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NO. 51387-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DOUG HERMANSON, an individual,

Respondent,

v.

MULTICARE HEALTH SYSTEM, INC., a Washington Corporation
d/b/a TACOMA GENERAL HOSPITAL, JANE and JOHN DOES 1-10
and their marital communities comprised thereof,

Petitioners.

MUTLICARE HEALTH SYSTEM'S REPLY IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW

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I. FACTUAL REPLY

Many factual representations in Mr. Hermanson's response have nothing to do with the issues before the Court on the motion for discretionary review, are factually inaccurate, and/or are merely allegations and argumentative assertions passed off as factual truths. Although space does not permit it to address all of the factual inaccuracies in Mr. Hermanson's response, MultiCare points out some.

First, Mr. Hermanson's claim, *Resp. at 4*,¹ that no one interacting with him at the hospital observed any signs of alcohol intoxication ignores that alcohol intoxication was one of his primary diagnoses, *see, e.g., App. 403, 409, 415*, that his blood alcohol level was 330, well over the legal limit, *see, e.g., App. 282, 290, 406, 414*, and that the police report indicates Officer Williams was told that "the odor of intoxicates [sic] was noticeable," *App. 86*. Mr. Hermanson's claim, *Resp. at 3, 4, 5*, that the blood alcohol level was "erroneous," "an odd anomaly" or "not reliable" is not a proven or undisputed fact. *Cf. App. 7-10 and App. 11-14*.

Second, despite Mr. Hermanson's claim, *Resp. at 4*, it is also not a proven or admitted fact that "Dr. Patterson decided on his own to pick up

¹ Mr. Hermanson's response does not contain page numbers. Citations herein to pages of the response assume that no page number would be assigned to the cover page, and that the pages beginning with the page headed "Overview" and ending with the page headed "Conclusion" would ordinarily be consecutively numbered pages 1-21.

the phone, call the TPD, and without any warrant or even request by the TPD ... illegally disclose[]” Mr. Hermanson’s blood alcohol level. *See App. 290-92; cf. App. 7-10 and App. 11-14.* The same is also true of his claim, *Resp. at 5*, that after her social work consultation with him, “Ms. Van Slyke immediately picked up the phone, (again without a request much less a warrant), and disclosed to the TPD everything Mr. Hermanson had just told her in confidence as well as his trauma blood test result.” The appendix page he cites in support of the latter proposition, *App. 93*, indicates that Ms. Van Slyke “consulted with law enforcement,” but says nothing about what was communicated.

Third, despite his claims, *Resp. at 6*, there are questions of fact as to whether any disclosure of Mr. Hermanson’s health care information was illegal and whether any such disclosure caused his house arrest, ankle monitoring, ignition interlock, or any other actions of which he complains, *see App. 290-92; cf. App. 7-10 and App. 11-14*, especially given the fact that he had a history of three prior DUIs, *App. 96*.

Fourth, contrary to his assertions, *Resp. at 6*, Mr. Hermanson’s lawsuit alleges more than just illegal disclosure of health care information. His complaint alleges claims of negligence, defamation, false imprisonment, and violation of the physician-patient privilege, and contains allegations of negligent supervision and negligent failure to create or enforce

policies and procedures. *App.* 7-10. And, his claims encompass more than just a claim that a disclosure was made. As his complaint, *see App.* 7-10, and his arguments in his Response make clear, *Resp. at* 3-5, he also claims that no one involved in his care observed any signs of intoxication, but instead relied only a purportedly anomalous, erroneous, and unreliable blood alcohol level for the diagnosis of alcohol intoxication, and that the information provided to the police was false or inaccurate.

Fifth, although Mr. Hermanson asserts, *Resp. at* 6, that the only individuals involved in the alleged disclosure of confidential information were “Dr. Patterson and arguably the social worker,” he never explains how he knows that, or more importantly how MultiCare could know that, without speaking to those involved in Mr. Hermanson’s emergency room care. Indeed, in his pre-suit demand letter, he asserted (albeit erroneously) that Stephanie Wheeler, M.D., the MultiCare-employed family practice resident involved in his emergency room care, was the person who allegedly disclosed health care information to the police.² *App.* 278 (¶5), 282-86. And, in later correspondence, when defense counsel tried to get clarification of whose conduct was at issue, Mr. Hermanson’s counsel

² Even though Mr. Hermanson knows full well that MultiCare’s counsel spoke with Dr. Wheeler to investigate his pre-suit claim, *App.* 278 (¶6), 290-92, Mr. Hermanson now suggests, *Resp. at* 3-4, *n.1*, that only if Dr. Wheeler “is in fact a licensed physician” and has first hand knowledge of the release of confidential information would it be appropriate for MultiCare’s counsel to speak with her *ex parte*.

insisted that it was every person who violated Mr. Hermanson's physician-patient privilege – "If a person did not violate the privilege, they are not at issue. If they did, they are. You tell me. Simple." *App. 41*. Yet, Mr. Hermanson has never been able to explain the "Catch 22" conundrum he has created as to how MultiCare's counsel would be able to identify (or make a record of, *see Resp. at 7*) every person who violated the privilege if MultiCare's counsel is precluded from speaking with anyone involved in the emergency room care other than physicians it employed.

Sixth, Mr. Hermanson's assertion, *Resp. at 6-7*, that he does not know which of Mr. Hermanson's emergency room care providers, other than Dr. Patterson, MultiCare's counsel has spoken with, ignores the fact that defense counsel told Mr. Hermanson's counsel exactly who they had spoken with to investigate the pre-suit demand, *App. 290-92*, as well as who they were retained to jointly represent, *App. 28, 39, 56*.³

Finally, Mr. Hermanson erroneously asserts, *Resp. at 9*, that the trial court allowed MultiCare's counsel to have "privileged, ex parte communications with all of plaintiff's treating health care providers (except

³ Mr. Hermanson, apparently trying to cast doubt on whether there is a joint representation agreement, chastises MultiCare for not filing it with the Court. *See Resp. at 7-8*. He cites no authority requiring MultiCare to do so or precluding defense counsel, who was a party to the agreement, *App. 129*, from providing declaration testimony concerning its existence, *see App. 28, 129*. Defense counsel's testimony in that regard, contrary to Mr. Hermanson's assertion, *Resp. at 7*, is not hearsay. Mr. Hermanson also ignores that MultiCare offered to make a copy of the agreement available to the trial court for *in camera* inspection. *See App. 123-24*.

Dr. Patterson and the social worker).” Not so. The trial court’s order allows MultiCare to have ex parte privileged communications only with Paulene Wheeler, R.N. and Carla Difibaugh, R.N., and requires MultiCare to seek leave of court before having ex parte communications with any other MultiCare health care providers. *App. 1-2.*

II. ARGUMENT IN REPLY

A. Discretionary Review Should be Granted under RAP 2.3(b)(4).

Notwithstanding the trial court’s certification of the orders at issue, Mr. Hermanson asserts that the RAP 2.3(b)(4) certification standards are not met, that MultiCare’s “cobbling together” of federal cases interpreting the federal statute from which the rule was derived are not persuasive, and that “the issues ‘certified’ for review are not certifiable.” *Resp. at 1-2.* Yet, he offers no countervailing authority, nor does he even address the certification standards. Instead, he relies on his unpersuasive ipse dixit.

Based on the authorities set forth in the Motion for Discretionary Review, the orders at issue involve controlling questions of law for which there is substantial ground for difference of opinion and immediate review may materially advance the ultimate termination of the litigation. Thus, the certification standards of RAP 2.3(b)(4) are met and the trial court’s certification of the orders at issue should be accepted and review granted.

Ultimately, it appears that Mr. Hermanson is ambivalent as to

whether or not review is accepted, *see Resp. at 2*, but, if review is granted based upon the trial court's certification, wants the parts of the orders with which he disagrees reviewed as well. MultiCare has no concern in that regard and assumes that appellate review of the orders at issue will include such issues as (1) whether *Loudon's* prohibition on defense counsel's ex parte contact with a plaintiff's treating physicians, *see Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), extends to other non-physician treating health care providers; (2) whether *Youngs'* allowance of privileged ex parte contact between defendant hospital's counsel and nonparty employed treating physicians, *see Youngs v. PeaceHealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014), is limited to treating physicians employed by the hospital or extends to treating physicians who although independent contractors are the hospital's admitted agents and/or to other treating health care providers who are the hospital's non-physician employees or agents; and (3) the scope of the ex parte contact that is allowable under *Youngs* where, as here, the treating health care providers with whom the defendant hospital's counsel seeks to have privileged ex parte communications had no involvement in plaintiff's care at any time apart from the emergency room visit that is the subject of the lawsuit, and thus have no irrelevant privileged medical information to convey to defense counsel.

Thus, MultiCare assumes that, if review is granted, the trial court's

rationales for allowing MultiCare's counsel to have ex parte contact with Nurses Wheeler and Defibaugh, but not with Dr. Patterson or social worker Van Slyke, and not with any other MultiCare health care provider absent further leave of court, will be part and parcel of that review. That does not mean, however, that MultiCare agrees with Mr. Hermanson's "fly-specking" assertions, *Resp. at 1-3*, that MultiCare somehow was required to seek discretionary review of, or assert error with respect to, those parts of the trial court's orders as to which it did not disagree and was not aggrieved, or his assertions that the trial court's allowing of privileged ex parte communications with the two nurses was in error.

B. Review Is Also Warranted Under RAP 2.3(b)(2).

Claiming that MultiCare has argued that, under *Youngs*, "the corporate attorney-client privilege ... trumps the ex parte protection of *Loudon* across the board," *Resp. at 12*, Mr. Hermanson asserts that MultiCare's analysis of *Youngs* does not justify review, *Resp. at 10-12*. But, Mr. Hermanson's "straw man" mischaracterization of MultiCare's arguments does not justify denial of review. What MultiCare has argued is what *Youngs* says – "the corporate attorney-client privilege trumps the *Loudon* rule where an ex parte interview enables corporate counsel 'to determine what happened' to trigger the litigation," and such trumping is necessary to "strike[] the proper balance between the attorney-client

privilege and physician-patient privileges, limiting *Loudon*'s prophylactic protections to the extent necessary to protect a corporate defendant's right to fully investigate its potential liability." *Youngs*, 179 Wn. 2d at 663-65.

Mr. Hermanson further asserts that the trial court did not err in precluding MultiCare's counsel from having privileged ex parte contact with Dr. Patterson (because he was only an admitted agent, but not a direct employee of MultiCare) and social worker Van Slyke (because, although employed by MultiCare, she was not a physician), but instead erred in allowing MultiCare's counsel to have privileged ex parte contact with the two nurses (because they were not physicians and had not been shown to have knowledge of the release of confidential information to the police). *See Resp. at 1-2, 9-10*. But, his assertions are premised on his erroneous insistence, *Resp. at 1-2, 9-10, 20*, that *Loudon* (which concerned only nonparty treating physicians) prohibits defense counsel from having ex parte contact with all nonparty treating health care providers, and that *Youngs* carved out only a very narrow exception to allow a defendant hospital's counsel to have corporate attorney-client privileged ex parte contact only with nonparty treating physician employees, and no other nonparty treating health care provider employees or agents.

The issue in *Loudon* was whether counsel for the defendant physicians could have ex parte contact with other nonparty treating physicians.

Loudon did not address whether its prohibition on ex parte contact (based on the physician-patient privilege) extended beyond a plaintiff's nonparty treating physicians to encompass all of plaintiff's nonparty non-physician treating health care providers. Nor did *Youngs* draw a distinction between physician employees and physician or between physician and non-physician employees/agents of a defendant hospital in deciding when the corporate attorney-client privilege trumps the *Loudon* rule. It spoke in terms of employed physicians only because employed physicians were the subject of the ex parte contact at issue in that case.

Mr. Hermanson's assertion, *Resp. at 9-10*, that the trial court erred in allowing MultiCare's counsel to have ex parte contact with the two non-party nurse employees because "MultiCare created no record they have any personal knowledge of the 'triggering' event," which he defines as the release of confidential health care information, ignores the fact that MultiCare could not make such a record without being able to speak to the nurses to find out whether they had such personal knowledge. It also too narrowly circumscribes the "triggering" event. More is at issue to trigger MultiCare's asserted liability, as Mr. Hermanson claims, *inter alia*, that no one observed any signs of intoxication, that what was communicated to police was false, and hospital personnel were negligently supervised and trained, all claims involving facts about which the nurses likely would

have knowledge even if it was known for certain that they themselves did not have contact or overhear any contact with police.

Mr. Hermanson also complains that the trial court erred in not restricting MultiCare's counsel's ex parte communication with the nurses, *see Resp. at 9*, but ignores that they, and the other health care providers, had no involvement in Mr. Hermanson's care other than during his emergency room visit. Thus, they have no irrelevant privileged healthcare information to convey so as to warrant any such restriction.

Ultimately, Mr. Hermanson's claim of error in allowing privileged ex parte communication with the two nurses whom he claims have no knowledge of the litigation-triggering event, but lack of error in disallowing privileged ex parte communication with Dr. Patterson and Ms. Van Slyke, whom he admits have knowledge of the litigation-triggering event, only reinforces why discretionary review should be accepted.

RESPECTFULLY SUBMITTED this 20th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 20th day of November, 2017, I caused a true and correct copy of the foregoing "MultiCare Health System's Reply in Support of Motion for Discretionary Review" to be delivered in the manner indicated below to the following counsel of record:

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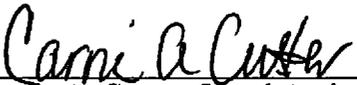
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Dated this 20th day of November, 2017, at Seattle, Washington.



Carrie A. Custer, Legal Assistant

FAVROS LAW

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