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NO. 51387-1-II

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.

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

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I. INTRODUCTION

Youngs v. PeaceHealth, 179 Wn.2d 645, 316 P.3d 1035 (2014), teaches that the corporate attorney-client privilege trumps the prohibition of ex parte contact with a plaintiff's nonparty treating physicians set forth in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), where an ex parte interview enables counsel for a corporate defendant "to determine what happened' to trigger the litigation." *Youngs*, 179 Wn.2d at 664. Notwithstanding that teaching of *Youngs*, Mr. Hermanson effectively asks this Court to eviscerate MultiCare's corporate attorney-client privilege in this case.

Based on a distorted and erroneous view of what *Loudon* and *Youngs* say, Mr. Hermanson asks this Court to hold that MultiCare's counsel is not entitled to have attorney-client privileged ex parte contact with any of the trauma team health care providers who, on behalf of MultiCare, provided the emergency room care to Mr. Hermanson that forms the basis for this litigation, even though it is their conduct that gives rise to MultiCare's alleged liability and/or they have firsthand knowledge of events giving rise to the litigation. That is not what *Loudon* and *Youngs* stand for and should not be the law.

Contrary to Mr. Hermanson's assertions, *Youngs* does not hold that the corporate-attorney client privilege does not apply to, or does not trump

the *Loudon* rule as to, a nonparty treating physician such as Dr. Patterson whose conduct gives rise to litigation against a defendant hospital simply because the physician is an agent, rather than a direct employee, of the hospital. Nor does *Youngs* hold that the corporate attorney-client privilege does not apply to a hospital's non-physician health care provider employees or agents whose conduct gives rise to the defendant hospital's alleged liability or who have firsthand knowledge of what happened to trigger the litigation against the hospital. Neither *Loudon* nor *Youngs* specifically considered, much less decided, whether the *Loudon* rule applies to non-physician health care providers and nothing in *Youngs* suggests that the corporate attorney-client privilege cannot apply to them. Mr. Hermanson's insistence that, under *Loudon* and *Youngs*, counsel for a defendant hospital may have privileged ex parte contact only with physician employees, and not with physician agents or non-physician employees or agents of the defendant hospital, is incorrect.

II. FACTUAL REPLY

Many of the factual representations made in Mr. Hermanson's "Respondent's/Cross-Appellant's Brief" (*Resp. Br.*) are inaccurate, are allegations or argumentative assertions passed off as factual truths, or are irrelevant to the issues on appeal – whether *Loudon* prohibits MultiCare's counsel from having, or whether *Youngs* allows MultiCare's counsel to

have, ex parte attorney-client privileged communications with the members of the trauma team involved in Mr. Hermanson's care during the emergency room visit that forms the basis for this litigation. The following are examples of Mr. Hermanson's factual inaccuracies.

First, Mr. Hermanson asserts, *Resp. Br. at 10, 11*, that no one who interacted with him in the hospital – not the police officers, the EMTs, or any of the treating health care providers – detected any signs of intoxication, and that the medical records indicate that he had no such signs. Those assertions, however, are belied by the facts that alcohol intoxication was one of his primary diagnoses, *see, e.g., Appendix to Resp. Br. at 21, 27, 28, 33, 39, 80-88, CP 555*; on admission to the emergency department he had a high blood alcohol level of 330, well over the legal limit, *see, e.g., CP 547, 555, Appendix to Resp. Br. at 24, 32, 38, 44, 62*; and the police report indicates that the police were told that “the odor of intoxicates [sic] was noticeable,” CP 81.

Second, Mr. Hermanson claims, *Resp. Br. at 11*, that “it appears evident Dr. Patterson and [Social Worker] Van Slyke were motivated by some type of personal animus” in communicating with the police. But, noticeably absent from his claim of “personal animus” is any evidentiary support.

Third, despite his claims of illegality, *Resp. Br. at 11, 12*, whether

any disclosure of his health care information to police was illegal is neither a proven nor an undisputed fact. *See, e.g.*, CP 209-11 (MultiCare’s responses to requests for admission); *see also* CP 543 (§6), 556. Nor is it a proven or undisputed fact, as Mr. Hermanson’s claims, *see Resp. Br. at 12*, that any such disclosure caused his house arrest or ankle monitoring, especially in light of the prosecutor’s description at Mr. Hermanson’s arraignment of the serious nature of the accident that led to Mr. Hermanson’s criminal charges, of the public safety threat Mr. Hermanson had posed, and of Mr. Hermanson’s criminal history that included “three prior DUI-related offenses.” CP 90-91.

Fourth, Mr. Hermanson claims, *e.g.*, *Resp. Br. at 4, 7, 13, 15*, that the factual issue or event triggering the litigation is limited to the alleged disclosure of confidential health care information to police. But, the causes of action alleged in his complaint include negligence, defamation or false light, false imprisonment, and violation of the physician-patient privilege, and are based on much broader conduct, including negligent supervision and negligent failure to create or enforce policies or procedures, as well as claims that the information disclosed to police concerning his intoxication was false, and that those making the disclosures had no right or excuse to do so. CP 1-4. Thus, more (about which all of the members of the trauma team have firsthand knowledge) is

at issue to trigger MultiCare's asserted liability than just the alleged disclosure of health care information. Indeed, Mr. Hermanson also claims, *Resp. Br. at 10-11*, that none of the health care providers noted "any sign of intoxication," that "personal animus" motivated the alleged disclosures, and that a "total betrayal" of the "confidential and sensitive" "substance counseling process" occurred that is "worse" than the disclosures. Thus, the breadth of the conduct and facts at issue cannot be so narrowly circumscribed as to encompass only the alleged disclosure of health care information.

Fifth, Mr. Hermanson's assertions, *Resp. Br. at 13-14*, that only Dr. Patterson and Ms. Van Slyke have knowledge of the event triggering the litigation, and that MultiCare has conceded that fact are not true and are contradicted by the record. *See* CP 81,121; 8/11/17 RP 6-7. Even if specific acts of disclosure were the only conduct at issue, which is not the case, the Tacoma Police Department arrest report states that "the doctor" and "a nurse" contacted one of the officers and reported Mr. Hermanson's blood alcohol level, his admission that he had had "a couple beers," and his "noticeable" odor of intoxicants. CP 81. And Social Worker Van Slyke's crisis intervention progress note indicates that she "consulted with law enforcement," CP 88. As MultiCare argued below, this evidence establishes that, in addition to Dr. Patterson and Ms. Van Slyke, the

trauma team nurses, Nurses Wheeler and Defibaugh, “possibly [have] knowledge of interactions with police” and “may have interacted with the police.” 8/11/17 RP at 6-7; *see also* CP 121.

Mr. Hermanson never explains how he knows, or more importantly how MultiCare could know without speaking to those involved in Mr. Hermanson’s emergency room care, that only Dr. Patterson and Social Worker Van Slyke were involved in allegedly disclosing health care information to the police. Indeed, in his pre-suit demand letter, Mr. Hermanson claimed (albeit erroneously) that Dr. Stephanie Wheeler, the MultiCare-employed family practice resident involved in the emergency room care, was the person who allegedly disclosed the health care information. And, in later correspondence, when defense counsel tried to get clarification of whose conduct was at issue, Mr. Hermanson’s counsel insisted that it was every person who violated Mr. Hermanson’s physician-patient privilege – “If a person did not violate the privilege, they are not at issue. If they did, they are. You tell me. Simple.” CP 35. Yet, Mr. Hermanson has never been able to explain how MultiCare’s counsel would be able to identify every person who violated the privilege if MultiCare’s counsel is precluded from speaking with anyone involved in the emergency room care other than MultiCare-employed physicians.

Sixth, contrary to Mr. Hermanson's claims, *Resp. Br. at 13*, MultiCare's arguments below, *see, e.g.*, CP 17-19, and on appeal, *see, e.g.*, *App. Br. at 39-41*, did not and do not rely on a claim that "other providers may have useful information." Because the complaint can be read to target the conduct of any one or more of the six trauma team members who provided care to Mr. Hermanson, and relevant documentary evidence indicates that at least three of them may have had some contact with police, corporate counsel would "find it extremely difficult, if not impossible," to investigate Mr. Hermanson's claims, "to determine what happened" to trigger the litigation," and to adequately assess and advise MultiCare as to its potential corporate liability if not allowed to speak with the individuals whose conduct is at issue or who witnessed matters at issue. *Youngs*, 179 Wn.2d at 662 (quoting *Upjohn Co. v United States*, 449 U.S. 383, 392, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1991)).

Finally, Mr. Hermanson claims, *Resp. Br. at 14*, MultiCare failed to present evidence other than hearsay to establish that it had entered into a joint representation agreement with Dr. Patterson, PA-C Boeger, and Dr. Wheeler, or that Dr. Patterson "wanted" such representation. But, defense counsel, who was a party to the agreement, presented declaration testimony describing the agreement and its signatories and offered to produce a copy for *in camera* inspection. CP 22, 118-19, 124. Mr.

Hermanson fails to identify any authority suggesting that counsel's declaration was insufficient to support MultiCare's description of the joint representation.

Ultimately, what is not in dispute that is of pertinence to the issues on appeal are the facts that (1) the only health care at issue in the litigation is the emergency room care the trauma team provided to Mr. Hermanson at MultiCare's Tacoma General Hospital on September 11, 2015; (2) the members of the trauma team who provided that care on behalf of MultiCare were Dr. Patterson and PA-C Boeger, who were employed by MultiCare's corporate affiliate, Trauma Trust, and were admitted agents of MultiCare, and Dr. Wheeler, Nurses Wheeler and Defibaugh, and Social Worker Van Slyke, who are MultiCare employees, and (3) none of those trauma team members provided care to Mr. Hermanson at any time before or after the September 11, 2015 emergency room visit or had an ongoing relationship with him as a patient. CP 2, 10-11, 124-25, 129, 153-54, 167-68, 210, 470-72, 474-84, 542-45. Those are the key facts needed to resolve what is at issue on this appeal – whether MultiCare's counsel is able to have attorney-client privileged ex parte communications with any or all of the trauma team members.

III. ARGUMENT IN REPLY

A. Mr. Hermanson Mischaracterizes MultiCare's Arguments.

Throughout his nine-page introduction, *Resp. Br. at 1-9*, his statement of facts, *id. at 9-14*, and his argument, *id. at 14-50*, Mr. Hermanson repeatedly mischaracterizes MultiCare's arguments on appeal, as well as its actions before the trial court and its motivations in general. For example, he incorrectly asserts that MultiCare: (1) "ignores the reasoning of both *Loudon* and *Youngs*," *Resp. Br. at 5*; (2) "wants this Court to rewrite *Youngs*," *id. at 1*; (3) "argues a hospital can circumvent *Youngs* as long as it can persuade witnesses to agree to be represented by the hospital's attorney," *id. at 5*; (4) is "asking this Court to save it from an untenable situation it created itself," *id. at 8*; and (5) "wants full contact, on all topics, with every hospital employee providing health care without regard to whether they had 'firsthand knowledge' of the triggering event," *id. at 13*.

To the contrary, MultiCare has consistently argued that: (1) Mr. Hermanson's allegations of liability against MultiCare place in issue the emergency room care the MultiCare trauma team members provided to him on September 11, 2105; (2) defense counsel must be allowed to talk to the trauma team members who provided that care on behalf of the hospital in order to defend both MultiCare, and the other clients (Dr. Patterson,

PA-C Boerger, and Dr. Wheeler) they were retained to jointly represent; (3) *Youngs* trumps the *Loudon* rule and ensures that defense counsel's contact with members of the trauma team will be protected by the attorney-client privilege because the trauma team members provided the medical care at issue, engaged in the conduct that gives rise to MultiCare's alleged liability, and/or have firsthand knowledge of the facts giving rise to the litigation; (4) neither *Loudon* nor *Youngs* says what Mr. Hermanson's claims – *i.e.*, that a defendant hospital's counsel may only have privileged *ex parte* contact with physicians who are directly employed by the hospital, and not with physician agents of the hospital or other non-physician employees or agents of the hospital; and (5) there is nothing untoward about MultiCare's, Dr. Patterson's, Dr. Wheeler's, and PA-C Boerger's entry into a joint representation agreement. *See* CP 15-19, 119-22, 152-64; *App Br. at 12-41*.

B. *Loudon* Only Addressed Defense Counsel's Ability to Have Ex Parte Contact with Plaintiff's Nonparty Treating Physicians, Not with Other Nonparty Treating Health Care Professionals.

Mr. Hermanson repeatedly mischaracterizes *Loudon* and overstates its reach, claiming that its prohibition on *ex parte* contact applies to the very physicians whose conduct forms the basis of the litigation, as well as all non-physician health care providers. *See, e.g., Resp. Br. at 22, 25-28, 29, 33-34*. But, the question presented in *Loudon* was limited to whether

defense counsel could have ex parte contact with two particular treating *physicians* who provided care to the patient in a different state after the events triggering the lawsuit had occurred. *Loudon*, 110 Wn.2d at 676. It is obvious from the *Loudon* court's statement of facts that the two physicians at issue there did not provide the health care giving rise to the litigation, were not present when that health care was provided, and did not have any kind of employment or agency relationship with any defendant in the lawsuit. *Id.* And, the *Loudon* court's analysis did not consider or address whether its holding would or should be extended to other treating health care providers such as nurses or social workers.¹ *See id.* at 677-82.

Relying on cases analyzing criminal defendants' claims that the testimonial physician-patient privilege in RCW 5.60.060(4) can apply to non-physicians in certain circumstances,² Mr. Hermanson asserts, *Resp.*

¹ Contrary to Mr. Hermanson's assertions, *Resp. Br. at 25*, MultiCare did raise below the issue of whether the *Loudon* rule applies to non-physician health care providers. *See CP 16-18, 120.*

² *See State v. Cahoon*, 59 Wn. App. 606, 610-11, 799 P.2d 1191 (1990) (because no physician was in attendance when EMT responded to defendant's home and asked her about drug she admitted to taking, statutory physician-patient privilege did not apply); *State v. Gibson*, 3 Wn. App. 596, 598-600, 476 P.2d 727 (1970) (police guard who was present during medical exam to protect jail physician and detain patient in custody was deemed to be the agent of the physician, such that his testimony at trial violated RCW 5.60.060(4)); *State v. McCoy*, 70 Wn.2d 964, 965-66, 425 P.2d 874 (1967) (because no physician was present and no physician "had yet been in attendance or had seen the patient" when an emergency room nurse found a package of narcotics in his sock, the physician-patient relationship "had not yet been effected" and RCW 5.60.060(4) did not prevent the nurse from testifying at patient's criminal trial for unlawful possession of narcotics).

Br. at 25-27, that “[a]ll health care providers at MultiCare” were bound by the privilege that “attached” when Dr. Patterson first saw Mr. Hermanson within minutes of his arrival at Tacoma General.

But, *Loudon*’s prohibition on ex parte contact with plaintiff’s treating physicians did not rely on such criminal case authority interpreting the testimonial statutory privilege, which by its terms prohibits trial testimony and is necessarily waived at least as to “medical information relevant to the litigation” when a patient puts his physical condition in issue. *Loudon*, 110 Wn.2d at 678; *see, e.g., Cahoon*, 59 Wn. App. at 611-12 (physician-patient privilege does not preclude use of defendant’s statements to EMT to establish probable cause for issuance of search warrant). Instead, based on policy concerns underlying the physician-patient privilege, the *Loudon* court created the *Loudon* rule to prevent the “disclosure of irrelevant, privileged medical information” during pre-trial ex parte interviews by defense counsel of a plaintiff’s nonparty treating physicians who were not involved in the events triggering the litigation. *Loudon*, 110 Wn.2d at 678. In particular, it was policy concerns, not the applicability of the testimonial statutory privilege as interpreted by the courts on a case-by-case basis, that justified creating a rule to preserve the “unique” “fiduciary confidential relationship which exists between a physician and patient.” *Loudon*, 110 Wn.2d at 681.

Nothing in *Loudon* suggests that defense counsel representing a physician whose conduct is at issue in a medical negligence lawsuit cannot speak to that physician. And nothing in *Loudon* suggests that its prohibition on ex parte contact was intended to apply to non-physicians, much less non-physicians whose conduct is at issue in a lawsuit, whether or not a physician was also present. As *Youngs* makes clear, *Loudon* did not address the attorney-client privilege. See *Youngs*, 179 Wn.2d at 652-53. Thus, contrary to Mr. Hermanson's repeated unsupported assertions, *Loudon* alone does not resolve the questions raised either in his cross-appeal from the portion of the trial court's order that allows MultiCare's counsel to have privileged ex parte contact with Nurses Wheeler and Defibaugh or in MultiCare's appeal from the portions of the trial court's order that prohibit its counsel from having ex parte contact with Dr. Patterson and Social Worker Van Slyke and requires MultiCare's counsel to seek court approval before speaking with any of the other trauma team members.

C. *Wright v. Group Health Hospital Does Not Resolve the Issues Involved in this Appeal.*

Mr. Hermanson claims, *Resp. Br. at 17-21*, that consideration of *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), is necessary, but also argues that the "outcome of this case" does not depend

on application of *Wright* “without modification,” whatever that means, or on a “reconciliation” of *Wright*, *Upjohn*, and *Youngs*. In essence, he conflates the interpretation of the term “party” in attorney disciplinary rules with that of “client” in the context of the corporate attorney-client privilege, *Resp. Br. at 16-19, 29*, in a misguided effort to support his theory that only employees, rather than agents, can be covered by a corporation’s attorney-client privilege, *id. at 18-19, 29*. But, *Wright* made clear the distinction: “the *Upjohn* Court was expanding the definition of “clients” so the laudable goals of the attorney-client privilege would be applicable to a greater number of corporate employees,” while the disciplinary rule places limits on opposing counsel’s contacts with a represented “party” “to protect the corporation so its agents who have the authority to prejudice the entity’s interests are not unethically influenced by adverse counsel.” *Wright*, 103 Wn.2d at 202. The issue in *Wright* was “[w]hich of the corporate party’s employees should be protected from approaches by adverse counsel?” *Id.* at 197. Although the *Wright* court considered the implications of the attorney-client privilege on that issue, it ultimately concluded that the privilege itself would not prevent plaintiff’s counsel from interviewing the defendant corporation’s employees because plaintiff’s counsel was seeking to interview them concerning the facts of the case, not concerning privileged corporate confidences. *Id.* at 194-95.

In contrast, this case involves the corporate attorney-client privilege, but does not involve attorney disciplinary rules preventing adverse counsel from contacting a represented “party.” *Wright* has no application here, as both *Loudon* and *Youngs* reveal. *Loudon*, 110 Wn.2d at 681 (*Wright* resolved different questions and did not address policy concerns involved in defense counsel’s contacts with plaintiff’s treating physicians); *Youngs*, 179 Wn.2d at 652 (rejecting the suggestion that *Wright* resolves the conflict between the *Loudon* rule and the corporate attorney-client privilege).

D. *Youngs* Did Not Involve and Does Not Require Application of the Loudon Rule to Non-Physicians or Non-Employee Physicians.

Pointing to language in the trial court’s order in one of the two cases decided in *Youngs*, Mr. Hermanson asserts, *Resp. Br. at 2-3, 23-24*, that health care providers who are not physicians and physicians who are not employees cannot be covered by a defendant corporation’s attorney-client privilege. Asserting that this is the “most important issue on appeal” and one upon which “MultiCare should not be allowed to offer an argument,” Mr. Hermanson claims, *Resp Br. at 23-24*, that the *Youngs* court “would have left intact the trial court’s order allowing contact with all the hospital’s employees” if it had intended to allow privileged ex parte contact with anyone other than “physician-employees.” But, Mr.

Hermanson's claim in that regard is premised on something the *Youngs* court did not address, much less rule upon. He cites no authority to support his theory that *Youngs* should be interpreted based on something it does not even say.

Contrary to Mr. Hermanson's claims, *Resp. Br. at 24*, the *Youngs* court did not prohibit contact "with anyone other than 'physician-employees.'" Rather, the *Youngs* court (1) affirmed "the portion of the trial court's order permitting defense counsel's ex parte communications with Mr. Youngs' nonparty treating physicians, but only as to those physicians who have firsthand knowledge of the alleged negligent incident and only as to communications about the facts of that incident," and (2) reversed only "the portion of that order permitting ex parte communications with Mr. Youngs' other nonparty treating physicians (those lacking firsthand knowledge of the alleged negligent incident) and with any of Mr. Youngs' nonparty treating physicians on topics other than the facts of the alleged negligent incident." *Youngs*, 179 Wn.2d at 672. Nowhere does *Youngs* hold that the corporate attorney-client privilege cannot apply to non-physician health care providers or to physicians who are agents, rather than employees, of the defendant hospital.

As MultiCare explained in its opening brief, *see App. Br. at 24-31, 33-39*, nothing in *Youngs* suggests that a corporation's attorney-client

privilege only reaches physicians directly employed by the corporation. Nor can the opinion rationally be construed to create such a limited rule. In both consolidated cases considered in *Youngs*, the plaintiffs only objected to defense counsel's ex parte contacts with "physicians" other than those whose conduct gave rise to their claims. *Youngs*, 179 Wn.2d at 654-56 (plaintiff *Youngs* did not object to contact with Drs. Leone and Berry, the "physicians whose conduct gave rise to his lawsuit," but objected to contact with "any other physician who treated him"; plaintiff Glover initially objected to contact with her "treating physicians at Harborview outside the emergency department" and then withdrew her objection to "any of the [Harborview] Emergency Department or Cardiology staff ... involved in [her] care, so long as those individuals were not shown any records of her subsequent care [at UWMC]").

Nothing in *Youngs* suggests that either plaintiff objected to defense counsel's contact with any non-physician health care provider or even claimed that the *Loudon* rule applied to non-physician health care providers. Nor does anything in *Youngs* suggest that either plaintiff argued for any distinction to be drawn based upon whether a physician whose alleged conduct is at issue and gives rise to the hospital's alleged liability was an agent, rather than a direct employee, of the hospital.

Loudon did not address the applicability of the ex parte contact prohibition to non-physician health care providers, and *Youngs* did not hold that the corporate attorney-client privilege would not apply to them. Thus, neither case supports Mr. Hermanson's claims, *see, e.g., Resp. Br. at 3-4, 9, 15, 25-28, 43-47*, that the trial court erred in allowing MultiCare's counsel to have privileged ex parte contact with Nurses Wheeler and Defibaugh, and properly precluded MultiCare's counsel from having such contact with Social Worker Van Slyke, simply because they were not physicians.

And, *Youngs* did not address the employment status of any of the physicians the parties identified as the subject of the motions for protective orders at issue. *See Youngs*, 179 Wn.2d at 654-56 (identifying physicians at issue as those "who treated [Youngs] at St. Joseph," "treating physicians at Harborview," Harborview "staff" "involved in [Ms. Glover's] care," and "treating physicians at University of Washington Medical Center"). Although the opinion refers repeatedly to "corporate employees," *see, e.g., id.* at 661, it also repeatedly states its holding adopting a modified version of the *Upjohn* flexible test to determine the application of the attorney-client privilege without using the term "employee," *see, e.g., id.* at 653, 664-65.

In other words, the Court did not consider whether a different rule would apply if the physicians who treated the plaintiffs at the identified hospitals were independent contractor agents, rather than direct employees, of those hospitals. If the Court had meant to limit application of the corporate attorney-client privilege to corporate employees, but not other corporate agents, it would have so stated. Mr. Hermanson's claim to the contrary is also contradicted by the Supreme Court's later recognition in *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 780-81 & n.3, 381 P.3d 1188 (2016), that the corporate attorney-client privilege extends to "constituents and agents" of a corporation, which "can only act through" such "constituents and agents."

Moreover, although one of the trial court orders reviewed in *Youngs* referred to hospital "employees who provided health care to" the plaintiff, it is clear from the opinion that the application of the attorney-client privilege turned on whether each particular physician had knowledge of events triggering the litigation rather than on the physician's employment status. *Youngs*, 179 Wn.2d at 671-72. In particular, the Court affirmed the "portion of the trial court's order permitting" contact with "Mr. Youngs' nonparty treating physicians, but only as to those physicians who have firsthand knowledge of the alleged negligent incident," and reversed the portion of the order permitting contact with

“other nonparty treating physicians (those lacking firsthand knowledge of the alleged negligent incident) and with any of Mr. Youngs’ nonparty treating physicians on topics other than the facts of the alleged negligent incident.” *Id.* at 672. The Court also affirmed the trial court order prohibiting defense counsel from contacting plaintiff Glover’s “treating physicians at University of Washington Medical Center,” “[b]ecause these physicians were not present when the alleged negligent incident occurred at Harborview.” *Id.* at 671. In other words, the Court only prohibited contact with respect to certain physicians, not non-physician health care providers, and did so without any reference to the physicians’ employment status.³

Despite the clarity of the remand directions in *Youngs*, and unlike both plaintiffs in *Youngs*, Mr. Hermanson claims that MultiCare’s defense counsel cannot have ex parte contact with a physician (Dr. Patterson) who he acknowledges, *e.g.*, *Resp. Br. at 13*, is a physician whose conduct is at issue, and who was present during and has firsthand knowledge of the alleged negligent incident. Nothing in *Youngs* supports his claim that such

³ Even the dissenting justices in *Youngs* would have remanded with instructions to prohibit only ex parte contact with “physicians” and to explicitly allow such contact with “Dr. Richard Leone and Dr. Donald Berry,” the two physicians “whose conduct gave rise to [Youngs’] lawsuit,” *Youngs*, 179 Wn.2d at 654, 683, and whose roles in the conduct triggering litigation is equivalent to Dr. Patterson’s role here.

a result is required simply because Dr. Patterson is an agent, rather than a direct employee, of MultiCare.

In sum, MultiCare asks this Court to follow *Youngs* and conclude that any objections by Mr. Hermanson based on *Loudon* to ex parte contact between defense counsel and the members of the trauma team whose care is at issue and/or who have knowledge of the facts giving rise to the litigation “must yield” to MultiCare’s attorney-client privilege and/or Dr. Patterson’s individual attorney-client privilege. Based on *Youngs*, this Court should reverse the portion of the trial court’s order that precludes MultiCare’s counsel from having attorney-client privileged ex parte contact with Dr. Patterson and Social Worker Van Slyke, both of whose alleged disclosures form a basis for the litigation against MultiCare and both of whom Mr. Hermanson concedes have knowledge of events triggering the litigation. This Court should also affirm that portion of the court’s order that allows MultiCare’s counsel to have privileged ex parte contact with Nurses Wheeler and Defibaugh, and reverse the portion of the order that requires MultiCare to seek leave of court before having privileged ex parte contact with other members of the trauma team involved in Mr. Hermanson’s emergency room care, as all of them, even if they did not make any disclosures to the police, still have knowledge of

facts concerning matters and events triggering the litigation that arises out of Mr. Hermanson's emergency room visit.

E. *Loudon and Youngs Do Not Prevent MultiCare and Dr. Patterson from Being Jointly Represented.*

Accusing MultiCare, Dr. Patterson, and defense counsel of subterfuge, Mr. Hermanson claims, *Resp. Br. at 34-40*, that they are "ethically restricted" from entering into a joint representation agreement and that they cannot waive ethical duties they owe to Mr. Hermanson by entering into such an agreement. However, all of these claims are premised on Mr. Hermanson's erroneous assertion that, under *Youngs*, MultiCare's counsel may have attorney-client privileged ex parte contact only with physician employees, and not with physician agents or non-physician employees or agents, of MultiCare, who have knowledge of facts giving rise to the litigation or whose conduct gives rise to MultiCare's alleged liability. Because Mr. Hermanson's view of the rationale and holding of *Youngs* is incorrect, his attacks on the joint representation agreement on that basis must fail.

Even if Dr. Patterson, PA-C Boeger, or Dr. Wheeler had been involved in treating Mr. Hermanson sometime prior or subsequent to the emergency room visit triggering the litigation, which they were not, the mere fact that, under *Youngs*, 179 Wn.2d at 664-65, the *Loudon* rule

would bar MultiCare's counsel from interviewing them about that prior or subsequent care would not necessarily preclude MultiCare's counsel from jointly representing them in connection with this litigation. *See* RPC 1.7. Nothing in *Loudon* or *Youngs* suggests that the Court intended to adopt new ethics rules concerning joint representation or to restrict hospitals from entering into joint representation agreements with physicians whose conduct on behalf of the hospital forms the basis of the litigation against it, simply because the plaintiff chose not to sue the physician individually.

IV. CONCLUSION

For the reasons stated above and those set forth in MultiCare's opening brief, MultiCare's counsel should be permitted to have ex parte attorney-client privileged communications with any member of the trauma team who provided care to Mr. Hermanson during his visit to the Tacoma General emergency room. Therefore, this Court should: (1) reverse the portions of the trial court's order that prohibit defense counsel from having attorney-client privileged ex parte contact with Dr. Patterson and Social Worker Van Slyke; (2) affirm the portions of the trial court's order that allow defense counsel to have attorney-client privileged ex parte contact with Nurses Wheeler and Defibaugh; and (3) reverse the portion of the trial court's order that requires defense counsel to obtain trial court approval before communicating ex parte with other MultiCare health

providers involved in Mr. Hermanson's care in the one emergency room visit that is at issue in this case.

RESPECTFULLY SUBMITTED this 7th day of August, 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 7th day of August 2018, I caused a true and correct copy of the foregoing document, "Reply 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

FAVROS LAW

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