Replaces (overlength) amicus brief filed 12/19/19

No. 97783-6

SUPREME COURT 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,

Petitioner.

AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE HOSPITAL ASSOCIATION, WASHINGTON STATE MEDICAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION

Michael F. Madden, WSBA #8747
David M. Norman, WSBA #40564
BENNETT BIGELOW & LEEDOM, P.S.
601 Union Street, Suite 1500
Seattle WA 98101
(206) 622-5511
Attorneys for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. IDENTITY & INTEREST OF AMICI

In *Youngs v. PeaceHealth,* 179 Wn.2d 645, 316 P.3d 1035 (2014), this Court fashioned a rule that balances the interests protected by the attorney-client and patient-physician privileges. It held:

> [A]n attorney hired by a defendant health care provider to investigate or litigate an alleged negligent event may conduct privileged ex parte communications with a plaintiff's nonparty treating physician only where the communication meets the general prerequisites to application of the attorney-client privilege, the communication is with a physician who has direct knowledge of the event or events triggering the litigation, and the communications concern *the facts of the alleged negligent incident*.

Id. at 653 (italics in original). Conversely, *Youngs* prohibits *ex parte* communications with treating physicians concerning pre or post-event care. *Id.* at 671. Over the five years since it was issued, the *Youngs* rule has proved to be reasonably workable.

In this case, the Court of Appeals majority needlessly upset the *Youngs* balance by holding that counsel for a defendant-hospital cannot have "*ex parte*" or privileged communications with a physician who is the hospital's admitted agent and whose conduct forms the basis for the claim against the hospital. The sole basis for its holding is that the physician's employer is a corporation affiliated with the hospital, rather than the hospital itself. In reaching this result, the Court of Appeals majority mistakenly concluded that *Newman v. Highland Sch. Distr. No. 203,* 186 Wn.2d 769, 381 P.3d 1188 (2016) compels rejection of well-settled national precedent holding that the corporate attorney-client privilege applies to communications between corporate counsel and affiliated entities and their

employees. Relatedly, the Court of Appeals erroneously held, notwithstanding the presence of common interests and the clients' decision to jointly engage counsel, that *Newman* and *Loudon v. Mhyre,* 110 Wn.2d 675, 756 P.2d 138 (1988) preclude joint representation of MultiCare, Trauma Trust, and Dr. Patterson.

The decision below has a serious negative impact on members of the Washington State Hospital Association ("WSHA"), the Washington State Medical Association ("WSMA"), the American Medical Association and its Litigation Center ("AMA"), and the Washington business community generally. In the health care setting, many hospitals and health systems in Washington employ physicians through separate but affiliated entities.[1] Most often, these affiliated physician groups receive legal services from the same lawyers who advise the hospital or system. They may also have the same insurance.

Other hospitals contract with independent physician groups to provide and manage medical services within their facilities. Although these arrangements vary considerably, from the service-specific, *e.g.,* emergency medicine, to comprehensive "full-service" arrangements, these arrangements almost always include management services provided by the physicians, such as medical directorships and quality improvement, as well as requirement to cooperate with the hospital regarding liability claims.

[1]Examples include UW Medicine and UW Physicians, CHI-Franciscan Health and Franciscan Medical Group, Seattle Children's Hospital and Children's University Medical Group, and Kaiser Health and Washington Permanente Medical Group.

These requirements involve the contractor in important facets of hospital operations.

As was the case here, claims involving physicians employed by hospital-affiliated entities are often brought solely against the hospitals or health system in which they work. Similarly, where the conduct of a physician employed by an independent group contracted with the hospital is at issue, plaintiffs may choose to simplify their case by only naming the hospital, assserting that it is vicariously liable for conduct of the involved physicians. In either instance, these cases have heretofore been defended without any restriction on the ability of hospital counsel to communicate with the targeted physicians or to jointly represent the hospital, involved physicians, and their employers.

Hermanson changes the rules of the game in an unwarranted way; *i.e*., if a hospital is the only defendant, its counsel cannot have any contact with physicians whose conduct is at issue, except when opposing counsel is present. Further, *Hermanson* precludes physicians and their employers, who often face insurance, regulatory and reputational issues arising from the lawsuit, from entering into a joint defense agreement with the hospital. In this way, *Hermanson* weaponizes *Loudon* by allowing plaintiffs to name hospitals as the sole defendant and thereby to preclude the involved parties from effectively defending themselves.

II. STATEMENT OF THE CASE

Respondent alleges that on September 11, 2015 "employees and agents" of Tacoma General Hospital improperly disclosed confidential

health care information to police. Clerk's Papers ("CP") 2. He further alleges that disclosure "by TG's employees and staff, was TG's release of that information." CP 3. Subsequently, plaintiff identified the "employees and agents" allegedly responsible for the disclosure as Dr. David Patterson, an employee of Trauma Trust, and two non-physician employees of the hospital. CP 59.

After receiving notice of the claim and prior to commencement of suit, MultiCare, Dr. Patterson and Trauma Trust jointly retained counsel. CP 22. MultiCare subsequently admitted it is responsible for the actions of its employees and any acts or omissions of Dr. Patterson or any other Trauma Trust employees involved in Mr. Hermanson's care. CP 129.

Trauma Trust is a non-profit corporation formed to provide trauma and emergency medical services at Tacoma General and St. Joseph's hospitals. CP 95. MultiCare and Franciscan Health (operator of St. Joseph's) are its corporate members. *Id.* Trauma Trust's offices are located at Tacoma General[2] and its board is dominated by Franciscan and MultiCare representatives.[3]

III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' misreading of *Youngs* and *Newman* creates unwarranted and unreasonable barriers to effective defense of many medical malpractice matters.

[2] *Hermanson,* 448 P.3d at 157.

[3] See https://www.tacomatrauma.org/about-us/board-directors/ (last accessed 12/9/2019).

If MultiCare employed Dr. Patterson directly, its counsel could have privileged communications with him because he has direct knowledge of the events creating the alleged liability. *Youngs,* 179 Wn.2d at 653. Likewise, if plaintiff added Dr. Patterson or Trauma Trust as defendants, common interest privilege would protect relevant communications between them, the hospital, and their respective counsel. *Sanders v. State,* 169 Wn.2d 827, 853, 240 P.3d 120 (2010). The Court of Appeals majority reasoned that these holdings do not apply here because: (a) an agent of the hospital who is employed by a hospital-affiliated entity has the same status as the former employees in *Newman*; and (b) *Loudon* overrides any common interest privilege or joint defense agreement. *Hermanson,* 448 P.3d at 162-163.

Treating Dr. Patterson like the former employees in *Newman* represents a significant misreading of this Court's decision. The critical factor in *Newman* was not employment status; it was the absence of an ongoing agency relationship, and consequent inability of the principal to control the agent. *Newman,* 186 Wn.2d at 780 ("When the employer-employee relationship terminates, this generally terminates the agency relationship."). Furthermore, as *Newman* noted, RPC 1.13, comment 2 recognizes that the corporate attorney-client privilege is not limited to communications with "employees:"

> When **one of the constituents** of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its

> lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees **or other constituents** are covered by Rule 1.6.

Id. (emphasis add).

Here, Dr. Patterson was at all times the hospital's admitted agent and an employee of an entity over which MultiCare has considerable control. There is no evidence MultiCare lacked authority to require him to disclose information to its lawyers, or of any divergence of interests between him and MultiCare. Judge Glasgow's concurring and dissenting opinion in *Hermanson* correctly identified this problem in the majority's rationale, noting that unlike a "third-party witness," Dr. Patterson was an admitted agent of MultiCare, with a continuing ongoing duty of loyalty. 448 P.3d at 168. Therefore, unlike a former employee, he may be MultiCare's "speaking agent" with regard to statements made during litigation. *Wright v. Group Health Hosp*., 103 Wn.2d 192, 201, 691 P.2d 564 (1984).

B. The Court of Appeals' rejection of a joint defense agreement is unwarranted and not supported by authority.

The proposition that *Loudon* precludes joint representation of the non-party agent accused of negligence and the responsible party-principal is completely illogical, and inconsistent with *Newman*. The concern behind the *Loudon* rule is the potential for harm to the patient-physician relationship, which is mitigated by requiring the presence of the patient's lawyer during any meeting with the physician. 110 Wn.2d at 677-80. That

concern does not exist when, as here, patients accuse physicians of misconduct. In such circumstances, patients cannot legitimately expect physicians to be neutral or to preclude them from joining in the hospital's defense. Therefore, *Youngs* and *Loudon* do not apply. Additionally, *Newman* recognized that joint representation of the non-party former employees and the employer is appropriate where there is a common interest. *Newman,* 186 Wn.2d at 783 (privilege applied to communications with former employees during period when they and defendant were jointly represented).

C. The Court of Appeals' holding that the corporate attorney-client privilege does not cover communications with affiliated entities and employees represents an unwarranted and harmful departure from national precedent.

The Court of Appeals majority posited that *Newman* implicitly rejected the reasoning of cases such as *In re Bieter*, 16 F.3d 929, 937-39 (8th Cir. 1994) and *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). *Hermanson*, 448 P.3d at 163. These cases applied the flexible multi-factor test developed by United States Supreme Court in *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677 (1981), which has been utilized by this Court on multiple occasions, including in *Newman* and *Youngs.* In a well-reasoned opinion by Judge Tallman, *Graf* held that communications between an ostensible "outside consultant" and corporate counsel were subject to the corporation's attorney-client privilege because the consultant was an agent of the employer and authorized to communicate with its

attorneys regarding legal matters concerning the company. 610 F.3d at 1157. Accordingly, when charged with federal crimes, the consultant could not assert attorney-client privilege with respect to those communications. *Id.* Like many other courts, *Graf* adopted the approach in *Bieter,* where the Eighth Circuit reasoned that, "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Bieter,* 16 F.3d 937-938. In support of its reasoning, *Bieter* referenced both *Upjohn* and NYU law school dean John E. Sexton's article, *A Post–Upjohn Consideration of the Corporate Attorney–Client Privilege*, 57 N.Y.U. L. REV. 443 (1982), which noted that a "literalistic extension of the privilege only to persons on the corporation's payroll" would "invariably" prevent the corporation's attorney from engaging in a confidential discussion with a non-employee, "no matter how important [that employee's] information would be to the attorney." *Id*. at 498 (cited and quoted in *Bieter*, 16 F.3d at 937). Instead, Dean Sexton proposed that:

> A corporate attorney-client privilege faithful to *Upjohn* would protect communications of those persons who, either when they are speaking or after they have acquired their information: (1) possess decision making responsibility regarding the matter about which legal help is sought, (2) are implicated in the chain of command relevant to the subject matter of the legal services, or (3) **are personally responsible for or involved in the activity that might lead to liability for the corporation**.

Id. at 500 (emphasis supplied).

A majority of federal courts addressing the issue have adopted this reasoning,[4] including at least three judges sitting in the Western District of Washington.[5] In one factually similar decision, the attorney-client privilege was held to apply to the medical director of the defendant's clinic even though the medical director was employed by another entity and worked under contract for the defendant through that entity. *Jones v. Nissan North America, Inc*., 2008 WL 4366055 at *7 (M.D. Tenn. Sept. 17, 2008). A number of state courts have also adopted the *Bieter* court's conclusion that the attorney-client privilege may apply to communications between an entity's counsel and third parties.[6]

---

[4] *See*, *e.g*., *Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141, 147–48 (D.C. Cir. 2002); *In re Copper Mkt. Antitrust Litig*., 200 F.R.D. 213, 218-19 (S.D.N.Y. 2001); *Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 439-40 (D. Md. 2005); *In re Flonase Antitrust Litig*., 879 F.Supp.2d 454, 458-60 (E.D. Penn. 2012); *U.S. ex rel. Strom v. Scios, Inc*., 2011 WL 4831193 at **2-4 (N.D. Cal. Oct. 12, 2011); *U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati*, 2009 WL 5033940 at *4 (S.D. Ohio Dec. 11, 2009); *Stafford Trading, Inc. v. Lovely*, 2007 WL 611252 at **6-7 (N.D. Ill. Feb. 22, 2007); *In re Morning Song Bird Food Litigation*, 2015 WL 12791473 at **6-7 (S.D. Cal. July 17, 2015); *ASU Students for Life v. Crow*, 2007 WL 2725252 at *3 (D. Ariz. Sept. 17, 2007).

[5] *Gibson v. Reed*, 2019 WL 2372480 at *2 (W.D. Wash. June 5, 2019); *Kelly v. Microsoft Corp*., 2009 WL 168258 at **2-3 (W.D. Wash Jan. 23, 2009) (applying Washington law); *Davis v. City of Seattle*, 2007 WL 4166154 at **3-4 (W.D. Wash. Nov. 20, 2007).

[6] *See*, *e.g*., *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314, 319-25 (Tenn. 2019) (adopting functional equivalent analysis after conducting comprehensive survey of other jurisdictions); *Alliance Const. Solutions, Inc. v. Dept. of Corr*., 54 P.3d 861, 869-71 (Colo. 2002); *Sieger v. Zak*, 18 Misc.3d 1143, 859 N.Y.S.2d 899 (N.Y. Sup. Ct. Feb. 21, 2008); *One Ledgemont LLC v. Town of Lexington Zoning Bd. of Appeals*, 2014 WL 2854788 at *2 (Mass. Land Ct. June 23, 2014).

The *Hermanson* majority's rejection of this well-reasoned and widely-adopted approach threatens to make Washington an outlier in the corporate world. Further, to the extent *Hermanson* purports to preclude counsel for MultiCare from having privileged communications with Trauma Trust, the majority seemingly ignored a large body of case law holding that the privilege applies where counsel for an entity communicates with the representatives of a separate, but affiliated, entity concerning matters of common interest. As noted in *Brigham Young Univ. v. Pfizer, Inc*., 2011 WL 2795892 at *5 (D. Utah July 14, 2011), refusal to extend the corporate privilege to closely related entities would undermine much of current corporate governance and structure.

IV. CONCLUSION

This case presents important issues concerning the attorney-client privilege, which warrant this Court's review. Accordingly, on behalf of their members, WSHA, WSMA, and the AMA ask that the Court grant MultiCare's petition of review.

RESPECTFULLY SUBMITTED this 19th day of December 2019

BENNETT BIGELOW & LEEDOM, P.S.

By: _____

Michael F. Madden, WSBA #8747
David M. Norman, WSBA #40564
Attorneys for *Amicus Curiae*
Washington State Hospital Association,
Washington State Medical Association,
and American Medical Association

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 pleading to be served this date, in the manner indicated, to the parties listed below:

Counsel for Respondent/Cross-Appellant:
Dan'L W. Bridges, WSBA #24179
McGaughey Bridges Dunlap PLLC
3131 Western Avenue, Suite 410
Seattle, WA 98121-1036
T: (425) 462-4000
E: Dan@mcbdlaw.com

☒ Legal Messenger
☐ Facsimile
☐ ECF/Email
☐ 1st Class mail
☐ Federal Express

Counsel for Appellant/Cross-Respondent
Daniel F. Mullin, WSBA #12768
Tracy A. Duany, WSBA #32287
Bryan T. Terry, WSBA #39645
MULLIN, ALLEN & STEINER PLLC
101 Yesler Way, Suite 400
Seattle, WA 98104-3425
T: (206) 957-7007
E: dmullin@masattorneys.com
tduany@masattorneys.com
bterry@masattorneys.com

☒ Legal Messenger
☐ Facsimile
☐ ECF/Email
☐ 1st Class mail
☐ Federal Express

Attorneys for Petitioner MultiCare Health System
Mary H. Spillane, WSBA #11981
Jennifer D. Koh, WSBA #25464
FAIN ANDERSON VANDERHOEF ROSENDAHL O'HALLORAN SPILLANE, PLLC
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
T: (206) 749-0094
E: mary@favros.com
jennifer@favros.com

☒ Legal Messenger
☐ Facsimile
☐ ECF/Email
☐ 1st Class mail
☐ Federal Express

DATED this 19th day of December, 2019.

Cynthia Hehnke, Legal Assistant

BENNETT BIGELOW & LEEDOM

December 19, 2019 - 11:35 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97783-6
Appellate Court Case Title:	Doug Hermanson v. MultiCare Health System, Inc.
Superior Court Case Number:	16-2-13725-9

The following documents have been uploaded:

- 977836_Other_20191219113225SC853819_2857.pdf
  This File Contains:
  Other - Praecipe
  The Original File Name was Praecipe - Revised Amicus Curiae Memorandum of WSHA WSMA and AMA.pdf

A copy of the uploaded files will be sent to:

- Dan@mcbdlaw.com
- bterry@masattorneys.com
- carrie@favros.com
- dmullin@masattorneys.com
- dnorman@bbllaw.com
- eboehmer@masattorneys.com
- jennifer@favros.com
- lvandiver@bbllaw.com
- mary@favros.com
- mmadden@bbllaw.com
- reception@mcbdlaw.com
- tduany@masattorneys.com

Comments:

Sender Name: Lori Yniguez - Email: lyniguez@bbllaw.com
Filing on Behalf of: Michael F. Madden - Email: mmadden@bbllaw.com (Alternate Email: chehnke@bbllaw.com)

Address:
601 Union Street
Suite 1500
Seattle, WA, 98101
Phone: (206) 622-5511

Note: The Filing Id is 20191219113225SC853819