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.

RESPONDENT'S/CROSS-APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF

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1. Overview

Amicus relies on Patterson being what it calls an "admitted agent." That stumbles on the mundane point Patterson was not an agent; he was an independent contractor. Also, the test amicus asks be applied would not extend privilege here nor to any treating care provider.

2. Amicus' Misstates Bieter And The Issue Presented

MultiCare's contract repudiates Patterson was an agent: "…each party is an independent contractor with respect to the others… no party is authorized or permitted to act or to claim to be acting as an agent…" CP 480. Admitting liability does not make him an agent. It only means MultiCare made the litigation decision to accept liability *after the fact*.

Thus, the issue is *not* whether a privilege should extend to agents as Amicus posits. It is whether a privilege can be created by admitting liability for an independent contractor. It cannot. It would encourage gamesmanship by corporations willing and able to pay for greater protection.

3. Even If A Functional Employee Or Agent Privilege Is Adopted It Would Not Reach Health Care Providers In A Hospital

Amicus urges this court adopt In re Bieter Co., 16 F.3d 929 (8th Cir. 1994)[1] asserting it extends privilege to functional or constructive employees.

[1] Amicus asserts Bieter represents the "national precedent" saying it is endorsed by "a majority of federal courts." In support, its footnote 5 lists (1) one 1st Circuit case, (2) a New York District Court case, (3) a Maryland District Court case, (4) a Pennsylvania District Court case, (5) a 6th Cir. Case, (6) a North and South Dakota District Court

Amicus inflates Bieter's reach; it extends privilege in *limited* situations with a two-step test: (1) "is the relationship… the sort that justifies application of the privilege"; if so, (2) would the person satisfy the requirements of a privilege if employed. Id. at 938. Washington has a rule to determine privilege for employees. The only question presented if Bieter is applied is the first; the nature of the relationship, Bieter at 938 said:

> The information-giver must be an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services.

Bieter does not explain what a "significant relationship" is. It simply says there must be one. Albeit, the relationship there shows it is a high bar.

The "outside consultant" in Bieter functioned as "the sole representative" of the entity with the entity's attorneys and wrote letters for the entity, to its attorneys "directly." Id. at 936. Before litigation, the agent established himself as the proxy of the principal. Bieter looks at the relationship at the time the liability causing act took place, to determine if the relationship was "significant" at the time.

That is critical as Amicus's rationale is the opposite. Amicus'

(same circuit), (7) a 9th Circuit case, and (8) a Arizona District Court case. Mr. Hermanson suggests that does not establish a "majority of federal courts" follow this rule. This also reveals amicus' argument Division Two's decision is out of step with the national rule and puts Washington at a business disadvantage as hyperbole.

position is not that a treating doctor has a significant relationship *at the time of treatment*, it is *it wants to a significant relationship with the doctor after the fact* to discuss his/her treatment of the plaintiff in secret.

Other authority cited by amicus is consistent. Amicus cites US v. Graf, 610 F.3d 1148 (9th Cir. 2010). Like Bieter, in Graf the "outside consultant" "was the company's voice in its communications with counsel" "authorized" to work on many "legal matters" and was the "attorney's primary contact." Id. at 1157. It was the significance of the relationship at the time of the conduct that was the determining factor, not after-the-fact.

Amicus errs by not giving weight to the fact the agents in Bieter and Graf were not simply 'agents,' but had taken on the alter ego of the principal and functioned as the principal itself in legal matters. They require at the very least that the agent is "enmeshed in the management structure" of the principal. Hermanson v. MultiCare, 483 P.3d 153, 163 (2019). Doctors, nurses, etc., are not "enmeshed" in the management of a hospital.

Finally, Amicus' errs by asserting Bieter is consistent with Newman v Highland School Dist. No. 203, 186 Wn.2d 769 (2016) and that Division Two is inconsistent with it. Newman did not extend privilege to ex-employees because they (1) "can no longer bind the company," id. at 780 – *as an independent contractor cannot do*; and (2) do not owe "duties of loyalty, obedience, and confidentiality to the corporation," id., *as*

independent contractors do not owe.[2] An independent contractor's sole duty is to perform on the contract. Their raison d'etre *is independence.* See Kamla v. Space Needle Corp., 147 Wn.2d 114, 121 (2002).

4. The Court Should Not Adopt Bieter

Bieter acknowledged it was creating a "general rule that the Upjohn Court specifically refused to announce." Bieter, 16 F.3d at 937, citing Upjohn, 449 US at 386. Moving past that, this Court should decline to adopt Bieter for the same reason it declined to extend the privilege in Newman.

Amicus argues privilege should be expanded so hospitals can "defend without any restriction, Amicus, p. 3 and at page 8, it cites foreign cases supporting Bieter but all rely on reasons this Court already rejected in Youngs and Newman. Newman explained even if an independent contractor's "conduct… might may expose the corporation to vicarious liability," that does "not justify expanding the attorney-client privilege beyond its purpose." Newman, 186 Wn.2d at 781.

Amicus cites the Fourth Circuit case of Neighborhood Dev. Collab. V. Murphy, 233 FRD 436 (D.Md 2005) as an example of why this Court should adopt Bieter. But Newman *already rejected* the Fourth Circuit's rationale for extending privilege to former employees as "unpersuasive."

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[2] In candor to the court, the Trauma Trust contract at para. 9 creates a duty of confidentiality. The issue presented is whether a privilege is available to contractors in a hospital in general, not the specific terms of MultiCare's and Trauma Trust's contract.

Newman, 186 Wn.2d at 781.

Hospitals are large, going concerns. Having determined it is in their pecuniary interest to pay independent contractors versus employees, they cannot be heard after the fact to demand rights and protections they would have had if they made a different business decision. Amicus laments this as a plaintiff's tactical decision. Amicus ignores a hospital's own conduct to use an independent contractor. Youngs was decided in 2014 and if with knowledge of it a hospital uses independent contractors it can hardly claim surprise or disadvantage.

Further, privilege functions only when there is "predictability when determining the applicability" of it. Newman, 186 Wn.2d at 782. Applying Bieter to Patterson would create an after the fact, ad hoc privilege relying on the hospital's litigation strategy of accepting liability. That is unworkable.

Finally, if successful here in eroding the clear line between nonemployees and hospitals, hospitals will seek further erosion of Loudon until it is meaningless; that was the import of what it asked for in Youngs.

Not only does a bright-line rule better serve privilege, it is important to not countenance further erosion of Loudon; as Justice McCloud observed in Youngs: continued expansion of privilege in the hospital setting "in the era of rapidly consolidating healthcare systems (will) all but eviscerate Loudon." Youngs v. PeaceHealth, 179 Wn.2d 645, 661 (2014).

5. Even If Bieter Is Applied Patterson Is Not Entitled To Privilege

A doctor or nurse providing healthcare in a hospital are important to that patient but to the hospital they are little different than a worker on a production line. They are interchangeable. Individually they have no particular impact on the principal's larger commercial enterprise. Only after misconduct takes place do they have any unique significance to the principal. No treating provider has the "special relationship" to a hospital required of Bieter to extend privilege. Amicus glossed over that arguing as though Bieter applies to any agent. It does not. A treating provider is not "enmeshed" with hospital management. Hermanson, supra.

Also, Amicus errs in its factual argument MultiCare had sufficient control over Patterson to extend privilege. (1) Amicus asserts without citation "MultiCare ha(d) "considerable control" over Patterson. Amicus, p. 6. There is no evidence of that. (2) As an independent contractor MultiCare could *not* exercise control over his delivery of care. The billing relationship between MultiCare and Physician's Trust does not constitute control over Patterson. (3) Amicus asserts at p. 6 "there is no evidence MultiCare lacked authority to require him to disclose information to its lawyers…" That argument reverses the burden; it is not for the adverse party to demonstrate the absence of privilege. Dietz v. Doe, 131 Wn.2d 835, 844 (1997). Also, whether MultiCare could direct Patterson after the fact has nothing to do with whether

it had control over his provision of services which is where the "significant relationship" must be. Finally, MultiCare could not require Patterson to speak with its lawyers. The Physician's Trust contract, para. 26, indicates its promises are the "final and entire agreement" and "there are no representations, promises, terms, or conditions or obligations other than those herein." No provision gives MultiCare the right to direct Patterson.

6. Amicus's Joint Defense Theory Is Without Merit

This was briefed previously. Amicus adds nothing new and it puts the issue on its head: it is not whether a joint defense agreement may give rise to some privilege. It is whether one may exist here in the first place.

The protection in Loudon is as much for the patient and process as the doctor. Loudon, 110 Wn.2d at 670. Even if a provider could waive their personal Loudon protection, neither a provider or a hospital may waive *the patient's protection* nor that of the court and process. The doctor and attorney could not speak with each other and the attorney would be ethically bound from entering such a relationship.

Finally on the point of so-called "joint defense agreements," this Court should address the subterfuge Amicus and MultiCare rely on. An attorney should be barred per se from arguing they "represent" a fact witness in a matter they are litigating; whether at deposition or otherwise. A fact witness 'belongs' to no party. The process has long turned a blind eye to

corporate defendants asserting its employees "asked" its attorney to "represent" them as a subterfuge to refuse to provide contact information, block witness access, and confabulate a constructive privilege where none exists. It presents an ethical conflict that has been ignored too long. If the person does not fall within the privilege on the basis of the underlining claim, a clever defendant cannot create a privilege by this trick and device.

7. Response To Miscellaneous Arguments

At pp. 9-10 Amicus cites the unpublished case of Jones v. Nissan North America, Inc., 2008 WL 4366055 (MD 2008), asserting it extended privilege to a "medical director" who had "a significant relationship" to the principal (Amicus called it a "client"). Amicus creates the impression Jones is analogous to a hospital. It is not. The issue presented by Jones was an outgrowth of an employee's ADA claim where the medical director participated with defense counsel in the defense of an *earlier* workers compensation claim and plaintiff sought to pierce the communications in that *earlier* matter. Id. That is unlike the independent contractor relationship of Patterson. Amicus also fails to acknowledge Jones admitted there was "scant authority" to support its holding.

Amicus at fn. 9 asserts "at least three judges sitting in the Western District of Washington" have followed Bieter.

In Kelly v. Microsoft, 2009 WL 168258 the Court found no privilege

but said it did "not take issue" with Bieter. Id. at 3. That was the full extent of its Bieter analysis. That is insufficient to cite it as persuasive. More notably, it found it "problematic" for a corporate defendant to "hire a fact witness and then instruct that witness under the cloak of privilege." Id. at 2. In Kelly it appears the person at issue was hired after litigation commenced. That is only a small and irrelevant step removed from this case. It is in the words of Kelly no less "problematic" to allow a corporation to create a privilege after the fact by accepting liability for a person it may otherwise have no liability for, than to hire them after the fact. Either way, the hospital is buying silence and control with money; in Kelly it was a paycheck, here it is providing indemnification. The law should not tolerate a hospital being able to determine if an injured plaintiff can have access to his/her own health care provider by deciding after the fact to pay for the provider's defense.

Davis v. City of Seattle, 2007 WL 4166154 cited by Amicus addressed whether the City could assert a privilege to questions put *to its actual attorney*. Id. at 4. That is inapposite and provides neither support or illustration of what constitutes a "significant relationship" as required by Bieter. Gibson v. Reed, 2019 WL 2372480, the third Washington, District Court case cited, is thinner. It mentions Bieter; one time, with no analysis, as a "see also" following a citation to Graff.

Finally, at p. 10-11 Amicus cites Brigham Young University v. Pfizer,

2011 WL 2795892 (D. Utah, 2011)[3] asserting it holds there is a privilege for communications between counsel "for an entity," with "the representatives of a separate, but affiliated, entity concerning matters of common interest." BYU only addressed privilege between entities that are parent to subsidiary corporations, holding when there is "a parent entity that dictates in large part… (the) polices and actions" of the subsidiary, there is no reason not to extend privilege to the subsidiary. Id. at 5. It is sufficient to say that is unlike the case at bar; Physicians Trust is not a subsidiary of MultiCare nor does it possess any of the characteristics discussed in that case.

8. Conclusion

Further erosion of Loudon will result in what Justice McCloud warned of: its total erosion. It will make the existence of privilege a right to be bought that injured plaintiffs cannot avail themselves of. Not that they should be able to: justice should not be for sale, nor should privileges.

DATED this 14th day of January, 2020.
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Certificate of Service
I, Dan Bridges, certify under oath and the penalty of perjury that on 1/14/20 I filed this brief and provided service by way of the court's electronic service portal.
January 14, 2020 /s/ Dan Bridges

[3] Out of 26 cases cited by Amicus fully 11 are unpublished decisions of District Courts. If the rule it seeks adoption of is as well settled and broadly implement as Amicus claims, it would not need to resort to so many unpublished, trial court memoranda.

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