p. 2; App. 2). Defendants Kersbergen and Haire, who were co-workers at Gelita, engaged in acts of racial discrimination, including tying a rope in the shape of the noose, and engaging in various acts of racial harassment (including telling Plaintiff to "get to the back of the bus", calling Plaintiff a "talking monkey" and the like). (Petition p. 3; App. 3). These acts of discrimination and harassment directed at Plaintiff escalated into physical violence. (Petition p. 4; App. 4).

Defendant Kneip was Plaintiff's supervisor at Gelita and was aware of the noose, but did nothing about it. (Petition, p. 3; App. 3). When Plaintiff complained about it to Defendant Tolsma (of Gelita's Human Resources Department), no corrective action was taken against the perpetrators. (Petition p. 3; App. 3). When the racially hostile work environment, in the form of discriminatory comments, jokes, and assaultive behavior continued, Plaintiff told Kneip he was going to complain to Human Resources, but Kneip told Plaintiff not to waste his time doing it because "we stick together. HR will believe all of us before they believe you." (Petition p. 4; App. 4). Because of these allegations, Plaintiff disagrees with Defendants' characterization of Fenceroy's retirement as "voluntary"; instead, the allegations present a case of constructive discharge, and Plaintiff has accordingly claimed damages for lost wages and benefits. (Petition p. 5; App. 5).

As noted in Defendants' Statement of Facts, the issue involved in this appeal revolves around attorney Ruth Horvatich investigation of Plaintiff's complaints after he left employment at Gelita. The particulars of her investigation will be set forth in the argument section below.

## ARGUMENT

## I. PRESERVATION OF ERROR AND STANDARD OF REVIEW.

Plaintiff does not contest Defendants' preservation of error statement. Because the present appeal involves a discovery issue, Plaintiff also agrees that Defendants must show that the trial court abused its discretion in allowing the deposition of Horvatich to go forward. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009). Defendants' burden is significant:

> It is undisputed that the trial court has wide discretion in its rulings regarding discovery issues. *Pollock v. Deere & Co.,* 282 N.W.2d 735, 738 (Iowa 1979). Such rulings will be reversed only when an abuse of discretion is found. *Id.* Rulings within the trial court's discretion are "presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption." *Countryman v. McMains,* 381 N.W.2d 638, 640 (Iowa 1986).

*Williams v. Dubuque Racing Ass'n*, 445 N.W.2d 393, 394 (Iowa Ct. App. 1989).

While Plaintiff generally agrees that rulings involving disqualifications of counsel are reviewed on an abuse of discretion standard, Plaintiff disagrees that this appeal presents issues related to disqualification of counsel[1]. Nowhere in Judge Neary's ruling allowing the deposition of counsel to go forward does he state that defense counsel would therefore be

[1] Specifically, Defendants claim that allowing the deposition of Horvatich to go forward "will likely lead to the disqualification of defense counsel in these proceedings".

disqualified from representing Defendants. At the hearing on Defendants' Motion for Protective Order, Plaintiff specifically stated on the record that he was not seeking the disqualification of counsel. (Hearing Transcript pp. 25-26; App. 270-271). Iowa Court Rule 32:3.7 regarding lawyers acting as witnesses does not automatically disqualify Ms. Horvatich from continuing to represent Defendants. The rule specifically contemplates that another lawyer from her law firm may continue to represent Defendants at trial even if she is a witness. There is no evidence that counsel will be disqualified, so Defendants' claim that their counsel will be disqualified from representing them should be disregarded in this appeal.

## II. ON APPEAL, THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER SHOULD BE UPHELD, AND PLAINTIFF SHOULD BE ALLOWED TO TAKE THE DEPOSITION OF COUNSEL.

### A. INTRODUCTION.

Iowa Rule of Civil Procedure 1.504(1) puts the burden on the person from whom discovery is sought to show good cause for a protective order. As noted by Judge Neary at page 2 of his Ruling (App. 231), the burden of proof was on the Defendants to prove that the deposition should not have gone forward due to privilege issues, citing *Allen v. Lindeman*, 148 N.W.2d 610, 615 (Iowa 1967).

Iowa Code § 622.10(2) notes that privileges may be waived. Because it impedes the full and free discovery of the truth, the attorney-client privilege is strictly construed. *See Chidester v. Needles,* 353 N.W.2d 849, 852 (Iowa 1984).

Privileges, including attorney-client, may be waived either on an express or implied basis. *Squealar Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995). There is no blanket prohibition against taking an attorney's deposition just because they have entered an appearance or are defending a client in a case. *See* Iowa Court Rule 32:3.7; *Harding v. Dana Transport, Inc.,* 914 F.Supp. 1084, 1102-3 (D.N.J. 1996) citing *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) (In cases where the attorney's conduct itself is the basis of a claim or a defense, there is little doubt that the attorney may be examined as other witnesses.) *See also Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633, 642 (Iowa 2004) (A waiver may be implied by "conduct making it unfair for a client to invoke the privilege.").

As set forth in more detail below, Plaintiff submits that the deposition of Ms. Horvatich should go forward because Defendants waived the claim that her role in the investigation of Fenceroy's discrimination complaint is privileged, for at least three reasons: (1) They asserted without qualification,

the *Faragher-Ellerth* affirmative defense and they used evidence pertaining to Horvatich's investigation into Fenceroy's Iowa Civil Rights Commission Complaint in support of that defense in their Motion for Summary Judgment and have expressed their intention to do so at trial by their affirmative defenses paragraphs 47, 48 and 49. (2) They testified by deposition to communications involving counsel during the investigation. (3) Third parties were present during counsel's investigation.

### B. DEFENDANTS' WAIVER DUE TO THE ASSERTION OF THE *FARAGHER-ELLERTH* AFFIRMATIVE DEFENSE, AND USE OF COUNSEL'S INVESTIGATION IN SUPPORT OF SAID DEFENSE.

In order to prove a hostile work environment claim, Plaintiff must show:

> (1) he… belongs to a protected group; (2) he…. was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment.

*Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 744 (Iowa 2003)(alteration added). Plaintiff's claims involve harassment by both nonsupervisory and supervisory employees. As to Plaintiff's claims that he was harassed by nonsupervisory employees, he must also show that the employer "knew or should have known of the harassment and failed to take proper remedial action". *Id.* As to Plaintiff's claims regarding supervisory

employees, the *Farmland Foods* decision noted as follows: "When a supervisor perpetrates the harassment, but no tangible employment action occurred[2], the employer may assert the *Faragher-Ellerth* affirmative defense to avoid liability." *Id.* (citing *Faragher v. City of Boca Raton,* 524 U.S. 775, 807, 118 S.Ct. 2275, 2293, 141 L.Ed.2d 662, 689 (1998); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633, 655 (1998).

There is no question Defendants raised the *Faragher-Ellerth* affirmative defense. They stated in their Answer that "Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant Gelita USA, Inc. or to otherwise avoid harm" and that "Defendants exercised reasonable care to prevent and promptly correct any harassing behavior to its knowledge". (Answer p. 4; App. 10). At the hearing on the Motion for Protective Order, defense

[2] A constructive discharge is a tangible employment action; therefore, it is questionable as to whether Defendants will ultimately be able to assert the *Faragher-Ellerth* privilege at trial. *See Lopez v. Aramark Unif. & Career Apparel, Inc.,* 426 F. Supp. 2d 914, 948 (N.D. Iowa 2006). At this stage of the proceedings, however, Defendants are still asserting the affirmative defense, and Plaintiff must be allowed to engage in discovery of the evidence that Defendants have asserted in favor of the defense.

counsel did not amend, forego, dismiss or strike this assertion of their defenses. (Hearing Transcript pp. 22-23; App. 267-268).

The essence of Defendants' argument on appeal may be summed up as follows – they claim that because counsel's investigation into Plaintiff's discrimination complaints was performed after his employment at Gelita ended, Plaintiff cannot take her deposition. They go so far as to state:

> Defendants are not relying upon any investigation conducted by defense counsel after Fenceroy filed his discrimination charge. Those complaints were not made by Fenceroy during his employment, and therefore, the adequacy of that investigation and remedial action undertaken by the Company are not "at issue" nor are they part of Gelita's *Faragher-Ellerth* affirmative defense.

(Defendants' Brief p. 14). Defendants' argument on appeal is contradictory to their assertion of the defense at the trial court level.

Throughout the entirety of these pre-appeal proceedings – the ICRC investigation, the initial pleadings, discovery, and the Motion for Summary Judgment, Defendants brought up the investigation involving attorney Horvatich as evidence in support of their affirmative defenses. Proof that Defendants intend to use Ms. Horvatich's investigation as proof of the *Faragher-Ellerth* defense is her May 30, 2013 letter to the ICRC, (Exhibit A to Plaintiff's Resistance to Defendants' Motion for Protective Order; App. 193-219) wherein she stated on Gelita's behalf:

This letter serves as the position of Gelita USA, Inc. in the above referenced matter… [letter page 1]…
…

Other than the rope described above, and despite the Company's clear policies regarding harassment, Complainant never made any other complaints to the Company regarding harassment However, in his charge, Complainant made several allegations relating to "racist jokes" by coworkers. **The Company first learned of these allegations when it received Complainant's complaint filed with the Iowa Civil Rights Commission. After receiving the complaint, the Company conducted an investigation regarding Complainant's allegations.** During the investigation, Bob Kersbergen denied the majority of the allegations contained in the Complainant's complaint, but recognized that another employee had told the "farm joke" referred to in the complaint and that he and the Complainant had gotten into a physical altercation. As a result of the investigation, Mr. Kersbergen was terminated. Also as a result of the investigation, Tom Haire, Lewis Bergenske, and Kent Crosgrove were disciplined for failing to report incidents they were witness to, which were referred to in Complainant's complaint. Specifically regarding Complainant's investigation allegation relating to harassment from Mr. Kneip, Mr. Kneip has no recollection of any such conversation or meeting and denies any knowledge of such a reference and has never told Complainant nor any other employee that it is a waste of time to complaint to human resources and that HR would believe them before they would believe you.

**Response to Charge of Discrimination**

The Complainant alleges that he was discriminated against and harassed because of his race and was also retaliated against after making a complaint to human resources. His allegations are unsupported and lack any basis in evidence or truth.
…

**II. Racial Harassment Claim**

**…** A claim of hostile work environment based on coworker harassment requires proof that

(1) The Complainant belongs to a protected group;

(2) he was subjected to unwelcome harassment;

(3) the harassment was based on his membership in a protected group:

(4) the harassment affected a term, condition, or privilege of his employment by creating a hostile work environment; and

(5) the employer knew or should have known about the harassment and **failed to take proper remedial action**.
**…**

Additionally, the Company did not have knowledge of the Complainant's alleged racial harassment. Complainant only made one complaint to the Company regarding a "noose" hanging in the Ossein Plaint. This complaint was promptly investigated and resolved. He failed to make any other complaints of harassment to management. The Complainant has failed to provide sufficient evidence that he endured sever and pervasive racial hostility, that the Company knew or should have known of such hostility, and that the Company did nothing about it. **In fact, as explained below, the Company took prompt action to resolve the complaints of harassment, despite the fact that Complainant no longer worked at the Company because of his voluntary retirement.**

… Even if the Company knew about the coworker harassment and Complainant was subject to harassment by his supervisor, **the Company has clearly shown that it exercised reasonable care to prevent and promptly corrected any harassing behavior and the Complainant unreasonably failed to take advantage of the Company's reporting procedures**. In the absence of a tangible employment action, which as explained above is true in the case, **the employer is entitled to demonstrate its entitlement to the *Ellerth-Faragher***

> **affirmative defense.** *Weger v. City of* Ladue, 500 F3d 710, 718 (8thy Cir. 2007). The affirmative defense is satisfied by showing that (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior and **(2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm**. *Brenneman v. Famous Dave's of Am., Inc.*, 507 F3d 1139, 1145 (8th Cir. 2007). Here, the Company clearly met this defense.
>
> … Additionally, after the Complainant filed the charge at issue with the Iowa Civil Rights Commission, the Company investigated the allegations of harassment , which resulted in the termination of Mr. Kersbergen and the discipline of Mr. Haire, Mr. Bergenske, and Mr. Cosgrove [sic]. … **Thus it is clear that the Company exercised reasonable care to prevent harassment, promptly corrected any harassing behavior, and the Complainant unreasonably failed to take advantage of the Company's clear reporting procedures. As a result, the Complainant's allegation of racial harassment fails.**

(App. 195-197)(Emphasis added.)

Therefore, Attorney Horvatich's letter to the Civil Rights Commission emphasizes that one of Gelita's defenses is that "the Company has clearly shown that it exercised reasonable care to prevent and promptly corrected any harassing behavior and the Complainant unreasonably failed to take advantage of the Company's reporting procedures" pursuant to the *Faragher-Ellerth* defense. Defendants claim that the investigation Attorney Horvatich conducted after Plaintiff's complaint to the ICRC was reasonable, and one Plaintiff should have taken advantage of, exemplified by the

statement in the letter: "In fact, as explained below, the Company took prompt action to resolve the complaints of harassment, despite the fact that Complainant no longer worked at the Company because of his voluntary retirement." (App. 197).

Their assertion that Attorney Horvatich's investigation was reasonable and resulted in corrective action began during Defendants' response to Fenceroy's Civil Rights Complaint, continued in their Answer's affirmative defenses, paragraphs 47, 48 and 49, (Answer, App. 10) and culminated in its arguments and evidence presented in support of their Motion for Summary Judgment. Specifically, in their Summary Judgment Statement of Material Facts, Defendants pled several paragraphs pertaining to the investigation:

> 34. After his retirement, Plaintiff filed a Charge of discrimination against Gelita with the Iowa Civil Rights Commission and Equal Employment Opportunity Commission. (*Id*. at § 16). In his Charge he identified several incidents where employees allegedly made inappropriate racial comments and jokes in the workplace or engaged in other improper conduct. (*Id*). Plaintiff never reported these incidents during his employment with Gelita. (*Id*.).
>
> 35. Plaintiff's allegations of discrimination and harassment are contained in his answers to Defendants' First Set of Interrogatories, which mirror those alleged in his Iowa Civil Rights Commission Charge. (Ex. 12, Plaintiff's Answers to Interrogatories, Interrogatory 4).
>
> 36. After receiving Plaintiff's Charge of discrimination, Tolsma conducted an investigation regarding the

> incidents alleged in Plaintiff's Charge. (Ex. 1, Tolsma Aff., § 17).
>
> 37. After completing the investigation in May 2013, it was confirmed that inappropriate racial jokes, remarks and other inappropriate conduct occurred in the presence of Plaintiff. (*Id*.). As a result, the Company terminated Bob Kersbergen from his employment on May 24, 2013. (*Id*.). In addition, several employees received discipline for failing to report incidents of inappropriate conduct that they witnessed including Kent Crosgrove, Tom Haire, and Lewis Bergenske. (*Id*.). (Ex. 10).

(Defendants' Statement of Material Facts and Memorandum Brief in Support of Motion for Summary Judgment, pp. 8-9; App. 151-152). In the section of their supporting Brief entitled "Gelita Exercised Reasonable Care to Prevent and Correct Promptly Any Harassing Behavior", Defendants specifically argue:

> Even though Plaintiff was no longer with Gelita at the time of his Complaint, in response to his charge, the Company investigated his allegations, discharged one employee, and disciplined three others. (Ex. 1, Tolsma Aff. ¶ 17).

(Defendants' Statement of Material Facts and Memorandum Brief in Support of Motion for Summary Judgment p. 17; App. 160).

Consequently, Defendants placed evidence regarding the investigation overseen by Horvatich squarely at issue through their continued assertion to the Civil Rights Commission, in their Answer, and to the trial court of the *Faragher-Ellerth* affirmative defense, and through the use of the evidence

involving that investigation in support of that defense. Plaintiff must be allowed to take depositions related to this defense, and the evidence Defendants offer in support of its defense to have a fair opportunity to counter it. *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) (In cases where the attorney's conduct itself is the basis of a claim or a defense, there is little doubt that the attorney may be examined as other witnesses.)

During the investigation, Attorney Horvatich was not just an attorney defending Gelita – she used that role with that of being an internal investigator who directed and actively participated in the investigation of Plaintiff's discrimination complaint. She is a fact witness, subject to being deposed by Plaintiff. Because Defendants rely on the sword of her investigation to exonerate themselves from liability, Gelita cannot now unfairly claim the shield of privilege to prevent Plaintiff from getting a fair trial.

In addition to using the evidence of the investigation as a part of their defense, Attorney Horvatich's participation in the investigation is well established. Exhibit A to Plaintiff's Resistance to Defendants' Motion for Protective Order was Defendants' May 30, 2013 letter which Horvatich

wrote on behalf of Gelita to the ICRC, in which she identifies her investigation. (App. 193-198).

In her letter, Exhibit A, second paragraph, page 3, Ms. Horvatich admits:

> After receiving [Fenceroy's ICRC] complaint, the Company [Gelita] conducted an investigation regarding Complainant's allegations. During [Gelita's] investigation, Bob Kersbergen denied the majority of the allegations contained in the Complainant's complaint, but recognized that another employee had told the "farm joke" referred to in the complaint and that he and the Complainant had gotten into a physical altercation. As a result of the investigation, Mr. Kersbergen was terminated. Also as a result of the investigation, Tom Haire, Lewis Bergenske, and Kent Crosgrove were disciplined for failing to report incidents they were witness to, which were referred to in Complainant's complaint." Page 3, Horvatich May 30, 2013 letter to ICRC.

(App. 195).

The investigation Ms. Horvatich references as a defense in Exhibit A that led to the firing of Mr. Kersbergen and the discipline of Mr. Haire, Mr. Bergenske and Mr. Crosgrove is the investigation she herself conducted. The deposition excerpts submitted along with Plaintiff's Resistance to Defendants' Motion for Protective Order (Kersbergen, Crosgrove, deposition and Haire) confirm her involvement. (App. 220-228).

In Mr. Kersbergen's deposition, he testified as follows:

> Q. And was there an investigation that you know of, into what you'd done wrong?

A. Yeah. Yeah….

Q. Tell me about that.

A. God, I don't know the exact date of it, but Jeff was there. I believe Ruth was there. I was obviously. And my union representation was John Hos—Hoswald, and he was sitting there reading a book. That was the extent of my legal representation. And they asked essentially, you know, about – about the ----these allegations that Oliver made. And, you know, I addressed them as best as I could….

Q. How long did that last, that meeting?

A. I would say roughly an hour and 15 minutes, something like that. That's not—Don't hold me to that. I—but—you know.

Q. And did anybody record it? Like was there a court reporter there?

A. I believe it was. I believe it was. I don't---

Ms. Horvatich: I object on attorney-client privilege.

Mr. Munger: You're going to object to whether it was recorded or not?

Ms. Horvatich: I don't know what you mean by recorded. Do you mean like if I had notes of the meeting or what type of a recording? …

Q. And so my question about was—was this recorded, was – was—did you see a tape recorder there or -- …

A. I don't recall, but I think—I'm positive people were taking pretty extensive notes.

Q. Okay. So who do you think was taking notes?

A. I know Ruth (Horvatich) was.

(Deposition of Robert Kersbergen, pp. 22-24; App. 221).

At Mr. Crosgrove's deposition, he testified as follows:

Q. …Exhibit 35 is Defendants' GELITA, USA, Inc., Tom Haire and Jeff Tolsma's First Supplemental Responses to Plaintiff's set of Requests for Production of Documents, and it was provided to us on the 25th of February 2016, I believe or thereabouts, according to the –I'm looking at the date on page 2. And it includes your affidavit, which is Exhibit 36. And I'm going to show this document to you and show you the date on it that I just referred to. And then also show you your affidavit and the interview rights that are attached. So just—just make sure that what has been produced to us is …is the statement, that's contained in Exhibit 35 the same as the statement that I've put in front of you as Exhibit 36?

A. Yes, it appears to be, yes. …

Q. …Ruth [Horvatich] who is here today, is the one that prepared that affidavit for you to sign, correct?

A. Correct.

Q. And do you remember her telling you that she was not your lawyer, she was the company's lawyer?

A. Yes.

Q. …And is that what is the second page of Exhibit 36, is your signing that interview notice of rights acknowledging that she was not your lawyer?

A. Yes.

Q. And so the process was, as I understand it, you met with Ruth and talked with her and probably provided information to

her. And then some time went by, and then there came a time when she presented an affidavit—this affidavit for you to sign, and you signed it and made the changes on it that – that are in your handwriting. Would that be a fair statement as to the process?

A. Yes.

Q. Do you remember meeting with Ruth.

A. Yes.

Q. How long did the meeting last?

A. An hour.

Q. …Was anybody else there for that meeting besides you and Ruth?

A. Yes.

Q. Who?

A. Jeff Tolsma.

Q. Anybody else? …

Q. …If it was somebody else, who do you think –what category would they fall into, like officers of the company or other lawyers or paralegals or just anything you can come up with?

A. John Hoswald may have been there a union representative for me.

Q. …what union is that?

A. Local 222.

Q. And what capacity is he with the union?

A. A union steward."

(Deposition of Kent Crosgrove, pp. 7-10; App. 223-224).

Further evidence that Attorney Horvatich actively directed and participated in the investigation that Defendants rely on as their defense in this case is found in Defendant Haire's testimony:

> Q. So you were working and you were called up to the office, correct?
>
> A. Right. Right.
>
> Q. And did you take a union representative with you?
>
> A. I'm thinking there was one up there, but I don't remember…
>
> Q. And did someone prepare the affidavit [Haire Deposition Exhibit 30] for you?
>
> A. Yeah. Because I didn't fill nothing out or make nothing out.
>
> Q. Was that there for you to sign when you got to the office?
>
> A. I don't remember if it was or not. I couldn't tell you. I don't remember…
>
> Q. And you don't know who prepared it [Exhibit 30, his affidavit]?
>
> A. No. Well, I think Ruth (Horvatich) did.
>
> Q. Well, what makes you think Ruth did?
>
> A. Because she was the one on the phone…

Ms. Horvatich: …And I have already told you my position is attorney-client privilege. I created this document [Exhibit 30, Affidavit of Mr. Haire]

Mr. Munger: But were you representing him when you created it, is my question.

Ms. Horvatich: I was representing GELITA. …

Q. Okay. So the question to you, sir [Defendant Mr. Haire] is, were you told that she [Ms. Horvatich] was representing you when you signed that affidavit?

A. Yes.

Q. By—by her? Is that correct?

A. Yes.

Q. Okay. On—in this phone call?

A. Yes.

Q. So that's why you believe she's your attorney?

A. Yes.

Q. And today do you believe she's your attorney?

A. Yes.

Q. For the same reason?

A. Yes.

Ms. Horvatich: Can we take a break?

Mr. Munger: Sure.

(A recess was take from 2:11 pm to 2:24 pm.)

Mr. Munger: …The video is back on and we're coming back from a break. And if I may just ask, so what is your position at this time so I know where I can go?

Ms. Horvatich: At this time we're not objecting on the attorney-client privilege and that counsel can ask this employee questions relating to the investigation." …

Q. So you have in front of you Exhibit 30, which is the affidavit, correct?

A. Right.

Q. Now that we've had a break, do you remember anything else about the circumstances of who prepared this or when it was prepared?

A. Well, I think Ruth prepared it, but I think it was through the union or something. I don't know….

Q. And are you standing by everything that's on this as being true?

A. No.

(Deposition of Defendant Tom Haire, pp 62-72; App. 226-228). Attorney Horvatich's active participation in this investigation which is claimed by Gelita as a defense, cannot be disputed.

As noted by Judge Neary, *Harding v. Dana Transport, Inc*., 914 F.Supp. 1084 (D.N.J. 1996) presented a similar issue in a Title VII case involving sex discrimination. In that case, Defendant hired an outside counsel, Mr. Bowe, to act as both a defense attorney to the charge and to

conduct an investigation. *Id* at 1088. Defendant then brought a motion for protective order to prevent Plaintiff's from deposing Mr. Bowe about the investigation, claiming attorney-client privilege and work-product privilege. As in our present case, Defendant Dana used the investigation of outside counsel as a defense during the administrative proceedings. *Id* at 1093-1094. Defendant claimed in the federal court hearing that there was no need for Plaintiff to depose counsel because Defendant was only going to tell the trial jury there was an investigation and not go into the details of it. *Id.,* 1093, 1096. In its analysis, the Court recognized that Title VII permits employer liability which employers may refute by proving that they reasonably and sufficiently investigated the allegations of discrimination. The Court held:

> By asking Mr. Bowe to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, Dana cannot now argue that its own process is shielded from discovery. Consistent with the doctrine of fairness, the plaintiffs must be permitted to probe the substance of Dana's alleged investigation to determine its sufficiency. Without having evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial can discern its adequacy. Consequently, this court finds that Dana has waived its attorney-client privilege with respect to the content of Mr. Bowe's investigation of the plaintiffs' allegations. This waiver extends to documents which may have been produced by Mr. Bowe or any agent of Defendant Dana that concern the investigation.[9] ...

*Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1096 (D.N.J. 1996)

(Footnote omitted.)

In its analysis, the court further said:

However, the present case adds a complexity not present in either *Steiner, Giordano* or *Bouton:* Mr. Bowe acted as Dana's attorney as well as its investigator. Dana retained Mr. Bowe as its attorney to defend it against specific allegations of discrimination. As an appropriate part of his preparation (*see Upjohn,* 449 U.S. at 391, 101 S.Ct. at 683), Mr. Bowe conducted the investigation at issue. *1095 The defendants would like this court's inquiry to end there. However, as mentioned before, Dana's use of its attorney's investigation compels this court to continue.

The Third Circuit addressed a similar issue in *Glenmede Trust Company v. Thompson,* 56 F.3d 476 (3d Cir.1995). The court denied the defendant, Glenmede Trust Company, appeal of a district court order compelling Glenmede's law firm, Pepper Hamilton & Scheetz ("Pepper Hamilton"), to comply with a subpoena duces tecum requesting its file relating to all work it performed for Glenmede Trust regarding the repurchase transaction. *Glenmede* involved a shares repurchase or "buy-back" transaction. Glenmede Trust served as a trustee for the defendant, the Pew Charitable Trusts ("the Pew"), and as an investment advisor for the plaintiffs, the Thompson family ("Thompson"). Both Thompson and the Pew held substantial shares of Oryx Energy Company stock. Glenmede arranged a profitable buy-back transaction of Oryx stock for the Pew which it did not extend to Thompson. Before completing the transaction, Glenmede consulted its attorney as to whether it could extend the Oryx transaction to its investory clients. The firm issued an Opinion Letter advising Glenmede that "it could not notify its private clients of the buy-back negotiations between Oryx and Glenmede acting in its capacity as trustee of the Pew Charitable Trusts." *Id.* at 479. Glenmede then excluded its private clients with holdings of Oryx stock from the buy-back transaction "allegedly, based on the Opinion Letter from Pepper, Hamilton." *Id.*

The *Glenmede* plaintiffs maintained that Glenmede's reliance on the Opinion Letter placed the legal representation at issue.

Consequently, the plaintiffs sought disclosure of the firm's entire file concerning any and all services performed for Glenmede in connection with the buy-back transaction, including documents underlying the Opinion Letter. Glenmede and its firm objected to the production on the basis of the attorney-client privilege. The Third Circuit affirmed the district court's ruling that "Pepper Hamilton's involvement in structuring and closing the transaction required the production of back-up documents to the Opinion Letter *to permit the Thompson family to analyze the reasonableness of Glenmede's reliance on the advice of counsel.*" *Id.* at 480. The court reasoned that the defendants should not be permitted to define the scope of their own waiver of the attorney-client privilege stating:

There is an inherent risk in permitting the party asserting a defense of its reliance on advice of counsel to define the parameters of the waiver of the attorney-client privilege as to that advice. That party should not be permitted to define selectively the subject matter of the advice of counsel on which it relied in order to limit the scope of the waiver of the attorney-client privilege and therefore the scope of discovery. To do so would undermine the very purpose behind the exception to the attorney-client privilege at issue here—fairness.

The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice—whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client.

*Id.* at 486; *see also Bierman v. Marcus,* 122 F.Supp. 250, 252 (D.N.J.1954) (in deciding whether the attorney-client privilege is waived, "the most important consideration is fairness. He (the client) cannot be allowed after disclosing as much as he pleases, to withhold the remainder"). The court found that Glenmede had placed in issue advice related to the structure of the stock repurchase transaction. Accordingly, the court found that Glenmede Trust had waived the attorney-client privilege as to all

communications, both written and oral, to or from counsel as to the entire transaction. *Glenmede,* 56 F.3d at 487.

Two other cases further illuminate the applicability of waiver in the present suit. The District Court for the Northern District of California came to a similar conclusion in *Handgards, Inc. v. Johnson & Johnson,* 413 F.Supp. 926, 929 (N.D.Cal.1976). In that patent action, the court found that "[b]y putting their lawyers on the witness stand in *1096 order to demonstrate that the prior lawsuits were pursued on the basis of competent legal advice and were, therefore, brought in good faith, defendants will waive the attorney-client privilege as to communications relating to the issue of the good-faith prosecution of the patent action." *Id.* The court affirmed its earlier order to disclose all relevant records, opinion letters, interviews of witnesses, internal files, memoranda and notes which pertained to the validity of the attorney's assertions at issue. *Id.* at 928. In another analogous situation, the District Court for the Southern District of New York concluded that the defendant had brought privileged information into issue in an action for breach of contract. *Garfinkle v. Arcata National Corp.,* 64 F.R.D. 688 (S.D.N.Y.1974). The defendant asserted that it did not fulfill one element of the contract for sale of stock pursuant to the advice of its counsel—counsel advised the defendant that it need not register the stock although the contract provided that the defendant would. *Id.* at 689. The court found that although the documents relating to the attorney's advice were clearly protected by the attorney-client privilege, "that privilege may be waived if the privileged communication is injected as an issue in the case by the party which enjoys its protection." *Id.* The defendant was willing to provide the Opinion Letter to the plaintiff but no underlying documents or information. However, the court found that the plaintiff was entitled to know how the opinion letter came into being: the defendant must not be permitted to "use the letter as both a sword and a shield." *Id.* Consequently, the court ordered that all documents relating to the advice be disclosed.

*Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1094-96 (D.N.J. 1996) The *Harding* Court went on to find an implied waiver of Defendant's work-product privilege using a similar analysis. *Id.* at 1099.

Several other courts have held that when an attorney's investigation is used as a defense to liability, discovery is appropriate. *See Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, 2009 WL 1543651, at *12 (N.D. Ind. June 2, 2009):

> Indeed, a defendant may also waive the attorney-client privilege if it asserts its investigation as part of its defense. *Harding,* 914 F.Supp. at 1093. Where counsel's investigation itself provides a defense to liability, "the defendants have fused the roles of internal investigator and legal advisor. Consequently, [the defendants] cannot now argue that its own process is shielded from discovery." *Id.* When this occurs, fundamental fairness requires that "the plaintiffs ... be permitted to probe the substance of [the defendant's] alleged investigation to determine its sufficiency." *Id.* "Without having evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial can discern its adequacy." *Id.; see also Chivers v. Cent. Noble Cmty. Schs.,* 1:04–CV–00394, 2005 U.S. Dist. LEXIS 16057 (N.D.Ind. Aug. 4, 2005) (finding that the school's former superintendent waived the attorney-client privilege by placing the attorney's advice at issue).

*Id. See also Volpe v. US Airways, Inc.*, 184 F.R.D. 672 (M.D. Fla. 1998) (employer that relies on thoroughness of internal investigation as defense against sexual harassment charge must disclose to plaintiff notes taken during such investigation*); Pray v. New York City Ballet Co.,* 1997 WL 266980 (S.D.N.Y. 1997) (employers litigation defense counsel, who also

served as attorney conducting internal investigation of discrimination complaints, subject to deposition; by asserting thoroughness of investigation as defense in sexual harassment litigation employer waived attorney-client privilege); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 68 Cal.Rptr.2d 844 (2d Dist. 1997) (investigation documents normally covered by attorney-client privilege or work-product doctrine discoverable because defendant waived protections in raising adequacy of investigation as defense to discrimination claim); *Musa-Muaremi v. Florists' Transworld Delivery, Inc.,* 270 F.R.D. 312, 317–19 (N.D. Ill. 2010)(noting that it "would be unfair to allow an employer to hide its investigations and remedial efforts in the case up to the point of trial when it intends to use related evidence of its remedial efforts to evade liability", collecting various cases in support of that finding); *E.E.O.C. v. Outback Steakhouse of FL, Inc.,* 251 F.R.D. 603, 611 (D. Colo. 2008)(collecting several cases where the waiver of privilege is found under similar circumstances).

Because Defendants have unqualifiedly asserted the *Faragher-Ellerth* defense in their Answer as an Affirmative Defense, and because they offer the results of Attorney Horvatich's investigation in support of their defense, Plaintiff must, in fairness, be able to engage in discovery to challenge that

defense in order to prevail. Plaintiff must have a fair opportunity to prove that Gelita did not exercise reasonable care in its investigation and that the resulting alleged disciplinary action was not reasonable. Plaintiff must have a fair opportunity to show that he did not unreasonably fail to take advantage of Gelita's reporting procedures. Plaintiff's position is that it was fruitless to complain of discrimination at Gelita. Since the Defendants have submitted evidence regarding Attorney Horvatich's investigation in support of their defense, Plaintiff must have the opportunity to discover what Ms. Horvatich knew and when she knew it, what she did, what she recommended be done and why. Discovery is needed so that Mr. Fenceroy can explore whether counsel's investigation was inadequate and biased for her client, Gelita, and against Plaintiff. Proof that it was inadequate and biased will buttress Plaintiff's position that it was fruitless to complain of discrimination at Gelita and therefore he acted reasonably.

Accordingly, because Defendants have waived the asserted privileges due to their affirmative defenses, and the evidence they offered in support thereof, their appeal should be denied.

### C. DEFENDANTS' WAIVER DUE TO THEIR TESTIMONY REGARDING THE INVESTIGATION.

As noted above, several defense witnesses testified during their depositions, as to their interactions with Attorney Horvatich during her

investigation. (App. 220-228). Moreover, Tolsma submitted an affidavit in support of Defendants' Motion for Summary Judgment which specifically dealt with the investigation which involved Attorney Horvatich. (App. 39-44). On appeal, the Court should find that these witnesses testimony which Defendants did not object to, waives the privileges asserted.

The Iowa Supreme Court has noted:

> On cross-appeal, defendants contend the district court erred when it refused to allow defendants to examine plaintiffs' attorney concerning any advice he may have given to plaintiffs regarding the effect of the statute of limitations on their claim. Defendants assert that some of the information they seek is not privileged, and, in the alternative, if it is privileged, plaintiffs waived the right to object when they disclosed certain information in the affidavits. Defendants also contend plaintiffs waived their privilege during their depositions wherein counsel objected to certain questions on the basis of the attorney-client privilege but did not direct his clients not to answer. During the depositions, these questions were answered by plaintiffs.
>
> Thus, the issue is whether plaintiffs may disclose a privileged attorney communication about a matter that is relevant and material to issues in the case, and then invoke a privilege to prevent disclosure of other communications by the attorney about the same matter. We consider each instance of alleged disclosure. Because of our conclusion as to the first disclosure which occurred in plaintiffs' affidavits, however, we need not decide whether the privilege was waived in the depositions.
>
> Iowa Code section 622.10 governs the attorney-client privilege. It provides in part:
>
> A practicing attorney ... who obtains information by reason of the person's employment ... shall not be allowed, in giving testimony, to disclose any confidential communication properly

> entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.
>
> Because it impedes the full and free discovery of the truth, the attorney-client privilege is strictly construed. *See Chidester v. Needles,* 353 N.W.2d 849, 852 (Iowa 1984).
>
> Consequently, we have held that voluntary disclosure of the content of a privileged communication constitutes waiver as to all other communications on the same subject. *See* Iowa Code § 622.10 (privilege does not apply when person, in whose favor prohibition is made, waives the right); *State v. Cole,* 295 N.W.2d 29, 35 (Iowa 1980) (recognizing theory of waiver in physician-patient relationship); *Kantaris v. Kantaris,* 169 N.W.2d 824, 830 (Iowa 1969) ("A client waives objection to an attorney's testimony when the client testifies to the communications.").
>
> Professor Wigmore explains:
>
> [W]hen [the privilege holder's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

J. Wigmore, *Evidence* § 2327 at 636 (McNaughton rev. 1961). *Miller v. Cont'l Ins. Co.,* 392 N.W.2d 500, 504–05 (Iowa 1986). The Court in *Miller* proceeded to find a partial waiver of the privilege, and remanded with directions that the attorney could be deposed. *Id.* at 505.

Because the Defendants testified regarding their interactions with Attorney Horvatich, the Court should find that Defendants waived any attorney-client privilege that may otherwise have attained in the pre-litigation investigation. The deposition transcripts cited above show Defendants asserted the privilege to some questions, but not all. Defendants allowed testimony regarding aspects of Attorney Horvatich's role in the investigation, including what she said to those she was representing, and the fact that she was asking them to sign documents that she created. Accordingly, discovery should be allowed to go forward on issues where Defendants waived their privilege.

### D. DEFENDANTS' WAIVER DUE TO THE PRESENCE OF THIRD PARTIES.

The deposition excerpts cited above also prove that Attorney Horvatich's investigation was not just a confidential internal investigation; it involved a third party union representative, John Hoswald, who was representing the interests of its union members. By conducting its investigation in the presence of a third party who was not Gelita and not representing Gelita but was actually an adversary to Gelita's interests, Gelita waived and is estopped from claiming attorney-client and work product privileges apply to communications with them.

Ms. Horvatich's thought processes and communications were revealed to the third party by her actions, questions and deeds at the time of her investigation on behalf of Gelita. To the extent there was a privilege, Gelita waived it by the presence of the union. *See, e.g. State v. Flaucher*, 223 N.W.2d 239, 241 (Iowa 1974)(generally, information given in the presence of third parties not within the scope of the privilege destroys the confidential nature of the disclosures). The following discussion by the Iowa Supreme Court is also *apropos*:

> We also note commentators' criticisms of extending the attorney-client privilege to communications to persons outside those specified in the privilege statute. Saltzburg, *Communications Falling Within the Attorney-Client Privilege,* 66 Iowa L.Rev. 811, 816 (1981) ("Third party communications are unprivileged because the attorney-client privilege is not established to give the client an edge over others in litigation. It is not a strategic tool designed to enable a litigant or potential litigant to gain an advantage by keeping evidence to herself rather than sharing it with others."); *see also* Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan.L.Rev. 455, 463–64 (1962).

*State v. Craney*, 347 N.W.2d 668, 677–78 (Iowa 1984).

Accordingly, the Court should find that the asserted privileges have been waived due to the presence of a third party.

### E. THE *SHELTON* TEST FROM THE EIGHTH CIRCUIT IS NOT PERTINENT TO THIS APPEAL.

Defendants argue that the trial court erred in deciding whether or not the deposition should proceed by failing to apply the test in *Shelton v. Am. Motors*, *Inc.*, 805 F.2d 1323 (8th Cir. 1986). First of all, while the trial court utilized federal law for guidance, it was under no obligation to adopt this specific test, which is not found in Iowa law. The test appears to be contradictory to Iowa law - as held in *Miller v. Cont'l Ins. Co.,* 392 N.W.2d 500, 504-05 (Iowa 1986), attorneys can and should be deposed when they are fact witnesses.

In any event, *Shelton* is not applicable. The attorney in that case was not a fact witness whose testimony was not related to a specific defense – the opposing attorneys in that case were seeking to depose an in-house attorney who had compiled documents in anticipation of litigation. In the present case, Ms. Horvatich is outside counsel and a fact witness directly related to the investigation which Defendants rely upon to prove the *Faragher-Ellerth* defense.

Finally, assuming *arguendo* that the *Shelton* test should be used, Plaintiff has met that standard. No other means are available to obtain her testimony, the information is relevant and any privileges have been waived, and the information is crucial to the case. Defendants claim Tolsma's

testimony is sufficient for discovery purposes, but he could obviously not testify as various matters which can only be discovered from Attorney Horvatich directly, such as her notes from the investigation, her role in creating documents for people to sign, and how and why she made her recommendations and conclusions during the investigation.

Defendants easily could have avoided this issue by Gelita hiring an independent, qualified, third party to conduct a reasonable investigation and make reasonable, non-biased recommendations. Gelita could also have had their in-house Human Resources Department conduct the investigation. Choosing to hire their defense attorney to participate in the investigation, then using that investigation as a part of their defense, is nothing more than an unfair tactic by gaining an advantage to prevent Plaintiff from engaging in discovery regarding the reasonableness of their investigation and resulting action.

## CONCLUSION.

For all the foregoing reasons, Plaintiff-Appellee requests that the Court find that Judge Neary did not abuse his discretion by denying Defendants' Motion for Protective Order and ordering the deposition of Attorney Horvatich to go forward, and remand the case for further proceedings consistent with Judge Neary's Order.

## REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee requests to be heard orally upon submission of this matter.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

On the 6th day of December, 2016, the undersigned hereby certifies that Plaintiff-Appellee's Brief and Request for Oral Argument was filed with the Iowa Supreme Court by electronic filing via EDMS. Additionally, the undersigned certifies that on the 6th day of December, 2016, this document was served upon all parties to this appeal by electronic filing via EDMS:

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DATED this 6th day of December, 2016.

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