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COURT OF APPEALS
STATE OF NEW YORK

WANG

Appellant,

-against-

NO. 88

JAMES

Respondent.

92 Franklin Street
Buffalo, New York
November 14, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Christy Wright
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next matter on the calendar
2 is Number 88, Matter of Wang v. James.

3 MR. BORELLI: Good afternoon, Your Honors. May
4 it please the court, Andrew Borelli from Gale Gale & Hunt,
5 LLC on behalf of petitioner, appellant, Jun Wang. I'd like
6 to reserve two minutes for rebuttal, if I may, Your Honor.

7 CHIEF JUDGE WILSON: You may.

8 MR. BORELLI: Your Honors, this appeal really
9 turns on one issue, and that's the issue of a request
10 whether Dr. Wang was acting at the request of the
11 Department of Corrections when he ---

12 JUDGE RIVERA: So what would be the outer
13 boundaries of your rule? How many individuals might be
14 entitled to the defense and the indemnification
15 protections? How far down are we going to go? How many
16 more tests? How many more lab reports?

17 MR. BORELLI: Yes, Your Honor. My proposal for
18 the test here is really just those necessary ancillary
19 medical services to a procedure that's already been
20 approved by the Department of Corrections, particularly
21 those where it's an indivisible part of the procedure. For
22 example, here, a biopsy necessarily contemplates a
23 pathology review.

24 JUDGE TROUTMAN: Does it matter whether or not
25 they have the right to voice whom they would wish to use

1 for those procedures?

2 MR. BORELLI: Your Honor. While I understand
3 that's the state's position, I would say not here, not when
4 they have implicit --- when not when they've conceded that,
5 yes, we've approved a biopsy. They take the trappings that
6 come with that.

7 JUDGE TROUTMAN: So you're saying they can - - -
8 they should be bound, but they get no voice as to who
9 provides the services of the biopsy?

10 MR. BORELLI: Under the facts of this case,
11 that's correct.

12 CHIEF JUDGE WILSON: So for example, before a
13 surgery, you need to take everybody's blood to make sure
14 sufficiently it's going to coagulate or that it --- they're
15 not HIV positive. That's an ordinary routine, pre-surgical
16 procedure to take a blood sample. That gets sent off to
17 LabCorp, a huge corporation. That's a necessary part of
18 the surgery. Is DOCCS indemnifying LabCorp?

19 MR. BORELLI: I would say in that scenario, Your
20 Honor, that if it's done pre-surgically as part of standard
21 pre-testing, then that perhaps DOCCS might be. I'm not
22 saying it's unequivocal. I --- but in this scenario with
23 these facts, it's these --- they're so inextricably
24 intertwined, the biopsy is meaningless. The Department of
25 Correction says we need to figure out if there's

1 malignancy. The only way to do that is to have that
2 pathology review.

3 JUDGE HALLIGAN: What if the ---

4 JUDGE CANNATARO: Wait, Counsel --- I'm sorry.
5 Go ahead.

6 JUDGE HALLIGAN: What if one of the surgical
7 instruments, for example, had been contaminated? And
8 that's something that is simply provided by some external
9 third-party, there, too? I mean, I'm trying to understand
10 where we draw a line here under your theory.

11 MR. BORELLI: No, Your Honor, I wouldn't
12 necessarily agree with that.

13 JUDGE HALLIGAN: So why would why would those
14 lead to different results? Why is the pathologist - - -
15 who is not identified in any contract, be performing this
16 at the implicit request of DOCCS, but not someone who is
17 providing surgical instruments?

18 MR. BORELLI: Well, Your Honor, again, with
19 respect to this particular scenario, while a surgical
20 instrument may be used during that procedure, here, DOCCS
21 expressly knew that there was going to be a pathologist
22 that was going to review it. They've conceded that.

23 JUDGE HALLIGAN: But that's true, too. If I'm
24 going to perform surgery, I'm going to need --- I'm not a
25 doctor, but I've watched enough TV. I'm going to need a

1 scalpel, right? I'm just trying to understand what makes
2 something inevitable, which I sort of take to be your
3 touchstone. Although, tell me if you think otherwise.

4 MR. BORELLI: No, Your Honor, that's correct.
5 Where is that inevitability? Yes, the Department of
6 Corrections should be held responsible for --- for that ---
7 for that provider or individual.

8 JUDGE CANNATARO: So a slightly different
9 approach to this overall question of what's your test. I
10 understand your inextricably-linked theory that you really
11 don't do a biopsy without a pathology report to go along
12 with it. But that's not --- that's not what --- what,
13 17 --- Section 17 of Public Officers Law requires. They
14 ask, at the request of, or maybe that's 24-a. So how
15 does --- how does your inextricability argument satisfy the
16 requirement of the statute which says, at the request of?

17 MR. BORELLI: Because requests in that's --- in
18 Section 24-a of the correction law doesn't indicate whether
19 it has to be expressed or implicit. That language ---

20 JUDGE SINGAS: Doesn't it least suggest that
21 there's some minimal contact between the parties?

22 MR. BORELLI: I would agree, Your Honor, except
23 for the statute also says any person. And it doesn't
24 require an employment or contractual relationship. And so
25 therefore, if legislature wished it said differently, it

1 could have changed that because public officers' law
2 clearly says ---

3 JUDGE CANNATARO: Wouldn't that be --

4 MR. BORELLI: --- employer, employee, and any
5 kind of contractor.

6 JUDGE CANNATARO: Wouldn't the
7 employment/contractual relationship requirement be a
8 perfectly reasonable limitation on the application of the
9 statute, especially given the fact that we're talking about
10 a derogation of a common law principle of sovereign
11 immunity. We have to construe it narrowly. And I think I
12 get the impression from hearing some of these questions
13 that you want us to go down a very slippery slope.

14 MR. BORELLI: Well, Your Honor, with respect to
15 that, while I don't disagree that that would be reasonable,
16 but that's not the way the statute is written. And if the
17 legislature -- and if the language needs to be different,
18 then that's up to the legislature.

19 JUDGE TROUTMAN: So again, you're suggesting
20 there is no end. Anything that's related to the initial
21 procedure, everybody gets the protection of the public
22 officer's law?

23 MR. BORELLI: That's not correct, Your Honor. If
24 I may ---

25 JUDGE TROUTMAN: Okay. So where --- where ---

1 where is your cutoff? I'm just not clear.

2 MR. BORELLI: Well, first of all, if we look at
3 Section 24-a of the Correction Law, it has to be an
4 individual who's licensed under one of those sections. And
5 that may also go to Judge Halligan's point about the
6 scalpel. And if we're talking about a third party
7 providing instruments, that person may not be licensed
8 under there. So first, we're limited by the individuals
9 underneath 24-a.

10 Secondly, I think the boundaries could again be
11 that indivisibility test and to provide a couple of
12 examples, for --- for example, let's say the Department of
13 Corrections determines that an inmate is having what appear
14 to be signs and symptoms of a stroke and sends the inmate
15 out to an outside hospital. And they want to know, did
16 this patient have a stroke or is the patient having a
17 stroke? And a way to do that would be to perform radiology
18 imaging. And I would argue that that would have to be
19 covered by the Department of Corrections, the radiologists
20 who interpreted those films.

21 But let's say during the scope of that workup for
22 stroke, they discover a cardiac issue with the inmate. And
23 ultimately the patient or the inmate ends up needing a
24 bypass. And --- and let's say something goes awry in that
25 bypass. I don't believe I would not argue that the

1 Department of Corrections would be on the hook for that
2 cardiothoracic surgeon because the Department of
3 Corrections never asked for cardiac workup to be done.

4 JUDGE TROUTMAN: So once the --- are you saying
5 that once the initial request for medical services provided
6 is --- that medical services be provided, at the request
7 of, just keeps spiraling onward?

8 MR. BORELLI: No. Maybe I'm not clear.

9 JUDGE TROUTMAN: So who -- at the -- what does at
10 the request of mean with respect to your client?

11 MR. BORELLI: With respect to my client, it's
12 that test --- that he was not involved. If the Department
13 would not have been involved - - - if the Department of
14 Corrections had not asked for this biopsy to be done ---

15 JUDGE GARCIA: So Counsel, I'm --

16 JUDGE HALLIGAN: But to that --- sorry. Just
17 quickly, if I can. Aren't you really reading out while
18 acting at the request of the department? It seems to me if
19 your view of 24-a is correct, then it would have ended by
20 saying the provisions of Section 17 shall apply to a
21 licensed person who is rendering or has rendered
22 professional services authorized under such license, which
23 would cover any medical services provided by a licensed
24 individual. So what meaning does acting at the request of
25 have under your interpretation?

1 MR. BORELLI: In my interpretation, it is that
2 that very point in this scenario, because there's a part of
3 a procedure that is inextricably linked, it must --- that
4 is --- that is the reading. And I think in the example
5 I've given, if you take it further and even if it was after
6 an operation in the hospital on an inmate and the patient
7 developed an infection after this hip --- after a hip
8 surgery, let's say, I would not argue that the infectious
9 disease care that would be needed to care for that inmate
10 would be covered by the Department of Corrections.

11 (Simultaneous speech)

12 JUDGE GARCIA: If --- I understand your
13 opponent's policy arguments here, the state wants to know
14 who they're contracting with. It may be an incentive to
15 get people to go into a facility to do certain work. What
16 is the policy benefit of reading this your way?

17 MR. BORELLI: Policy benefit to my client?

18 JUDGE GARCIA: Policy benefit -- I understand
19 it's money, but what's the policy benefit of us
20 interpreting it the way you want us to? I mean, I assume
21 your client has --- has malpractice insurance. I assume he
22 isn't incentivized to do this work because of some
23 arrangement. So this seems to me an ordinary course
24 request comes from another doctor. You do it; you get
25 paid. So what would be the policy reason for us to

1 substitute the state as the insurer here?

2 MR. BORELLI: Because the state should be
3 defending indemnifying my client for a work that he's
4 provided for an inmate ---

5 JUDGE GARCIA: I understand this is what you
6 want, but why should we do that?

7 MR. BORELLI: And even of significant damages
8 that might go beyond the policy is malpractice policy
9 limits. It would -- the state certainly has further
10 coverage. And so ---

11 JUDGE GARCIA: That's true of any malpractice
12 action your client may have, right? I mean, it may always
13 go beyond the policy limits, not --- it's not unique to a
14 state client here. So what --- I'm trying to understand,
15 again, because I can see state needing to know who they're
16 contracting with, needing to verify, needing --- or needing
17 to provide incentives for people to do the type of work
18 they're doing. But those don't apply here with your
19 client. None of those reasons. They didn't get to vet
20 your client and they didn't need to provide an incentive
21 for him to do work for the state.

22 MR. BORELLI: Respectfully, Your Honor, with
23 respect to the vetting, I mean, it's because of the way the
24 statute is worded. It says any person doesn't require that
25 contractual relationship, doesn't require an employment

1 relationship. So the state has ---

2 CHIEF JUDGE WILSON: Let me try with just --
3 Judge Garcia's is getting out a different way. Your client
4 gets pathology samples from all over the place, some from
5 prisons perhaps, but also from hospitals and general public
6 and other physicians and so on. And I assume he's
7 indifferent as to where they're coming from, right? He's
8 going to do the best job he can regardless. He's not
9 really even paying attention where are they coming from,
10 right?

11 MR. BORELLI: That's correct.

12 CHIEF JUDGE WILSON: So then what --- why would
13 providing a state indemnity affect his behavior?

14 MR. BORELLI: I --- I don't -- It wouldn't have.
15 I don't necessarily --

16 CHIEF JUDGE WILSON: Right. He's going to ---

17 MR. BORELLI: --- agree that it would've ---

18 CHIEF JUDGE WILSON: --- continue to ---

19 MR. BORELLI: --- affect his behavior. He should
20 be ---

21 CHIEF JUDGE WILSON: Right.

22 MR. BORELLI: --- performing his service as he
23 always ---

24 CHIEF JUDGE WILSON: He's going to perform them
25 as well as he performs regardless of where the sample is

1 coming from.

2 MR. BORELLI: Correct. I agree with that.

3 CHIEF JUDGE WILSON: So then --- then what is the
4 public policy benefit of providing the state indemnity
5 versus the private indemnity through insurance?

6 MR. BORELLI: Because I don't --- it's simply,
7 Your Honor, that if he was acting --- if he was he was
8 performing this service on behalf of an incarcerated
9 individual, he should be receiving the benefits that, for
10 example ---

11 JUDGE CANNATARO: That's not the statutory test,
12 counsel. The statutory test is, at the request of the
13 department, not on behalf of the patient. And without
14 asking the same question for a third time, how does the
15 state benefit from expanding its liability coverage in this
16 way?

17 MR. BORELLI: Well, I'm sure --- respectfully,
18 I'm sure it costs the state more money to defend my client.
19 But they requested this biopsy. They said he needs it. We
20 need to understand if there's malignancy. And the only way
21 to do that is to have a pathologist look at it.

22 CHIEF JUDGE WILSON: Let me ask you this. Would
23 it be possible for somebody in your client's position,
24 assuming ---- let's assume for a moment we rule against
25 you, would it be possible in the future for your client or

1 someone in your client's position to insist on a contract
2 with DOCCS if they're going to do pathological work for
3 people who are incarcerated?

4 MR. BORELLI: Yes, certainly could ask for a
5 contract if they so chose to go down that road.

6 CHIEF JUDGE WILSON: So there is sort of a
7 contractual --- even if we were to rule against you. Of
8 course, that doesn't help you in this case, your client in
9 this case. But in terms of a rule going forward, it's
10 something that can be contracted around.

11 MR. BORELLI: Yes, it could, Your Honor. But the
12 fact of the matter is, the statute doesn't provide for that
13 necessarily now as it's written today. I mean, yes, they
14 could privately do that, but I don't think that's
15 necessarily required. Thank you very much, Your Honors.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. HU: Good afternoon, Your Honor. Kevin Hu on
18 behalf of the Attorney General's office. The attorney
19 general reasonably and correctly concluded that Dr. Wang is
20 not entitled to the benefits of Section 24-a because DOCCS
21 did not expressly and directly request that he provide the
22 pathology services at issue here.

23 JUDGE GARCIA: Counsel, what if he -- what if he
24 says --- what if his client in the future and all in that
25 situation, going to the Chief Judge's question, say, I'm

1 not doing this.

2 MR. HU: Judge Garcia - - -

3 JUDGE GARCIA: You can indemnify me; I'm not
4 doing it.

5 MR. HU: If we could sort of play out the ---
6 the --- the downstream consequences of affirmance here. So
7 I---

8 JUDGE GARCIA: No, no, but answer first my
9 question. So what if they say, I'm not doing this, I want
10 a contract with you and now all your biopsy work and, I
11 guess, other potential work is stalemated. Is that a good
12 result?

13 MR. HU: That is a good result because ---

14 JUDGE GARCIA: It is?

15 MR. HU: ---it would ultimately lead to an
16 outcome that is consistent with the legislative purpose of
17 correctional 24-a. So --- so in that outcome, one of two
18 things would happen. Either pathologists would come
19 forward and demand a contract with the state and we would
20 then agree to provide them with these protections. Or the
21 state may proactively seek out these individuals. But the
22 key factor in both of those outcomes is the state then has
23 the obligation --- then has the opportunity, excuse me, to
24 seek out particular individuals and weigh their
25 credentials, qualifications, and the potential risks they

1 propose.

2 JUDGE HALLIGAN: And is it the individuals? I
3 want to make sure I understand your position. Does there
4 have to be a contract between the individual provider, the
5 person, and DOCCS, or if DOCCS contracts with a facility?
6 So for example, you know, Pathology Services INC, will that
7 encompass any person who is providing services for that
8 entity?

9 MR. HU: So Judge Halligan, I want to draw a
10 distinction between the language of 24-a itself versus a
11 contract, because certainly in a contract the state can
12 provide --- provide protections that go above and beyond
13 24-a.

14 JUDGE HALLIGAN: So what --- how else other than
15 a contract could a person be providing services at the
16 request of DOCCS?

17 MR. HU: So ---

18 JUDGE HALLIGAN: A contract I assume you think
19 qualifies, yes?

20 MR. HU: Absolutely.

21 JUDGE HALLIGAN: Okay. How else?

22 MR. HU: I could imagine some circumstances. So
23 I should --- I should note that as a --- the prevailing
24 practice among DOCCS is to have contracts with individual
25 specialists. The provision of specialty services are

1 really when DOCCS will call upon specific individuals to
2 provide services. But there may be a circumstance where
3 maybe one specialty is really so esoteric that there's no
4 preexisting contract that they could call up that
5 individual and say, we need this particular service. Are
6 you willing to provide it? And that sort of oral request,
7 provided it comes from someone with sufficient authority to
8 really bind DOCCS, we would agree would cover ---

9 JUDGE HALLIGAN: But are there not any
10 arrangements made with a facility or a practice group, or
11 are you saying that the only arrangements DOCCS makes are
12 with individual healthcare providers, individual persons?

13 MR. HU: So the predominant arrangement is to
14 have individual contracts with certain specialists.

15 JUDGE HALLIGAN: I thought the federal cases
16 maybe suggested there are few --

17 MR. HU: That's right, Your Honor. We are
18 currently aware of six. But those --- and so in those
19 cases it gets complicated because there is contract
20 language. The two contracts I'm aware of simply parrot the
21 language of Correction Law 24-a, and ultimately don't
22 provide any guidance as to what it means to be requested
23 under those circumstances. And sort of --- our office has
24 received requests for indemnification pursuant to two of
25 those hospitals. And actually ---

1 JUDGE RIVERA: It sounds a very convenient way to
2 avoid the statute if your position is, we have to, whether
3 it's expressed in a contract or otherwise, what sounds to
4 me like you're saying a rare situation, right, because of a
5 particular type of specialty that you need in a particular
6 case that you might have someone with authority who reaches
7 out, doesn't, for whatever reason, put that in writing. I
8 don't understand that. But okay, those things happen.
9 That unless you do that, 24-a never applies, even though
10 you know that the person you've contracted with is going to
11 have to do something else, is going to either have to adopt
12 another medical expert's opinion or rely on another medical
13 expert's opinion to reach sort of another stage of expert
14 conclusion. It strikes me is not exactly what 24-a is
15 allowing the state to do - - - or DOCCS to do.

16 MR. HU: So Your Honor, it's important to ---

17 JUDGE RIVERA: But isn't it --- let's put it
18 another way. Isn't he right when he says you can't have a
19 biopsy without someone actually rendering some medical
20 opinion about the cells?

21 MR. HU: To be clear, Your Honor, we completely
22 agree with that statement. And ultimately --- but when ---
23 when DOCCS request a service, either expressly or
24 implicitly, they are certainly on the hook financially for
25 the cost of those services. And that is an obligation we

1 honored. We paid the bill, which included the pathology
2 services without objection. But the benefits of section
3 24-a are quite frankly extraordinary. They are provided by
4 the grace of the legislature. Defensive ---

5 JUDGE HALLIGAN: So if your view is, and maybe
6 I'm not understanding it correctly, the 24-a encompasses
7 only a DOCCS-to-individual person arrangement, whether that
8 is in the rare case oral or otherwise pursuant to a
9 contract, how could DOCCS --- what is DOCCS's statutory
10 authority to provide indemnification that goes beyond that
11 in a contract?

12 MR. HU: I'm not aware of any, Your Honor, but
13 perhaps I could use an example of how two divergent
14 contract situations have worked, and that might provide
15 some guidance for your question. So for one of the --- for
16 one of the contracts with a Westchester Medical,
17 Westchester regularly provides an addendum that has a list
18 of practitioners that have been providing services pursuant
19 to that contract. So when our office receives a request
20 for the protections of 24-a, the only thing we really do is
21 look at, is this provider on that list?

22 JUDGE CANNATARO: So you do enter into contracts
23 with entities, medical specialists?

24 MR. HU: That's right. That's right.

25 JUDGE CANNATARO: And then maybe the contract

1 specifies which of the providers actually fall under the
2 umbrella of the medical center. But the --- the top line
3 agreement is actually between DOCCS and a facility, not an
4 individual; is that correct?

5 MR. HU: That is correct, Your Honor. And we are
6 aware of six --- six such arrangements.

7 JUDGE CANNATARO: And --- and this case here,
8 this specific case, was it with the medical center where
9 the --- where the biopsy was performed, or was it with the
10 particular provider who performed it?

11 MR. HU: It was with --- I apologize for
12 interrupting, Your Honor.

13 JUDGE CANNATARO: No.

14 MR. HU: It was with Dr. Cody, the surgeon.
15 There was no contract with the hospital. There was no
16 contract with the pathology group that employed Dr. Wang,
17 or Dr. Wang itself. It was solely with the surgeon.

18 JUDGE CANNATARO: Who selected the pathology
19 provider?

20 MR. HU: The pathology provider was selected by
21 the hospital.

22 JUDGE CANNATARO: They had a contract with the
23 pathology group --- Dr. Wang's pathology group, right?

24 MR. HU: That is correct.

25 JUDGE CANNATARO: So it was sort of like a

1 nondiscretionary, this is who you're going to send the
2 cells to, right?

3 MR. HU: That's right, Your Honor. Really DOCCS
4 requested to Dr. Cody to provide a biopsy. We certainly
5 anticipated that certain pathology services would be
6 provided, but we entrusted Dr. Cody to make those
7 arrangements.

8 JUDGE RIVERA: But I'm a little confused. I
9 thought you said before you paid for the services.

10 MR. HU: That's right.

11 JUDGE RIVERA: So --- so the services are
12 provided by Dr. Wang in part. Why isn't Dr. Wang then
13 someone who falls under 24-a? You've already paid for the
14 service.

15 MR. HU: We paid for the services. But what he's
16 seeking here is really the extraordinary benefit.

17 JUDGE RIVERA: Oh, I understand that. But 24-a
18 says that they get that if they have rendered the
19 professional services, and once you paid for it, how can
20 you challenge it now?

21 MR. HU: Your Honor, I disagree.

22 JUDGE RIVERA: I mean, I could see you paying
23 Cody. I get that because that's the contract, and that's
24 the first thing you requested to provide services.

25 MR. HU: Your Honor, I disagree with the

1 conflation of whether services are requested as being the
2 sole consideration under Section 24-a. That would imply
3 that ---

4 JUDGE RIVERA: Maybe I'm misunderstanding your
5 response to Judge Halligan, or perhaps I've misunderstood
6 what she was asking, but if those are not services you
7 requested, how are you able to expend state money to pay
8 for them?

9 MR. HU: So perhaps I can clarify. What DOCCS
10 was requesting pathology services, certainly, but it was
11 not requesting services from Dr. Wang in particular, and
12 that is really what takes him outside the scope of Section
13 24-a.

14 JUDGE RIVERA: If we disagree with you, what ---
15 what kind of action might you have available to you, right,
16 to perhaps cabin what you --- what you I think have
17 articulated very well in your brief as the real potential
18 costs to the state. The particular kinds of contracts you
19 could enter or the particular kinds of demands you could
20 make of your contractees for their subcontractors. I mean,
21 what happened here is you've got a subcontract, right?
22 That's the problem. They didn't do it in house.

23 MR. HU: That's correct, Your Honor. And so in
24 many ways, the outcome will be similar. DOCCS will
25 proactively go forward and suddenly become a lot more

1 specific in the contracts it enters into.

2 JUDGE RIVERA: And what's wrong with that? Why
3 is that not a good thing?

4 MR. HU: It would certainly be a good --- it
5 would certainly be a good thing. But in the interim, there
6 are certain --- I think there are many permutations where
7 services may not be anticipated and --- and premising
8 Correction Law 24-a on whether the service was implicitly
9 or explicitly authorized would then deprive the state of
10 the ability to make ---

11 CHIEF JUDGE WILSON: If we were to rule against
12 you, how could you --- give me an example of how you could
13 draft a contract to avoid the statutory indemnity?

14 MR. HU: To --- Chief Judge Wilson, are you
15 asking whether a part --- whether the state could say we
16 are not providing any --- any indemnification at all?

17 CHIEF JUDGE WILSON: If we were to rule against
18 you in this case, it would mean that we are interpreting,
19 at the request of, to include services that are a necessary
20 procedure or something you did request, even if the person
21 providing this is somebody you had never heard of, right?
22 If we -- if we ruled against you. So in that world, is
23 there a way you could write a contract, insulate yourself
24 from that liability? If there is, can you tell me how
25 because I can't imagine it at the moment?

1 MR. HU: I suppose --- the only thing I can think
2 would be like a series of interlocking contracts. So we
3 would then identify every potential downstream provider,
4 you know, the specialties that aren't necessarily client
5 facing, that you would not necessarily directly request.
6 We would then seek out those individuals, have those
7 contracts in place. And then in terms of the specialties
8 that we regularly interact with ---

9 CHIEF JUDGE WILSON: But you wouldn't be --- you
10 wouldn't be avoiding the indemnity in that case; you'd be
11 contractually assuming the indemnity.

12 MR. HU: That's right. Or at least ---

13 CHIEF JUDGE WILSON: I'm asking suppose you ---
14 suppose that --- imagine that there's a public policy
15 that's very important to the State not to have to pay for
16 LabCorp or for a pathology outfit that's indifferent about
17 who's going --- for whom it's providing the services.
18 They're just commercially providing a large service. And
19 the public policy reasons articulated for this statute
20 don't really have anything to do with that, because you're
21 not bringing somebody in the hospital who wouldn't
22 otherwise do this work, right?

23 So if you wanted to for the state to avoid that
24 liability and in the hypothetical world, I imagine where
25 we've ruled against you in this case, even though you had

1 no idea who this person was; is there a way you could write
2 a contract to avoid that statutory liability?

3 MR. HU: Your Honor, I can't think of one, but I
4 would ---

5 JUDGE RIVERA: Well, could you enter --- let's
6 say --- let's take Dr. Cody. That contract. Would you
7 have had a provision in that contract either forbidding
8 this outsourcing of these kinds of tests? I mean, you
9 could have that, I guess, or otherwise requiring if they're
10 going to have these subcontracts that whoever they
11 subcontract with waves this coverage. Is it possible to
12 waive 24-a? You could write it in a way that says assuming
13 without --- accepting that this would cover it, you waive
14 the coverage. Can you do that, or can you --- can a party
15 not - - - or a potential party, not waive?

16 MR. HU: Assuming there were adequate, I don't
17 see why not. Why the State could - - - in exchange for a
18 waiver of those benefits, I suppose that would be
19 permissible, but I do not have any authority for that
20 proposition, Your Honor.

21 JUDGE HALLIGAN: Just so I'm clear, is your view
22 that, at the request of, can only extend to an individual
23 named person, or that it could extend, but generally
24 doesn't, to a facility?

25 MR. HU: So in the absence of a contract, our

1 position would be that it is the specific ---

2 JUDGE HALLIGAN: No, if you have a contract, what
3 I --- what I am asking is if you have a contract with a
4 facility, is that on its own terms something that can fall
5 within, at the request of, or do you read Section 24 as
6 attaching only to a named person that DOCCS could vet if it
7 choose to do so?

8 MR. HU: I apologize, Your Honor. I
9 misunderstood the question. So in --- if we read 24-a as
10 attaching only to a specific person, so even if there is a
11 contract with the hospital, unless that contract specifies
12 the specific individuals that should be covered, we would
13 take the position that merely repeating the language of
14 24-a would not be sufficient.

15 JUDGE RIVERA: So what if --- what if the
16 contract said the Department of Surgery? Didn't name the
17 surgeons because maybe surgeons rotate in and out.

18 MR. HU: We --- so --- so if the contract were
19 with the Department of Surgery ---

20 JUDGE RIVERA: No, no. Just --- let's just say a
21 hospital.

22 MR. HU: Yes.

23 JUDGE RIVERA: They have a surgical wing.

24 MR. HU: Yes.

25 JUDGE RIVERA: Whatever they call it. I'm just

1 saying department. If the contract just said the
2 Department of Surgery, didn't name any one individual. It
3 didn't name specific surgeons. Does it cover any surgeon
4 who's at the time working in the Department of Surgery who
5 then provides these services, and then there's a lawsuit?

6 MR. HU: Unless there is specific language
7 indicating that indemnification obligations similarly
8 extended to every member of that Department, we would take
9 the position ---

10 JUDGE RIVERA: So what happens with your
11 contracts any --- any time someone is brought in? Let's
12 forget about someone who leaves, someone who is brought in
13 to, let's say, one of these groups, they are not covered
14 until the contract is amended, replaced, whatever you need
15 to do? I don't know how you do your contract, so I can't
16 speak to that.

17 MR. HU: Yes. So that is the position we've
18 taken with ---

19 JUDGE RIVERA: A rider or something?

20 MR. HU: --- with respect to the contract for
21 Albany Medical Center, which just has the language of
22 Correction Law 24-a and nothing more specific. But again,
23 in contrast for the Westchester Medical contract, when
24 there is an addendum with those specific individuals, then
25 those --- then those protections have been ---

1 JUDGE RIVERA: That is your interpretation?

2 MR. HU: That is how our office has dealt with
3 requests for indemnification.

4 JUDGE RIVERA: We have not otherwise interpreted
5 the statute in that way?

6 MR. HU: That is correct, Your Honor. This
7 is---this is the first case to present the meaning of
8 Correction Law 24-a. So unless there are any further
9 questions, we respectfully request that this court affirm.
10 Thank you.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. BORELLI: Just briefly, Your Honors. To
13 Judge Rivera's last point about the contracts with the
14 facilities, it begs the question, if there's a contract
15 between the Department of Corrections and the facility but
16 doesn't name any providers and yet there's indemnification
17 language, well, then who would it cover? I fail to see
18 what that --- what effect that contract would have if those
19 benefits aren't going to be extended to the physicians. So
20 if they're --- if ---

21 JUDGE RIVERA: No ---

22 CHIEF JUDGE WILSON: Wouldn't ---

23 JUDGE RIVERA: --- but I thought his point
24 was---I'm sorry.

25 CHIEF JUDGE WILSON: Go ahead.

1 JUDGE RIVERA: I thought his point was that there
2 would have to be particular individuals named in the
3 contract. And if they're not named, I thought this was
4 what I was trying to get up to in part. Even if they work
5 there, even if they did provide some service that they
6 would not benefit from 24-a. I thought that's the position
7 that they were taking.

8 MR. BORELLI: Correct. Maybe I was unclear. But
9 my point --- my point there was simply that, well, if they
10 need to be individually named and they're not, and yet this
11 contract still has this indemnification language in it,
12 then what is the meaning of it if it doesn't cover anybody?
13 So if they can --- so therefore, it would seem to suggest
14 that those providers should be covered if that language is
15 in there. And the last thing I would like just to say
16 quickly is I know there's concern about the fiscal ---

17 JUDGE RIVERA: But I don't know how that helps
18 you because there's no contract. The contract is with
19 Cody, not with your client.

20 MR. BORELLI: Correct. I guess my point in
21 saying that is if --- if that's the case, if they're going
22 to do that and indemnify these physicians who are not named
23 in a contract just because of blanket indemnification
24 language between DOCCS and the facility, then why shouldn't
25 Dr. Wang be indemnified here? The situation is no

1 different. The physician's still performing services on an
2 incarcerated person.

3 JUDGE RIVERA: Um-hum. Did Dr. Wang --- I'm
4 sorry if this is in the record, and I've just missed it.
5 Did Dr. Wang know that this was an individual --- a DOCCS,
6 could --- could Dr. Wang have returned it and said, I'm not
7 going to do this.

8 MR. BORELLI: Your ---

9 JUDGE RIVERA: Because I know I won't get
10 indemnified if I get sued?

11 MR. BORELLI: To answer your question, yeah, no,
12 my understanding is he did not. That would not have been
13 in the record because that was prior to his deposition, his
14 subsequent involvement in the case. This was very early.
15 But my understanding is that he was not --- was unaware at
16 the time. Unless Your Honors have any other questions,
17 I'll submit the rest of my argument. Thank you very much.

18 CHIEF JUDGE WILSON: Thank you.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Lazalee v. Wegmans, No. APL-2023-8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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