No. 104136-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL K. SNYDER, individually,

Respondent,

v.

VIRGINIA MASON MEDICAL CENTER, et al.,

Petitioner.

ANSWER TO VMMC PETITION FOR REVIEW

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A. Introduction.

There is no reason to grant VMMC's petition for review of the Court of Appeals' decision confirming that it violated the *Loudon* rule by engaging in *ex parte* contacts with Michael Snyder's health care providers. The unlawfulness of VMMC's secret defense strategy is well-established by this Court's earlier decisions, which the Court of Appeals correctly relied on to reject every excuse VMMC offers to justify its unlawful conduct in secretly communicating with these nonparty and former employee fact witnesses in violation of *Loudon*. This Court should deny VMMC's petition and accept review on Snyder's petition, in order to firmly place the burden on VMMC of disproving prejudice arising from its *Loudon* violations.

B. Restatement of Facts.

The facts are accurately summarized in Snyder's petition for review. As set out in more detail there, long before Snyder even knew of the participation of VMMC's

former employees in the surgical error that left him with significant brain damage, VMMC had begun preparing them for testimony in this litigation, without seeking court authorization or notice to Snyder. VMMC secretly set up a defense "team" to facilitate *ex parte* communications with Snyder's physicians before Snyder even knew of their involvement in the surgery that caused his devastating injuries. (Snyder Pet. 8-12; CP 1593, 1632, 1637-38, 1713-14))

Through its secretly deployed defense "team," implemented even before discovery had begun, VMMC irredeemably spoiled the most important eyewitnesses in this medical malpractice case before they were disclosed, deposed, or even identified to Snyder. At the very same time it was deliberately "shaping" and "influencing" the testimony of Snyder's physicians with "talking points," witness coaching, and strategy memos, VMMC deflected any examination of its secret defense strategy by claiming

not only that VMMC **could not contact** Snyder's health care providers under *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), but that it **could not represent** its former employees' interests. In fact, it did both.

In holding that VMMC violated *Loudon,* the Court of Appeals correctly applied *Loudon*; it did not "extend" it. (VMMC Pet. 8, 24) The Court instead rightfully recognized that "VMMC has not established any basis for disregarding the *Loudon* rule as applied to its communications with its former employees and nonparty fact witnesses." (Op. 20-21) The Court should ignore the sanitized version of the facts in VMMC's petition for review, which only continues the subterfuge it began by setting up its secret defense strategy knowing it was unlawful. This Restatement of Facts refutes three false claims relied upon by VMMC and establishing that VMMC knew it was violating *Loudon:*

1. Snyder did not "target" nonparty physicians.

VMMC asserts that its secret defense strategy was proper because Snyder put VMMC "on notice" that the physicians with which it engaged in *ex parte* communications were "targets" or "likely targets" of Snyder's malpractice action. (VMMC Pet. 2) That assertion is false.

Snyder did not even know that former residents Dr. Chew and Dr. Downey participated in the procedure that led to his injuries until months after commencing this action. Drs. Chew and Downey were not identified on the informed consent forms. (CP 3175-77) Drs. Chew and Downey were not listed on Dr. Brandenberg's January 16, 2018, narrative Operative Report. (CP 923-26) VMMC listed them, along with over 100 "treating health care providers" who VMMC claimed might "testify about causation, damages and disability issues" (CP 1634, 1668-72), and with the express qualification that only Snyder,

but not VMMC's counsel, could contact them under *Loudon*. (CP 1669)

VMMC, not Snyder, knew of its former residents' participation in the surgery that caused Snyder's grievous injuries. VMMC, not Snyder, targeted its former employees in its secret defense team.

2. VMMC used its risk managers as a conduit to funnel information to Snyder's nonparty, nonemployee physicians.

VMMC went to extraordinary lengths to shield its *ex parte* contacts with its former employees. VMMC knew it was wrong, or at least problematic, for it to set its secret defense scheme in motion. VMMC retained "outside" counsel Jennifer Oetter to represent the former employees. (CP 1593) She was in no way "independent." (VMMC Answer to Snyder Pet. 21) Rather than setting up a conflict wall to protect communications, VMMC directed attorney Oetter to report, and to funnel *ex parte* communications, to the same claims managers to whom VMMC defense

counsel reported. (CP 1632, 1637-38, 1642-43, 1713-14) Yet VMMC's only acknowledgment of these steps is its offhand concession that *"Newman* . . . might be read to prohibit VMMC's counsel from having privileged communications" with former employees. (VMMC Pet. 4)

VMMC could have, but did not, alert Snyder or seek court permission to engage in these *ex parte* contacts before Snyder's lawyers uncovered the scheme near the conclusion of discovery. Only after that revelation did VMMC attempt to sanitize its *Loudon* violations by belatedly asking the trial court for an order "allowing for *ex parte* and privileged communications with" Drs. Aranson, Chew and Downey. (CP 2187-98) As the trial court recognized, however, "[h]ow [can] a communication which is disallowed by law . . . be protected under the cloak of privilege?" (CP 2378)

As detailed in Snyder's petition (Snyder Pet. 13-16), VMMC continues to resist discovery of the extent and content of its hundreds of documented *Loudon* violations.

3. VMMC purposefully misdirected Snyder and the courts by claiming it was complying with *Loudon* while it was secretly violating its obligations.

VMMC knew that its secret defense scheme violated *Loudon*, engaging in a concerted effort to conceal it from Snyder.

VMMC claimed that defense counsel was prohibited from contacting Snyder's physicians at the same time it was preparing them for deposition. (Snyder Pet. 8-12) And attorney Oetter filed a motion to intervene on behalf of Dr. Aranson, one of the nonparty, nonemployee physicians, claiming "VMMC did not have access to Dr. Aranson as they were defending the lawsuit." (CP 4427) That representation was made shortly after an hour-long conversation between VMMC risk manager Pat Nishikawa, attorney Oetter, and Dr. Aranson about this litigation.

Nishikawa had days earlier texted Dr. Aranson directly to tell him "he is essential in prepping the case." (CP 1662, 1633, 1665-66)

VMMC backed attorney Oetter up in this lie. Far from claiming a "common interest," as it does now in seeking review (VMMC Pet. 16-20), VMMC supported Dr. Aranson's motion for intervention by telling the trial court that "[c]ounsel for VMMC and Dr. Brandenberger cannot adequately represent Dr. Aranson's interests in this lawsuit because their interests . . . may be in conflict." (CP 276) The trial court rejected VMMC's claims of a "common interest" justifying its *Loudon* violations, finding as a matter of fact that VMMC had not established "any joint defense representation agreement or other means by which Jennifer Oetter had a privileged relationship with counsel for and/or representatives of Virginia Mason." (CP 1243) The Court of Appeals correctly rejected VMMC's argument that this purported common interest privilege could trump

Loudon because "VMMC did not challenge the trial court's finding that there was no such agreement." (Op. 18-19)

The Court would learn nothing of VMMC's deceit from the sanitized version of the facts VMMC presents in its petition for review. But the trial court recognized VMMC's duplicitous "smokescreen" (CP 2378) and "pretty major ethical violations," which created "a pretty huge problem here:"

> [T]here seems to be a pretty major ethical violation here . . . The communications here it seems to me were per se a violation of Washington state law . . . So we have a pretty huge problem here . . . The way to fix it is not yet understood by me, but the gravity of the situation I think cannot be understated.

(CP 2378, 2380)

The "way to fix it" is by granting Snyder's petition for review and provide a meaningful remedy for VMMC's unlawful conduct. (Snyder Pet. 13-16, 20-28) The trial court and the Court of Appeals were not taken in by VMMC's dissembling. Neither should this Court. It should

disregard VMMC's restatement of the facts and deny VMMC's petition for review.

C. Why This Court Should Deny VMMC's Petition for Review.

1. The Court of Appeals' decision confirming that VMMC's defense strategy was unlawful conflicts with no case law, and was compelled by *Loudon*.

Health care information and disclosures are protected by fiduciary duties, by federal and state statutes, by court rule, and by this Court's decisions. A lawsuit operates only as a limited waiver of the physician-patient privilege as to defendants, and that "[w]aiver is not absolute . . ." *Loudon v. Mhyre*, 110 Wn.2d 675, 678, 756 P.2d 138 (1988). "[A] plaintiff-patient's *waiver* of the physician-patient privilege *does not authorize ex parte communications between the defendant and the plaintiff's treating physicians*." *Youngs v. PeaceHealth*, 179 Wn.2d 645, 659, ¶19, 316 P.3d 1035 (2014) (emphasis in original) (quoting *Carson v. Fine*, 123 Wn.2d 206, 210-11, 867 P.2d

610 (1994)). Because "an *ex parte* interview . . . may result in disclosure of irrelevant, privileged medical information . . . [t]he plaintiff's interest in avoiding such disclosure can best be protected by allowing plaintiff's counsel an opportunity to participate in physician interviews and raise appropriate objections." *Loudon*, 110 Wn.2d at 678.

A defendant is entitled to obtain evidence from treating physicians through discovery or other communications in which the patients' counsel participates. *Loudon*, 110 Wn.2d at 680. But as the Court of Appeals correctly held, the *Loudon* rule prohibits any *ex parte* communication with nonparty treating physicians, whether direct or indirect, including contacts with the nonparty physician's attorney or other intermediary. (Op. 20)

2. The Court of Appeals' decision rejecting VMMC's claim that it could "shape" and "influence" nonparty physicians' testimony through intermediaries conflicts with no case law, and was compelled by *Smith*.

This Court has confirmed that *Loudon* prevents any *ex parte* contacts, direct or indirect. *Smith v. Orthopedics Intern., Ltd., P.S.*, 170 Wn.2d 659, 666, ¶11, 244 P.3d 939 (2010). In *Smith*, prior to the testimony of plaintiff's physician at trial, defense counsel sent to the physician's lawyer the plaintiff's trial brief, transcripts of the testimony of plaintiff's expert, and the physician's own deposition testimony, along with a letter from plaintiff's counsel. 170 Wn.2d at 663, ¶4. This Court expressly forbade the subterfuge of using intermediaries (in *Smith*, as here, the nonparty physician's "independent" attorney) to transmit information that would allow defendants "to accomplish indirectly what they cannot accomplish directly." 170 Wn.2d at 668-69, ¶15.

Smith made clear that one purpose of the *Loudon* rule is to prohibit defense counsel from using *ex parte* contacts to "shape" or "influence" the testimony of a nonparty treating physician:

> If a nonparty treating physician receives information from defense counsel prior to testifying as a fact witness, *there is an inherent risk that the nonparty treating physician's testimony will to some extent be shaped and influenced by that information.*

170 Wn.2d at 668, ¶14 (emphasis added). Such *ex parte* contacts undermine the fiduciary relationship between physician and patient:

> It seems obvious that even the mere threat that these kinds of communications may occur—where defense counsel and counsel for the nonparty treating physician are "helping each other out"—necessarily "endanger[s] the trust and faith invested" in a physician by a patient.

Smith, 170 Wn.2d at 669, ¶16 (alteration in original) (quoting *Loudon*, 110 Wn.2d at 679).[1]

The *Loudon* rule is also intended to prohibit malpractice defendants from compromising the testimony of plaintiff's physicians with appeals to shared interests and sympathies, and from exploiting the bias of *Loudon*-bound physicians:

> [R]isks that are not generally present in other types of personal injury litigation, including the risk of discussing the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, [and] the notion that the treating physician might be the next person to be sued, among others . . .

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[1] The "trust and faith" a patient such as Snyder invests in his physicians was particularly acute here with regard to Dr. Chew, who had a professional preoperative relationship with Snyder and spent hours at Snyder's postoperative bedside. (CP 1767) VMMC exerted perhaps its most concerted unlawful efforts in shaping Dr. Chew's testimony, secretly flying its chief medical officer to Prosser, Washington, armed with "talking points" prepared by VMMC defense counsel, to "support" Dr. Chew in the company of the attorney VMMC retained to represent the nonparty, nonemployee physicians. (CP 1832; Snyder Pet. 10-11)

Smith, 170 Wn.2d at 669, n.2, ¶15 (internal quotations and quoted source omitted). These personal and professional concerns are, in reality, largely unfounded (*see* Snyder Op. Br. 18, n.3), yet they were precisely the pressures VMMC brought to bear on Dr. Aranson in promoting his intervention and embedding attorney Oetter as counsel in the litigation.

Smith's concerns about protecting the integrity of the both the fiduciary relationship and the litigation process prohibited VMMC from secretly using *Loudon* material to "shape" or "influence" the testimony of plaintiff's nonparty physicians here. Given the clear holding of *Smith*, VMMC could not have thought it was entitled to use intermediaries, including its claimed defense "team," to sanitize its breach of the *Loudon* rule. And importantly, this Court affirmed that the contacts in *Smith* violated *Loudon* even though the nonparty physician's involvement in plaintiff's surgery made him "at risk of being sued

himself." *Smith v. Orthopedics Int'l, Ltd., P.S.*, 149 Wn. App. 337, 343, ¶11, 203 P.3d 1066 (2009), *aff'd*, 170 Wn.2d 659, 244 P.3d 939 (2010).

This Court thus has already rejected VMMC's claims that it could arrogate to itself the right to decide that its *ex parte* contacts were proper because the physicians' care was at issue, or they were "targets" of Snyder's lawsuit. Although *Smith* left unresolved the burden of proof issue raised by Snyder's petition for review (Snyder Pet. 20-26), there is no reason to accept review on VMMC's petition to reiterate that the types of *ex parte* contacts undertaken here violate *Loudon,* which this Court in *Smith* has already made clear.

3. VMMC indisputably did not limit its secret defense team to the "facts of the incidence," contrary to *Youngs*.

VMMC claims that the corporate attorney-client privilege at issue in *Youngs*, 179 Wn.2d at 653, ¶6, justified its secret *ex parte* communications with Snyder's

nonparty, nonemployee physicians. (VMMC Pet. 9-11) To the contrary, *Youngs* confirms VMMC's deliberate violation of the *Loudon* rule.

Youngs balanced the tension between the corporate attorney-client privilege and the *Loudon* rule prohibiting corporate attorneys from speaking with treating physicians who worked for the corporation at the time of the communications. This Court in *Youngs* expressly rejected the argument that the corporation's right to privileged communications with its employees "trumps *Loudon*." 179 Wn.2d at 652, ¶5. The Court instead held that a corporate defendant's attorney "may engage in privileged (ex parte) communications with the corporation's physician-employee where the physician-employee has firsthand knowledge of the alleged negligent event and where the communications are *limited to the facts of the alleged negligent event*." *Youngs*, 179 Wn.2d at 671, ¶38 (emphasis added).

VMMC indisputably violated *Youngs*' limitation of *ex parte* communications to "the facts of the alleged negligent event." The "talking points," witness coaching, and strategy memoranda that VMMC freely disseminated through its risk managers to these nonparty, nonemployee physicians were not communications directed to the physician's "firsthand knowledge" of care. *Youngs*, 179 Wn.2d at 671, ¶38. Nor were they intended to be; VMMC implemented its secret defense strategy deliberately to influence the physicians' testimony. Its contacts would have violated *Youngs* even had these physicians been *current* employees or agents. They were not, rendering VMMC's *ex parte* contacts doubly unlawful.

4. VMMC indisputably crossed the bright-line rule prohibiting *ex parte* communications with former employees that, regardless of the risk of vicarious liability, this Court established in *Newman*.

As VMMC concedes (VMMC Pet. 11), *Youngs* did not address the crucial issue in this case—whether the

corporate attorney-client privilege can shield communications with *former* employees. But this Court in *Newman* rejected the extension of *Youngs'* corporate attorney-client privilege to former employees, including the former residents with whom VMMC engaged in *ex parte* contacts through its defense "team." *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 782, ¶18, 381 P.3d 1188 (2016).

This Court rejected vicarious liability for its former employees' conduct as a basis for extending the corporate defendant's privilege to former employees in *Newman*, 186 Wn.2d at 780-81, ¶¶16-17. The *Newman* Court instead imposed a bright-line rule terminating the corporate attorney-client privilege because there is no "principled line of demarcation that extends beyond the end of the employment relationship." 186 Wn.2d at 782, ¶18.

Newman makes very clear that any corporate attorney-client privilege VMMC enjoyed in speaking with

Snyder's care providers (which under *Youngs* was in any event strictly limited to their knowledge of his injury during surgery) ended when their employment ended. The corporate attorney-client privilege did not immunize VMMC's *ex parte* communications or "trump" Snyder's ongoing fiduciary relationship or physician-patient privilege with his nonparty physicians, not only because a hospital's corporate privilege is strictly limited to an employee's firsthand knowledge of the alleged negligent event, but because the corporate attorney-client privilege does not apply to post-termination communications with former employees.

Newman, a high school football player, sustained a head injury in practice before suffering permanent brain damage in a game the next day. At issue was whether his coaches knew or should have known that he had suffered a concussion in practice and prohibited his participation in the game. *Newman*, 186 Wn.2d at 775, ¶3. Several of the

coaches were no longer working for the school district by the time of discovery in Newman's lawsuit, and the question this Court decided on discretionary review was whether the defendant district could prepare these former employees for their deposition testimony in privileged *ex parte* communications—much as VMMC wanted to prepare its former residents here. *Newman*, 186 Wn.2d at 775-76, ¶¶6-7.

This Court in *Newman* considered and expressly rejected VMMC's contention that a corporate defendant's vicarious liability for a former employee's actions could justify secret, privileged *ex parte* communications with its former employees:

> [Defendant]'s argument for extending the attorney-client privilege to its communications with the former coaches emphasizes that these former employees may possess vital information about matters in litigation, and that their conduct while employed may expose the corporation to vicarious liability. These concerns are not unimportant, but they do not justify expanding the attorney-client privilege beyond its purpose.

186 Wn.2d at 781, ¶17 (emphasis added).

VMMC asks this Court to accept review to impose a "medical malpractice" exception to *Newman*. Medical malpractice actions, however, present a far more compelling case for rejecting a corporate defendant's reliance on the corporate attorney-client privilege to justify *ex parte* contacts with ex-employees than did *Newman*. In *Newman*, the high school football player had no protected relationship with his former assistant coaches, let alone a fiduciary relationship and physician-patient privilege.[2] Here, the protected special relationship between Snyder and his physicians underlies the prohibitions on *ex parte* contacts under *Loudon* and *Smith* and makes VMMC's

[2] The protections governing health care information include not only RCW 5.60.060 and *Loudon* but the robust confidentiality provisions of the Uniform Health Care Information Act (UHCIA), RCW ch. 70.02, and privacy regulations adopted under the Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. pts. 160 & 164. These provisions apply with full force during litigation. (*See* Snyder Pet. 20)

conduct even more egregious. Rather than providing a basis for review under RAP 13.4(b)(4), VMMC would undermine the public interest in protecting the confidential physician-patient relationship.

5. This Court held again in *Hermanson* that the potential of vicarious liability could not justify VMMC's *Loudon* violations, and that a corporate defendant cannot create a "workaround" to *Loudon*.

This Court confirmed *Newman's* critical distinction between present and former employee/agents in *Hermanson v. Multi-Care Health Sys., Inc.*, 196 Wn.2d 578, 590, ¶22, 475 P.3d 484 (2020). This Court held that there must be "an ongoing obligation" between the employee/agent and the employer/principal for *Youngs* to apply:

> We did not extend the corporate attorney-client privilege to former employees in *Newman* because such former employees "c[ould] no longer bind the corporation and no longer owe[d] duties of loyalty, obedience, and confidentiality."

Hermanson, 196 Wn.2d at 588, ¶17 (brackets in original) (quoting *Newman*, 186 Wn.2d at 780, ¶16). This bright-line rule, ending the corporate defendant's attorney-client privilege with employment termination, "preserves a predictable legal framework." *Newman*, 186 Wn.2d at 782, ¶18. Here, in the absence of any "ongoing obligation" to VMMC, communications with former employees could not be protected by the corporate attorney-client privilege. *Newman*, 186 Wn.2d at 780, ¶ 16.

This Court also once again rejected VMMC's argument that the potential of vicarious liability could justify its *Loudon* violations, because "whether there is vicarious liability between two defendants is separate from whether such parties may have ex parte communications with one another under evidentiary privilege." *Hermanson*, 196 Wn.2d at 590, ¶23. VMMC continues to conflate these issues, identifying the medical providers' claimed "common interest" in rebutting claims of

malpractice, and thus the possibility of vicarious liability, as a compelling justification for its secret *ex parte* contacts with former employees. (VMMC Pet. 17-18)

Hermanson clearly rejected alternative methods to circumvent *Loudon* and *Youngs*, including claimed "separate" or "independent" representation of treating physicians that VMMC manufactured here:

> [The hospital]'s argument would allow any corporation to circumvent a plaintiff's physician-patient privilege by entering into a representation agreement with a treating physician, rendering the physician-patient privilege moot whenever the corporation chooses.

Hermanson, 196 Wn.2d at 590, ¶23, n.1. VMMC's secret "litigation support team" was just another prohibited subterfuge around *Loudon* and *Smith*. The Court of Appeals did not "misread" *Hermanson* (VMMC Pet. 17), and there is no reason for this Court to accept review on VMMC's petition to once again hold that VMMC was not

entitled to some secret "workaround" to *Loudon* that it so recently rejected in *Hermanson*.

6. VMMC's claimed corporate privilege does not implicate constitutional rights.

Contrary to VMMC's hyperbole, *Loudon* does not prohibit a defendant from obtaining evidence from a treating physician. There is no risk that providers will "first notice that their care is at issue . . . when and if they are subpoenaed to testify," as VMMC posits. (VMMC Pet. 9) Snyder has never argued that the *Loudon* rule prohibits contact by corporate defense counsel with prior employees altogether, only that such contact must take place in the context of discovery, or at a minimum with the knowledge of the patient and his counsel and with court approval. And this Court need not accept review on VMMC's petition to reiterate the obvious point that a medical malpractice defendant cannot engage in the sort of deceptive, secret defense strategy that VMMC undertook here.

Moreover, VMMC is not just asking that it be allowed to "contact" Snyder's treating physicians. Instead, it seeks "privileged" communications with them for the purpose of shaping and influencing their testimony—a right this Court has already said it does not have.

VMMC's equal protection argument conflates the waiver of the physician-patient privilege with VMMC's asserted right to engage in privileged communications with former employees involved in Snyder's care. The limited automatic waiver of the physician-patient privilege for Snyder's treating physicians under RCW 5.60.060 is akin to the waiver established by this Court in *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990) (VMMC Pet. 22), which held the attorney-client privilege was waived as to the plaintiff's successor counsel, who were named parties by way of the defendant's cross-claim in plaintiff's legal malpractice action. But that waiver did not authorize each of the client's lawyers to have privileged *ex parte*

contacts with the defendant-lawyer and his counsel in the legal malpractice action.

Protecting VMMC's *ex parte* communications with nonparty former employees as privileged would be a perversion of *Loudon*. Privileged communications are protected in order "to promote the adversary process, not to pervert it." Edna Selan Epstein & Michael M. Martin, *The Attorney-Client Privilege and the Work-Product Doctrine*, 151 (2nd ed. 1989). "It would indeed be perverse . . . to allow a lawyer to claim an evidentiary privilege to prevent disclosure of work product generated by the very activities the privilege was meant to prevent." *Moody v. IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981).

VMMC's secret defense strategy to circumvent *Loudon* by having *ex parte* communications with nonparty nonemployees is not justified by case law or public policy. "Whereas confidentiality of communications and work product facilitates the rendering of sound legal advice,

advice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.' Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection." *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2nd Cir. 1984).

No defendant has the right to act unlawfully in aid of its defense. A privilege is, by definition, not a right. Nor are privileged communications necessary for VMMC to fulfill any obligation to "insure" or otherwise protect its former employees' professional interests.

As the Court of Appeals correctly recognized, "an arrangement to pay for . . . representation does not equate to a privilege to which the physician-patient privilege and the *Loudon* protections must give way." (Op. 19) Insurers commonly use conflict walls and third-party administrators to fulfill their defense obligations while preserving the integrity of each insured's separate

privileged communications. VMMC did not have to position its risk managers to act as a conduit for *ex parte* communications among VMMC and its former employees in order to fulfill any obligations it might have to them. Instead, its defense scheme was clearly intended to shape and influence their testimony, in violation of *Loudon*, *Smith*, and *Youngs*.

"Privileges are recognized because law-makers and courts consider protecting confidential relationships more important to society than ferreting out what was said within the relationship. The privilege for communications between client and attorney ceases when the purpose of the privilege is abused, when the lawyer becomes either the accomplice or the unwitting tool in a continuing or planned wrongful act." *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir.), *cert. denied*, 475 U.S. 1109 (1986).

If it truly believed its communications among its defense "team" were proper, and privileged, VMMC could

have given Snyder proper notice instead of misleading answers in discovery and motions practice. VMMC could have given the trial court an opportunity to decide the issue before undertaking to secretly influence the testimony of Snyder's treating physicians through "talking points," strategy memos, and other means that illicitly permeated the discovery process. Instead, rather than obtain permission, VMMC bet on being able to obtain forgiveness—which it asked for only after it was caught in its subterfuge. This Court should not further reward VMMC's unlawful conduct by accepting review on its petition of the Court of Appeals' well-reasoned rejection of its excuses for violating *Loudon*.

D. Conclusion.

This Court's prior precedent makes clear that VMMC did not have authority to violate Snyder's privileged relationship with physicians who were neither parties nor current employees of VMMC. The Court of Appeals

correctly adhered to this established law. That VMMC persists in mischaracterizing and minimizing its clear violations of its obligations under Loudon and its progeny does not warrant further review in this Court.

I certify that this answer is in 14-point Georgia font and contains 4,549 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 6th day of June, 2025.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 6, 2025, I arranged for service of the foregoing Answer to VMMC Petition for Review, to the court and to the parties to this action as follows:

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