No. 104136-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL K. SNYDER, individually,
Respondent,

v.

VIRGINIA MASON MEDICAL CENTER,
Petitioner,

JARED BRANDENBERGER, MD., and JOHN and JANE DOE PHYSICIANS, UNKNOWN JOHN and JANE DOE NURSES,
Defendants.

MEMORANDUM OF *AMICI CURIAE* WASHINGTON STATE MEDICAL ASSOCIATION, WASHINGTON STATE HOSPITAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF VIRGINIA MASON MEDICAL CENTER'S PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae are the Washington State Medical Association, Washington State Hospital Association, and the American Medical Association ("Health Care *Amici*"), per their motion. They have a continuing interest in cases affecting their members, patients, the health care system and its costs. The WSMA and the WSHA were *amici curiae* in the Court's most recent cases construing the scope of the *Loudon* rule[1] addressing an employer defendant's *ex parte* communications with its providers whose care is at issue, *Youngs v. PeaceHealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014), and *Hermanson v. MultiCare,* 196 Wn.2d. 578, 475 P.2d 484 (2020).

At issue is whether healthcare organizations and their providers can fully and fairly defend themselves against negligence claims. *Youngs* and *Hermanson* held they could. Their principles should be extended to all the physicians here.

[1] *Loudon v. Mhyre,* 110 Wn.2d 675, 756 P.2d 138 (1988).

Health Care *Amici* support the Virginia Mason Medical Center ("VMMC") petition for review ("Petition") because they believe *Snyder v. Virginia Mason Medical Center, et al.,* __ Wn.App.2d ___, 566 P.3d 873 (2025) ("*Snyder*" or "Decision"), misapplied *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016) and so conflicts with *Youngs*, *Hermanson,* RCW 5.60.060(4)(b) (physician-patient waiver provision), 7.70.020 (defining health care providers), and 7.70.030 (must prove injury was caused by health care provider).

The Court should grant VMMC's Petition to address the Decision's misapplication of the *Loudon* rule by prohibiting *ex parte* contact between the employer defendant's counsel and "non-party" physicians, here former employees and former medical residents whose care is at issue and whom the employer must defend. Health Care *Amici* believe the ruling effectively denies the corporate defendant the ability to fully defend itself and its physicians, contrary to *Youngs* and *Hermanson*.

The Decision's application of the *Loudon* rule is premised on *Newman*, which did not involve medical negligence. *See Snyder,* 566 P.3d at 881-882. *Newman* barred former school district employees from privileged conversations with the district's attorneys defending against claimed injuries that occurred while they were employed. The Decision "followed" *Newman* to apply *Loudon* to medical treatment team members who, when the litigation ensued, were former employees and not named parties. *Id.* Health Care *Amici* believe the reliance on *Newman* was due in part to an incomplete understanding of the health care system, particularly the medical training programs at private hospitals and the University of Washington. The continuing obligations that physicians have post-training or post-service distinguish them from the employees in *Newman* and make it inapplicable.

If not corrected, the Decision will harm the health care system, compromise medical training programs, and increase health care costs, harming patients throughout Washington.

II. ISSUES ADDRESSED BY *AMICI CURIAE*

Health Care *Amici's* concerns are reflected in the first two issues stated in VMMC's Petition,[2] which *Amici* summarize:

> *Youngs, Hermanson,* and underlying federal law extend the corporate attorney-client privilege to members of the health care treatment team so a corporate health care provider can "determine what happened" and fully defend itself and its providers against negligence claims. Must this right to a full and fair defense include applying the attorney-client privilege to treatment team physicians who, when suit is brought, are not named defendants and are no longer employees of the entity but, as part of the medical treatment team for the care at issue, are genuinely part of the legal team because of their professional involvement and continuing confidentiality and other professional obligations to the entity?

III. STATEMENT OF THE CASE

Health Care *Amici* accept the facts as stated by VMMC. *Amici* highlight as an example one physician involved in the care who was not named as a defendant and was not employed by VMMC when the case was filed as an illustration of the problems arising from applying *Newman* in this context.

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[2] Health Care *Amici* also support review addressing VMMC's third issue that raises physicians' due process rights.

The complaint named VMMC and only one physician, plus unnumbered "John and Jane Doe Physicians" and nurses, as defendants. Petition at 2; CP 1-3. During discovery, VMMC arranged for separate counsel to represent the former employee physicians in the litigation because of concern that if *Newman* applied it could preclude privileged communications with the treatment care team members solely because they now were former employees. *See* Petition, 3-4. The Petition summarizes how cumbersome the discovery and defense process quickly became, leading to discretionary review at the Court of Appeals because the situation became untenable. Petition at 4-6. Two examples show why Health Care *Amici* are highly concerned.

First, plaintiff's counsel refused to provide copies of transcripts of its experts criticizing the care of one "unnamed" physician to the physician's attorney, Ms. Oetter. She had been retained by VMMC to represent Dr. Aranson. After learning that Dr. Aranson's care had been criticized at plaintiff's experts' depositions, she asked plaintiff's counsel for copies of the

transcripts. CP 2308, 2319-2320, 2328. That simple request was rejected, after which Western Litigation, VMMC's claims manager and litigation coordinator, provided them to Ms. Oetter. CP 433. This led to an unnecessary cascade of procedural wrangling after the transcripts were obtained, requiring a motion by Dr. Aranson to intervene in the case to protect himself (CP 4419-4434), and a motion for a protective order. CP 430-438.

Second, as the facts of this case show, plaintiff took the deposition of a claimed "fact witness" physician member of the treatment team who later, ***after*** his deposition; and ***after*** plaintiff's experts were deposed, was identified as a targeted defendant. Then, he had to intervene to get into the case.

Dr. Aranson's motion to intervene is instructive. It succinctly states his–and every physician's–interest in defending their care after they have left their training or former employer:

> ... in light of new claims by plaintiff's experts critical of his care[] Dr. Aranson has an independent interest in defending his own care in this litigation because any finding that he was negligent, even if it is under the

> umbrella of an entity, will adversely affect him professionally for the rest of his career.

CP 4419. The motion to intervene details the sequence of events which, Health Care *Amici* believe, would be avoidable with a proper interpretation and application of *Youngs* and *Hermanson* to application of attorney-client and physician-patient privileges:

> - During litigation, plaintiff's counsel refused to allow counsel for VMMC and [the one named physician] to represent doctors involved in the care who were not named defendants....Doctors involved in the care who were not named defendants were required to have independent counsel for their depositions and any other interaction regarding this matter...
> - In early September 2020, below signed counsel was contacted by plaintiff's counsel's paralegal to arrange for the deposition of Dr. Aranson....
> - During all email and phone exchanges, counsel for plaintiff created the impression Dr. Aranson was simply a fact witness and was not a target in the litigation....
> - Dr. Aranson's deposition took place on November 19, 2020....
> - Two years after the lawsuit was filed [on March 8, 2019, or in 2021 after his deposition], Dr. Aranson was made aware that experts retained by plaintiff were critical of his care.....

\# \# \#

- Plaintiff's counsel declined to give Dr. Aranson's counsel....any...document that would have put Dr. Aranson or VMMC on notice that Dr. Aranson's care was at issue....
- ... *after* Dr. Aranson's deposition, witness disclosures and, critically, after experts had already criticized his care – plaintiff's counsel apparently called counsel for VMMC and agreed to allow the FAVROS firm to represent Dr. Aranson in defending his care....

CP 4421-22 (declaration references omitted; italics in original).

Dr. Aranson's intervention motion describes the risks to him professionally of adverse judgments or settlement payments based on his care, whether he was a named defendant or not. CP 4422. Reports must be made to the National Practitioner Data Bank and relevant medical boards in Washington, Maine, and New Hampshire where he is licensed. *Id.* The motion to intervene says:

> Dr. Aranson was originally involved with this litigation as a witness. It was not apparent that plaintiff would pursue a claim based on the care provided by Dr. Aranson until the deposition of [plaintiff's] experts....in early 2021. Dr. Aranson brings this motion to intervene so he can fully and fairly defend his care and interests....

CP 4423.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

A. Review Should Be Granted To Review The *Loudon* Rule In The Current Medical-Legal Landscape.

Health Care *Amici* believe review should be granted not only because the Decision conflicts with *Youngs, Hermanson,* RCW 5.60.060(4)(b) (the physician-patient waiver provision), 7.70.020 (defining health care providers to include employees and agents), and 7.70.030 (requiring proof that injury was caused by health care provider),[3] but because the Court needs to re-examine how – if at all – the *Loudon* rule should be applied today, nearly 40 years after it was first created in an entirely different health care environment.

The Decision creates unnecessary roadblocks to the defense against medical malpractice claims by health care employers who are, per RCW 7.70.020, the providers, but cannot fully investigate and prepare their defense because the physicians whose care is at issue are no longer employed when the case is

[3] If review is granted Health Care *Amici* will elaborate on how the Decision is inconsistent with the statutes.

brought and are not named as parties by the plaintiff's attorneys. Under the Decision, VMMC's lawyers "cannot contact the physicians or their counsel except in depositions or at trial." Petition at 20. Health Care *Amici* believe this rule unnecessarily conflicts with the principles in *Youngs* and *Hermanson* and underlying federal law on privilege and makes defense practically impossible.

It also is not logical. Either "*Loudon's* application becomes a matter of timing rather than substance," Petition at 20, or a matter of who the plaintiff chooses to name in the complaint, absent a motion to intervene, as Dr. Aranson had to do.

The Petition aptly summarized:

> as interpreted by plaintiffs, and not addressed by the Court of Appeals, *Loudon* means that VMMC counsel cannot, without opposing counsel's permission, contact the physicians to investigate what happened, provide them with the medical records they created, or receive information their personal counsel has gathered that would assist in defending their common interest. Apparently, the defense cannot even contact the witnesses to schedule their testimony, identify exhibits about which the witness may be questioned, or inform the witness of limine rulings.

Petition, p. 20.

This is at odds with the fundamental purpose of the attorney-client privilege this Court embraced in *Youngs* relying on the U.S. Supreme Court's approach in *Upjohn*[4] and which the lower federal courts and this Court have applied ever since. *See, e.g., Hermanson*, 196 Wn.2d at 586-590.

Indeed, in *Hermanson,* Judge Glasgow's partial dissent below and the majority of this Court articulated the need for a common sense approach to privilege that permits a corporate defendant to defend itself.[5] The only difference here is that the

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[4] *Upjohn Co. v. United States,* 449 U.S. 383 (1981). *See Youngs,* 179 Wn.2d at 650-653, 661-665, analyzing *Upjohn.*

[5] *See Hermanson v. Multi-Care Health System, Inc.*, 10 Wn.App.2d 343, 371-372, 448 P.3d 153 (2019) (Glasgow, J., dissenting in part) (advocating for a functional analysis for the contractor with "an ongoing duty of loyalty" that would permit extension of the privilege as envisioned in *Youngs* and "allow corporate counsel to quickly and fully investigate the corporation's potential liability, promoting, for example, early and efficient resolution of cases."); *Hermanson,* 196 Wn.2d at 581-582, 587-588 (adopting the functional analysis for purposes of privilege to ensure consistency with *Youngs* and *Upjohn* and the corporation's right to a defense).

corporate defendant must also defend its former employees who were involved in providing the challenged care and have their own individual and professional interests at stake in the litigation, whether they are named or not. Health Care *Amici* know from their daily work that privileged communication is needed with all members of the medical care team to maintain individual hospitals' ability to assess quality issues, as well as an exemplary system of medical training. This is described in the joinder of the University of Washington School of Medicine, an entity also is bound to defend the hundreds of new medical residents and trainees each year who provide care through its programs. *See, e.g.,* Declaration of Cindy A. Hamra, Associate Dean for Graduate Medical Education at the U.W. School of Medicine, filed in the UW Joinder.

B. The Rules From *Youngs* and *Hermanson* Should Apply To Protect The Privilege.

What is of special concern to the WSMA and AMA is that the individual physicians who provided the care will be deprived of a full and thorough defense unless this Court takes review and

restores the sort of order that existed under the rules of *Youngs* and *Hermanson* with a rule that balances the interests of all the parties – but also ensures the corporate employer defendant as well as the individual providers all have full defenses. For not only does application of *Loudon* become a matter of timing under the Decision, it also becomes a matter of litigation strategy if the physicians providing the care are not named in order to invoke the *Loudon* rule as a sword – even though they remain at risk for their license and professional futures as a non-party.

C. There Is An Easy Solution: Health Care Team Members Automatically Are Members Of The Legal Defense Team.

Health Care *Amici* suggest that a solution need not be complicated. That would just spark more procedural wrangling seeking advantage, as occurred here. Instead, Health Care *Amici* suggest that the default rule should be that physician members of the medical treatment team are presumptively part of the legal defense team with privileged communications, whether named

as parties or not, and whether still employed at the health care entity or not.

This Court needs to take review to re-examine whether and how the *Loudon* rule applies in the current medical-legal landscape so as to promote patient safety and accountability. It should tell the lower courts that, despite the intervening *Newman* decision involving a different employment setting, the *Youngs* and *Hermanson* holdings, and underlying federal law, require that health providers – both entities and individuals – are entitled to a full defense. With all due respect, the continuing relationship of health care providers to their health entity employers after they leave employment, particularly physicians in training as are certain physicians in *Snyder*, is materially different than that of former football coaches to their former high school employers in *Newman*.

If not corrected, the Decision will harm the health care system, patients, and *Amici's* members, while increasing the cost of care and potentially wreak havoc with the medical training

system in this state which is largely operated by the University of Washington School of Medicine.

V. CONCLUSION

Health Care *Amici* urge the Court to grant review of the VMMC Petition.

This document contains 2,479 words, excluding the parts of the document exempted by RAP 18.17.

Respectfully submitted this 11th day of July, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 11th day of July, 2025; at Seattle, Washington.

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CARNEY BADLEY SPELLMAN

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