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NO. 97783-6

SUPREME COURT OF THE STATE OF WASHINGTON

DOUG HERMANSON, an individual,

Respondent/Cross-Appellant,

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/Cross-Respondent.

MULTICARE HEALTH SYSTEM, INC.'S ANSWER TO
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION'S AMICUS CURIAE BRIEF

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I. INTRODUCTION

The Washington State Association of Justice (WSAJF) proffers an expansive reading of the physician-patient privilege and *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), and a restrictive reading of the corporate attorney-client privilege and *Youngs v. PeaceHealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014), as support for its proposition that, when a plaintiff chooses not to name a treating physician whose conduct gives rise plaintiff's vicarious liability claim and whose relationship with the corporate health care provider defendant is based on agency rather than direct employment, corporate defense counsel should be precluded from having privileged ex parte communications with the treating physician about the conduct for which the plaintiff seeks to hold the corporate health care provider defendant vicariously liable. Yet, WSAJF offers no principled justification for why that should be the rule or why, under *Loudon*, simply because the plaintiff chooses not to sue a treating physician agent or employee whose alleged wrongdoing gives rise to the corporation's alleged vicarious liability, corporate defense counsel's tools for investigating and defending against plaintiff's vicarious liability claims suddenly must be restricted solely to formal discovery.

As has already been extensively briefed, this Court in *Loudon*, a case that did not involve any claims of vicarious liability against a corporate

health care provider defendant, held that defense counsel in personal injury cases may not have ex parte contact with the plaintiffs' nonparty treating physicians. And, this Court in *Youngs*, a case that involved nonparty treating physicians who were employees of the corporate health care provider defendant, but whose conduct was not in issue, held that "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,'" *Youngs*, 179 Wn.2d at 664, such that corporate defense counsel could have privileged ex parte communications with the non-party treating physicians as long as "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, 664-65.

MultiCare Health System submits this answer to WSAJF's amicus brief to further explain (1) why *Loudon*'s prohibition on defense counsel having ex parte contact with a plaintiff's nonparty treating physician should not apply to corporate defense counsel's communications about the facts giving rise to the litigation with a nonparty treating physician (whether an employee, agent, or ostensible agent) for whose conduct the corporate defendant is alleged to be vicariously liable; and (2) why the corporate attorney-client privilege as applied in *Youngs* should apply to corporate

defense counsel's communications not just with those nonparty treating physicians who are employees of the corporation, but also with nonparty treating physicians who are agents of the corporation even though employed by a corporate affiliate, who have knowledge of the facts giving rise to the litigation, and especially when their conduct forms a basis for the corporation's alleged vicarious liability.

II. ARGUMENT

- A. WSAJF assumes, without principled justification, that *Loudon* was intended to preclude corporate defense counsel from having ex parte communication about the facts giving rise to the litigation with a nonparty treating physician for whose conduct the corporate defendant is alleged to be vicariously liable.

Insisting that *Loudon* established “a bright-line rule prohibiting ex parte contact between defense counsel and nonparty treating physicians,” *WSAJF Br. at 4*, WSAJF erroneously assumes that *Loudon*'s ex parte contact prohibition applies to preclude corporate defense counsel from having ex parte communications about the facts giving rise to the litigation with a nonparty treating physician for whose conduct the plaintiff seeks to hold the corporate defendant vicariously liable. But, WSAJF fails to acknowledge that neither *Loudon* nor any of its progeny has ever expressly considered that issue or so held. Indeed, as MultiCare has previously briefed, *Loudon* did not involve any claim of vicarious liability against a corporate health care provider. Nor did *Youngs*, as the plaintiffs in the

Youngs' consolidated cases rightfully did not object to corporate defense counsel having ex parte communications with the nonparty treating physicians for whose alleged wrongdoing the plaintiffs sought to hold the corporate defendant vicariously liable.

Other jurisdictions that have confronted the issue have recognized an exception to their ex parte contact prohibitions where the patient seeks to hold a hospital vicariously liable for the alleged wrongdoing of the nonparty treating physician. *E.g.*, *Morgan v. County of Cook*, 252 Ill. App. 3d 947, 954, 625 N.E.2d 136, 140 (1993); *Wilson v. IHC Hosps., Inc.* 2012 UT 43, 289 P.3d 369, 395-96 (2012); *Public Health Trust v. Franklin*, 693 So.2d 1043, 1045-46 (Fla. App. 1997); *White v. Behlke*, 2004 Pa. Dist. & Cnty Dec. LEXIS 202 at *16-17, 65 Pa D. & C. 4th 479, 490-92 (2004), discussed more fully at pages 7-8 of MultiCare's Supplemental Brief.¹

¹ In a footnote, WSAJF attempts to distinguish these cases, *WSAJF Brief at 12, n.2*, by asserting that none of them "address whether a defendant hospital may have ex parte privileged communications with a plaintiff's treating physician who is employed by an independent contractor in the absence of a statute or court rule permitting such communications. But, WSAJF offers no principled basis for suggesting that the applicability of *Loudon* to corporate defense counsel's communications with a nonparty treating physician for whose conduct the corporate defendant is alleged to be vicariously liable should turn on whether the vicarious liability arises from the physician's status as agent, or an ostensible agent, rather than employee, of the defendant corporation. Nor is WSAJF's assertion about the cases from other jurisdictions even accurate. For example, the *Morgan* decision did not hinge on any statute or court rule. And, although *Morgan* happened to involve a physician-employee, the court's decision did not hinge on the physician's employment status; it hinged upon plaintiff's allegation that the hospital was vicariously liable for the physician's wrongdoing. *Morgan*, 252 Ill. App. 3d at 954-56, 625 N.E.2d at 140-42. In *Wilson*, there was no suggestion that the non-employee nonparty treating physician with whom defense counsel improperly had ex parte contact (a radiologist employed by another institution who reviewed an MRI taken at that other

WSAJF nevertheless invokes the physician-patient privilege, *WSAJF Br. at 1*, 7, and reads it expansively to support its claim that, if the treating physician is an agent or ostensible agent rather than a direct employee of the corporation, corporate defense counsel should not be allowed to have ex parte communication with that treating physician even though the physician's alleged wrongdoing gives rise to plaintiff's vicarious liability claims against the corporate defendant. In so doing, WSAJF not only ignores the fact that the physician-patient privilege is purely statutory and in derogation of common law and thus is to be strictly construed, *Carson v. Fine*, 123 Wn.2d 206, 212-13, 867 P.2d 610 (1994), but also ignores the fact that a plaintiff necessarily waives the privilege as to a given treating physician when he or she makes a claim concerning that physician's care and puts that physician's conduct in issue, *see id.* at 213-14.

institution after the plaintiff's injury) was one for whom the hospital was alleged to be vicariously liable. *See Wilson*, 289 P.3d at 377-78, 391-95. In *Public Health Trust*, although interpreting a statutory exception to the general rule of patient confidentiality, the court did not base its decision on whether the nonparty treating physician was an employee of the hospital, but rather found that "the hospital as an institutional health care provider has a right to conduct ex parte interviews with its own **agents or employees** for whom it might be vicariously liable." *Public Health Trust*, 693 So.2d at 1045 (emphasis added). And, the decision in *White* also did not turn on whether the nonparty treating physician was an employee of the hospital, as it recognized that defense counsel may engage in ex parte communications with the plaintiff's treating physician "if that physician's status as an **ostensible agent** of the defendant and the physician's treatment of the plaintiff are both at issue in the medical negligence litigation." *White*, 2004 Pa. Dist. & Cnty Dec. LEXIS at *1-2, 65 Pa. D. 7 C. 4th at 480-81 (emphasis added).

Although WSAJF cites various public policy considerations that underlie the *Loudon* decision, *WSAJF Br. at 7-8*, WSAJF fails to articulate how any of those public policy considerations are advanced by prohibiting corporate defense counsel from speaking with the very physicians whose allegedly wrongful conduct gives rise to the litigation and the corporate defendant's alleged vicarious liability. Indeed, none of *Loudon's* public policy concerns justify applying *Loudon's* ex parte contact rule to physicians for whose conduct a corporate defendant is alleged to be vicariously liable, thereby stripping the corporate defendant of its ability to have its counsel effectively investigate the validity of and prepare its defense to plaintiff's vicarious liability claims.

Here, there is no risk of disclosure of "irrelevant, privileged medical information" or "inadvertent wrongful disclosures" by the treating physician whose alleged wrongdoing is at issue in this case, as Dr. Patterson's sole involvement in Mr. Hermanson's care was only one emergency room visit. Even had Dr. Patterson had other involvement in Mr. Hermanson's care before or after that visit, any risk of disclosure of information from any other visits can be obviated by limiting any ex parte communication to the facts of the alleged incident, as *Youngs* already does with respect to the corporate attorney-client privilege.

Nor is there any legitimate concern that allowing MultiCare's counsel to have ex parte communication with Dr. Patterson would have any "chilling effect" on Mr. Hermanson's physician-patient relationship with him or could hinder further treatment from him, as there is no ongoing physician-patient relationship and Mr. Hermanson's allegation that Dr. Patterson engaged in wrongdoing for which MultiCare is vicariously liable would have already chilled any ongoing relationship had there been one. Having made a claim that Dr. Patterson has engaged in wrongdoing for which MultiCare is vicariously liable, Mr. Hermanson himself has made Dr. Patterson his "legal adversary," put him on the defensive, and made him a non-neutral witness for the defense.

Plaintiffs should not be allowed to use *Loudon* to secure a tactical advantage or as a sword to deprive corporate defendants or their counsel of the ability to effectively assess and defend against plaintiffs' vicarious liability claims by precluding them from speaking privately with the very physicians whose conduct allegedly gives rise to those vicarious liability claims simply because plaintiffs chose not to sue those physicians individually. It makes no sense to suggest as WSAJF does, *WSAJF Br. at* 8, that defense counsel for a hospital alleged to be vicariously liable for a physician's alleged wrongdoing has to engage in a deposition to find out what that physician knows, did, thinks, or has to say about his or her alleged

wrongdoing. Neither WSAJF nor Mr. Hermanson has proffered any principled justification for such a result or for their insistence that plaintiff's counsel must be allowed to participate in corporate defense counsel's interviews of treating physicians whose conduct forms a basis for plaintiff's vicarious liability claims.

This Court should hold that *Loudon's* ex parte contact prohibition does not apply with respect to corporate defense counsel's communications about the facts giving rise to the litigation with those nonparty treating physicians for whose alleged wrongdoing the plaintiff seeks to hold the defendant corporation vicariously liable.² Whether such ex parte communications would be privileged is a separate issue that would depend on whether it is subject either to an individual attorney-client privilege under a joint representation agreement that meets the ethical standard of RPC 1.7, or to the corporate-attorney client privilege or both.³

² Contrary to WSAJF's assertions, *WSAJF Br. at 5, 6*, such a holding does not put the "integrity of the physician-patient relationship in the hands of the corporate defendant and erode the protections in *Loudon*," or "tip the careful balance established in *Youngs*." It places the ability of the corporate defendant to have ex parte communications with the treating physician whose conduct is in issue in the hands of the plaintiff who seeks to hold the corporate defendant vicariously liable for that physician's conduct."

³ Because WSAJF only addresses the corporate attorney-client privilege, MultiCare, in answering WSAJF's amicus brief, focuses on the applicability of that privilege, not the applicability of the individual attorney-client privilege.

- B. WSAJF offers no principled justification for its assertion that the corporate attorney-client privilege should apply only to employees, but not to other agents, of the corporation who have knowledge of the facts giving rise to the litigation or for whose conduct the corporation is alleged to be vicariously liable.

Begging the question of whether *Loudon* even applies to preclude corporate defense counsel from having ex parte communications with a nonparty treating physician for whose conduct the plaintiff claims the corporate health care provider defendant is vicariously liable, WSAJF argues, *WSAJF Br. at 4-5*, that this Court should hold: (1) that “the *Youngs* rule is limited to corporate employees,” and (2) that, if the *Youngs* rule does apply to independent contractor agents, the burden of proving agency should be placed on the corporate defendant to show “the right to control the manner of the agent’s work.” WSAJF’s arguments, however, are rife with analytical problems.

First, WSAJF couches its arguments and characterizes the Court of Appeals’ decision in this case as if they implicate only the applicability of the *Youngs* rule. But, the Court of Appeals’ holding is much broader and has a much more expansive reach. The Court of Appeals held that the ***corporate-attorney client privilege***, not just the *Youngs* rule, applies only to employees, and not to agents, of a corporation. *See Hermanson v. MultiCare*, 10 Wn. App. 2d 343, 359-60, 448 P.3d 153 (2019), *rev. granted*, 194 Wn.2d 1023 (2020). And, if the corporate-attorney client privilege does

apply to agents of a corporation, which it should, WSAJF offers no principled basis why *Youngs*' application of the corporate attorney-client privilege should not apply to treating physician agents of a corporate health care provider defendant, as long as those treating physicians have direct knowledge of the events triggering the litigation and the ex parte communications concern the facts giving rise to the litigation. Here, it is undisputed that Dr. Patterson has direct knowledge of the events triggering the litigation, especially given Mr. Hermanson's claims that Dr. Patterson's alleged wrongdoing forms a basis for MultiCare's vicarious liability.

Second, as previously noted, to support its position, WSAJF erroneously seeks to have the physician-patient privilege construed expansively even though that privilege is in derogation of common law and, thus should be strictly construed. *Carson*, 123 Wn.2d at 212-13. But, when it comes to the attorney-client privilege, which is "the oldest of privileges for confidential communications known to the common law," *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L.Ed.2d 584 (1981), and, thus, not in derogation of common law, WSAJF seeks to have it construed much more restrictively. Yet, under *Youngs*, it is the corporate attorney-client privilege that trumps the physician-patient privilege as applied in *Loudon*, not the other way around.

Third, WSAJF offers no principled justification for why the corporate attorney-client privilege should apply only to employees, but not to agents who are the functional equivalents of employees, of the corporation. *Youngs* did not so hold, as it involved only employed physicians. It did not involve physicians who plaintiffs alleged or who the defendant corporations admitted were agents of the corporation, much less physicians for whose allegedly wrongful conduct the corporate health care provider defendant would be vicariously liable.

Fourth, to the extent WSAJF relies on *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 381 P.3d 1035 (2014), as support for the proposition that the corporate attorney-client privilege applies only to employees, and not agents, of the corporation, *WSAJF Br. at 12-13*, its reliance is misplaced. The issue in *Newman* was not whether the corporate attorney-client privilege extended to communications with non-employee agents of the corporate entity, but rather whether it extended to postemployment communications with former employees of the corporate entity.⁴ As Judge Glasgow correctly observed in her dissent in *Hermanson*, 10 Wn. App. at 370-71, the distinction drawn in *Newman* as to former

⁴ As the *Newman* court framed what was at issue: “At issue is whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees for purposes of apply the corporate attorney-client privilege. *Newman*, 186 Wn.2d at 774.

employees was not based on some “rigid adherence to the definition of “employee,” but “was temporal: the former employees were not covered by the privilege because they were no longer agents of the corporation.” Indeed, the very basis for this Court’s decision in *Newman* declining to extend the corporate attorney-client privilege to former employees was based on agency principles, with the majority repeatedly citing with approval Restatements on agency law and the law governing lawyers. *See Newman*, 186 Wn.2d at 780-81. And, those Restatements make clear that “the objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer” and “[t]he concept of agent also includes independent contractors with whom the corporation has a principal-agent relationship.” *Restatement (Third) Governing Lawyers* § 73, cmts. d and e.

As Judge Glasgow also correctly observed in her dissent in *Hermanson*, 10 Wn. App. at 370-73, Dr. Patterson “is no different from an employee because he has an ongoing duty of loyalty towards MultiCare” and a “continuing agency relationship [that] would surely benefit from forthright communication with MultiCare’s attorney ‘to determine what happened’”; treating him differently “simply because he is an agent but not a formal employee” would be “at odds with the delicate balance” this Court struck in *Youngs*; and “no compelling justification exists for not treating

him as the “functional equivalent” of an employee subject to the “same rules of corporate attorney-client privilege.”

Fifth, in its effort to convince this Court to reject the reasoning of a majority of federal courts and a number of state courts that have adopted the reasoning of *In re Bieter*, 16 F.3d 929, 936-39 (8th Cir. 1994), which held that “it is inappropriate to distinguish between those on the client’s payroll and those who are instead, and for whatever reason, employed as independent contractors,” *id.* at 937, and 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 [corporate attorney-client] privilege envisions flowing most freely,” *id.* at 937-38, and *United States v. Graf*, 610 F.3d 1148, 1159 (9th Cir. 2010), which held that communications between an ostensible “outside consultant” and corporate counsel were subject to the corporate attorney-client privilege because the ostensible outside consultant’s “role was that of a functional employee,”⁵ WSAJF attempts to minimize Dr. Patterson’s relationship with MultiCare. Contrary to WSAJF’s assertions, *WSAJF Br. at 6, 11, 16*, MultiCare does not rely solely on its “admission” of agency for the extent of Dr. Patterson’s

⁵ See Amicus Curiae Brief of Washington State Hospital Association, Washington State Medical Association, and American Medical Association at pages 12-14 and cases cited therein.

relationship with MultiCare. *See* CP 470-484 (setting forth the relationship to MultiCare and the role of Trauma Trust's trauma surgeons, including a Trauma Medical Director, in the delivery of trauma services at MultiCare's Tacoma General Hospital as the Primary Trauma Center).

Despite WSAJF's attempt to minimize Dr. Patterson's role, the facts remain that Dr. Patterson was an integral part of the MultiCare system, was required to follow the policies and procedures of MultiCare, and was an agent of MultiCare when delivering care within the scope of his duties in providing trauma services there. CP 472 (¶¶10-11). The close relationship that both Trauma Trust and Dr. Patterson have with MultiCare is further evidenced by the facts that Trauma Trust's administrative offices are located within Tacoma General, MultiCare provides billing, IT support and equipment to Trauma Trust, MultiCare and its other hospital partners have agreed to cover deficits Trauma Trust's services incur, and they all are in partnership in the delivery of care. CP 471 (¶¶8-9). And, perhaps most importantly, Dr. Patterson's provision of trauma services at MultiCare was an inherent function of the hospital, without which the hospital could not properly achieve its purpose. *See Adamski v. Tacoma Gen'l Hosp.*, 20 Wn. App. 98, 112, 579 P.2d 970 (1978). Indeed, before Trauma Trust contracted with MultiCare to provide trauma services, patients could not seek Level II trauma care in Pierce County. CP 471(¶6). Notwithstanding WSAJF's

protestations to the contrary, it is difficult, if not impossible to conceive how much more extensive a relationship Dr. Patterson would need to have with MultiCare to come within the rationale of *In re Bieter* and *Graf*, when Dr. Patterson's role was to fulfill an inherent function of the hospital.

Sixth, to the extent that WSAJF urges this Court to reject the rationale of *In re Bieter* and *Graf* and their extensive progeny, it ignores the dichotomy such a rejection would create. As discussed more fully in the Amicus Curiae Brief of Washington State Hospital Association, Washington State Medical Association, and American Medical Association at pages 12-15, rejection of *In re Bieter*'s and *Graf*'s "well-reasoned and widely adopted approach" not only "threatens to make Washington an outlier in the corporate world because the majority of jurisdictions hold that the [corporate attorney-client] privilege applies where counsel for an entity communicates with the representatives of a separate, but affiliated entity concerning matters of common interest," but also makes the applicability of the corporate attorney-client privilege and "the privileged status of confidential communications with a corporation's non-employee agents and affiliated entities ultimately turn on whether a case is brought in state or federal court."

Finally, with regard to WSAJF's assertions, *WSAJF Br. at 4-5, 16-20*, that MultiCare should bear the burden of proving agency by showing

“the right to control the manner of the agent’s work,” WSAJF turns the applicable burden of proof on its head. WSAJF ignores that Mr. Hermanson was the one who claimed that Dr. Patterson was MultiCare’s agent for whose conduct MultiCare could be held vicariously liable, and that, but for MultiCare’s admission of agency, Mr. Hermanson would bear the burden of proving the existence of an agency relationship and MultiCare’s vicarious liability for Dr. Patterson’s alleged wrongdoing.

Perhaps even more importantly, WSAJF’s attempt to apply hornbook rules of agency using the traditional right of control test ignores the fact that Washington courts have long-recognized that the right of control test has limited applicability in the hospital-physician relationship because “the governing body of a hospital never actually exercises, nor can it exercise, much control over a physician’s medical decisions and his [or hers] actual treatment of patients” even when the physician is clearly an employee of the hospital. *Adamski*, 20 Wn. App. at 105, 107; *see also Wilson v. Grant*, 162 Wn. App. 731, 744-45, 258 P.3d 689 (2011). Here, MultiCare’s ability to exercise control over Dr. Patterson’s medical decision-making and treatment of trauma patients does not differ whether he is directly employed by MultiCare or by its affiliate, Trauma Trust. And, WSAJF provides no principled justification for why a plaintiff should be entitled to establish a vicarious liability claim based on an agency

relationship between a treating physician and hospital in the absence of any such right of control, but a hospital must be required to prove a right of control before its defense counsel can have corporate attorney-client privileged communications with the treating physician for whose conduct the plaintiff alleges the hospital is vicariously liable.

III. CONCLUSION

For the foregoing reasons and those set forth in MultiCare's prior briefing, this Court should reverse the Court of Appeals' decision to the extent it precludes MultiCare's counsel from having privileged ex parte communications with Dr. Patterson and hold that (1) *Loudon's* prohibition against ex parte contact does not apply when the nonparty treating physician is one for whose conduct the plaintiff seeks to hold the defendant corporate health care provider vicariously liable; and (2) the corporate attorney-client privilege applies and, consistent with *Youngs*, trumps the *Loudon* prohibition with respect to defense counsel's communications about the facts giving rise to the litigation not only with nonparty treating physician employees of the corporation, but also with nonparty treating physician agents of the corporation, who have direct knowledge of the facts giving rise to the litigation.

RESPECTFULLY SUBMITTED this 22nd day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of May, 2020, I caused a true and correct copy of the foregoing document, “MultiCare Health System, Inc.’s Answer to Washington State Association for Justice Foundation’s Amicus Curiae Brief,” to be delivered in the manner indicated below to the following counsel of record:

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