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Appeals Court Rejects Corporate Attorney-Client Privilege For "Functional Employees"

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Division II of the Washington Court of Appeals recently rejected the application of the corporate attorney-client privilege to "functional employees" in *Hermanson v. Multi-Care Health Systems, Inc.*, ___ Wn. App.2d ___, ___ P.3d ___, 2019 WL 4021900 (Aug. 27, 2019). In the privilege context, "functional employees" are not directly employed by a corporation but are sufficiently integrated into a company's operations that some federal courts—including the Ninth Circuit and Washington's federal district courts—have concluded that they fall within the corporation's attorney-client privilege.

In *Hermanson*, the plaintiff had been treated in the emergency room of defendant Tacoma General Hospital following an automobile accident. The plaintiff was given a blood screen that showed the presence of alcohol—which the hospital disclosed to the police and that then led to criminal charges against him. The plaintiff later sued the hospital under a variety of theories arguing that the alcohol test result fell within the physician-patient and should not have been disclosed.

The hospital, the doctor who treated him and the doctor's employer that provided trauma services for the hospital under a contract all retained the same law firm. The defense firm informed plaintiff's counsel it also represented the

emergency room nurses and a social worker who participated in the plaintiff's treatment. At that point, the parties went to the Pierce County trial court to resolve questions over the intersection of the attorney-client and physician-patient privilege under the leading decision on that issue: *Youngs v. PeaceHealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014), in which the Supreme Court held that an attorney for a defendant hospital in a medical malpractice case could discuss a claimant's treatment at issue with an employee-physician involved notwithstanding the physician-patient privilege.

The trial court held that because the doctor was not a direct employee of the hospital, he did not fall within the hospital's attorney-client privilege. By contrast, because the nurses involved were direct employees of the hospital, they did fall within the hospital's attorney-client privilege and, following *Youngs*, the hospital's attorney-client privilege "trumped" the physician-patient privilege. The trial court, however, declined to apply that same reasoning to the social worker who was also a direct employee of the hospital. The trial court's decision went up on discretionary review to Division II of the Court of Appeals.

The Court of Appeals affirmed in part and reversed in part on a 2-1 vote. The majority agreed that the doctor did not fall within the hospital's attorney-client privilege but concluded that both the nurses and the social worker did. The

dissenting judge agreed on the nurses and the social worker—but would have also included the doctor.

Both the majority and dissenting opinions have extended discussions of *Youngs* and the interplay between the attorney-client and physician patient privileges. *Hermanson*, therefore, is a "must read" for lawyers who handle medical malpractice and related litigation.

For the rest of us, *Hermanson* is also a "must read" for its approach on whether the doctor fell within the hospital's attorney-client privilege.

As noted, the majority concluded that because the doctor was employed by an association that provided trauma services rather than the hospital itself, he was not included within the hospital's attorney-client privilege. In doing so, the majority expressly rejected the notion that the doctor was a "functional employee" of the hospital—*and* the leading Ninth Circuit decision applying that concept to corporate privilege: *U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010). *Graf* itself cites federal decisions from Washington recognizing the "functional employee" concept (at 1158). The dissenter in *Hermanson* argued that the doctor should have been recognized as a "functional employee" of the hospital and that corporate privilege should extend to him under *Graf*.

Given the marked shift in many businesses today away from the traditional employer-employee model to alternatives ranging from consultants to contractors, the *Hermanson* majority's refusal to include "functional employees" within corporate privilege may reverberate far beyond the narrow confines of medical malpractice. As of this writing, it is not clear whether *Hermanson* will be reviewed by the Washington Supreme Court. Stay tuned.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.