No. 999473

IN THE SUPREME COURT OF WASHNGTON

KASEY CAHAN, an individual,

Petitioner,

v.

FRANCISCAN HEALTH SYSTEM, a Washington public benefit corporation, d/b/a ST. FRANCIS HOSPITAL,

Respondent.

RESPONDENT FRANCISCAN HEALTH SYSTEM'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. COUNTER-STATEMENT OF THE CASE 3

III. ARGUMENT 7

A. Cahan did not articulate a cognizable public policy. 9

B. Cahan invented her proffered public policies not to further the public good, but to provide a basis to sue her employer over her eminently justifiable discharge. 13

C. Cahan was not fired because she refused to perform some illegal act. 15

IV. CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Danny v. Laidlaw Transit Servs., Inc.,
165 Wn.2d 200 12

Farnam v. CRISTA Ministries,
116 Wn.2d 659 (1991) 13, 14, 15

Roberts v. Dudley,
140 Wn.2d 58 (2000) 3, 8

Sedlacek v. Hillis,
145 Wn.2d 379 (2001) 8, 12

Smith v. Bates Tech. Coll.,
139 Wn.2d 793 (2000) 13

Stewart-Graves v. Vaughn,
162 Wn.2d 115 (2007) 12

Statutes

RCW 18.79.040(1) 9, 10

RCW 18.79.040(1)(e) 10

RCW 18.79.260 9

Other Authorities

RAP 13.4(b) 7

WAC 246-840-705 9

WAC 246-840-705(3) 10

WAC 284-43-5642 8

Respondent Franciscan Health System d/b/a CHI Franciscan Health (Franciscan or the Hospital) answers Petitioner Kasey Cahan's Petition for Discretionary Review of the Court of Appeals' unpublished decision affirming the trial court's summary judgment for the Hospital in her action for wrongful discharge in violation of public policy.

I. INTRODUCTION

Hospitals do not fire long-serving nurses lightly, but Franciscan had ample cause to fire Kasey Cahan. As well developed in the record below, Cahan was described by her co-workers and managers as overbearing, bossy, confrontational, aggressive, harsh, rude, dismissive, unaware, and a bully. The Hospital fired Cahan when she refused to accept a performance improvement plan. Opinion at 8, 13.

Cahan then filed a wrongful discharge lawsuit in which she tried to style herself a whistleblower because, before her termination, she had complained about an *internal* Hospital paperwork issue: doctors sometimes sent patients to her department before properly entering their orders into the Hospital's electronic records system. Pretending that the consent and orders did not exist, Cahan claimed that she had been wrongfully discharged because she had refused to perform the unlawful act of caring for patients without their consent, or without doctors' orders telling her what to do.

The trial court accepted that Cahan had articulated a clear mandate of public policy, giving her a legally cognizable claim for wrongful discharge—if she could establish that she had been fired for complaining about these supposed public policy violations, or refusing to administer care or treatment without patient consent or beyond the scope of her nursing

license. However, the trial court dug into the complex, undisputed facts on summary judgment and concluded that Cahan's complaints about these policies were unrelated to her well-documented and supported discharge.

The Court of Appeals affirmed on the alternative basis that Cahan's complaints about the Hospital's internal paperwork bottlenecks did not implicate any cognizable public policy. In an unpublished but nonetheless thorough opinion, the Court of Appeals reviewed the undisputed facts of Cahan's discharge in language indicating that it would readily affirm the summary judgment based on lack of causation if necessary, per the trial court's detailed analysis. *See* Opinion at 2–14. But the Court of Appeals affirmed on the alternate bases that Cahan was inventing public policies to fit her situation, and nothing about Cahan's discharge implicated the supposed public policies she had identified. Specifically, Cahan had never been directed to administer care to a patient without that patient's consent; or to administer any care beyond the scope of her nursing license without a doctor's orders. *See* Opinion at 18–22. Rather, Cahan had been complaining about her "frustration with doctors' failure to comply with internal policies regarding timely transmittal of documentation—and management's decision not to do more to correct this noncompliance," which was an "internal workflow matter" rather than any "clear mandate of public policy." *Id.* at 21–22.

The Court of Appeals thus determined that the trial court had erred in allowing Cahan to invent public policies to fit the facts of her discharge, contrary to this Court's direction that the judicial branch "may not *sua sponte* manufacture public policy but rather must rely on that public policy

previously manifested in the constitution, a statute, or a prior court decision." *Roberts v. Dudley*, 140 Wn.2d 58, 65 (2000). The Court of Appeals also observed that Cahan's conduct was not motivated by any actual effort to address the public good, but rather by her own frustration with having to pick up the slack left by certain doctors in complying with the Hospital's internal paperwork protocols. And finally, even though Cahan was trying to manufacture public policies to fit her case, she still had not presented facts that would implicate these supposed policies. Opinion at 18–22.

The Court of Appeals wisely avoided allowing bad facts to make bad law. This Court should deny Cahan's Petition for Review.

II. COUNTER-STATEMENT OF THE CASE

The core narrative of any claim for wrongful discharge in violation of public policy is: *My employer required me to do something that would have violated public policy; I refused; and my employer fired me as a result.*

Cahan devotes half of her Petition for Review to her statement of the case, but nowhere in this narrative is there anything resembling a legally cognizable claim for wrongful discharge in violation of public policy. Cahan's Petition for Review naturally ignores the wealth of undisputed evidence that justified her dismissal—the extensive and undisputed record about how Cahan's inability to communicate effectively and lack of professionalism created discord with her co-workers, negatively impacted morale, and disrupted the productivity and cohesiveness of her department. As her performance evaluations over the years established, Cahan simply did not listen, and had to have things her way. That is why she was

eventually given a formal Performance Improvement Plan, and was suspended and eventually discharged for refusing to accept it. *See* Opinion at 8–13.

Cahan's Petition avoids all of this, and instead develops only Cahan's complaints to Hospital management about the paperwork bottleneck. Cahan had convinced the trial court that Washington law recognizes a public policy against nurses administering care to patients without their consent (based on the common law doctrine of informed consent); and a public policy against nurses administering care without a doctor's orders (based on the Washington licensing statute for nurses which explains how nurses operate independently with respect to some aspects of medical care and treatment, and "interdependently" when executing a doctor's orders).

The trial court nonetheless entered summary judgment against Cahan because the undisputed facts confirmed that Cahan's confrontational, dismissive, and bullying behavior justified her termination, and because Cahan presented no evidence that her complaints about the paperwork bottleneck resulted in her discharge.

Cahan appealed from this summary judgment, and the Hospital cross-appealed the trial court's legal ruling that Cahan had articulated new and cognizable public policy bases for the tort of wrongful discharge (even though Cahan's own case did not implicate her proffered public policies).

The Court of Appeals wisely decided to take up the question of whether Cahan really did identify a new public policy—a more far-reaching question than whether the undisputed facts at summary judgment

established that Cahan was fired for reasons other than complaining about the paperwork bottleneck.

In its unpublished opinion, the Court of Appeals succinctly reviewed the well-developed record of undisputed facts regarding how the Hospital did not fire Cahan for complaining about the paperwork bottleneck, but took her complaints seriously, and responded supportively and professionally. *See* Opinion at 2–8.

Specifically, Cahan did indeed complain to Hospital management about patients being sent to her department before all of their consent paperwork and orders had been entered into the Hospital's electronic record system. *Id.* at 3–4 (quoting Cahan's detailed email complaining about the problem and asking how she should handle the situation). This is the part that Cahan emphasizes in her Petition. *See* Petition for Review at 10.

The Court of Appeals then reviewed the Hospital's response to Cahan's *what should I do* query—a key and dispositive portion of the record below that Cahan omits from her Petition. As the Court of Appeals laid out in detail, Hospital management responded timely, beginning with an immediate response email that forwarded the relevant Hospital procedures. *See* Opinion at 4. Then Hospital management provided more detailed responses the next day. *Id.* at 5. These responses were thoroughly professional and supportive. They acknowledged that Cahan had raised important concerns—indeed, the Hospital wanted to know which doctors were dilatory in entering orders into the electronic record system. *Id.* at 6. Management provided detailed directions to Cahan regarding what to do and who to call should she ever again have a patient arrive in her department

without all the patient's orders and other paperwork having been properly entered into the Hospital's system. *Id.* at 5–7. Management even provided draft language to show Cahan how to report these issues to management:

> An example email or IRIS [the Hospital's anonymous complaint system] would say:
>
> > "I received a liver BX patient of Dr. Chen's today from IR at 1230. There were no post-procedure orders in Epic [the Hospital's electronic record system]. I called him to ask that orders be placed. The orders were not in Epic until 1300. This delayed my ability to provide care for the patient."

Id. at 7, quoting Hospital management's detailed directions to Cahan.

Cahan's manager concluded by explaining why such specifics were needed for management to address the problem:

> I understand the frustration and anxiety this causes and I want to resolve it. It would be helpful to have specific incidents to refer to hold providers accountable. It is difficult to make effective changes with blanket statements, unfortunately we need specifics.

Id. In other words, Hospital management completely agreed with Cahan about this issue, and asked her to help solve it.

Cahan ignored these instructions. The next time a patient arrived in her department without the requisite paperwork in the system, Cahan did not report the problem up the chain as directed, and work cooperatively to address it. She simply refused to admit the patient. Opinion at 7. Cahan left it to others to report the problem to management and help resolve it, as she had been asked to do. *Id.* at 8.

The Court of Appeals ruled that Cahan had not identified a proper clear mandate of public policy that could support a wrongful discharge

claim on the facts she presented. Cahan had not pointed to a single patient who had not provided informed consent for treatment, or who was treated by professionals who were operating beyond the scope of their licenses. Rather, Cahan was complaining only that the consent documentation and physician orders had not been timely entered into the Hospital's electronic records system, requiring her to make efforts to fix this internal paperwork problem. *Id.* at 20–22. She was not seeking to advance the public good, *e.g.*, by protecting patients from unauthorized and unwanted surgeries, but rather was raising purely private complaints to Hospital management about having to pick up slack left by some doctors. *Id.*

III. ARGUMENT

This Court's consideration of petitions for discretionary review is guided by the criteria in RAP 13.4(b):

> (b) Considerations Governing Acceptance of Review.
>
> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

There are no conflicts in decisional law here, so criteria (1) and (2) are not at issue. (Indeed, the Court of Appeals properly disposes of easy cases like Cahan's in unpublished opinions to avoid creating the sort of

decisional law that might otherwise warrant this Court's attention and limited resources.) Nor does Cahan's Petition present any constitutional issues. Only criterion (4)—public interest—is potentially at issue here.

But even that criterion is not joined by this case. Determining precisely what public policies are important enough to limit at-will employment may be a matter of substantial public interest. But here, the Court of Appeals did not have to struggle with whether to alter the balance between at-will employment and protecting conduct aimed at fostering the public good. Rather, the Court of Appeals recognized that Cahan had transparently attempted to manufacture public policies to fit the facts of her well-justified discharge, and rejected these proffered public policies.

Any discharged employee can argue that he was fired in violation of some invented public policy. *Yes, I was fired for my excessive absenteeism, but I was taking "mental health" days. Washington recognizes a strong public policy of supporting mental health (per the mental health parity provisions in WAC 284-43-5642), so I was discharged in violation of this established public policy.* This Court has warned lower courts against chipping away at at-will employment principles by judicial recognition of new public policies, which discharged employees can always invent to suit their situation. *Sedlacek v. Hillis*, 145 Wn.2d 379, 389 (2001) (courts "cannot conclude that a clear mandate of public policy exists merely because the plaintiff can point to a potential source of public policy that addresses the relevant issue."); *Roberts v. Dudley*, 140 Wn.2d 58, 65 (2000) ("A court may not *sua sponte* manufacture public policy but rather must rely on that public policy previously manifested in the constitution, a statute, or

a prior court decision.").

Thus, when a lower court recognizes a new public policy, this Court may be interested in exercising its discretion to review the decision in order to police the balance between at-will employment and public policy wrongful discharge. By contrast, an unpublished decision that carefully considers and correctly rejects a discharged employee's attempt to manufacture a new and dubious public policy is not the sort of decision that merits this Court's discretionary review. Especially where the invented public policy is not even implicated by the employee's conduct.

A. Cahan did not articulate a cognizable public policy.

In the trial court, Cahan offered two ostensible clear mandates of public policy to support her claim for wrongful discharge: (1) a public policy prohibiting nurses from administering care to patients without provider orders, and (2) a public policy prohibiting nurses from administering care to patients without patient consent. *See* Opinion at 18; Petition at 1.

Cahan argued below that the first public policy is grounded in Washington statutes and regulations describing the practice of nursing as following physicians' orders. Petition at 14–15, citing RCW 18.79.040(1)(e), 18.79.260, and WAC 246-840-705. This is true, so far as it goes. A nursing license has its limits—there are certain things that nurses may only do "under the general direction of a licensed physician or surgeon," such as administer medications, treatments, tests, and inoculations. Petition at 15. Cahan's wrongful discharge claim is based on the premise that Washington law prohibits nurses from administering any

care or treatment independently—they may **only** do what doctors order them to do. *Id.* Thus, as Cahan argued below, Washington law and public policy supposedly required her to refuse to admit patients without first having orders in place because she could do nothing until she received a doctor's orders, lest she act beyond the scope of her license.

As the Court of Appeals correctly recognized, however, Cahan only describes part of the practice of nursing. Nurses sometimes act interdependently and are required to follow doctors' orders, *e.g.* when they are "executing of medical regimen as prescribed by a licensed physician and surgeon." RCW 18.79.040(1)(e), WAC 246-840-705(3). But nurses have extensive education and training that provides them with "specialized knowledge, judgment, and skill," which nurses can employ, and are properly expected to employ, independently. Opinion at 19, quoting RCW 18.79.040(1), 18.79.040(1)(a), and WAC 246-840-705(3).

Thus, if a patient came to Cahan's department before a doctor's orders were properly entered into the Hospital's electronic record system, public policy does not require Cahan to refuse to admit the patient. Cahan could begin the admissions process by, *e.g.*, taking the patient's vitals and providing other initial care and treatment that was within the scope of her independent nursing practice, while waiting for orders for anything that was beyond that scope. The Hospital drew this line clearly for Cahan, so she would know what to do and not to do, and thereby allay any concerns about practicing beyond her license; and the Hospital told Cahan precisely how to follow up to obtain the orders when they were not entered into the electronic records system. *See* Opinion at 3–7 (reviewing in detail Cahan's *what am*

I supposed to do questions and the Hospital's detailed and thorough answers to them).

The Court of Appeals correctly concluded that Cahan did not refuse to admit a patient in late December 2017 because doing so would be contrary to public policy. She refused to admit that patient as a petulant expression of her frustration over having to pick up slack left by others. Opinion at 21–22.

The same analysis applies even more strongly to Cahan's other proffered mandate of public policy prohibiting nurses from administering care to patients without their consent. Cahan did not argue below that any patients were being operated on, treated, or otherwise cared for without their informed consent. Rather, Cahan's complaint was that the existing consent paperwork had not been timely entered into the Hospital's electronic records system. Opinion at 20–21. Cahan acknowledged that if the Hospital had not obtained a patient's written informed consent before a surgery, there would be a "hard stop." *Id.* at 21.

No aspect of Washington public policy requires nurses to stand idly by and do nothing for patients until all of their informed consent paperwork is properly uploaded into the Hospital's internal record system. If Cahan were genuinely concerned about losing her nursing license for caring for a patient without consent, then she could always ask *May I take your blood pressure?* etc. before doing so.

The Court of Appeals also properly questioned whether the tort doctrine of informed consent could even constitute a clear mandate of public policy. Opinion at 21. The Court of Appeals chose to "assum[e] without

deciding that the doctrine of informed consent rises to the level of a clear public policy," in rejecting Cahan's claim that her termination arguably contravened this policy. *Id.* The Court of Appeals was correct to view its assumption skeptically. The informed consent doctrine arose at common law to provide a tort remedy for a patient who suffered injury from a medical treatment that a reasonably prudent person would not have consented to under similar circumstances. Opinion at 20–21 and n.14; *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 122 (2007). Informed consent claims are thus inherently situational—a cognizable and meritorious claim for informed consent depends entirely on the specific facts of each case, and what is reasonable under the circumstances. *Id.* Unless and until the Washington State Legislature decides to micromanage the practice of medicine by legislating exactly how medical professionals must advise their patients in specific situations, the doctrine of informed consent cannot supply a "clear mandate of public policy" as needed to support a wrongful discharge claim. *E.g. Sedlacek*, 145 Wn.2d at 385 ("findings of public policy must be clearly grounded in legislation or prior jurisprudence in order to protect employers from frivolous lawsuits and to assure balance between the interests of the employer and the interests of the employee"). Otherwise, a hospital could not fire an anti-vaxxer employee for spreading vaccine misinformation to patients, since the fired employee could portray the misinformation as facts that the employee is obligated to disseminate under the public policy of "informed consent." Cahan's informed consent-based public policy claim thus fails under this analysis as well. *Sedlacek*, *supra*; *accord Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 235, ¶ 61

(Madsen, J., concurring/dissenting) ("An employer should not be exposed to liability where a public policy standard is **too general** to provide any specific guidance or is **so vague that it is subject to different interpretations.**" (emphases added)).

B. Cahan invented her proffered public policies not to further the public good, but to provide a basis to sue her employer over her eminently justifiable discharge.

The tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy. Opinion at 17–18 (emphases in original), *quoting Smith v. Bates Tech. Coll.*, 139 Wn.2d 793, 801(2000); *see also Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 671 (1991) (the employee "must have been seeking to 'further the public good'" in engaging in her allegedly public-policy-linked conduct).

Cahan's December 2017 email to Hospital management did not inform management about any actual or hypothetical dangers to any actual or hypothetical patients. Opinion at 3–4. Rather, Cahan asked *what am I supposed to do when …*? *Id.* And Hospital management responded: *You're right that this is an internal paperwork problem that we need to fix; thanks for raising it; here is exactly what to do and who to call in this situation. Id.* at 4–7. In other words: do your part to pick up the slack, and tell us who is responsible for that slack. *Id.* at 7 (quoting a Hospital manager's response: "I understand the frustration and anxiety this causes and I want to resolve

it. It would be helpful to have specific incidents to refer to hold providers accountable."). That, however, was not what Cahan wanted to hear. She told management "I don't feel comfortable taking these patients any more," and then refused to admit the next patient that arrived without orders, instead of following management's detailed directions. *Id.* at 7 (emphasis added).

As the Court of Appeals correctly recognized, Cahan was not "seeking to further the public good when she [emailed management] and later when she refused to admit the IR patient." Opinion at 21, citing *Farnam*. To the contrary, the Court of Appeals recognized that "the only reasonable conclusion from the record is that Cahan's December 2017 conduct was motivated by private or proprietary interests, namely, her frustration with doctors' failure to comply with internal policies regarding timely transmittal of documentation—and management's decision not to do more to correct this noncompliance." *Id.* at 21.

This correct analysis offers another reason to reject Cahan's Petition for Review. Cahan did not provide any evidence that the issues she raised actually implicated patient safety. Opinion at 21. She was asking management *what should I do when* …; and when she didn't like management's answer of *do your part by picking up the slack and reporting the slack's source*, Cahan told management *I don't feel comfortable doing this*. Cahan was not advocating for patients but was protecting advancing her own interests. Cahan's wrongful discharge claim thus fails for yet another reason: even if her proffered public policies were well grounded in statute or regulation (which they are not), Cahan was not "seeking to further

the public good through her conduct." Opinion at 22, citing *Farnam*, 116 Wn.2d at 671–72 ("Conduct that may be praiseworthy from a subjective standpoint or may remotely benefit the public will not support a claim for wrongful discharge.").

C. Cahan was not fired because she refused to perform some illegal act.

Cahan tried to invent public policies that could turn her personal complaints into a cognizable claim for wrongful discharge. The Court of Appeals correctly saw through this attempt and rejected it. But even if the Court of Appeals had uncritically accepted it, as the trial court did (in the course of entering summary judgment against Cahan based on lack of causation), the fact remains that Cahan failed to show that she was fired for refusing to violate the supposed public policy that she articulated.

Nobody questions the basic premises that patients should not be treated without their informed consent, and that nurses should not practice beyond the scope of their nursing licenses. And perhaps if a nurse were fired for refusing a hospital's direction to perform some kind of medical procedure beyond the scope of her license to a patient who never gave (or revoked) consent for such treatment, then the public policy questions that Cahan tries to present here would be properly joined.

But these policies were never even joined in this case. A close reading of Cahan's Petition reveals this profound gap between a refusal to do an illegal act (something that *might* support a public policy wrongful discharge) and Cahan's action that triggered her suspension (and combined with a lengthy history of performance problems to ultimately lead to her

termination).

Cahan argues that her public policy wrongful discharge "arises from her reporting of the Hospital's misconduct and **her refusal to commit an unlawful act; namely, providing care and treatment to a patient for whom no consent and no orders had been written**." Petition at 13 (emphases added).

Compare this description of the supposed triggering event for Cahan's discharge (in the argument section of her Petition and without any record citation) with the description of the triggering event that Cahan offered just two pages earlier in the Petition—in her statement of the facts (where a petitioner must provide record citation):

> On December 27, 2017, Cahan refused to admit a patient without report or orders because **the doctor had yet to provide the required documentation.** (CP 599; 08.19.2019 Cahan Declaration ¶ 16.)

Petition at 11 (emphasis added).

This contrast says it all. In her argument section, Cahan claims (or tries her best to imply) that she was fired for refusing to perform the unlawful act of caring for a patient who had not consented to treatment, and whose treatment plan was not defined by a doctor's orders. But when she must provide record citations, Cahan acknowledges (albeit in deliberately vague language) that the patient had consented, and orders had been written—the issue was that the paperwork for the consent and orders had not been entered into the Hospital's electronic record system when the patient came to Cahan's department for admission. Cahan had asked Hospital management what to do in this situation, and management had

given her very clear instructions: do what you can to start the admission process while tracking down the orders, and then report the details to management. Cahan ignored those instructions and refused to admit the patient.

The Court of Appeals correctly recognized how the problem Cahan complained about was an *internal* Hospital paperwork bottleneck that resulted in some patients showing up for admission in Cahan's department before the existing consent paperwork and orders had been entered into the Hospital's electronic records system. Opinion at 20–21. Cahan simply makes up the part in her argument section about being fired for "refus[ing] to commit an unlawful act."[1] So even if Cahan's proffered public policy were accepted, her discharge would not have implicated it.

IV. CONCLUSION

The trial court mastered the intricate undisputed facts of Cahan's discharge, and correctly concluded that Cahan failed to present a triable case. The Court of Appeals could have affirmed on that sound basis, but chose to thoughtfully address and reject Cahan's attempt to manufacture two new public policies that would fit the facts of her case, and provide her with an ostensible wrongful discharge claim.

The Court of Appeals' opinion is thorough, correct, and unpublished. It offers this Court no reason to entertain Cahan's Petition for Review.

[1] Cahan made similar attempts to embellish the record in the Court of Appeals, as Franciscan documented in its opening brief in that court. *See* Franciscan's opening brief in the Court of Appeals at 1–5.

Respectfully submitted this 23rd day of July, 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing document to be served this date, by electronic service, to the parties listed below:

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