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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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RESPONDENT'S/CROSS-APPELLANT'S  
SUPPLEMENTAL BRIEF

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**TABLE OF CONTENTS**

1. Youngs Was Incorrectly Decided And Should Be Rejected By This Court ..... 1

A. ....

2. Youngs Should Not Be Extended ..... 1

3. Even If A Functional Employee Or Agent Privilege Is Adopted It Would Not Reach Health Care Providers In A Hospital..... 2

4. The Court Should Not Adopt Bieter ..... 7

5. Even if Bieter Is Applied Patterson Is Not Entitled To Privilege ..... 12

6. Amicus’ Joint Defense Theory Is Without Merit..... 13

7. Response To Miscellaneous Arguments ..... 15

8. Conclusion..... 19

## **TABLE OF AUTHORITIES**

### **Washington Authority**

#### **Supreme Court**

Newman v. Highland School Dist. No. 23, 186 Wn.2d 769 (2016) .	5, 8, 10
Youngs v. Peace Health, 179 Wn.2d 645 (2014) .....	11

#### **Court of Appeals**

### **Federal Authority**

#### **Circuit Court**

U.S. v. Graf, 610 F.3d 1148 (9 <sup>th</sup> Cir. 2010) .....	5
In re Bieter Co., 16 F.3d 929 (8 <sup>th</sup> Cir. 1994).....	3, 4, 7
Diversified Industries, Inc. v. Meredith, (8 <sup>th</sup> Cir. 1977).....	3

#### **District Court**

Brigham Young University v. Pfizer, 2011 WL 2795892 (D. Utah 2011)	19
Gibson v. Reed, 2019 WL 2372480 .....	18
Kelly v. Microsoft, 2009 WL 168258 (WD Wash 2009).....	17
Jones v. Nissan North America, Inc., 2008 WL 4366055 (MD 2008).....	16
Davis v. City of Seattle, 2007 WL 4166154 (WD Wash 2007).....	18
Neighborhood Dev. Collab. V. Murphy, 233 FRD 436 (D.Med 2005) .....	9

1. **Youngs Was Incorrectly Decided And Should Be Rejected By This Court – And If Not Rejected Its Extension Should Be**

**A. OVERVIEW**

Mr. Hermanson did not ask the trial court or Court of Appeals to reject Youngs. Such would not have been an argument for a good faith extension of law but instead asking those courts to abolish Supreme Court authority; something neither may do:

We are bound to follow our Supreme Court's precedents and have no authority to abolish them.

Gorman v. Pierce Cty., 176 Wn. App. 63, 76 (2013). See also 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578 (2006).

It appears this argument may only be made, for the first time, here. In the event this is overstepping the undersigned apologizes however even if not available as relief, the following authority and argument is applicable as to why MultiCare's request to extend Youngs should be rejected: Upjohn, which was the basis of Youngs, neither supports or requires extension.

**B. AUTHORITY**

Washington has long recognized it provides greater substantive protections than its federal counterpart. See State v. Gunwall, 106 Wn.2d 54, 59 (1986).<sup>1</sup> Further, federal case law is deemed less persuasive when the law

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<sup>1</sup> Mr. Hermanson does not suggest the issue presented in this case is of Constitutional magnitude and does not assert he is afforded greater protection by the State Constitution versus the Federal Constitution. These are not Constitutional rights at either the Federal

being applied is dissimilar. See Antonious v. King County, 153 Wn.2d 256, 266 (2004) explaining in the context of case law on discrimination, “where (federal law) and (state) statutes are different and following federal cases would not further the purposes of state law, the court has declined to find federal authority persuasive.”

While both Federal and State law have the attorney-client privilege, Federal law has nothing remotely like the protection this State affords under Loudon. See The Journal of Contemporary Health Law and Policy, Vol. 31:1, p. 40. (“Most federal courts allow ex parte defense counsel interviews when applying federal law largely because informal discovery techniques are well accepted and no federal rule specifically prohibits the activity.”)

Thus, any suggestion there must be a balance per se between Upjohn and Loudon, or that Loudon must yield to the attorney-client privilege as articulated by the U.S. Supreme Court, is unpersuasive for the failure to recognize the attorney-client privilege as articulated by Upjohn exists on a field of existence devoid of Loudon. Washington provides greater rights.

Unless MultiCare intends on arguing Loudon’s protections limiting the attorney-client privilege are neither significant or material (protections not provided by Upjohn), it cannot be said this area of Federal law is

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or State level. However, this is a relevant contextual reminder that this Court is not bound to walk lock-step with the U.S. Supreme Court on substantive state law issues.

sufficiently similar to State law such that Upjohn is particularly relevant much less ultimately persuasive.

MultiCare fails to account for that difference.

Upjohn, Loudon, and Youngs are all court created rules, to protect judicially recognized policy values. What is more, the issue here is the attorney-client privilege and physician-patient privileges *as they exist in Washington State* – not Washington D.C. Mr. Hermanson does not suggest the U.S. Supreme Court should be given no weight but it should equally not be forgotten this Court is interpreting *State substantive rights*.

Thus, this Court need not have “balanced” Upjohn with Loudon merely because the U.S. Supreme Court issued Upjohn. Instead, this court should have weighed the critical protections of Loudon long recognized in this state and appreciated (1) how it is actually Upjohn that must be reconciled with the *differing and greater legal protections* that exist in this State for patients and (2) how Loudon limits the scope of permissible attorney-client relationships and contact in a corporate setting.

Mr. Hermanson suggests with all due and proper respect to the majority in Youngs it did neither and that was error that should be corrected:

Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. In order to effectuate the purposes of stare decisis, this court will reject its prior holdings only upon a clear showing that an established rule is incorrect and harmful.

State v. Otton, 185 Wn.2d 673, 678 (2016) (internal citations omitted).

State v. Barber, 170 Wn.2d 854, 864 (2011) discussed the applicable standard.

The meaning of “incorrect” is not limited to any particular type of error. We have recognized, for example, that a decision may be considered incorrect based on inconsistency with this court's precedent; inconsistency with our state constitution or statutes; or inconsistency with public-policy considerations.

Id. at 864 (internal citations omitted).

Explaining what is harmful, Barber was less concrete and instead cited several specific situations where the requirement was met indicating “the common thread was the decisions detrimental impact on the public interest.” Id. at 865.

In applying the foregoing authority, Mr. Hermanson could engage in an extended and detailed historical discussion of the policy underpinnings of Loudon and the appropriate limit of the attorney-client privilege, or he could indicate: See the dissent in Youngs. It is suggested to be impossible to more completely articulate the issues raised by Youngs than already done by Chief Stevens in her detailed dissent.

The majority of Youngs erred. Not only did it err for the reasons articulated by Chief Stevens, it erred for not giving sufficient weight to the fact that although both Washington and Federal courts recognize the attorney-

client privilege, the attorney-client privilege on the Federal level exists without any Loudon restriction. Thus, although authority such as Upjohn may be considered, *given the dissimilarity of the attorney-client privilege as it exists in Washington and its limitations* in light of Loudon that create greater patient rights as compared to the privilege in Federal courts, Upjohn cannot be identified as necessarily persuasive, much less binding, much less as having precedence over Washington case law in the same area of the law.

Youngs was “incorrect.” See Barber at 864. Youngs found Loudon needed to yield to Upjohn because in in Washington, the attorney-client privilege yielded with respect to Loudon by granting patients greater protections. Yet, that issue the majority in Youngs found compelled limiting Louden was *actually a red flag* indicating Washington provided greater patient protections, the law of privilege was dissimilar, and that applying that dissimilar federal privilege law did “not further the purposes of state law (and this court should have) declined to find federal authority persuasive.” Antonious, 153 Wn.2d at 266.

Youngs in essence put the controlling authority on its head. Thus, as Chief Stevens pointed out in her dissent, the notion Loudon must be balanced with Upjohn or that Upjohn provided any authority to override or limit Loudon, was error. And as that assumption is the fulcrum upon which the Youngs majority rests, its conclusions were no less error.

Youngs is also “harmful.” See Barber at 865.

Again, Chief Stevens did a better job at articulating the harm Youngs inflicts by eroding the protections of Loudon than any identification of the harm Mr. Hermanson could provide. Youngs does not balance the scales of justice or these competing privileges. Instead, and despite the good faith and well intention of the majority opinion, it actually tips the scales in favor of corporate hospitals by injury inflicted on injured plaintiffs.

As described in detail below, we ignore reality by not acknowledging how medical malpractice cases and other lawsuits that pit an injured plaintiff (such as the one at bar) against an institution actually work. Even if Youngs did not exist and litigants only had Loudon to apply, medical providers and institutions already routinely decline to speak with patients’ attorneys. They do so out of fear of personal liability, or disdain of the legal profession and a failure to realize it is not the attorney they are helping by having a conversation but their own patient, or they simply fear retribution by the institution for giving any aid and comfort adverse to the hospital.

Thus, the notion that absent Youngs plaintiffs have some type of litigation advantage, or as framed by MultiCare that Loudon creates some type of litigation disadvantage, ignores reality. What Loudon did in practical effect was simply to level the playing field. Under Loudon, hospitals may not have been able to speak directly with a patient’s hospital healthcare

providers, *but in application patients were not able to speak with them either.*

Thus, the harm of Youngs is that in practical application, patients still cannot speak with their healthcare providers, not even those who might have otherwise spoken to them, but the hospital is able to have unlimited ex parte, secret conversations with the patient's healthcare providers, to the patient's detriment, and the patient cannot even discover what was discussed. That is the exact opposite of open discovery.

Further, as identified in Loudon, the most likely outcome of that type of dynamic is to subvert the patient's treating healthcare provider into an expert witness for the institution. Not only does that violate every basic privilege and duty owed by healthcare providers to patients, it does so for no compelling policy reason other than to create special protections for hospitals.

Finally, it is suggested the case at bar demonstrates the very peril Chief Stevens warned of in her dissent. Any erosion of Loudon will beget more erosions. Despite the clarity of Youngs applying only to employees, MultiCare took it on itself to act as if the law was what it wanted the law to be, versus what it actually was, and had extensive ex parte conversations with a nonemployee treating provider of plaintiff. It asked the trial court to save itself from that decision because the clear impact of that inappropriate contact, if in fact inappropriate, is the disqualification of defense counsel; at

the very least. Further, given the brief of Amicus it is clear the hospital industrial complex is using Youngs as a springboard for further erosion. MultiCare's conduct in this case demonstrates exactly why Loudon should not have been eroded in the first place to say nothing of further eroding Loudon with an extension of Youngs.

Bright line rules exist for a reason. This court should return to the bright line rule established by Loudon with the acknowledgment that Loudon creates a different landscape than presented to the US Supreme Court in Upjohn and thus compels a different result.

## 2. **Youngs Should Not Be Extended**

If Youngs is not rejected, it should not be extended as urged by MultiCare. As already briefed by Mr. Hermanson in his motion for discretionary review and response to Amicus, none of the policy reasons for creating a privilege between a corporation and employees exist for nonemployee independent contractors. See Newman v. Highland School Dist. No. 23, 186 Wn.2d 769, 781 (2016). The analysis of foreign authority relied on by MultiCare has already been rejected in this state. Id.

Further, this Court should reject further erosions of Loudon. Although the so-called slippery slope argument is overused it is suggested to be a perfect fit here. This court has already taken a large step onto a very slippery slope by its decision in Youngs. If this court is unwilling to step back onto

level ground by rejecting Youngs, at the very least it should resist MultiCare's invitation that it walk further down the hill. Unquestionably, any further extension of Youngs will be used by the hospital industrial complex to argue for further erosions until Loudon simply ceases to exist.

Even if it is arbitrary to draw a distinction between an employee physician an independent contractor position, *which it is not*, it remains critical to not allow further erosion of Loudon protections. Privileges best exist where they are clear and not subject to ambiguity. Newman, 186 Wn.2d at 782. The public-policy trade-off of not allowing further erosions greatly outweighs trying to create exceptions for the hospital industry every time it comes up with a creative way to staff its hospitals as it did here with its third-party contract with Physician's Trust.

Although the physician-patient privilege is a creature of statute, (see RCW 5.60.060(4)), the existence of the attorney-client privilege is the offspring of common law:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.

Youngs v. Peacehealth, 179 Wn.2d 645, 650 (2014). That the legislature codified it (see RCW 5.60.060(2)(a)) does not change its origin as a necessary and inherent creation of the Courts.

As such, it is a protection uniquely suited to judicial molding to meet the needs of our ever-evolving society. Although Youngs presented sharp

disagreement between the concurrence and dissent, both sides appeared to agree to at least that. (“...these rules reflect practical distinctions and policy considerations.” Youngs, 179 Wn.2d at 676, Stephens concurrence/dissent).

Mr. Hermanson does not argue corporations are entitled to less protection than an individual. Unfortunately, while admittedly well intended, Youngs tipped the scales in favor of hospitals. (“While I appreciate the majority's attempt to balance the competing interests at stake, the solution it offers is no solution at all.” Youngs, 179 Wn.2d at 681, Stephens).

Further, no attorney should be heard to ethically claim they represent a fact witness if that person cannot in fact qualify as an actual client. Upjohn provided corporations some measure of relief with the not unreasonable acknowledgment that corporations can only act through employees and therefore it is not unreasonable to allow some amount of protected conversations, subject to strict limits, to further a defense.

However, as Chief Stevens pointed out in detail in her dissent, hospitals should not be treated the same as any garden variety corporation *for the simple fact they are not the same*. Pretending they are, which is the position taken by MultiCare, is a false equivalency. An employee of Boeing who has unique knowledge of bad wiring does not owe to an injured airline passenger any of the duties healthcare providers owe to their patients and are critical for the public good.

Thus, hospitals and doctors are different from garden-variety corporations for the simple fact that they are.

Further, MultiCare and amicus present this Court a false choice. MultiCare and amicus resort to scare tactics and fear mongering, going as far as to imply trauma care will be impacted if hospitals cannot get their way in the defense of litigation; Amicus went as far to assert without any support in the record that an adverse ruling here puts the whole of the State of Washington at a “competitive disadvantage.” Exactly what that competitive disadvantage is, went unsaid by Amicus. Ostensibly, perhaps Amicus would have this court believe that if hospitals cannot have full and unfettered privileged contact with all of their employees, MultiCare will need to pick up and move to Idaho in order to treat the injured people of Pierce County.

That MultiCare, the Washington State Hospital Association, Washington State Medical Association and the AMA must resort to such rhetoric says much. It is not balance they seek. It is full control of the witnesses and access to them that is their end goal. It is suggested it makes no sense and does this process no good to ignore that.

However, as Loudon acknowledged, the question is *not* whether a hospital may have access to the facts necessary to defend itself. It can under Loudon. *The question is in what manner will it obtain those facts.*

We are unconvinced that any hardship caused the defendants by having to use formal discovery procedures

outweighs the potential risks involved with ex parte interviews. Defendants may still reach the plaintiff's relevant medical records, and the cost and scheduling problems attendant with oral depositions can be minimized (though perhaps not as satisfactorily) by using depositions upon written questions pursuant to CR 31. Moreover, plaintiff's counsel may agree to an informal interview with both counsel present. Furthermore, the argument that depositions unfairly allow plaintiffs to determine defendants' trial strategy does not comport with a purpose behind the discovery rules-to prevent surprise at trial.

Loudon, 110 Wn.2d at 680.

And, highlighting exactly the conflict Mr. Hemanson has argued throughout this case that prohibits MultiCare from asserting an attorney-client relationship with the non-employee Dr. Patterson or non-physicians with no ability to bind the corporation:

The lack of supporting authority underscores that the implication the majority derives from Upjohn is not supportable. While the attorney-client privilege encompasses past communications between corporate defense counsel and corporate employees, this does not translate into a right of defense counsel to engage in ex parte communications with all employees once litigation commences. Corporate defense counsel represents the defendant corporation, not its employees. Indeed, counsel cannot corepresent an employer and employee if the duty to one client would be materially limited by the duty to the other. RPC 1.13(g) (referencing RPC 1.7). Potentially conflicting obligations are unavoidable in a medical malpractice action where a nonparty treating physician is both an employee of the defendant and a fiduciary of the plaintiff.

Id. at 676.

Youngs went too far. Extending it should be rejected.

3. **The Trial Court Did Not Err To The Extent It Limited MultiCare's Contact With Its Employees On Mr. Hermanson's Motion For A Protective Order**

On Mr. Hermanson's motion the trial court ordered MultiCare could not have further contact with employees without leave of the court. MultiCare objected that was inappropriate because Youngs did not impose that burden. The Court of Appeals agreed.

However, what both MultiCare and the Court of Appeals fail to give weight to was the trial court found MultiCare *already* had wide ranging, ex parte contact it had no right to engage in under Youngs insofar as it conceded it had extended conversations already with Dr. Patterson.

Even if MultiCare had a good faith argument for *an extension* of Youngs to apply to non-employees, it had no good faith belief that Youngs actually did apply to nonemployees for the simple fact Youngs explicitly and repeatedly said its exception only applied to employees.

The law is the law until it is not.

MultiCare should have sought a determination by the trial court regarding its contacting nonemployee Patterson before doing so. It did not. Instead, it acted in knowing disregard of Youngs and proceeded in a manner it wished the law would be, versus what it actually was.

In that regard, the Court of Appeals agreed at least in part. The Court of Appeals affirmed the trial court's decision Youngs does not apply to

independent contractors such as Patterson.

Given that, it was well within the trial court's discretion to fashion an order to prevent further violations of Youngs. The Court of Appeals erred by only evaluating the question as whether Youngs required prior approval while not giving weight to the fact the trial court was not imposing that as a matter of first impression but responding to the inappropriate ex parte contact MultiCare *already had*.

Thus, even if this court finds Youngs should be extended to independent contractors, that does not obviate the appropriateness of the trial court's order requiring MultiCare to seek leave before further contact of plaintiff's medical providers. If only after over a year on appeal MultiCare prevails on that legal question, does not change the fact it proceeded in disregard of Youngs originally. MultiCare has demonstrated it will proceed in a manner of how it wants the law to be versus what it actually is. And given that, it was well within the trial court's discretion to fashion a protective order to protect against further violations. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494 (1997).

Further, the Court of Appeals correctly appreciated the trial court had not yet determined, as a question of fact, whether the two nurses or social worker had first-hand knowledge of the "triggering event" as required by Youngs as a prerequisite for ex parte, much less privileged, contact. Given

MultiCare already engaged in ex parte contact with Dr. Patterson without the legal propriety of that being resolved, the trial court was well within its discretion to require MultiCare to make a factual showing that it was entitled to further ex parte, privileged contact. That is particularly important considering that once such contact happens there is no way to take it back if engaged in incorrectly.

Therefore, as noted in Mr. Hermanson's petition, this matter should be remanded to the trial court for further factual findings and action consistent with the ultimate findings of law. The Court of Appeals erred finding MultiCare could have ex parte contact with all of its employees without the fact-finding the court itself identified was still missing.

4. **MultiCare Did Not Make A "Functional Employee" Argument Below And Should Not Be Heard To Make It Here**

In regard to Dr. Patterson, MultiCare argues he is a "functional employee" and therefore should be treated as an employee.

However, MultiCare did not make that argument to the trial court. Instead, it erroneously argued Youngs could be extended to nonemployees by its sharp characterization of Patterson as an "admitted agent." The first-time MultiCare contended Dr. Patterson was a "functional employee, was page 28 of its brief in Division II.

But, as already briefed, Patterson was not an "admitted agent." Instead, MultiCare simply conceded and/or admitted liability for his actions.

Agreeing after-the-fact to indemnify a person for an act that has *already* taken place does not change what they were at the time of the action *already* taken. As adequately briefed in both Mr. Hermanson's petition for review and response to Amicus, both MultiCare and Physician's Trust expressly repudiated Patterson was MultiCare's agent. MultiCare does not have the ability to transmute after the fact what Patterson was at the time of the tort.

RAP 2.5 provides "the appellate court may refuse to review any claim of error which was not raised in the trial court." Although "a party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground," MultiCare does not seek to have a decision of the trial court *affirmed* by raising an argument not made below. *Instead*, it seeks to obtain a *reversal* of the trial court based on an argument it did not make to the trial court nor present a factual record that has "been sufficiently developed to fairly consider the ground." Although this case admittedly raises an important public policy issue, it cannot be said to raise an issue of "manifest error affecting a constitutional right." See RAP 2.5(a).

Mr. Hermanson is cognizant of the fact he is making an argument here that he did not make below. However, as noted above it would not have been appropriate for him to ask the trial court or Court of Appeals to abolish or reject this court's decision in Youngs. That is nothing like MultiCare's failure

to raise an argument it had not merely the ability but the obligation to make and to create a record supporting it before it reached this court

5. **MultiCare Cannot Contract Around Rights Belonging To Mr. Hermanson**

Below and in its petition MultiCare argued it should be able to circumvent Youngs by the expedient of Dr. Patterson allegedly asking MultiCare's attorneys to represent him as well.

Ignoring for the moment there was no admissible evidence Dr. Patterson actually wanted that, the argument stumbles upon the basic fact Youngs and Loudon explained the protection against ex parte a contact is owned by, and for the protection of, Mr. Hermanson and the judicial process itself.

Perhaps if the protection was only Dr. Patterson's he could waive it. However, neither he or MultiCare can waive protections owned by other parties. For MultiCare to suggest they can is frivolous.

Albeit, the argument is illustrative of the subterfuge long employed by large corporations asserting mere fact witnesses supposedly "asked" the corporation's attorney to "represent" them at deposition, or in general, as a means to interfere with injured plaintiffs contacting basic fact witnesses.

C. **Conclusion**

The decision of the court in this case will meaningfully and very directly affect the rights and protections of literally hundreds of thousands of

Washington state citizens in what is, in practical effect, probably the most important professional relationship they will ever have: the trust, faith, and confidence they place in their healthcare providers.

Eroding patient protections will deter the candor necessary to facilitate proper treatment. While the specific facts of this case are perhaps less important than the legal issues raised, the facts of this case provide context. Here, while Mr. Hermanson was being interviewed by a social healthcare worker to assist him and provide counseling regarding a possible alcohol abuse issue, Mr. Hermanson was candid - as he should have been. That counselor ran right out and told the police what Mr. Hermanson told her as well as disclosing lab tests for which the police had no warrant.

It takes no speculation to appreciate that if Mr. Hermanson was told by MultiCare as he came in the door that everything he said will be used against him and communicated directly to the police, that he would have been less forthcoming and that every patient put in that position will be less forthcoming as well.<sup>2</sup>

Corporations have the right and need to defend themselves. Some accommodation must be made to allow them to discover the facts necessary

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<sup>2</sup> This in no way undermines the need for mandatory reporting on certain issues including child abuse. However, those are well defined and narrow exceptions carved out by the legislature with bright line rules. An argument by MultiCare that those types of self-reporting issues have any application to this case would be poorly taken.

to do so. However, it is simply false that continuing the protections provided by Loudon prevent that. The issue is not whether hospitals can gain access to that information. The issue is only the means by which they will do so.

Loudon acknowledged the friction but found resort to civil discovery was adequate. And as described above, that is the situation injured plaintiffs *already find themselves* as doctors and healthcare providers routinely decline to speak with attorneys representing injured patients. Loudon did not create a litigation disadvantage for hospitals, it only leveled the playing field.

While well intended, the 5 to 4 majority in Youngs erred. It put the rank order of authority on its head by viewing Upjohn as superior case law that Loudon had to yield to and be balanced against. The proper rank order was the reverse.

The appropriate analysis would have been to acknowledge Washington provides greater patient protection than federal courts, and a slightly more limited attorney-client privilege than federal courts to the extent Loudon restricts it ever so slightly but importantly, and consistent with this court's past precedent realize Upjohn had only limited weight. Instead, Upjohn was given undue weight to the detriment of Loudon and the critical protections of Loudon were needlessly minimized.

Youngs should be rejected.

If Youngs is not rejected what it should not be is extended. None of

the policy reasons for providing privilege to employees exist for independent contractors. Furthermore, as a basic issue public policy it is important to draw a clear line and not allow further erosion of Loudon. This court should make it clear it applies only to current employees and no one else.

DATED this 11th day of March, 2020.

McGAUGHEY BRIDGES DUNLAP, PLLC

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\_\_\_\_\_  
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**Certificate of Service**

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.  
03/11/2020 /s/ Dan Bridges

**MCGAUGHEY BRIDGES DUNLAP PLLC**

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