No. 97783-6

THE SUPREME COURT
OF THE STATE OF WASHINGTON

DOUG HERMANSON, an individual,

Respondent/Cross-Appellant,

vs.

MULTI-CARE HEALTH SYSTEM d/b/a TACOMA GENERAL HOSPITAL, a Washington Corporation

Appellant/Cross-Respondent.

RESPONSE TO MULTICARE'S PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

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I. Identity of Party

Doug Hermanson is the plaintiff and respondent/cross-appellant in the Court of Appeals.

II. Overview Of Case And Court Of Appeals Decision

Mr. Hermanson cross-petitions for review of the Court of Appeals' decision in Hermanson v. Multicare, 448 P.3d 153 (2019).[1]

Multicare does not deny it breached Mr. Hermanson's privilege and disclosed to the Tacoma Police Department without a warrant his confidential healthcare information.

What little discovery took place before discretionary review revealed two people responsible: (1) a social worker who was an employee of the hospital and (2) a physician who was not an employee.

The Court of Appeals correctly applied Youngs v. Peace Health, 179 Wn.2d 645 (2014) ruling the hospital corporate privilege extends only to hospital employees. It affirmed the trial court's order Multicare could *not* have ex parte contact with treating providers not employed by Multicare.

However, it incorrectly applied Youngs and allowed ex parte contact without limitation of all Mr. Hermanson's non-physician care providers employed by Multicare. Worse, it gave no weight to Youngs' requirement that being an employee is only a *threshold* requisite of contact; the employee

[1] Multicare attached the opinion in its appendix therefore it is not attached here.

must also have "direct knowledge of the event or events triggering the litigation" and any contact is limited to "the facts of the alleged" incident.

The Court of Appeals acknowledged the trial court did not resolve the scope of knowledge of those nonphysician employees but ordered Multicare could have full contact with them. At very best for Multicare, the Court of Appeals should have remanded for further fact-finding based on its decision. It was error to direct the final outcome contingent on facts not resolved.

Mr. Hermanson sought reconsideration. That was denied.

This court should *deny* Multicare's petition but *grant* Mr. Hermanson's cross-petition.

III. Issue Presented For Review By Multicare

1. Whether Youngs should be extended to include a hospital's non-employees.

IV. Issues Presented For Cross-Review

1. Whether non-physician employees are within Youngs;

2. Whether all hospital employees are 'parties' merely because a plaintiff identified John Doe employees;

3. Whether the Court of Appeals erred making a blanket finding Multicare may have ex parte contact with all employees without regard to whether they have first-hand knowledge of the facts triggering the claim.

V. Facts

The core facts are undisputed. However, Multicare errs on the following.

At p. 4 Multicare argues Mr. Hermanson "denied having consumed alcohol," ostensibly to paint him as dishonest. However, he told the social worker and CT tech he did. CP 96 and Hermanson appendix 425. Albeit even if he did deny it, that does not excuse Multicare's breach of his confidentiality or provide a greater litigation privilege.

Also at p. 4, what Multicare calls a "blood alcohol screen" was not; it was a broad based trauma screen, alcohol was one of perhaps 52 items screened. Hermanson appendix, 405-6. The test had none of the safeguards of a legal blood test. Despite extended interaction with TPD the officer detected no odor intoxicants or impaired behavior, CP 86, nor did a single health care provider. Hermanson appendix, 386-470. On discharge the nurse wrote Mr. Hermanson "amb. with a steady gait." Id. at 425.

At. p. 5, fn. 2, Multicare asserts Mr. Hermanson was aware prelitigation and "lodged no objection" to Multicare's attorneys representing the independent contractor Dr. Patterson. Mr. Hermanson did not know prelitigation he was an independent contractor. It was assumed he was an employee. There was no reason to object.

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VI. ARGUMENT

A. Multicares' Petition Should Be Denied

Multicare's argument it should be allowed ex parte contact with Dr. Patterson, not its employee, relies on generic corporate privilege principles. Multicare ignores its unique status as a healthcare provider.

Further, Multicare's argument rests on a subterfuge. It persistently calls Dr. Patterson an "admitted agent." Dr. Patterson was not an agent, he was an independent contractor. Multicare made the litigation decision to admit liability for his conduct but that does not change his legal status. A hospital cannot create a privilege by a pleading tactic.

As Multicare concedes, Dr. Patterson was an employee of Trauma Trust that contracted to provide trauma medical services. Dr. Patterson's relationship to Multicare was of an independent contractor. Multicare's contract with Trauma Trust explicitly states that:

> 14. **Independent Contractor Status.** With regard to the subject matter of this agreement, each party is an independent contractor with respect to the others. Except as expressly provided in this agreement, no party is authorized or permitted to act or to claim to be acting as an agent or employee of any other party. Nothing in this Agreement alters in any way control of the management, assets or affairs of any party. No party by virtue of this Agreement assumes any liability for any debts or obligations of any kind incurred by any other party to this Agreement. Each party agrees to be responsible for the safety of its own workforce and disclaims responsibility for workplace safety as to the workforce of each other party. Nothing in this Agreement shall be construed as limiting the rights of any party to contract with any other facility on a limited or general basis.

CP 480. Multicare's contract with Trauma Trust repudiates that Dr. Patterson was Multicare's "agent." ("…no party is authorized or permitted to act or claim to be acting as an agent or employee of any other party." Id.)

Multicare's citation to authority never adopted in Washington that an authorized agent should be treated the same as an employee for the determination of privilege founders on the fundamental failing that Dr. Patterson was not Multicare's agent. That Multicare, *after the fact*, decided to accept liability for his actions (what Multicare sharply calls being an "admitted agent") does not change what he was.

1. MULTICARE'S ARGUMENT IGNORES THE DISTINCTION OF HEALTHCARE PROVIDERS FROM STANDARD CORPORATIONS

This Court should reject Multicare's attempt to paint this as a question of basic corporate privilege and to ignore Dr. Patterson's and its (Multicare's) status as health care providers. Youngs recognized the importance of that distinction explaining it was attempting to reconcile what the majority found to be a conflict between generic corporate privilege principles under Wright/Upjohn with the unique protections afforded by Loudon and to "strike the proper balance" between Upjohn and Loudon. Id. at 664-665.

If Youngs was inclined to apply generic corporate privilege principles across the board in hospitals as Multicare asks this Court do to, it would have simply said it was adopting Upjohn in the health care setting. It did not. Youngs, 179 Wn.2d at 661. That cannot be ignored.

Thus, the question presented here is not whether a non-employee agent of any corporation may be swept under the same rug of privilege as

corporate employees. The question is whether a hospital should be afforded the ability to do so in further erosion of Loudon. The answer remains no. Multicare presents nothing new on that issue.

Multicare's reliance on Newman v. Highland School Dist. No. 23, 186 Wn.2d 769 (2016) for its petition is misplaced. At p. 13, MultiCare concedes Newman only resolved whether "former employees should be treated the same as current employees." This court said no. Multicare does not explain why, when this court refused to extend privilege to a person with an even *greater* connection (a former employee), it should now extend privilege to someone with a *lesser* connection (someone never employed).

2. FINDING A PRIVILEGE WOULD ALLOW HOSPITALS TO UNILATERALLY CREATE PRIVILEGES AS A LITIGATION STRATEGY

Newman explained the reason privilege is found for current employees is their duties of "loyalty, obedience, and confidentiality to the corporation." Id. at 780. Newman found former/past employees do *not* owe those duties and that mitigated against finding a privilege. Independent contractors *never* owed those duties and thus are even further removed. The only duty owed by an independent contractor is to perform the work contracted for. See Kamla v. Space Needle Corp., 147 Wn.2d 114, 121 (2002).

Further illustrating the divide, "a principal is not liable for the torts of independent contractors." Wilcox v. Basehore, 187 Wn.2d 772, 790 (2017). It is well settled hospitals may defend liability for an emergency room doctor's fault based on their status as an independent contractor. See Adamski v. Tacoma General, 20 Wn.App. 98, 100 (1978).

As an independent contractor, Multicare has no liability for Dr. Patterson's actions.[2] Mr. Hermanson did not know Dr. Patterson's status when he filed his lawsuit; he relied Dr. Patterson was a hospital employee.

As an independent contractor, Dr. Patterson is, in the words of Newman, "no different from other third-party fact witnesses to a lawsuit," id. at 781, albeit as a health care provider bound by Loudon.

Once the implications of Dr. Patterson's status as an independent contractor are understood, it reveals the impossibility of extending privilege.

Given Dr. Patterson was an independent contractor, Multicare could have as easily defended asserting it has no liability for his actions as a matter of law. See Wilcox. That would have been the easier and generally preferable means of defending itself as Multicare would not have to justify his violation of the health care privilege. It would only need to prove Dr.

[2] This is not a statement constituting judicial estoppel that claims arising out of Dr. Patterson's conduct should be dismissed. Multicare conceded liability for his actions. Further, ostensible agency may have created liability. But, having liability for a person is not the same as being a principal of that person.

Patterson was an independent contractor (which appears to be undisputable) and it (Multicare) exercised no control over his breach of health care privilege. That is a common litigation strategy where available.[3]

However, the ability to use that defense founders on the fact one of Multicare's employees also breached the confidential health care privilege. Thus, defending based on Dr. Patterson's independent contractor status would not result in a defense of the liability. Multicare is put to defend the breach because its employee did as well. Given that, Multicare is – lacking a better term – stuck defending the breach regardless.

And being stuck defending the breach, Multicare has seized on that to say he is an "admitted agent" to facilitate its attempt to bootstrap a privilege it does not have with him as a non-employee.

Whether a privilege exists cannot be determined by a defendant's litigation strategy.

> [A] privilege is not created, either expressly or impliedly, simply because a conversation was made in confidence.

Senear v. Daily Journal-Am., a Div. of Longview Pub. Co., 97 Wn.2d 148, 153 (1982).

[3] Anecdotally, the undersigned has defended many companies with exactly that defense: even if "it" happened (whatever "it" is in a given case), the company has no liability as it was not responsible for the actual tortfeasor's conduct.

Either a corporate hospital has (or should have) a privilege with a class of person or it does not. The result Multicare urges is not supported by law. However, even if a way could be found to gerrymander it, it presents bad public policy because it would allow a hospital to create privilege on an ad hoc basis based on whether it unilaterally accepts liability for its independent contractor's actions. That conflicts with the maxim that privilege questions must have clear, predictable answers in every case:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Id. at 782.

Allowing a hospital to, after-the-fact, change the status of an independent contractor with no privilege, into a legal entity with privilege (Multicare's newly created "admitted agent") would throw such uncertainty into privilege and the process as to be no privilege.

The Courts and plaintiffs would be put to wait for the hospital to decide if it will admit liability to determine if a privilege applies. Worse, independent contractor doctors would not know whether they have a privilege and thus whether it would be acceptable to speak with the hospital's attorney in an ex parte fashion. Finally, it invites mischief. A hospital could initially

claim it is accepting liability and thus has a privilege and later attempt to defend based on the doctor's independent contractor status.

Privileges are narrowly defined and generally disfavored. See Lowy v. PeaceHealth, 174 Wn.2d 769, 778 (2012). Their existence can never hinge on an after-the-fact litigation decision of a party. Multicare's creation of a new entity, an "admitted agent," is seen for the work around it is.

B. Mr. Hermansons' Cross-Petition Should Be Granted

The Court of Appeals held Multicare could speak ex parte with all employees who provided healthcare. That conflicts Youngs. The Court made other conclusions to work around Youngs that conflict other authority.

1. IF YOUNGS ONLY TOLERATES EX PARTE CONTACT WITH PHYSICIANS THE COURT OF APPEALS ERRED

In the trial court and Court of Appeals Mr. Hermanson argued Youngs did not apply to non-physicians because (1) it explicitly said it was allowing conduct only with employee *physicians*, and (2) it reversed a trial court order that would have *allowed* contact with *all employees* but affirmed only the "portion" of the order that allowed contact with physicians.

Division Two took the undersigned to task, saying Youngs provided no support to make that argument. The only thing an attorney can do is rely on the words of the opinion.

Youngs identified the plaintiff's objection and order under review. After identifying two doctors the plaintiff did not object to defense counsel having contact with:

> But he did object to defense counsel's ex parte contacts with any other physician who treated him at St. Joseph, even though he had responded to interrogatories in a manner that suggested he might bring claims implicating several additional, unidentified physicians. Citing Loudon, Mr. Youngs moved to prohibit "defense counsel from ex parte contact, directly or indirectly, with *any* of plaintiff Marc Youngs' treating health care providers, with the exception of Dr. Richard Leone, and Dr. Donald Berry." CP at 251. The trial court granted the motion, and PeaceHealth moved to reconsider. The trial court then reversed, stating that "counsel for PeaceHealth may have ex parte contact with PeaceHealth *employees* who provided health care to plaintiff Marc Youngs." CP at 9.

Youngs, 179 Wn.2d at 654 (all emphasis added).

The parties and the lower courts have only the words of Youngs.

Although the issue started with only doctors, the issue ultimately before the trial court was Mr. Young's objection to defense contact "with any of plaintiff Marc Youngs' treating health care providers" in a hospital setting. Id. And, the trial court's order was not limited to doctors, it said defense counsel "may have ex parte contact with PeaceHealth *employees* who provided health care" in a hospital setting. Id.

It is in that context Youngs held: "We affirm the portion of the trial court's order permitting defense counsel's ex parte communications with Mr. Youngs' nonparty treating physicians…" (underline added).

The entire "trial court's order," ordered the defense could contact "PeaceHealth employees who provided health care." But, Youngs only affirmed the "portion" of that order that reached "treating physicians."

It is agreed two physicians were discussed specifically and no others were. However, the contrast between the trial court's order allowing ex parte communications with hospital "*employees* who provided health care" without limitation, and Youngs affirming only "the portion of the trial court's order permitting defense counsel's ex parte communications with Mr. Youngs' nonparty treating physicians…" is difficult to not give weight to.

If there was no intention to distinguish between allowing contact with physicians, versus any employee, Youngs could have (would have) simply affirmed the trial court's order in whole, subject to the employees having first-hand knowledge of the event giving rise to litigation. The trial court already ordered that. It is suspected Youngs would not have indicated it was affirming "the portion" of the order "permitting contact with… nonparty treating physicians" if making a distinction between physicians and non-physicians was not material.

This Court knows better what it intended. But if it intended its rule consistent with the foregoing, the Court of Appeals erred allowing ex parte, privileged contact with non-physician employees.

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2. THE COURT OF APPEALS ERRED FINDING THE NURSE AND SOCIAL WORKER WERE PARTIES

The Court of Appeals found Multicare could have ex parte, privileged contact with three non-physicians: two nurses and a social worker, because they are "parties."

They are not parties.

The Court of Appeals' reasoning to reach that creates a new definition of party so broad it renders *every employee* of a corporation, a party.

According to the Court of Appeals, because Mr. Hermanson named John and Jane Doe employees as a placeholder, the fact the nurses and social worker are employees, makes them parties. That is not the law.

First, it simply is not. The Court of Appeals cited no authority for its conclusion because there is none.

Second, it is contrary to the Civil Rules and Wright v. Group Health, 103 Wn.2d 192 (1984).

CR 10(a)(2) provides a plaintiff "shall include (in the complaint) the names of all the parties." Only when names are "unknown" and "the plaintiff is ignorant of the name of the defendant" may a plaintiff resort to Doe parties. After the "true name" is "discovered, the pleading or proceeding may be amended accordingly."

Mr. Hermanson knew the names of those involved. To the extent he had any question, that was resolved by obtaining medical records pre litigation. CP 89 (as an example). Further, those names were in the open on motions *before* he amended his complaint and he did he did not name them in the amendment. [4]

Given CR 10, if Mr. Hermanson on remand sought to add the nurse or social worker as defendants, it would be time barred. The doctrine of relation back would not apply:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the original party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the new party will not be prejudiced in maintaining her or his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party.

CR 15(c).

Further, the nurses and social worker are not parties as they have no authority to bind Multicare. It is appreciated Wright discussed the attorney-

[4] The Court of Appeals acknowledged Mr. Hermanson moved to amend his complaint after Multi-Care's protective order motion when both the nurses and social worker were identified by name.

client relationship in the context of the RPCs but that does not make it distinguishable on this point:

> We hold the best interpretation of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, i.e., those employees who have "speaking authority" for the corporation.

Id. at 200 (quotation marks in original).

The Court of Appeals opinion conflicts Wright because it moots the requirement an employee must have "legal authority to bind" a corporation to be considered a "party." Now, merely being an employee with Doe employees alleged, is all that is required.

Finally, the conclusion they are "parties" is contrary to common sense; if true, Mr. Hermanson could add their names to the verdict form and enter judgment against them despite the fact they have never been served nor given an opportunity to defend. No person would contend that could take place. But if they are parties, it must be true.

Allowing this court's opinion to stand is an invitation to every corporate defendant to do what Wright said they cannot: attempt to throw the blanket of party status and privilege over every corporate employee simply by virtue of being employed where a plaintiff names Doe defendants.

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3. THE COURT OF APPEALS ERRED FINDING MULTICARE COULD HAVE CONTACT WITH THE NURSES AND SOCIAL WORKER

There was no basis for the Court of Appeals to have found MultiCare could have ex parte contact with the nurses and it was overbroad as to its order regarding the social worker.

The Court of Appeals acknowledged the trial court "did not resolve" (Opinion, at fn. 15) whether either the nurse or social worker had sufficient knowledge to bring them within the scope of Youngs, assuming Youngs is interpreted to apply to that class of healthcare provider.

It appears undisputed the social worker disclosed Mr. Hermanson's confidential health care information without a warrant. Assuming Youngs includes non-physician employees she likely comes within its scope. However, whether the nurses did (or have firsthand knowledge of such) remains an open question. Further, as to the social worker assuming she knows first-hand knowledge of, in the words of Youngs the "triggering event," does not mean defense counsel may have unrestricted communications with her about all her health care of Mr. Hermanson without limitation. Yet, that is what the Court of Appeals ordered.

These are important questions of fact to be resolved by the trial court to correctly apply the decisions of law. The Court of Appeals' decision is at

best ambiguous and at worse overbroad even assuming it was correct in holding Youngs applies to non-physician employees.

C. Review Should Be Accepted

RAP 3.4(b) applies; the Court of Appeals' decision:

> (1) …is in conflict with a decision of the Supreme Court; or
>
> (2) …is in conflict with a published decision of the Court of Appeals; or
>
> * * *
>
> (4) …involves an issue of substantial public interest that should be determined by the Supreme Court.

The decision finding hospital defense counsel may have ex parte contact with non-physicians conflicts Youngs.

The decision the nurses and social worker are parties merely by plaintiff naming Doe employee defendants as placeholders and the nurses and social worker being employees, is a substantial enlargement of what constitutes a party and violates the Civil Rules and Wright. It contradicts the case law set forth above and presents an issue of substantial public interest because if the Court of Appeals is correct, those individuals are parties right now. Meaning, although they have not been named, served, or given any notice, Mr. Hermanson may place their names on the verdict form and have judgment entered against them. That is the very definition of being a party defendant.

Not only is that decision by the Court of Appeals in error, it creates substantial peril that extends far beyond the hospital setting. That decision will be used in every corporate case by defense counsel to argue that a person by nature of being an employee is also a party any time a plaintiff uses a Doe placeholder – which is essentially every case. That will constitute a total erosion of Wright and a substantial enlargement of the attorney-client privilege to the determent of an open process.

Youngs acknowledged the peril of eroding any further the protection of Loudon. This Court should decline Multicare's invitation to completely bury it.

DATED this 29th day of October, 2019.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: _____
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Certificate of Service

I, Dan Bridges, certify under oath and the penalty of perjury under the laws of the State of Washington that on October 29, 2019, I caused this brief to be filed with the court and to attorneys of record for appellant/cross appellant by way of the court's electronic service portal.
October 29, 2019 /s/ Dan Bridges

MCGAUGHEY BRIDGES DUNLAP PLLC

October 29, 2019 - 4:14 PM

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Appellate Court Case Title:	Doug Hermanson v. MultiCare Health System, Inc.
Superior Court Case Number:	16-2-13725-9

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