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No. 97783-6

THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DOUG HERMANSON, an individual,

Respondent/Cross-Appellant,

vs.

MULTICARE HEALTH SYSTEM d/b/a TACOMA GENERAL  
HOSPITAL, a Washington Corporation

Appellant/Cross-Respondent.

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REPLY TO AMA'S AND WASHINGTON MEDICAL  
ASSOCIATION'S AMICUS CURIAE BRIEF

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## 1. Overview

Amicus' brief presents two related, albeit different issues: whether Youngs covers (1) non-employees, and (2) employee, non-physicians.

On the first, even with the benefit of respondent's brief, Amicus does not deny the import of what they seek is a privilege that healthcare corporations may unilaterally create after the fact.

A corporation may defend claims such as this arguing they have no liability for an independent contractor. See Stout v. Warren, 176 Wn.2d 263, 269 (2012) ("The general rule in Washington is that a principal is not liable for injuries caused by an independent contractor whose services are engaged by the principal.")<sup>1</sup> MultiCare could have done so, particularly given the contract whereby it and Dr. Patterson disclaimed being each-others' agent.

Instead, by clever use of a word created out of whole cloth, the "admitted agent," MultiCare and Amicus assert they can unilaterally create a privilege as a litigation strategy by deciding after the fact the disadvantage of accepting liability for an independent contractor is outweighed by the desire to have ex parte contact with that doctor to the patient's detriment.

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<sup>1</sup> There are other paths to liability such as "ostensible agency." Adamski v. Tacoma General Hospital, 20 Wn.App. 98, 115 (1978). However, the presence of ostensible agency does not mean there was actual control by the principal over the agent; it only serves to prevent a deception being perpetrated whereby an injured person is led to believe there was control that was lacking in-fact. Id. and D.L.S. v. Maybin, 130 Wn.App. 94, 101 (2005) ("The doctrine is intended to protect third parties who justifiably rely upon the belief that another is the agent of a principal.") Citing the Restatement (Second) of Agency.

The flaw of Amicus' argument is as simple as this: (1) If MultiCare decided to defend by arguing it had no liability for Patterson because he was an independent contractor, he would not be a so-called "admitted agent" and the basis for the asserted privilege would cease to exist; (2) at law and in those parties' contracts, a principal generally is not liable for the conduct of an independent contractor; thus (3) it was only MultiCare's litigation decision, after the tortious conduct and after being sued, to accept liability for Patterson's conduct that is the sole basis for the alleged privilege.

That is not how privilege works. Privilege either exists or it does not. It may be permissible to waive a privilege. However, the notion that whether a privilege exist in the first instance is up to a subjective, unilateral, after the fact decision by a litigant is antithetical to what privileges are; a privilege is not a pair of socks to take off or put on as it suits. Thus, the very argument Amicus and MultiCare make, that MultiCare admitted after the fact to accept liability for Patterson and *that* is what created a privilege, when before the fact it disclaimed responsibility for him, is the very best argument of why there is no privilege. Parties are held to the contracts they agree to. See Yakima County Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 389 (1993).

The work of hospitals and physicians is critical. That has been made even more clear by recent events. At all times they should be thanked and

respected for the work they do. Respondent and counsel thank them.

However, their arguments for further evisceration of Loudon to the point it ceases to exist do not withstand objective scrutiny and are often without a basis in fact or law.

Additionally, Amicus ignore the perils they assert exist by not extending privilege to independent contractors can easily be remedied by hospitals making a different business decision on the front end.

There is no law compelling hospitals to use independent contractors. MultiCare could have directly employed Dr. Patterson (or someone) if it chose. Instead, it made the business decision it was more advantageous to engage an independent contractor. MultiCare recognized benefits including not paying him as an employee, not having to pay payroll tax, nor any entanglements of employing a person. That may be beneficial to a hospital's bottom line, but the notion independent contractors are the only way to staff hospitals is not only not in the record, it is contrary to common sense.<sup>2</sup>

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<sup>2</sup> This entire line of argument is, while Amicus does not come out and say it, a request that this Court create a privilege because of an alleged public health necessity. Not only has Amicus and MultiCare not demonstrated the premise is true (that health care would suffer if hospitals cannot use independent contractors to staff hospitals) neither Amicus or MultiCare cite authority that a public health necessity may provide the basis for this Court to create such a privilege even if true. In Senear v. Daily-Journal American, 97 Wn.2d 148 (1982) this Court discussed “four fundamental conditions necessary to the establishment of a privilege by the court against the disclosure of communication.” Id. at 153. It is sufficient to observe here that Amicus has not briefed much less colored those conditions and that even if this Court wanted to take that task on for Amicus contrary to RAP 12.1(a), they are clearly not present.

MultiCare could have employed Dr. Patterson on a part-time basis if it only needed certain hours for coverage. A hospital need only decide to pay.

It could be conceded for the sake of argument (albeit there is no evidence) it is more expensive for a hospital to utilize an employee versus an independent contractor. However, for a hospital that is negligible. In 2018 MultiCare's revenue was \$2.98 billion with net income of \$1.5 billion.<sup>3</sup> This non-profit paid its 9 primary corporate officers, \$6,481,910 and its CEO \$2.1 million. *Id.*<sup>4</sup> Even if MultiCare paid \$50,000 a year more to have Dr. Patterson as a direct employee, versus an independent contractor, it is suggested it could have done that without impacting public health.

Issues of privilege are always somewhat arbitrary. RCW 5.60.060(1) provides spousal privilege for a couple married in Las Vegas for 1 day, but not to a couple living together 30 years. *See State v. Denton*, 97 Wn.App. 267, 270 (1999).<sup>5</sup> Arguably there is no reason for the distinction and the latter may have a more compelling argument to have a privilege. Yet, such distinctions are made because: (1) every privilege is a construct, and (2)

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<sup>3</sup><https://projects.propublica.org/nonprofits/organizations/911352172/201923049349301247/full>, May 20, 2020.

<sup>4</sup> *Id.*, p. 8-9, based on individuals 10-18.

<sup>5</sup> The Court held although a license by the State is not required, there must be some outward affirmance by "proper form and solemnities" demonstrating an intent to be bound as spouses. *See also State v. Avila-Cardenas*, 200 Wn.App. 1025, 11 (2017), 2017 WL 3588946. Merely living together does not suffice. *Id.*

clarity is required if the privilege is to have meaning. This case is no different. That it involves doctors and hospitals does not distinguish it.

2. **Loudon Applies To All Treating Physicians Without Regard To The Types Of Claims Made**

At page 6-7 Amicus argues Loudon only applies to “physicians whose care and treatment was not at issue in the litigation.” (cite from Amicus brief, not from Loudon). It is true the doctors in Loudon were not alleged to have been negligent. However, the policy issues identified Loudon were broad and not limited to negligent doctors.

Loudon found, for reasons that need not be stated here, ex parte contact with a treating physician is such an injury and peril to a patient, doctor, and the system of justice it is forbidden. If it was Loudon’s intention that was only true in third-party personal injury claims: (1) Loudon would have said that, and (2) Youngs would have said that and moved on. Instead, the majority in Youngs spent substantial time attempting to reconcile Loudon with Upjohn. Youngs took it as established Loudon applies to claims where the hospital’s doctor was alleged to have fault.

3. **Amicus’ Argument That Hospitals Can Contract Around Patient Privileges Is Frivolous**

If a patient has a privilege with their treating provider prohibiting ex parte contact by an adverse defense attorney, the hospital and the doctor cannot deprive the patient of it by a subterfuge – particularly one that only

serves the hospital and doctor.

The right belongs to the patient. Neither the hospital or the doctor have the ability to take away a right, that does not belong to them in the first place. Continued argument on this point is frivolous.

The two workarounds offered by Amicus do not withstand scrutiny.

First, Amicus argues “there is nothing in the rules of professional conduct” that gives rise to a conflict. (1) Even if correct, that something may not be a violation of the RPCs does not standing alone make it permissible, much less desirable. (2) Amicus ignores that even if an attorney might not have a conflict representing the doctor, if the patient has a right to not have their doctor engage in ex parte contact with the attorney, the doctor cannot waive their patient’s right and is precluded from speaking with the lawyer. Thus, even if the attorney might not be directly conflicted, the doctor would be barred from speaking with their attorney. Being prohibited from speaking with their client would be more than a small restriction of an attorney’s duty to zealously advocate for their client. See RPC 1.9 and *Hawkins v. King Co. Dept. of Rehab. Serv.*, 24 Wn.App. 338, 341-342 (1979) (applying CPR Canon 7). Finally, (3) and while respondent does not rely on this, the attorney would be conflicted. Any number of RPCs would take a dim view of an attorney inducing a doctor to violate a privilege owed to a patient, for the benefit of the lawyer’s client. See (1) RPC 3.4(c) prohibiting disobeying an

“obligation under the rules of a tribunal.” (2) RPC 4.1(a) making “a false statement of material fact.” Or, (3) RPC 8.4(d) “engaging in conduct that is prejudicial to the administration of justice.” There are others.

Inducing a doctor to violate privilege by ex parte contact: (1) requires the attorney to disobey the “obligation” imposed by Loudon to not have it even if the doctor may agree; (2) could be the “making of a false statement” if the attorney tells the doctor or implies the contact is appropriate; and (3) contact not allowed by law is “prejudicial to the administration of justice.”

None of those restrictions are cured by the attorney and the doctor agreeing to have the contact.

Second, albeit specific to this case, Amicus is wrong “nothing in the record indicates they (Patterson and MultiCare) did not validly consent to joint representation.” This fails for two reasons. (1) Even if true it is moot; they cannot waive the patient’s right that does not belong to them. (2) Amicus forgets the party asserting privilege has the burden of proving it. See Soter v. Cowles Pub. Co., , 745 (2007). As the Court of Appeals noted, there is no evidence Dr. Patterson consented. Revealing what is driving this, it was the hearsay of the hospital’s risk manager and insurance defense attorney making the assertion; this is being driven by the hospital’s carrier, not Dr. Patterson.

Third, Amicus at page 8 identifies reasons why Dr. Patterson might need a lawyer, asserting “even without being named as” a defendant, an

adverse jury finding could have consequences for Dr. Patterson. Those may be reasons why Dr. Patterson should have a lawyer. However, that does not mean he must have the same lawyer as the hospital.

This case reveals many subterfuges often ignored where corporations are involved. Respondent asks this court bring sunlight to them. The subterfuge revealed here is that employees of corporations (including hospitals) have equal bargaining power with their employers. For instance, that when an employee or independent contractor is told: here is our attorney, she/he is going to represent you, 'if that is that okay with you,' that the employee really has the ability to say no.

It could be conceded Dr. Patterson needed an attorney. And, it may be MultiCare and Dr. Patterson had the same insurance carrier. It may also be true the carrier had a duty to retain an attorney for Dr. Patterson.

If so, instead of being – Mr. Hermanson will be charitable and say frugal - and trying to save a few dollars by hiring only one lawyer, the insurance carrier should have hired MultiCare and Dr. Patterson their own attorneys. That would have addressed all the issues Amicus identifies that arise from Dr. Patterson needing an attorney without violating his privilege with Mr. Hermanson. It also reveals the fallacy of this entire line of argument: that Dr. Patterson needed an attorney, it had to be the hospital's attorney, so a privilege should be gerrymandered to allow that to happen.

What this case really reveals is hospitals and their carriers would like to sweep everyone within a hospital under the same umbrella, hire one law firm despite the conflicts and entanglements that creates, and have this court rubberstamp that by gerrymandering a privilege.<sup>6</sup>

Far from Mr. Hermanson desiring to use privilege “as a sword, rather than as shield” as Amicus asserts at page 9, MultiCare and Amicus seek that by piercing Mr. Hermanson’s protection under Loudon by the after the fact, litigation decision made by MultiCare.

**4. The Court Of Appeals Did Not Err In Its Application Of Newman**

Amicus argues at page 11 Newman is distinguishable because “it was the absence of an ongoing agency relationship, and consequent inability of the principal to control the agent” that was key in Newman. Amicus reasons

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<sup>6</sup> Amicus asserts related to this that if Dr. Patterson had his own attorney, communications between him and the hospital’s attorney would be privileged under a joint defense theory therefore it should make no difference whether those conversations happen in that context or in the context of retaining only one lawyer. That fails for all the same reasons.

Amicus ignores that the application of multiple privileges is much like the application of multiple layers of hearsay. It may be that the hearsay contained in a document is admissible, but all layers of hearsay must find an exception: both the hearsay within the document, and the hearsay of the document itself. Privilege is little to no different. It may be that under a joint defense theory, one party may speak with another and have that be privileged. It may be if given certain facts, a doctor could speak with a hospital’s attorney and that would be protected by a joint defense privilege. However, that only satisfies one layer of the issue. Amicus ignores that to even have the conversation that might be subject to a joint defense privilege, it must be permissible to have the conversation in the first place. If the contact is barred – regardless of the reason (be it Loudon or anything), the contact is barred in the first place. The fact that if contact was permissible it would be privileged does not excuse the fact the contact was barred. This is a fair example of how Amicus and MultiCare persistently place these issues on their head, or said another way, approach them in reverse. That is flawed as it allows them to ignore there are antecedent barriers in place.

that is not true here thus Division II erred holding Newman's not extending privilege to former employees applies to Patterson.

That fails for two reasons.

First, hospitals and Amicus cannot have it both ways. Either they use independent contractors, with the benefits and burdens of it, or not. If they do, they do not have the control Amicus asserts MultiCare had (or hospitals in general) to bring them within Newman. That level of control is antithetical to what utilizing an independent contractor requires. Stout, supra. Amicus should not ask this Court to ignore one-hundred years of agency law.

Second, Amicus ignores what it concedes Newman held is the distinguishing factor between former and current employees, is the evidence in this case given the Physician's Trust contract. MultiCare and Patterson expressly said they were not agents of, and did not control, each other.

Instead of acknowledging the lack of relationship MultiCare had at the time it matters (while Patterson was involved in the conduct), Amicus seizes on the relationship MultiCare wishes it had after being sued to argue MultiCare might be able to control Patterson in litigation, arguing at page 11: "there is no evidence MultiCare lacked authority to require him to disclose information to its lawyers..." That fails for three independent reasons.

(1) It is the relationship the parties had at the time of the events in question that is determinative, not the relationship MultiCare would like to

have after being sued. The cases Amicus cite examine the agent's relationship *at the time* of the tortious conduct. Arguing MultiCare wants a confidential relationship now, as the reason it should be allowed one, is circular. (2) Amicus again ignores the burden of proof. Amicus may not point to a lack of contrary evidence and say that means the affirmative must be true. It must point to evidence in the record proving the argument it makes because it (MultiCare) is the party asserting the existence of a privilege. (3) This is simply a recycle of the same argument that because MultiCare admitted liability after the fact for Patterson, he was its agent. It is without merit.

Finally, Amicus recycles the argument made in its brief asking this Court to accept review, based on inapposite authority from the Eighth Circuit. Amicus provides nothing new here and Mr. Hermanson already revealed the flaw in that analysis. (See Answer to Amicus Curiae Brief, p. 1-6). Amicus inflates the holding of In re Bieter Co., 16 F.3d 929 (8<sup>th</sup> Cir. 1994).

First, Bieter and that line of cases do not extend privilege to every non-employee who would be of assistance to a corporate defense as Amicus would have this court find. Bieter is limited to situations where a corporate entity uses an outside contractor in the fulfillment of legal services:

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.

Id. at 938. In Bieter the independent contractor functioned as “the sole

representative” for the entity with the entity’s attorneys and wrote letters for the entity, to its attorneys “directly.” Id. at 936. Before litigation, the agent established himself as the proxy of the principal. Id. That is true of other cases cited by Amicus. For instance, in US v. Graf, 610 F.3d 1148 (9<sup>th</sup> Cir. 2010) relied on by Amicus: the “outside consultant” “was the company’s voice in its communications with counsel” “authorized” to work on many “legal matters” and was the “attorney’s primary contact.” Id. at 1157.

That relationship is not present for an independent contractor physician providing healthcare inside of a hospital. Even if 100 years of independent contractor law is ignored and this court were to find an independent contractor physician is a direct agent of the hospital while providing healthcare, that is not the nexus required; what is required by Bieter and that line of authority is, as Division Two found, an “enmeshment in the management structure” of the corporation itself. 483 P.3d 153, 163 (2019). That a doctor or other provider is providing an important service, is not the same as involvement in the management of the hospital. Yet, it is involvement with the management structure of the entity that is required, even under Bieter and the other cases Amicus cites.

Finally, it is notable Amicus continues to overstate the holding in Brigham Young Univ. v. Pfizer, Inc., 2011 WL 2795892 (D. Utah 2011) even after Mr. Hermanson pointed out Amicus’ error in his Answer to Amicus’

brief in support of MultiCare’s motion for review. BYU only held a privilege may exist between two entities when a “parent entity... dictates in large part... (the) policies and actions” of the subsidiary. Id. at 5. That has no application to independent contractor doctors. In partial acknowledgment of that, between pages 14 and 15 Amicus raises all manner of hypotheticals regarding “turnaround” firms and interim executives who have a direct role in management. The inapplicability of such examples is clear on its face and require no further discussion.

5. **Youngs Should Not Be Extended To These Non-Physicians Specifically Or Non-Physicians In General**

According to Division II, Youngs already extends to non-physicians. Mr. Hermanson suggests Youngs cannot be read in that fashion. If Division II erred and it remains an open question, Youngs should not be extended in that fashion. Mr. Hermanson briefed this in response to MultiCare and need not repeat that here. Responses to arguments by Amicus will be made.

Amicus argues Loudon applies only to medical doctors and did not restrict an adverse attorney from having full, ex parte contact with a patient’s trusted nurses, social workers, or other critical healthcare providers. Amicus makes that argument to support the proposition that Youngs imposes no limitation on contacting non-physicians because Loudon placed no restriction on contacting them in the first place. That argument fails; both under the facts of this case and more generally.

First, specific to this case, MultiCare made that argument to Division II. Mr. Hermanson briefed<sup>7</sup> how all acts complained of by non-physicians occurred after Dr. Patterson established care thus those non-providers were subject to Patterson’s physician-patient privilege and therefore subject to Loudon. Mr. Hermanson was seen by Patterson at 7:35 p.m. Appendix p. 28. The nurses and social worker saw him thereafter. Appendix. pp. 44-46. After a “physician or surgeon (has)... been in attendance or ha(s) seen the patient,” all care afterwards is within the physician-patient relationship already established. State v. Cahoon, 59 Wn.App. 606, 610 (1990) citing State v. McCoy, 707 Wn.2d 964, 966 (1967). Division II did not see that authority and argument for what it was; instead, the court brushed it aside saying “social workers and nurses are subject to their own respective patient privileges.” Hermanson v. MultiCare, Cite, 10 Wn.App. 343, 362 fn. 13. That is true. But, it gives no weight to the fact they were *also* subject to Patterson’s physician-patient privilege which Amicus and MultiCare concede *is* subject to Loudon. Thus in this case, any argument the nurses and social worker were not physicians and therefore are not subject to Loudon, as a rationalization to argue Youngs does not apply, is moot: physicians or not, they were subject to Patterson’s privilege.

More generally as to every case, Amicus errs for two reasons.

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<sup>7</sup> Respondent’s/Cross-Appellant’s Brief to Division II, pp. 25-27.

(1) Although fact specific, in almost every case it is a medical doctor who establishes care, whether that is a quick bedside triage or in a clinic. In almost every case, every nonphysician is working under and at the direction of a physician and thus in accord with Cahoon and McCoy are within the penumbra of that physician's protections and restrictions including Loudon. Thus, in most practical applications, the distinction between physicians and non-physicians under Loudon made by Amicus is indeed without distinction.

(2) To the extent Loudon may be read to include only physicians, it is time to make clear it *should not* be read as such; its protections should reach every health care provider within the scope of a testimonial privilege. Every policy issue raised by Loudon applies with equal force to them. It is without logic or reason to say a patient suffers great harm by ex parte contact with their medical doctor, but not by ex parte contact with their nurse or social worker on the same issues. Courts decide based on the facts before them. Loudon only involved medical doctors. Here there are providers of different types. This court should use this as an opportunity, as a natural extension of its interpretation of Loudon and Youngs, to put this issue to bed. Providing lesser protection under Loudon for non-medical doctors serves no policy purpose and is a vehicle for mischief.

Amicus spends substantial time parsing statutes to make a distinction between medical doctors and other critical healthcare providers to argue other

providers should be given lesser status and patients less protection against ex parte contact with them. It is conceded there are differences in language in the statutes; that should be no surprise: they are different statutes. However, Amicus ignores and has no response to the public policy issues identified by Loudon and how they apply with equal force to any recognized healthcare provider. It is axiomatic the purpose of this court, and all courts, is “to elevate substance over form” and decide issues “on their merits.” See In re Detention of Turay, 139 Wn.2d 379, 390 (1999). Amicus’ hollow distinctions based on differing, non-material language in statutes does nothing to rebut the critical policy issues identified by Loudon and their application to providers other than medical doctors.

Next Amicus relies on RCW 70.02.050(1)(b) arguing hospitals have the right to speak with any of their employees, at any time, for the purpose of providing “legal services” to a facility therefore contact with nurses and social workers is appropriate without regard to Youngs. Amicus, p. 16-17. That founders on the fact the same argument was made in Youngs and even the majority rejected it. Youngs, 179 Wn.2d 645, 670 (2014). The issue is not whether a hospital can have information allowed under RCW 70.02.050(1)(b); it is the means by which it obtains it. Id. From Youngs: “Loudon does not prohibit the acquisition of knowledge; it merely imposes procedural safeguards to prevent improper influence or disclosures.” Id.

Amicus create a false equivalency; that not having that information in a secret, ex parte, and privileged manner is the same as not having the information at all. That is not well taken.

Next Amicus argues hospitals should be allowed ex parte contact with any employee because they need to speak with them to respond to discovery from plaintiffs. Amicus, pp. 17-18. That is a creative but easily revealed straw man. It is one thing for a hospital, in response to discovery, to generally ask “who has knowledge of” a given event to identify witnesses. But, it is another to sit them down and speak with them about it. And, it is yet another to demand they have a privilege, to keep those conversations private from the patient. Merely asking staff *if* they have knowledge is not what is at issue; speaking with them *about* their knowledge is. Not only should the Court reject this argument, it should make clear it will tolerate that type of gamesmanship in response to discovery.<sup>8</sup>

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<sup>8</sup> It is suggested this Court should have serious concern over this argument by the AMA and the Washington State Medical Association. Amicus would have this court believe that applying Loudon to non-physicians makes it impossible to answer discovery to identify fact witnesses because, they reason, they cannot make a distinction between simply identifying witnesses versus speaking with those witnesses about what they know. If amicus is to be believed, that requires this Court to find hospitals are incapable of properly following this Court’s holding in Youngs. Under Youngs, hospitals must be able to, no differently than identifying witnesses in the hypothetical Amicus pose, identify physicians with knowledge of only the facts giving rise to liability. And even more complicated, limit those discussions to those physicians’ knowledge of those facts. If the AMA and the State Medical Association are telling this Court hospitals cannot do something much more simple, to merely identify which employees might be witnesses in order to respond to discovery requests if Youngs applies to non-physicians, how can they do that in any circumstance much less accomplish the much more difficult task of stopping a conversation with a physician if it strays beyond the strict facts giving rise to

Next Amicus argues that even if Loudon is extended to nonphysicians, hospitals should be able to have ex parte, privileged contact with any of its employees whether or not they are parties, any time a plaintiff's claim seeks to "impute" those provider's "negligence... to the hospital." Amicus, pp. 18-19. Amicus relies on two Illinois cases. This argument is simply a repackaging of the same argument that hospitals want to be able to speak with all employees, at will, and have those conversations be privileged without restriction by either Loudon or Youngs. If this court decides to apply the Youngs exception to nonphysicians, that should rise and fall based on application of Youngs and Loudon - not application of a distant state's law that is inapposite to Washington's. In the Illinois cases cited by Amicus, they acknowledge an attorney-client privilege even after an employee separates from the hospital. Amicus, p. 19. That has been expressly rejected by this court in Newman.

## **6. Response To Other Arguments**

In no particular order, Amicus' brief raises additional issues.

Amicus argues that because a patient waives medical privilege when they put their physical condition at issue, that clears the way for ex parte contact. The Loudon protection is not merely an enforcement of the

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the liability The answer is: they cannot. Amicus seeks to have it both ways. This is another reason Youngs was incorrectly decided. It puts sole enforcement and implementation of privilege in the hands of a highly invested partisan with no oversight.

physician-patient statutory privilege, it is protection against ex parte contact by a hostile and adverse defense attorney. Even with privilege fully waived, protection against ex parte contact is critical and the more perilous situation than disclosure of the physical condition. Amicus' refusal to acknowledge the distinction is frivolous.

Amicus' reliance on foreign authority, for any issue, is of little to no weight. Consideration of other states' law is always a reasonable touchstone. However, it does no good for Amicus to not acknowledge and ask this court to give no weight to the fact (1) Washington has particularly unique protections when it comes to medical issues, Loudon; and (2) attorney-client privilege is substantive law and each states' law differs. For instance and as noted above, Amicus relies on cases from Illinois that recognize an ongoing attorney-client privilege even after an employee no longer works for the company. Yet, that is precisely the opposite of this state's law under Newman. Further, the need to reconcile Upjohn and attorney-client privilege as discussed by the US Supreme Court is also revealed to be at best a stretch and at worse inapposite given federal law does not recognize any protections against ex parte contact with providers as under Loudon. See The Journal of Contemporary Health Law and Policy, Vol. 31:1, p. 40. Indeed, if federal jurisprudence had a rule such as Loudon, Upjohn may well have been decided differently. Having no competing Loudon-like privilege to balance,

Upjohn had a free hand. Unless this Court is determined to abrogate Loudon, it does not.

Finally, Amicus argues at page 15 that “the social worker and nurses here had direct knowledge of the liability inducing events.” It might be assumed the social worker has direct knowledge of the liability inducing event of *her* violating Mr. Hermanson’s privilege by disclosing his healthcare information with neither a release or a warrant. However, there is no evidence as to whether any nurse has that knowledge. As noted in Mr. Hermanson’s answer to MultiCare’s brief, Division II acknowledged the trial court had not resolved those facts and despite that, Division II made a blanket holding MultiCare could speak with all those employees. That was error. At best for MultiCare, this matter must be remanded for further fact finding by the trial court.

DATED this 22<sup>nd</sup> day of May, 2020.

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By:   
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I, Dan Bridges, certify under oath and the penalty of perjury that on 2/28/20 I filed this brief and provided service by way of the court’s electronic service portal.  
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