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COURT OF APPEALS, DIVISION II
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,

Appellant/Cross-Respondent.

BRIEF OF APPELLANT/CROSS-RESPONDENT MULTICARE
HEALTH SYSTEM, INC.

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I. INTRODUCTION

Doug Hermanson sued MultiCare Health System, Inc., d/b/a Tacoma General Hospital, claiming that one or more members of the trauma team that evaluated and treated him in the emergency room following a single vehicle accident improperly disclosed information about his high blood alcohol level to police. Under a joint representation agreement, defense counsel was retained to jointly represent MultiCare, three members of the trauma team who were targeted or implicated by Hermanson's allegations (MultiCare-employed family practice resident Dr. Stephanie Wheeler; MultiCare's admitted agent – trauma surgeon Dr. David Patterson; and physician assistant Christopher Boeger), and Trauma Trust (the entity under contract with MultiCare to deliver trauma services at Tacoma General and the employer of Dr. Patterson and PA-C Boeger).

When seeking depositions of certain trauma team members (Dr. Patterson, Paulene Wheeler, RN, and Lori Van Slyke, MSW), Hermanson, aware of the joint representation, objected to defense counsel having ex parte contact with any of the providers involved in his emergency room care. MultiCare moved for a protective order to confirm that its counsel could have privileged ex parte communications with the individuals they were retained to jointly represent (including Dr. Patterson), as well as with other MultiCare employees having direct knowledge of the alleged

negligence, including Nurse Wheeler and social worker Van Slyke.

The trial court partially granted and partially denied the motion, ruling that defense counsel: (1) could not have privileged ex parte communications with Dr. Patterson because he was not a MultiCare employee, even though he was a MultiCare agent whose conduct was at issue and whom defense counsel was retained to jointly represent; (2) could have privileged ex parte communications with two nurses, Nurses Wheeler and Defibaugh, both of whom were MultiCare employees and who, though not physicians, fell under the physician-patient privilege; (3) could not have privileged ex parte communications with social worker Van Slyke, because she was not a physician, even though she was a MultiCare employee whose conduct was at issue; and (4) must seek a protective order before speaking with any other MultiCare healthcare providers.

In denying defense counsel the ability to have ex parte privileged communications with Dr. Patterson, MultiCare's admitted agent, and social worker Van Slyke, a MultiCare employee, both of whom have knowledge of facts giving rise to the litigation and whose conduct forms a basis for MultiCare's liability, the trial court misapplied the teachings of *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), and *Youngs v. PeaceHealth*, 179 Wn. 2d 645, 316 P.3d 1035 (2014), as to the interplay between the physician-patient privilege and the corporate attorney-client

privilege, and too narrowly applied the flexible approach to the corporate attorney-client privilege set forth in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). None of those cases justifies the trial court's order denying defense counsel the ability to have privileged ex parte communications with Dr. Patterson, social worker Van Slyke, or any other MultiCare health care provider involved in the emergency room visit at issue in this litigation.

II. ASSIGNMENTS OF ERROR

(1) The trial court erred in entering the parts of its August 11, 2017 order on MultiCare's Motion for Protective Order Regarding Ex Parte Privileged Communications ..., CP 135-36, that:

(a) Preclude MultiCare's counsel from having attorney-client privileged ex parte communication with Dr. Patterson, a jointly represented admitted agent of MultiCare whose conduct is at issue; and

(b) Preclude MultiCare's counsel from having attorney-client privileged ex parte communication with social worker Van Slyke, a MultiCare employee whose conduct is also at issue;

(c) Require MultiCare to seek leave of court before its counsel may have ex parte communication with "other MultiCare healthcare providers."

(2) The trial court erred in entering its September 26, 2017 Order denying MultiCare's motion for reconsideration, CP 603.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Under *Loudon v. Myhre*, 110 Wn.2d 675, 676-82, 756 P.2d 138 (1988) (prohibiting defense counsel from having ex parte contact with

a plaintiff's nonparty treating physicians), and *Youngs v. PeaceHealth*, 179 Wn.2d 645, 650, 664, 316 P.3d 1035 (2014) (holding, in the context of hospital-employed nonparty treating physicians, that a defendant hospital's "corporate attorney-client privilege trumps the *Loudon* rule where an ex parte interview enables corporate counsel to determine what happened to trigger the litigation"), may a defendant hospital's attorneys jointly represent a nonparty treating physician who is an admitted agent of the defendant hospital and whose conduct is at issue?

(2) Under *Youngs* and its application of the corporate attorney-client privilege, may a defendant hospital's attorneys engage in attorney-client privileged ex parte communications not only with a nonparty treating physician employed by the hospital, but also with a non-party treating physician who, while not directly employed by the hospital, acted as an admitted agent of the hospital, who has personal knowledge of the facts giving rise to the litigation and whose conduct is at issue?

(3) Do *Loudon* and *Youngs* apply to, or preclude a defendant hospital's counsel from speaking with, a defendant hospital's non-party non-physician employees whose care is at issue or who have knowledge of the facts giving rise to the litigation against the defendant hospital?

IV. STATEMENT OF THE CASE

A. Factual Background.

On September 11, 2015, after a one-car accident, Doug Hermanson was taken to MultiCare's Tacoma General Hospital, CP 2, where he was evaluated and treated for various injuries by a trauma team, including Dr. Stephanie Wheeler, a family practice resident employed by MultiCare; Dr. David Patterson, a trauma surgeon who is an admitted agent of MultiCare although employed by Trauma Trust (a non-profit MultiCare corporate affiliate under agreement with MultiCare to deliver trauma services at Tacoma General, CP 470-71, 474-84, 542-45); Christopher Boeger, PA-C, a physician assistant also employed by Trauma Trust; Pauleen Wheeler, R.N. and Carla Defibaugh, R.N., nurses employed by MultiCare; and Lori Van Slyke, M.S.W., a crisis intervention social worker employed by MultiCare. CP 10-11, 124-25, 129, 153-54, 167-68, 210, 472.

Hermanson claims that one or more members of the trauma team improperly disclosed information about his high blood alcohol level to Tacoma Police. CP 2.

B. Procedural Background.

Hermanson sued MultiCare and "Does 1-10" for negligence, false imprisonment, defamation, and violation of the physician-patient privilege. CP 1-4. MultiCare denied Hermanson's claims. CP 5-8. MultiCare

retained attorneys at Mullin, Allen & Steiner, PLLC, to jointly represent it, Trauma Trust, and three individual health care providers targeted or implicated by Hermanson's allegations (Dr. Patterson, Dr. Wheeler, and PA-C Boeger), *see* CP 543-45, each of whom consented in writing to the joint representation. CP 11-12, 22-23, 33, 38-39, 49-50. Hermanson's counsel was advised of the joint representation. CP 33, 38, 50.

When requesting depositions of Dr. Patterson, Nurse Wheeler, and social worker Van Slyke, Hermanson's counsel objected under *Loudon* to defense counsel having ex parte contacts with "the nonparty witnesses, all of whom are my client's health care providers," and asserted that MultiCare's corporate attorney-client privilege would not protect defense counsel's communications with them and that their joint representation created a conflict of interest. CP 24, 53-54.

1. MultiCare's motion for protective order.

MultiCare then sought a protective order to confirm that its counsel could have privileged ex parte communications with the persons they were retained to jointly represent, including Dr. Patterson, and with MultiCare employees having direct knowledge of the alleged negligence, including Nurse Wheeler and social worker Van Slyke. CP 10-11. MultiCare (1) pointed out that its counsel were entitled to have privileged ex parte communications with Dr. Patterson, because he was their client under the

joint representation agreement, CP 10, 15, 120; 8/11/17 RP 4; (2) noted that, under *Youngs*, 179 Wn.2d at 664-65, 671, the corporate attorney-client privilege “trumps” the *Loudon* rule and allows corporate defense counsel to “engage in privileged (ex parte) communications with the corporation’s physician-employee” with knowledge of the alleged negligent event, CP 15-16; (3) provided a copy of King County Superior Court Judge Bruce Heller’s rulings in a different case, *Lund v. Lawson, M.D.*, that, under *Youngs*, MultiCare’s counsel had a right to privileged ex parte communications with MultiCare’s non-physician employees because they were not physicians subject to the *Loudon* rule and they had direct knowledge of the incident, CP 16-17, 23-24, 41-47; and (4) argued that, even if the *Loudon* rule applied to non-physicians, *Youngs* would allow MultiCare’s counsel to have privileged ex parte communications with Nurse Wheeler and social worker Van Slyke because they had firsthand knowledge of the alleged negligence. CP 17-18.

In response, Hermanson argued that: (1) the *Loudon* rule is “an absolute prohibition” on a medical negligence defense attorney contacting any of “plaintiff’s health care providers,” whether or not physicians, CP 57; (2) *Youngs* created a “very narrow exception” to *Loudon* only for “employee-physicians” with direct knowledge of the incident, CP 57; (3) because Nurse Wheeler was not present when the blood alcohol level was

disclosed to police, social worker Van Slyke is not a physician, and Dr. Patterson is not a MultiCare employee, they did not fit into the *Youngs* exception, CP 66-69; (4) *Loudon* and RPC 1.9 prevent MultiCare's counsel from also representing Dr. Patterson and social worker Van Slyke, CP 70-74; and (5) the court should strike "hearsay" descriptions of the joint representation agreement and the submissions from *Lund*, CP 61.

In reply, MultiCare offered to submit the joint representation agreement *in camera*, pointed out that another judge's decision on a question of first impression could be considered, noted the inaccuracies and inconsistencies in Hermanson's view of *Loudon* and *Youngs*, and clarified that social worker Van Slyke was not party to the joint representation agreement and that MultiCare admitted legal responsibility for Dr. Patterson's actions performed within the scope of his duties. CP 118-22.

The trial court refused to consider Judge Heller's decision in *Lund* because MultiCare "did not provide any supporting information as to what Judge Heller was looking at" 8/11/17 RP 12-13. While noting that *Loudon* addresses "the manner in which defense counsel may communicate with a plaintiff's nonparty treating physician consistent with the physician-patient privilege" and that *Youngs* protects "the values underlying both the physician-patient and the attorney-client privileges," the court ruled that: (1) *Youngs* did not allow MultiCare's counsel to communicate

with Dr. Patterson because he was “not an employee”; (2) Nurses Wheeler and Defibaugh, even though not physicians, “fall under the physician-patient purview” and, as MultiCare employees “fall under the physician-patient privilege of the corporation” such that MultiCare’s counsel could communicate ex parte with them; and (3) social worker Van Slyke did not “fall[] under either the employee-physician or anything like a physician-patient analysis that the Court went through for the physicians, even though she is an employee of Multicare” and thus did not “fall[] under that privilege that can be afforded” the nurses under *Youngs*, such that MultiCare’s counsel could not communicate ex parte with her. 8/11/17 RP 23-25; *see also* CP 135-36. The court also required that MultiCare’s counsel seek a protective order before speaking with any other MultiCare health care providers. CP 136; 8/11/17 RP 26.

After the ruling, Hermanson’s counsel demanded that MultiCare’s counsel withdraw and “claw back” and not allow future counsel access to any client communications or work product. CP 168, 215-16.

2. MultiCare’s motion for reconsideration.

MultiCare timely moved for reconsideration, arguing: (1) *Loudon* does not apply to Dr. Patterson because his actions as MultiCare’s agent are at the center of the alleged negligent incident; (2) *Loudon* does not prevent joint representation of MultiCare and Dr. Patterson; (3) the corporate

attorney-client privilege applies to independent contractors and agents who are the functional equivalent of employees; (4) the trial court's ruling violates the due process rights of Dr. Patterson and MultiCare; (5) the trial court's ruling on social worker Van Slyke conflicts with *Youngs*; and (6) *Lund* properly could be considered for persuasive purposes. CP 150-557. MultiCare also submitted a leading legal ethicist's declaration, and copies of the materials before Judge Heller in *Lund*. CP 151, 165, 168-69, 485-88. The trial court denied the motion for reconsideration. CP 603.

3. MultiCare's motion for certification and/or stay.

On MultiCare's motion, the trial court, on October 20, 2017, granted certification of its orders and a stay pending resolution of a motion for discretionary review. CP 757-59, 610-22; 10/20/17 RP 6-8.

4. MultiCare's motion for discretionary review.

MultiCare then sought discretionary review of the following questions of law: (1) whether *Loudon* and *Youngs* preclude a defendant hospital's counsel from jointly representing a nonparty treating physician who is an admitted agent of the hospital and whose conduct is at issue; (2) whether *Youngs* applies only to nonparty treating physicians (and/or nurses) employed by a defendant hospital, such that the hospital's counsel may not speak ex parte with a nonparty treating physician such as Dr. Patterson, who is not an employee, but is an admitted agent of the hospital

whose conduct is at issue; and (3) whether *Loudon* and *Youngs* apply to, or preclude a defendant hospital's counsel from speaking with, nonparty non-physician (and non-nurse) employees or agents of the hospital, such as social worker Van Slyke, whose care is at issue and/or who have knowledge of facts giving rise to the litigation.

Commissioner Eric Schmidt granted MultiCare's motion for discretionary review under RAP 2.3 (b)(4). Treating Hermanson's response as a cross-motion for discretionary review, the Commissioner also granted review of Hermanson's stated issues of whether MultiCare may: "(1) have ex parte contact with nurses Wheeler and Defibaugh; and (2) have contact with its employee-physician related to the cause of action against both the hospital and the physician when the physician and MultiCare are both represented by the same attorney." "Ruling Granting Review" at 4-5.

V. STANDARD OF REVIEW

Discovery orders are generally reviewed for abuse of discretion. *Richardson v. Gov't Emps. Ins. Co.*, 200 Wn. App. 705, 711, 403 P.3d 115 (2017). An abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "When a trial court ... applies the wrong legal standard, its decision is exercised on untenable grounds." *Richardson*, 200 Wn. App. at 711 (citing *Mayer v.*

Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

When the trial court's decision regarding a discovery order rests on a question of law, the decision is reviewed de novo. *Id.* (citing *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999)). The application of the *Loudon* rule, the attorney-client privilege, and the physician-patient privilege (and extent of its waiver), are all questions of law. *See Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 854, 292 P.3d 779 (2013); *Loudon*, 110 Wn.2d at 677; *Youngs*, 179 Wn.2d at 664.

VI. ARGUMENT

The trial court applied the wrong legal standards by (1) applying the *Loudon* rule to prevent MultiCare's counsel from communicating with their jointly represented physician client, Dr. Patterson; (2) basing its decision as to whether Dr. Patterson, MultiCare's admitted agent, was covered by MultiCare's corporate attorney-client privilege solely on the fact that he was an independent contractor/agent, rather than a MultiCare employee; and (3) applying the *Loudon* rule to a non-physician corporate employee, social worker Van Slyke, while holding that, as a non-physician not subject to the physician-patient privilege, she was not covered by MultiCare's corporate attorney-client privilege under *Youngs* and *Upjohn*.

- A. While the Physician-Patient Privilege Generally Justifies Prohibiting Ex Parte Contact between Defense Counsel and a Plaintiff's Non-Party Treating Physicians, when the Defendant is a Corporate Entity, the Corporate Attorney-Client Privilege Trumps that General Rule and Allows Corporate Counsel to Conduct Privileged Ex Parte Interviews of Corporate Employees and Agents to Determine What Happened to Trigger the Litigation.

In *Loudon v. Mhyre, supra*, 110 Wn. 2d 675, a case that did not concern application of a hospital's corporate attorney-client privilege, the Washington Supreme Court held generally that, notwithstanding waiver of the physician-patient privilege, defense counsel in a personal injury action could not have ex parte contact with the plaintiff's nonparty treating physicians. In *Loudon*, a wrongful death suit, the plaintiff sued two Washington doctors who provided treatment to the patient after a car accident and released him from the hospital one week later. *Loudon*, 110 Wn.2d at 676. When he returned home to Oregon, the patient suffered complications and was treated by two Oregon physicians before he died one month later. *Id.* The plaintiff's suit did not target the Oregon physicians or their conduct. *Id.* The plaintiff voluntarily provided the Oregon medical records to the defendants, who then moved for an order declaring the physician-patient privilege waived and that defense counsel could have ex parte contact with the Oregon doctors. *Id.*

The Washington Supreme Court granted discretionary review to consider "whether defense counsel in a personal injury action may

communicate ex parte with the plaintiff's treating physicians when the plaintiff has waived the physician-patient privilege." *Id.* at 675-76. The Court held that the policy reasons underlying the physician-patient privilege justified prohibiting ex parte contact between defense counsel and plaintiff's non-party treating physicians, reasoning that (1) the policy underlying the privilege aims "to protect patient confidentiality and foster the fiduciary relationship between such physicians and their patients," *id.* at 677-80; *Youngs*, 179 Wn.2d at 652; and (2) prohibiting ex parte contact between the patient's "legal adversary" and nonparty treating physicians protects against inadvertent "disclosure of irrelevant, privileged medical information," while maintaining the physician-patient relationship and not hindering "further treatment," *Loudon*, 110 Wn.2d at 678-80.

In *Youngs v. PeaceHealth*, a case that did concern application of hospitals' corporate attorney-client privilege, the Washington Supreme Court analyzed whether "*Loudon* bars ex parte communications between a physician and his or her employer's attorney where the employer is a corporation and named defendant whose corporate attorney-client privilege likely extends to the physician, at least as to certain subjects." *Youngs*, 179 Wn.2d at 650. In so doing, it balanced the values underlying the corporate attorney-client privilege recognized in *Upjohn*, 449 U.S. at 386, against those underlying the physician-patient privilege.

In *Upjohn*, the United States Supreme Court overruled prior precedent limiting the corporate attorney-client privilege to counsel's communications with the corporation's upper level management "control group," *Upjohn*, 449 U.S. at 390, 397, and instead adopted a "flexible" "case-by-case" approach for analyzing the scope of the corporate-attorney client privilege and its applicability to lower-level and mid-level personnel that focuses on the perceived purposes underlying the attorney-client privilege and the corporate personnel's ability to provide information needed for corporate counsel to provide effective legal representation and advice, *id.* at 391-97.

As the *Upjohn* court explained, the attorney-client privilege encourages "full and frank communication between attorneys and their clients" to "promote broader public interests in the observance of law and administration of justice." *Id.* at 389. "The privilege recognizes that sound legal advice or advocacy" "depends upon the lawyer's being fully informed by the client" and encourages "clients to make full disclosure to their attorneys." *Id.* Communications between a corporation and its attorney must be protected from disclosure to realize the benefits of the privilege. *Id.* at 389-90. And, corporate counsel's investigation into the factual background of a legal problem and delivery of legal advice will necessarily often require communications not only with the control group

“officers and agents” who direct the corporation’s actions, but also with middle-level and lower-level non-managerial employees who “can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties” and who “have the relevant information needed by corporate counsel” to adequately “advise the client [corporation] with respect to such actual or potential difficulties,” all of which must be protected if the privilege’s purpose is to be served. *Id.* at 391-94 (citing *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608-09 (8th Cir. 1978)); *Youngs*, 179 Wn.2d 661-62.

Recognizing that application of the *Loudon* rule to non-party treating physicians who are hospital employees would deprive “counsel of the opportunity to communicate with a client,” and thereby destroy the attorney-client privilege, the *Youngs* court 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 663-64. Thus, the *Youngs* court adopted a “modified version” of *Upjohn*’s flexible approach under which corporate defense counsel may have privileged ex parte communication with a non-party treating physician as long as “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*,” while “[t]he *Loudon* rule “still bars ex parte interviews as to information about prior and subsequent treatment” of the patient. *Id.* at 653, 664-65. According to the *Youngs* court, this “strikes the proper balance between the attorney-client 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.” *Id.* at 664-65.

B. The Trial Court Applied the Wrong Legal Standards in Ruling that *Loudon* and *Youngs* Prevent a Defendant Hospital’s Attorneys from Having Attorney-Client Privileged Ex Parte Communications with a Nonparty Treating Physician Who Is an Admitted Agent of the Hospital and Whose Conduct Is at Issue in the Litigation.

The trial court denied MultiCare’s request for a protective order regarding privileged ex parte communications between Dr. Patterson and counsel retained to jointly represent him and MultiCare because “he’s not an employee of MultiCare” and such “communication would not be allowed” under *Youngs*. 8/11/17 RP 24. That ruling was based on an erroneous view of the law set forth in *Loudon* and *Youngs*, as it (1) ignored Dr. Patterson’s individual attorney-client privilege as a person jointly represented by defense counsel under a joint representation agreement; and (2) too narrowly and unduly restricted the applicability of MultiCare’s corporate attorney-client privilege under *Youngs* so as to

exclude any physician not directly employed by MultiCare, even though the physician was an admitted agent of MultiCare with knowledge of facts giving rise to the litigation and whose conduct was directly at issue. In precluding defense counsel from having privileged ex parte communications with Dr. Patterson, the trial court also violated Dr. Patterson's and MultiCare's due process rights to representation by counsel of choice.

1. In precluding defense counsel from having privileged ex parte communications with Dr. Patterson, the trial court erroneously ignored Dr. Patterson's individual attorney-client privilege as a jointly represented client.

Neither *Loudon* nor *Youngs* says anything about limiting a non-party treating physician's communications with his or her own counsel, or the extent to which defense counsel may jointly represent a defendant hospital and its nonparty treating physician agent, particularly when that agent's only knowledge of the patient pertains to the care at issue. Nothing in either of those cases suggests that the physician-patient privilege limits what a physician may discuss with his or her own attorney to secure legal advice and effective representation. Nor do either of those cases address under what circumstances defense counsel may or may not jointly represent a defendant hospital and its physician agents or employees whose only involvement in plaintiff's care forms part of the basis for the litigation against the hospital.

Notwithstanding Dr. Patterson's attorney-client relationship with defense counsel under the joint representation agreement and his individual attorney-client privilege, the trial court has prohibited Dr. Patterson from having attorney-client privileged communications with his own counsel. The trial court has done so even though defense counsel's ex parte communications with Dr. Patterson could not "result in disclosure of irrelevant, privileged medical information" or disrupt an ongoing physician-patient relationship – the harms the *Loudon* rule is intended to prevent. *Loudon*, 110 Wn.2d at 678-79. Dr. Patterson did not treat Hermanson apart from the emergency room visit that is the subject of this lawsuit and thus has no irrelevant, privileged medical information to convey or any ongoing physician-patient relationship to hinder.

Loudon's policy concerns about the physician-patient privilege simply are not present here. Because none of *Loudon*'s policy concerns are implicated, they do not justify precluding defense counsel from having attorney-client privileged ex parte communications with Dr. Patterson whom they have been retained to jointly represent. Context matters, as the Washington Supreme Court recognized in *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 311-13, 822 P.2d 271 (1992), in holding that the *Loudon* rule should not be extended to Board of Industrial Insurance Appeals proceedings in part and "[m]ore importantly" because the "public policy

considerations enumerated in *Loudon* are not implicated here.”

The policy concerns the *Loudon* court articulated for its decision to prohibit defense counsel from having ex parte communications with a plaintiff’s nonparty treating physicians were that: (1) the harm resulting from disclosure of “irrelevant, privileged medical information” cannot be “fully remedied by subsequent court sanctions,” *Loudon*, 110 Wn.2d at 678; (2) the “mere threat” that a physician would engage in private interviews with his or her patient’s “legal adversary” would “have a chilling effect on the physician-patient relationship and hinder further treatment,” *id.* at 679; (3) physicians have “an interest in avoiding inadvertent wrongful disclosures,” *id.* at 680; and (4) disputes may result from differences between a physician’s informal statements and trial testimony requiring defense counsel to testify as an impeachment witness, *id.* See also *Youngs*, 179 Wn.2d at 659-60. None of those policy concerns are present here, where Dr. Patterson’s only involvement in Hermanson’s care was during the emergency room visit at issue in the case and his alleged conduct forms part of the basis for MultiCare’s alleged liability.

Unlike the Oregon physicians in *Loudon*, who were not parties to a joint representation agreement, whose care and treatment was not at issue, and who could not trigger the liability of a named defendant, Dr. Patterson is jointly represented by MultiCare’s attorneys pursuant to a joint

representation agreement, and his alleged conduct forms a basis for MultiCare's alleged liability. Although Hermanson chose not to name Dr. Patterson as a defendant, he still seeks to hold MultiCare liable for Dr. Patterson's alleged wrongdoing while acting as MultiCare's agent. MultiCare has admitted that Dr. Patterson is its agent and that it is responsible for his allegedly negligent acts or omissions within the scope of his duties in providing trauma services at Tacoma General. CP 472 (¶11). Moreover, given that Dr. Patterson's involvement in Mr. Hermanson's care is limited to the one emergency room visit that is at issue in this litigation, there is no concern that Dr. Patterson may disclose irrelevant privileged information to MultiCare's counsel.

In sum, *Loudon's* policy concerns are not implicated here because (1) Dr. Patterson did not treat Hermanson on any occasion other than the emergency room visit at issue and he therefore has no "irrelevant, privileged medical information" to disclose; (2) Hermanson has no ongoing physician-patient relationship with Dr. Patterson to be hindered or chilled, (3) Hermanson himself breached "the sanctity of the doctor-patient relationship" by putting Dr. Patterson's conduct at issue, thereby eliminating any threat that Dr. Patterson's private communications with defense counsel retained to defend his conduct could have a "chilling effect" or hinder Hermanson's future treatment; (4) Dr. Patterson's interest in defending

against Hermanson's claims that he engaged in wrongdoing for which MultiCare can be held liable justifies allowing him to consult with defense counsel; and (5) by placing Dr. Patterson's conduct at issue, Hermanson himself has made Dr. Patterson a natural and necessary witness for the defense. *See Loudon*, 110 Wn.2d 678-80; *Youngs*, 179 Wn.2d at 651. As such, application of *Loudon*'s general prohibition of ex parte contact with plaintiffs' nonparty treating physicians is not justified here.

Nor is there anything untoward about MultiCare or its attorneys entering into the joint representation agreement with Dr. Patterson, or any of the other signatories to the agreement – family practice resident Dr. Wheeler, PA-C Boeger, and Trauma Trust. Although Hermanson did not name them as defendants, his allegations targeted or implicated each of the individual parties to the joint representation agreement. Indeed, in his initial demand letter before filing suit, Hermanson specifically identified Dr. Wheeler as the person who allegedly disclosed his high blood alcohol level to police. CP 543 (¶5), 547-51. MultiCare's investigation subsequently revealed that it was a male provider who was the actual target of the litigation, only two of which were involved in Hermanson's emergency room care – Trauma Trust employees Dr. Patterson and PA-C Boeger. CP 543-44(¶¶7-8). Given the agreement between MultiCare and Trauma Trust for the provision of trauma services at Tacoma General that

includes mutual indemnity obligations and requires MultiCare and Trauma Trust to provide counsel and cooperate in defense of claims, CP 544 (¶9), 479-80 (¶15), and the fact that Hermanson is claiming that MultiCare is vicariously liable for the conduct of one or more members of the trauma team, including Dr. Patterson, it makes perfect sense for MultiCare and Trauma Trust to decide that joint retention of defense counsel was the best way to defend against Hermanson's claims, *see* CP 544 (¶10).

Moreover, there is no conflict under the Rules of Professional Conduct that would preclude defense counsel from jointly representing MultiCare and Dr. Patterson (and the other signatories to the joint representation agreement). MultiCare admits responsibility for Dr. Patterson's actions performed within the scope of his duties. CP 472 (¶11); 544 (¶10). MultiCare's and Dr. Patterson's interests are thus aligned, with both having consented in writing to the joint representation. *See* Rule of Professional Conduct (RPC) 1.7; CP 22(¶2), 490-91 (¶¶23-24), 493 (¶¶36-39), 545 (¶11). Under RPC 1.7(b) and RPC 1.7 cmt. 23, even where a concurrent conflict of interest exists, an attorney may jointly represent two clients having similar interests in civil litigation if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Given Dr. Patterson's individual attorney-client relationship with defense counsel under the joint representation agreement, and the inapplicability of *Loudon*'s policy concerns under the facts of this case, the trial court erred in ruling that defense counsel could not have attorney-client privileged ex parte communications with Dr. Patterson.

2. The trial court also erroneously held that MultiCare's corporate attorney-client privilege extends only to employee physicians, and not to a physician who is an admitted agent of the hospital with direct knowledge of facts giving rise to the litigation and whose conduct is at issue.

Even if Dr. Patterson did not have a personal attorney-client relationship with MultiCare's counsel by virtue of the joint representation agreement, the trial court still erred in concluding that *Youngs* "was very specific in the language that it used" and "stands for" the proposition that a corporate attorney "can have" privileged contact "with employees, not external individuals but employees of the agents through the corporation" and adopting a bright-line rule that a hospital's attorney-client privilege cannot encompass communications with an "independent contractor" physician who is an admitted agent, but not a direct "employee," of the

hospital. 8/11/17 RP 9-11. Although *Youngs* and *Upjohn* both involved, and thus referred to, “employees”, there is no principled justification for concluding that a corporation’s attorney-client privilege does not extend to a corporation’s agents or independent contractors.

To the contrary, the corporate attorney-client privilege extends to “constituents and agents” of a corporation or any organization which “can act only through” such “constituents and agents.” *Newman v. Highland Sch. Dist. No. 203*, 186 Wn. 2d 769, 780, 381 P.3d 1188 (2016). Because independent contractors and agents are subject to the same “principal-agent relationship” that allows a corporation to require its employees to disclose facts material to their duties to its counsel for investigatory or litigation purposes, the corporation’s attorney-client privilege protects communications between the corporation’s attorney and persons “acting as agents of the organization.” *Id.* at 780-81 & n. 3. As Dr. Patterson is MultiCare’s agent and his “actions within the scope of” his duties have “embroil[ed]” MultiCare in this lawsuit, “it is only natural” that he “would have the relevant information needed by corporate counsel if [corporate counsel] is adequately to advise the client with respect” to the matter. *See Upjohn*, 449 U.S. at 391.

Corporations such as MultiCare can act only through their officers, employees, and agents, or constituents. *See* WPI (Civ.) 50.18 (“act or

omission of an officer or employee is the act or omission of the corporation”); WPI (Civ.) 105.02.01 (“act or omission of an officer, employee, or agent is the act or omission of the hospital corporation”); *Newman*, 182 Wn.2d at 780 (organization “can act only through its constituents and agents”). Hermanson has acknowledged as much in premising his assertion of liability against MultiCare on allegations that it “is responsible for the conduct and action of its employees, healthcare providers, agents, and those acting on its behalf while administering healthcare services to patients admitted to its facility,” and that it “through its authorized employees and agents disclosed to the Tacoma Police Department plaintiff’s confidential health care information” “obtained during the September 11, 2015 admission of plaintiff to its facility.” CP 2 (¶¶2.3-2.4).

In the hospital context, whether a physician is a hospital “employee” or an “independent contractor” does not resolve the question of whether an agency relationship exists or vicarious liability may result. Given the “possible variations of the hospital-doctor-patient relationship,” the most “troublesome situation” is when a patient seeks treatment directly from a hospital “and is there provided with or referred to a physician, usually a specialist” who is not a “salaried employee of the hospital.” *Adamski v. Tacoma General Hosp.*, 20 Wn. App. 98, 108, 579 P.2d 970 (1978). Based on the facts and circumstances of the relationship, the

hospital may be liable for the conduct of a physician who is not the hospital's direct "employee" because the physician is an agent under the doctrine of "ostensible agency" or "apparent agency." *Id.*; WPI (Civ.) 105.02.03 (hospital is liable for conduct of physician who was "the apparent agent of the hospital" even if "not a hospital employee").

Because an organization can only act through its "constituents and agents," its "constituents and agents" must be allowed to make privileged communications to corporate counsel in their "organizational capacit[ies]" to seek legal advice and to provide information "relevant to legal advice" for the corporation. *Newman*, 186 Wn.2d at 780; *Youngs*, 179 Wn.2d at 662 (citing *Upjohn*, 449 U.S. at 391-92, and *Diversified Indus., Inc.*, 572 F.2d at 608-09). Although "in the vast majority of cases," such information will be available from the client corporation's "employees," there are circumstances in which an agent other than an employee, even an independent contractor, will be the only corporate "constituents" that hold the corporation's knowledge. *In re Bieter Co.*, 16 F.3d 929, 937-38 (8th Cir. 1994). As the Eight Circuit explained in *Bieter*, 16 F.3d at 937-38:

[W]hen applying the attorney-client privilege to a corporation or partnership, 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. Such a distinction is consistent with neither the Supreme Court's decision in *Upjohn* nor our decision in *Diversified*.

Both decisions indicated that “the very purpose of the privilege” would be frustrated by application of the “control group” test because that test “discourag[es] the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.” *Upjohn*, 449 U.S. at 392 “The privilege recognizes that sound legal advice ... depends upon the lawyer being fully informed by the client.... ‘The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.’” *Upjohn*, 449 U.S. at 389 (quoting *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 613, 63 L.Ed.2d 186 (1980)).... “[I]t is only natural that” just as “[m]iddle-level – and indeed lower level – employees ... would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to ... actual or potential difficulties, *id.* at 391, so too would nonemployees who possess a “significant relationship to the [client] and the [client’s] involvement in the transaction that is the subject of legal services. [John E.] Sexton, [A Post-*Upjohn* Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443,] ... 487 [(1982)].

The independent contractor in *Bieter* was involved on a daily basis with the corporation’s principals and on the corporation’s behalf in an unsuccessful land development that was the basis for the litigation. *Bieter*, 16 F.3d at 938. Citing *Upjohn*, the *Bieter* court reasoned that “[t]here is no principled basis to distinguish the [independent contractor’s] role from that of an employee, and his involvement in the subject of the litigation [made] him precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand [the corporation’s] reasons for seeking representation.” *Id.* The *Bieter* court concluded that the inde-

pendent contractor “was in all relevant respects the functional equivalent of an employee.” *Id.*; see also *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010) (finding independent consultant qualified as functional equivalent of employee for purposes of extending the corporate attorney-client privilege); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 487 (1982)¹ (stating the rule guiding a principled application of *Upjohn* as: “The information-giver must be an *employee, agent, or independent contractor* with a significant relationship to the corporation and the corporation’s involvement in the transaction that is the subject of legal services.” (emphasis added)).

Here, Dr. Patterson indisputably has a significant relationship to MultiCare (as does his employer Trauma Trust) and to MultiCare’s involvement in the litigation Hermanson has brought against it. Dr. Patterson’s provision of trauma services at MultiCare’s Tacoma General Hospital is an inherent function of the hospital, a function without which the hospital could not properly achieve its purpose. See *Adamski*, 20 Wn. App. at 112 (acknowledging substantial evidence that a non-employee emergency physician was the hospital’s agent, thereby the hospital potentially vicariously liable for his negligence when performing an inherent function of the hospital – the provision of emergency room

¹ A copy of this law review article can be found at CP 218-70.

services). In fact, before Trauma Trust contracted with MultiCare to provide trauma services, patients could not seek Level II trauma care in Pierce County. CP 471 (¶6). The close relationship 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; that MultiCare provides billing, IT support, and equipment to Trauma Trust; that MultiCare and its other hospital partners have agreed to cover deficits incurred by Trauma Trust services; and that they all are in partnership in the delivery of care. CP 471 (¶¶8-9). MultiCare even provides Dr. Patterson an office inside Tacoma General and Dr. Patterson, like other physician-employees of Trauma Trust, is an integral part of the MultiCare system and required to follow MultiCare's policies and procedures when providing trauma services at Tacoma General. CP 472 (¶10). MultiCare has admitted that Trauma Trust physicians working at Tacoma General, including Dr. Patterson, are MultiCare's agents and that MultiCare would be responsible for any care they deliver within the scope of their duties providing trauma services there. CP 472 (¶11); 544 (¶10).

Where, as here, an independent contractor/agent has such a significant relationship with MultiCare, there is no principled basis to distinguish his role from that of an employee. Indeed, the fact that Hermanson seeks to hold MultiCare liable for Dr. Patterson's conduct makes Dr.

Patterson precisely the type of person with whom MultiCare’s attorneys would wish to confer confidentially in order to understand MultiCare’s reasons for seeking representation and to effectively advise and represent MultiCare. Dr. Patterson is the functional equivalent of a MultiCare employee whose communications with defense counsel, under *Upjohn* and *Youngs*, are subject to MultiCare’s corporate attorney-client privilege.

Contrary to the trial court’s ruling, *Youngs* did not adopt a bright-line rule that the corporate attorney-client privilege protects only communications between corporate counsel and “employees” of the corporation, and not communications between corporate counsel and other corporate “officers,” “constituents,” “agents” or “independent contractors.” Because nothing in *Loudon* or *Upjohn* or *Youngs* or even *Newman* suggests that the attorney-client privilege does not apply under the circumstances in this case, the trial court erred in precluding defense counsel from having attorney-client privileged ex parte communications with Dr. Patterson simply because he was an “agent” rather than an “employee” of MultiCare.

3. The trial court’s ruling precluding defense counsel from having attorney-client privileged ex parte communications with Dr. Patterson violates Dr. Patterson’s and MultiCare’s due process right to representation by their chosen counsel.

A civil litigant has “a constitutional right, deriving from due process, to retain hired counsel in a civil case.” *Gray v. New England Tel.*

and Tel. Co., 792 F.2d 251, 257 (1st Cir. 1986); accord *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117-18 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980) (a civil litigant’s right to retain counsel is rooted in fifth amendment notions of due process). MultiCare, like any other litigant, is entitled to retain counsel because a “corporation is a ‘person’ within the meaning of the equal protection and due process of law clauses.” *American Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 594, 192 P.3d 306 (2008) (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 80 L. Ed. 660 (1936)). And, although Dr. Patterson has not personally been sued in this case, he could be and the constitutional right to counsel should extend to him as potential litigant.

Moreover, even though he is not a named defendant, Dr. Patterson has a stake in the outcome of this litigation as any payment made as a result of his conduct will be reported to the National Practitioner Data Bank and the Department of Health, and action may be taken against his professional license. *See* CP 544-45 (§10). Hermanson should not be allowed to interfere with Dr. Patterson’s right to hire his choice of counsel to defend his care simply by choosing not to name him as a defendant.

The confidential consultation, communication, and preparation between a litigant (or potential litigant) and his counsel is part and parcel of the confidential attorney-client relationship. *See Youngs*, 179 Wn. 2d at

663 (“[D]epriving counsel of the ability to communicate confidentially with a client damages the privilege just as much as disclosing a prior communication”). The trial court’s preclusion of Dr. Patterson from communicating privately on a privileged basis with his own counsel and of MultiCare’s counsel from communicating privately on a privileged basis with MultiCare’s admitted agent whose allegedly wrongful conduct could trigger MultiCare’s liability eviscerates the attorney-client privilege and deprives both Dr. Patterson and MultiCare of their due process right to counsel of their choosing.

This Court should hold that MultiCare’s attorneys are entitled to communicate with Dr. Patterson ex parte on a confidential and attorney-client privileged basis.

C. The Trial Court Applied the Wrong Legal Standards in Ruling that the Corporate-Attorney Client Privilege Did Not Apply to Social Worker Van Slyke Because She Is Not a Physician Subject to the Physician-Patient Privilege, While Still Applying the Loudon Rule to Preclude Defense Counsel’s Ex Parte Contact with Her.

The trial court determined that the corporate attorney-client privilege under *Youngs* would protect defense counsel’s ex parte communications with the two MultiCare-employed trauma team nurses (Nurses Wheeler and Defibaugh), but not with MultiCare-employed social worker Van Slyke. The trial court’s rationale for applying the corporate attorney-client privilege to the MultiCare-employed nurses but not to MultiCare-

employed social worker Van Slyke was its view that the nurses “would fall under the physician-patient purview that was before the Court with *Youngs* ...,” but social worker Van Slyke would not fall “under either the employee-physician or anything like a physician-patient analysis that the Court [in *Youngs*] went through for the physicians.” 8/11/17 RP 25. That stated rationale makes no sense and, in any event, misses the mark, as it conflates two separate issues: (1) whether the *Loudon* rule applies at all to social worker Van Slyke; and then (2) if it does, whether the corporate attorney-client privilege trumps the *Loudon* rule because social worker Van Slyke has knowledge of events triggering the litigation against her employer and/or because her conduct forms a basis for that litigation.

While the applicable privileges may differ somewhat in their phraseology, both nurses and social workers, like physicians, are subject to patient privileges that limit their ability to be examined or compelled to testify in a civil action as to information acquired in attending their patients or clients. *See* RCW 5.60.060(4) (physician-patient privilege); RCW 5.60.060(9) (social worker-client privilege); RCW 5.62.020 (nurse-patient privilege). But, whether social workers are subject to any patient privilege or to the exact same patient privilege as nurses or physicians does not bear on the question whether the corporate attorney-client privilege applies to them when they have knowledge of facts giving rise to

litigation against their employer or when their conduct forms the basis for litigation against their employer.

While the fact that social worker Van Slyke is not subject to the physician-patient privilege set forth in RCW 5.60.060(4) may implicate whether the *Loudon* rule prohibiting ex parte communication with a plaintiff's nonparty treating physicians applies to her, it is not determinative of whether the corporate attorney-client privilege applies. Because the *Loudon* rule is premised on the plaintiff's physician-patient privilege and the "sanctity" of the fiduciary physician-patient relationship, its application would seem to depend on whether the health care provider at issue is subject to the physician-patient privilege. But, if the fact that social worker Van Slyke is not subject to the physician-patient privilege is of any moment, it is of moment only to the applicability of the *Loudon* prohibition on ex parte contact. If, as the trial court concluded, social worker Van Slyke does not fall under "the physician-patient [privilege] analysis," 8/11/17 RP 25, that drives the applicability of the *Loudon* rule, then *Loudon* imposes no impediment to defense counsel having privileged ex parte communication with her.

No Washington appellate court has held that the *Loudon* rule applies to social workers or that the social worker-client relationship is equivalent to "[t]he unique nature of the physician-patient relationship,"

that underlies the *Loudon* rule, *see Loudon*, 110 Wn.2d at 681, or that the policy reasons underlying the *Loudon* rule apply equally to the relationship between a plaintiff and a social worker employed by a hospital. But, even if the *Loudon* rule were held to apply to social workers like Ms. Van Slyke, the corporate attorney-client privilege would trump the *Loudon* rule under *Youngs* because social worker Van Slyke is a non-managerial hospital employee who has direct knowledge of events triggering the litigation and whose conduct forms a basis for the litigation.

Whether a hospital's corporate attorney-client privilege applies to a given health care provider agent or employee is not dependent upon whether the agent or employee is subject to the physician-patient privilege or any other patient privilege. Under *Youngs* what matters for purposes of applying the corporate attorney-client privilege to a particular health care provider is whether the health care provider has knowledge of events triggering the litigation.

In *Youngs*, the Court "relied on *Upjohn* to recognize that corporate litigants have the right to engage in confidential fact-finding and to communicate directions to employees whose conduct may embroil the corporation in disputes." *Newman*, 186 Wn.2d at 779. The *Youngs* court adopted the reasoning from *Upjohn* and its "flexible test" to determine whether attorney-client privilege applies to "corporate counsel's commu-

nications” with “nonmanagerial employees.” *Youngs*, 179 Wn.2d at 661 (citing *Upjohn*, 449 U.S. at 389); *see also Newman*, 186 Wn.2d at 779 (Washington Supreme Court has “embraced *Upjohn*’s flexible approach to applying the attorney-client privilege in the corporate client context”).

Upjohn rejected the narrow “control group” test limiting the attorney-client privilege to corporate counsel’s communications with “upper-level management” and held that the privilege can extend to communications with “low-and mid-level employees” that may be “the only source of information relevant to legal advice” because they can “embroil the corporation in serious legal difficulties” “by actions within the scope of their employment.” *Youngs*, 179 Wn.2d at 661-62. Generally, *Upjohn* allows “corporate counsel to have privileged (confidential and private) discussions with corporate employees” “to investigate claims and prepare for litigation.” *Id.* at 651.

In *Youngs*, the Court identified “*Upjohn*’s central policy concern” as facilitating “frank communication about alleged wrongdoing” between corporate employees with knowledge of the “factual background of a legal problem” and corporate counsel investigating “what happened to trigger the litigation.” *Id.* at 664 (internal quotations of *Upjohn*, 449 U.S. at 390, 392, omitted). In other words, the focus of the analysis of corporate attorney-client privilege in *Youngs* is on whether a non-managerial

employee has information relevant to corporate counsel's investigation of the corporation's potential liability, not on the employee's particular job duties. Nothing in *Youngs* suggests that the corporate attorney-client privilege only applies to communications between corporate counsel and non-managerial employees who are physicians. Rather, the rationale of *Youngs* would allow a defendant corporation's counsel to conduct privileged ex parte communications with a nonparty health care provider covered by the *Loudon* rule where the communication (1) meets the general prerequisites for application of the attorney-client privilege; (2) is with an individual "who has direct knowledge of the event or events triggering the litigation"; and (3) concerns the facts of the alleged negligent incident. *Youngs*, 179 Wn.2d at 653.

Here, social worker Van Slyke noted in hospital records that Hermanson had "a high BAL [blood alcohol level] on admission," that she had less than "60 minutes of direct contact with" him and his wife in the emergency department, and that she "consulted with law enforcement." CP 88. Indisputably, social worker Van Slyke has first-hand knowledge of the alleged negligent incident, as the basis for one of Hermanson's claims is the allegation that one or more members of the trauma team improperly disclosed his high blood alcohol level to police. CP 2.

Under such circumstances, it was error for the trial court to so

narrowly apply the flexible approach to the attorney-client privilege set forth in *Upjohn* and adopted in *Youngs* so as to preclude MultiCare's counsel from having privileged ex parte communications with social worker Van Slyke in order to investigate the facts surrounding Hermanson's allegations and to effectively advise and defend MultiCare.

D. The Trial Court Erred in Requiring MultiCare to Seek Leave of Court before Having Ex Parte Communication with "Other MultiCare Health Care Providers."

Neither *Loudon* nor *Youngs* justifies the trial court's order that defense counsel "must seek leave of court prior to ex parte communications" with "other MultiCare healthcare providers." CP 136. To the extent that the *Loudon* rule might generally be applicable to any of MultiCare's other trauma team health care providers, whether physicians or not, under *Youngs*, MultiCare's attorney-client privilege would trump the *Loudon* rule, as the members of the trauma team are the only corporate agents and employees with knowledge of the facts triggering this litigation. And, because none of the trauma team members who treated Hermanson at Tacoma General on September 11, 2015, had any involvement in his care apart from the emergency room visit at issue in this litigation, none of them have irrelevant privileged information to convey to defense counsel. Defense counsel must be allowed privileged confidential communications with the trauma team members in order to

assess MultiCare's potential liability, develop an appropriate litigation strategy, and effectively represent MultiCare in this action.

Nothing in *Loudon* or *Youngs* suggests an intent to require a defendant hospital's counsel to seek leave of court in order to engage in attorney-client privileged ex parte communications with those hospital employees and agents having knowledge of facts giving rise to the controversy. To the contrary, the *Loudon* court, in response to the defendant's suggestion that plaintiffs be required to seek a protective order to limit or prohibit ex parte contact, rejected the notion that the court system should be embroiled in supervision of every such situation. *Loudon*, 110 Wn. 2d at 679.

Nor does anything in *Loudon* or *Youngs* suggest an intent to allow a plaintiff to monitor or interfere with a defendant hospital's counsel's ability, consistent with the corporate attorney-client privilege, to confidentially investigate the factual background of plaintiff's claims so as to appropriately advise and defend the hospital. Indeed, "[a]bsent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance." *Christensen v. Munsen*, 123 Wn.2d 234, 240, 867 P.2d 626 (1994) (quoting *Carson v. Fine*, 123 Wn.2d 206, 220, 867 P.2d 610 (1994)).

The trial court's order requiring defense counsel to obtain court approval before contacting other MultiCare trauma team witnesses improperly infringes on MultiCare's corporate attorney-client privilege and should be reversed.

VII. CONCLUSION

For the above reasons, the trial court's order prohibiting defense counsel from communicating ex parte on a privileged basis with Dr. Patterson and social worker Van Slyke and requiring court approval before they can communicate ex parte with other Multicare health care providers should be reversed and the case remanded with directions to enter an order permitting defense counsel to have attorney-client privileged ex parte communications with any member of the trauma team who provided care to Hermanson on his one visit to the Tacoma General emergency room.

RESPECTFULLY SUBMITTED this 25th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 25th day of May, 2018, I caused a true and correct copy of the foregoing document, “Brief of Appellant/Cross-Respondent MultiCare Health System, Inc.,” to be delivered in the manner indicated below to the following counsel of record:

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s/Carrie A. Custer
Carrie A. Custer, Legal Assistant

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