No. 97783-6

SUPREME COURT OF THE STATE OF WASHINGTON

DOUG HERMANSON, an individual,

Respondent/Cross-Petitioner,

v.

MULTICARE HEALTH SYSTEM, INC., a Washington Corporation d/b/a TACOMA GENERAL HOSPITAL, JANE and JOHN DOES 1-10 and their marital communities comprised thereof,

Petitioner/Cross-Respondent.

AMICUS CURIAE BRIEF OF WASHINGTON STATE HOSPITAL ASSOCIATION, WASHINGTON STATE MEDICAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION

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I. IDENTITY & INTEREST OF AMICI

A. Identity

Amici are the Washington State Hospital Association ("WSHA"), the Washington State Medical Association ("WSMA"), the American Medical Association and its Litigation Center ("AMA"). WSHA is a membership organization representing the interests of over 100 Washington hospitals, many of which employ physicians through medical groups affiliated with the hospital or related healthcare systems.

WSMA is the largest medical professional association in Washington, representing more than 11,000 physicians, physician assistants, and trainees from nearly all specialties and practice settings throughout the state. Its mission is to advance strong physician leadership and advocacy to shape the future of medicine and advance quality care for all Washingtonians.

AMA is the largest professional association of physicians, residents and medical students in the United States. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. Through its Litigation Center, the AMA represents the interests of the medical profession in the courts. It brings lawsuits, files amicus briefs and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

B. Interest

Forty to fifty percent of American physicians are employed by hospitals and health systems or, like the targeted physician in this case, medical groups affiliated with hospitals or health systems.[1] In Washington, many hospitals and health systems employ physicians through legally separate but affiliated entities.[2] These affiliated physician groups often receive legal services from the same lawyers who advise the hospital or system. They may also have the same liability coverage.[3]

Other hospitals contract with independent physician groups to provide and manage medical services within their facilities.[4] Although they vary considerably from the service-specific (*e.g.,* emergency medicine) to comprehensive "full-service" staffing, these arrangements almost always include management services, such as medical directorships and quality improvement/risk management, as well as a requirement to cooperate with the hospital regarding liability claims. These requirements necessarily involve the contractor in important facets of hospital operations and management.

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[1] 2018 Survey of American's Physicians, p.11, *available at* https://physiciansfoundation.org/wp-content/uploads/2018/09/physicians-survey-results-final-2018.pdf (last accessed 12/17/2019).

[2] Additional major examples include UW Medicine and UW Physicians, CHI-Franciscan Health and Franciscan Medical Group, Seattle Children's Hospital and Children's University Medical Group, and Kaiser Health and Washington Permanente Medical Group.

[3] *See, e.g., Hyde v. UW Physicians,* 186 Wn. App. 926, 347 P.3d 918 (2015).

[4] *See, e.g., Adamski v. Tacoma General Hospital,* 20 Wn. Ap. 98, 102-103, 579 P.2d 970 (1978).

As was the case here, claims based on alleged errors by physicians employed by hospitals or affiliated entities are often brought solely against the hospitals or health systems in which they work.[5] Similarly, where the conduct of a physician employed by an independent group contracted with the hospital is at issue, plaintiffs may choose to simplify their cases by naming only hospitals as defendants, asserting that they are vicariously liable for conduct of the involved physicians.[6]

In either instance, these cases heretofore have been defended without any restriction on the ability of hospital counsel to communicate with the targeted physicians or, when appropriate under the Rules of Professional Conduct, to jointly represent the hospital, involved physicians, and their employers. By prohibiting joint representation and further holding that hospital counsel are prohibited from communicating with affiliated entities or physicians on matters of common interest, the Court of Appeals departed from settled law and thereby needlessly hampered the core functions of defense counsel.

WSHA's members also employ or contract with a wide variety of personnel who provide care or support services to patients. These include nurses, technicians, social workers, dieticians, transport personnel, housekeepers, and a variety of others. As shown below, extension of the rule in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988) to non-

[5] *See, e.g., Schoening v. Grays Harbor Comm. Hosp.*, 40 Wn. App. 331, 698 P.2d 593 (1985); *Tillotson v. University of Washington*, 11 Wn. App. 2d 1053, 2019 WL 7167172 (Dec. 23, 2019).

[6] *See*, *e.g.*, *Hogan v. Sacred Heart*, 101 Wn. App. 43, 2 P.3d 968 (2000).

physicians is inconsistent with the purposes of the rule and would unnecessarily complicate and hinder prompt, fair resolution of many liability claims.

II. STATEMENT OF THE CASE

Plaintiff/Respondent's complaint alleged that "employees and agents" of Tacoma General Hospital ("TG") improperly disclosed his confidential health care information to police. Clerk's Papers ("CP") 2. He further alleged that disclosure "by TG's employees and staff, was TG's release of that information." CP 3. Later, plaintiff identified a MultiCare social worker (Lori Van Slyke), and a trauma surgeon employed by Trauma Trust (Dr. David Patterson) as the "employees and agents" of MultiCare who were responsible for the disclosure. CP 56; CP 59 ("Based on discovery and plaintiff's investigation it appears the individuals who violated plaintiff's confidential health care information protection were [Lori] Van Slyke and Dr. Patterson").

Trauma Trust is a non-profit corporation formed to provide trauma and emergency medical services at Tacoma General and St. Joseph's hospitals. CP 95. MultiCare and Franciscan Health (operator of St. Joseph's) are its corporate members. *Id.* Trauma Trust's offices are located at Tacoma General.[7] Its board is dominated by Franciscan and MultiCare representatives.[8] In response to discovery, MultiCare admitted it was

[7] *Hermanson v. MultiCare Health System,* 10 Wn. App.2d 343, 348, 448 P.3d 153 (2019).

[8] *See* https://www.tacomatrauma.org/about-us/board-directors/ (last accessed 12/9/2019).

vicariously liable for the actions of its employees and any acts or omissions of Dr. Patterson or any other Trauma Trust employees involved in Mr. Hermanson's care. CP 129.

After receiving notice of the claim and prior to commencement of suit, MultiCare, Dr. Patterson and Trauma Trust jointly retained counsel. CP 22. In the superior court, plaintiff objected to defense counsel having contact with Dr. Patterson, Trauma Trust, social worker Van Slyke, and the two MultiCare-employed nurses who participated in plaintiff's emergency care.

III. ARGUMENT

A. Summary of Argument.

Regarding contact between Dr. Patterson, Trauma Trust, and defense counsel, the Court of Appeals' decision was premised on two fundamental errors. First, the majority held that *Youngs v. PeaceHealth,* 179 Wn.2d 645, 316 P.3d 1035 (2014), precludes contact between counsel for MultiCare and Dr. Patterson, the physician whose alleged actions are a basis for plaintiff's claim against MultiCare, or his employer. *Hermanson,* 10 Wn. App.2d at 356. This was error. *Loudon v. Mhyre,* 110 Wn.2d 675, 756 P.2d 138 (1988) does not preclude *ex parte* contact with physicians whose care and treatment is at issue and who are agents of the hospital.

The lower court majority's second error flowed from the first. It resolved a false conflict between *Loudon* and the corporate attorney-client

privilege by limiting the corporate privilege while summarily casting aside the privilege that existed between MultiCare, Dr. Patterson, Trauma Trust and the lawyer they had jointly engaged to represent their common interests. Nothing prohibits joint representation or limited confidential communications between counsel and their clients.

Even in the absence of joint representation, persuasive authority establishes that MultiCare's counsel is allowed have privileged communications with Dr. Patterson because he was and is its agent. The lower court majority's contrary interpretation of *Newman v. Highland Sch. Distr. No. 203,* 186 Wn.2d 769, 381 P.3d 1188 (2016) was error.

With regard to contact between hospital counsel and the nurses and social worker here involved, the Court of Appeals reached the correct result but for the wrong reason. Rather than deciding the case under *Youngs,* this Court should hold that *Loudon* does not apply to non-physicians.

B. *Loudon* and *Youngs* do not apply to physicians whose alleged fault is the basis for the plaintiff's claim.

Loudon announced a rule prohibiting defense counsel in personal injury cases from communicating with plaintiffs' non-party treating physicians except through formal discovery. 110 Wn.2d at 677-78. Each subsequent Washington decision applying the *Loudon* rule to preclude *ex parte* communications involved physicians whose care and treatment was

not at issue in the litigation.[9] Most recently, *Youngs* addressed whether *Loudon* prohibits defense counsel from communicating with physicians who are employed by their clients but whose care and treatment is not at issue in the case.[10] This Court fashioned a rule balancing the interests protected by the attorney-client and patient-physician privileges, holding that defense counsel can have privileged communications "with a plaintiff's nonparty treating physician only where the communication meets the general prerequisites to application of the attorney-client privilege, the communication is with a physician who has direct knowledge of the event or events triggering the litigation, and the communications concern *the facts of the alleged negligent incident*." 179 Wn.2d at 653 (emphasis in original).

Without a doubt, this standard covers physicians whose care and treatment is at issue because they necessarily have direct knowledge of the liability-triggering event. Nothing in any of *Loudon's* other progeny limits hospital counsel's ability to communicate directly with physicians whose care and treatment is a basis for the claim against the hospital.

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[9] In addition to *Youngs, see Ford v. Chaplin*, 61 Wn. App. 896, 898, 812 P.2d 532 (1991); *Rowe v. Vaagen Bros. Lumber, Inc*., 100 Wn. App. 268, 278, 996 P.2d 1103 (2000); *Smith v. Orthopedics Int'l, Ltd., P.S*., 170 Wn.2d 659, 665, 244 P.3d 939 (2010).

[10] The parties in *Youngs* and its companion case, *Glover v. Harborview,* agreed that defense counsel could communicate with the providers whose care and treatment was at issue. *Youngs,* 179 Wn.2d at 654, 656.

C. Communications between MultiCare, Dr. Patterson, and Trauma Trust were privileged because they were jointly represented.

In its haste to decide whether the corporate attorney-client privilege extends to non-employed agents of a corporation, the lower court majority simply brushed aside the fact that MultiCare, Dr. Patterson, and Trauma Trust had common interests in the matter and were jointly represented. It did so because it perceived joint representation as an attempt to "circumvent the rules of corporate attorney-client or physician-patient privilege." *Hermanson*, 10 Wn. App.2d at 361. This was the lower court's second fundamental mistake.

Even without being named as defendants,[11] plaintiff's allegation that Dr. Patterson improperly disclosed confidential or privileged healthcare information to police created a variety of potential liabilities for him and Trauma Trust. Among these are: (1) professional discipline for Dr. Patterson;[12] (2) reporting to the National Practitioner Data Bank, which could negatively impact his hospital privileges or insurance;[13] (3) civil liability under the Uniform Health Care Information Act;[14] or (4) civil and criminal penalties under HIPAA.[15] In these circumstances, it was entirely

[11] The Court of Appeals concluded that the social worker and two nurses were, in fact, named parties through plaintiff's Complaint naming "Jane and John Does" and alleging those individuals were employees of MultiCare. *Hermanson*, 10 Wn. App. 2d at 364.

[12] RCW 18.71.350; RCW 18.130.180.

[13] 45 CFR § 60.7.

[14] RCW 70.02.170.

[15] 42 U.S.C. § 1320-d-6(a).

appropriate for Dr. Patterson and Trauma Trust to engage counsel and to conclude their interests would be best and most efficiently served by joining forces with MultiCare to defend the claim.

The question then becomes, is there anything that prevented defense counsel from jointly representing MultiCare, Dr. Patterson, and Trauma Trust? Certainly, there is nothing in the Rules of Professional Conduct: there was no apparent conflict between the three clients and, even if there were, nothing in record indicates they did not validly consent to joint representation. *See* RPC 1.7(a)-(b). Nor did the patient-physician privilege prevent joint representation, because Mr. Hermanson waived that privilege when he made a claim concerning Dr. Patterson's care. *Carson v. Fine*, 123 Wn.2d 206, 213–14, 867 P.2d 610 (1994). Like lawyers and law firms who are accused of malpractice or other breaches of duty*, see Pappas v. Holloway*, 114 Wn.2d 198, 208, 787 P.2d 30 (1990), the patient-physician privilege does not prevent physicians from disclosing otherwise privileged information to their lawyers. To hold otherwise would enable patients to use the privilege as a sword, rather than a shield as Legislature intended. *Id.*

Because they were jointly represented, MultiCare, Trauma Trust, and Dr. Patterson's confidential communications with their lawyers concerning the matter were privileged, without regard to Dr. Patterson's status as a non-employed agent of MultiCare. *See Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 746–47, 174 P.3d 60 (2007) (attorney-client privilege applied to pre-suit communications between school district staff at risk of personal liability and counsel who jointly represented them and school

district regarding potential claim). *Newman v. Highland Sch. Dist. No. 203,* 186 Wn.2d 769, 783, 381 P.3d 1188 (2016) reached the same result in broader circumstances, holding that communications between non-party former school district employees and counsel who jointly represented them and the defendant school district were privileged.

Under the same principles, communications between Dr. Patterson and Trauma Trust and counsel jointly representing them and MultiCare were privileged, regardless of whether MultiCare's independent privilege extends to non-employee agents of the hospital.[16]

D. The lower court's reading of *Newman* should be rejected.

In *Youngs,* this Court fashioned what has proven to be a workable rule that balances the interests served by the patient-physician privilege against the need of hospitals to gather information necessary to the defense of claims against them. In this case, the Court of Appeals' majority needlessly upset that balance by holding that counsel for a defendant-hospital cannot have "*ex parte*" or privileged communications with a physician who is the hospital's admitted agent and whose conduct forms the basis for the claim against the hospital.

The sole apparent basis for this holding is that such communications are not privileged because the physician's employer is a corporation

[16] If Dr. Patterson and Trauma Trust had engaged separate counsel, confidential communications between them and MultiCare concerning Hermanson's claim would be privileged under the "common interest" or "joint defense" privilege. *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120, 134 (2010) (citing *Broyles v. Thurston County*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008)).

affiliated with the hospital, rather than the hospital itself. In reaching this result, the Court of Appeals majority mistakenly concluded that *Newman v. Highland Sch. Distr. No. 203,* 186 Wn.2d 769, 381 P.3d 1188 (2016) compels rejection of well-settled national precedent holding that the corporate attorney-client privilege applies to communications between corporate counsel and affiliated entities and their employees. Treating Dr. Patterson like the former employees in *Newman* represents a significant misreading of this Court's decision.

The critical factor in *Newman* was not employment status; it was the absence of an ongoing agency relationship, and consequent inability of the principal to control the agent. *Newman,* 186 Wn.2d at 780 ("When the employer-employee relationship terminates, this generally terminates the agency relationship."). Here, Dr. Patterson was at all times the hospital's admitted agent and an employee of an entity over which MultiCare has considerable control. There is no evidence MultiCare lacked authority to require him to disclose information to its lawyers, or of any divergence of interests between him and MultiCare. Judge Glasgow's concurring and dissenting opinion correctly identified this problem in the majority's rationale, noting that unlike a "third-party witness," Dr. Patterson was an admitted agent of MultiCare, with a continuing ongoing duty of loyalty. 10 Wn. App.2d at 371. Therefore, unlike a former employee, he may be MultiCare's "speaking agent" with regard to statements made during litigation. *Wright v. Group Health Hosp*., 103 Wn.2d 192, 201, 691 P.2d 564 (1984).

The Court of Appeals majority posited that *Newman* implicitly rejected the reasoning of cases such as *In re Bieter*, 16 F.3d 929, 937-39 (8th Cir. 1994) and *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). *Hermanson*, 10 Wn. App.2d at 359-60. These cases applied the flexible multi-factor test developed by United States Supreme Court in *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), which has been utilized by this Court on multiple occasions, including in *Newman* and *Youngs.* In a well-reasoned opinion by Judge Tallman, *Graf* held that communications between an ostensible "outside consultant" and corporate counsel were subject to the corporation's attorney-client privilege because the consultant was an agent of the employer and authorized to communicate with its attorneys regarding legal matters concerning the company. 610 F.3d at 1157. Accordingly, when charged with federal crimes, the consultant could not assert a personal attorney-client privilege with respect to those communications. *Id.*

Like many other courts, *Graf* adopted the approach set forth in *Bieter,* where the Eighth Circuit reasoned that, "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Bieter,* 16 F.3d 937-938.[17] This approach is

[17] *Bieter* referenced both *Upjohn* and NYU law school dean John E. Sexton's article, *A Post–Upjohn Consideration of the Corporate Attorney–Client Privilege*, 57 N.Y.U. L. REV. 443 (1982), which noted that a "literalistic extension of the privilege only to persons on the corporation's payroll" would "invariably" prevent the corporation's attorney from

consistent with RPC 1.13, comment 2, which recognizes that the corporate attorney-client privilege is not limited to communications with "employees:"

> When **one of the constituents** of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees **or other constituents** are covered by Rule 1.6.
>
> *Id*. (emphasis added).

A majority of federal courts addressing the issue have adopted this reasoning,[18] including at least three judges sitting in the Western District of

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engaging in a confidential discussion with a non-employee, "no matter how important [that employee's] information would be to the attorney." *Id*. at 498 (cited and quoted in *Bieter*, 16 F.3d at 937). Instead, Dean Sexton proposed that:

> A corporate attorney-client privilege faithful to *Upjohn* would protect communications of those persons who, either when they are speaking or after they have acquired their information: (1) possess decision making responsibility regarding the matter about which legal help is sought, (2) are implicated in the chain of command relevant to the subject matter of the legal services, or (3) are personally responsible for or involved in the activity that might lead to liability for the corporation.

Id. at 500.

[18] *See*, *e.g*., *Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141, 147–48 (D.C. Cir. 2002); *Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 440 (D. Md. 2005); *In re Copper Mkt. Antitrust Litig*., 200 F.R.D. 213, 218-19 (S.D.N.Y. 2001); *In re Flonase Antitrust Litig*., 879 F.Supp.2d 454, 458-60 (E.D. Penn. 2012); *Digital Vending Servs. Int'l, Inc. v. Univ. of Phoenix, Inc*., 2013 WL 1560212 at **8-10 (E.D. Va. Apr. 12, 2013); *U.S. ex rel. Strom v. Scios, Inc*., 2011 WL 4831193 at **2-4 (N.D. Cal. Oct. 12, 2011); *Trustees of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc*., 266 F.R.D. 1, 8-9 (D.D.C. 2010); *United States v. Advanced Pain Mgmt. & Spine Specialists of Cape Coral & Fort Myers*, 2018 WL 4381192 at *4 (M.D. Fla. June 28, 2018); *U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati*, 2009 WL 5033940 at *4 (S.D. Ohio Dec. 11, 2009); *Hope For Families & Cmty. Serv., Inc. v. Warren*, 2009 WL 1066525 at *10 (M.D. Ala. Apr. 21, 2009); *Am. Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc*., 2008 WL 5231831 at *3 (E.D.N.Y. Dec. 11, 2008); *Stafford Trading, Inc. v.*

Washington.[19] In one factually similar decision, the attorney-client privilege was held to apply to the medical director of the defendant's clinic even though the medical director was employed by another entity and worked under contract for the defendant through that entity. *Jones v. Nissan North America, Inc*., 2008 WL 4366055 at *7 (M.D. Tenn. Sept. 17, 2008).

A number of state courts have also adopted the *Bieter* court's conclusion that the attorney-client privilege may apply to communications between an entity's counsel and third parties.[20] As noted in *Brigham Young Univ. v. Pfizer, Inc*., 2011 WL 2795892 at *5 (D. Utah July 14, 2011), refusal to extend the corporate privilege to closely-related entities would undermine much of current corporate governance and structure.

The *Hermanson* majority's rejection of this well-reasoned and widely-adopted approach threatens to make Washington an outlier in the corporate world because the majority of jurisdictions hold that the privilege applies where counsel for an entity communicates with the representatives

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Lovely, 2007 WL 611252 at **6-7 (N.D. Ill. Feb. 22, 2007); *In re Morning Song Bird Food Litigation*, 2015 WL 12791473 at **6-7 (S.D. Cal. July 17, 2015); *ASU Students for Life v. Crow*, 2007 WL 2725252 at *3 (D. Ariz. Sept. 17, 2007).

[19] *See*, *e.g*., *Gibson v. Reed*, 2019 WL 2372480 at *2 (W.D. Wash. June 5, 2019); *Kelly v. Microsoft Corp*., 2009 WL 168258 at **2-3 (W.D. Wash Jan. 23, 2009) (applying Washington law); *Davis v. City of Seattle*, 2007 WL 4166154 at **3-4 (W.D. Wash. Nov. 20, 2007).

[20] *See*, *e.g*., *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314, 319-25 (Tenn. 2019) (adopting functional equivalent analysis after conducting comprehensive survey of other jurisdictions); *Alliance Const. Solutions, Inc. v. Dept. of Corr*., 54 P.3d 861, 869-71 (Colo. 2002); *Sieger v. Zak*, 2008 WL 598344 at **10-11 (N.Y. Sup. Ct. Feb. 21, 2008); *One Ledgemont LLC v. Town of Lexington Zoning Bd. of Appeals*, 2014 WL 2854788 at *2 (Mass. Land Ct. June 23, 2014).

of a separate, but affiliated, entity concerning matters of common interest. Equally troubling is the prospect that counsel for a company that contracted with a "turn-around" or other firm to provide interim executives (including "C-suite" officers) could not have privileged communications with those executives or that, in litigation, the privileged status of confidential communications will turn on whether a case is brought in state or federal court.

E. *Loudon* does not preclude privileged communications with non-physician/agents of a defendant hospital.

The Court of Appeals reached the correct result regarding whether *Loudon* precluded privileged communications with the MultiCare social worker and nurses involved in this case, but for the wrong reason. Although it is true, as the lower court held, that the social worker and nurses here had direct knowledge of the liability inducing events, it was error to conclude that *Loudon* applies to nurses and social workers. 10 Wn. App.2d at 363. As MultiCare correctly notes,[21] neither *Loudon* nor *Youngs* suggest that defense counsel cannot have *ex parte* contact with non-physician hospital staff. The primary purpose of the *Loudon* rule was to protect the unique fiduciary duty owed by a physician to his or her patient, which is "recognized by the Hippocratic Oath." 110 Wn.2d at 679. *Youngs* identified the same underlying policy purpose. 179 Wn.2d at 651. No authority supports the proposition that hospital nurses or social workers owe

[21] MultiCare Supplemental Brief at 16-18.

a similar fiduciary duty to patients.

Rather, their confidentiality obligations are set forth in applicable statutes and rules, which expressly authorize them to disclose otherwise confidential information to the hospital's lawyers. Regarding registered nurses, RCW 5.62.020 says, when "providing primary care or practicing under protocols,"[22] they may not be "examined in any civil or criminal action as to any information acquiring in attending a patient…." Here, MultiCare was not seeking to "examine" its nurses. Rather, it was seeking information which applicable statutes and rules specifically authorized them to disclose to the hospital; *i.e.,* WAC 246-840-70(4)(e) authorizes nurses to disclose confidential health care information "as provided in the Health Care Information Act, chapter 70.02 RCW." RCW 70.02.050(1)(b) permits health care providers to disclose health care information without the patient's authorization:

> To any other person who requires health care information for … legal … services to … or on behalf of the health care provider or health care facility; … and the health care provider or health care facility reasonably believes that the person:
> (i) Will not use or disclose the health care information for any other purpose; and
> (ii) Will take appropriate steps to protect the health care information;

The evidentiary privilege applicable to social workers (RCW 5.60.060(9)) applies only to "independent clinical social worker[s]." WAC

[22] "Primary care" and "Protocol" are defined in RCW 5.62.010. We assume that at least one of these applied to the nurses in question, although the record is not clear on that point.

246-8-09-010(2) defines "independent social work" as "the practice of th[is] discipline[ ] without being under the supervision of an approved supervisor." The record does not demonstrate that Ms. Van Slyke was functioning as such, but assuming that she was, the Health Care Information Act also authorizes social workers to disclose confidential health care information without patient consent for purposes of obtaining legal services themselves or on behalf of facilities in which they work. *See* RCW 70.02.010(19) (defining health providers to include social workers).

In addition to express statutory authority allowing nurses and social workers to disclose confidential health care information to hospital lawyers without patient consent, a number of practical considerations counsel against application of *Loudon* and *Youngs* to nurses, social workers, and other hospital staff. *Youngs* assumes, and it is true in most cases, that hospitals can discern from medical records which physicians are likely to have direct knowledge of the events leading to liability. *Youngs,* 179 Wn.2d at 664. In contrast, identification of nurses and other staff, licensed and unlicensed, who were in a position to know "what happened to trigger the litigation" is a much more difficult task.

First, during the typical hospitalization, the number of non-physicians involved in a patient's care dwarfs the number of physicians. As in this case, it is often not clear from the claim or complaint who the plaintiff

is targeting. Second, because of less-strict record-keeping requirements, changes of personnel due to shift changes and breaks, and simply (particularly in non-private settings like an emergency department or post-anesthesia recovery unit) being in proximity to the event without being formally assigned to a patient, it can be extremely difficult or impossible to identify those with direct knowledge based on the written record. If *Loudon* applies in these circumstances, defense counsel could not accurately respond to discovery asking for the identity of hospital staff with relevant knowledge. Instead, the parties would be required to utilize expensive and often limited number of depositions to accomplish what should otherwise be a fairly simple and inexpensive task. This approach is neither fair nor practical.

If the Court does not agree that *Loudon* is limited to physicians, the record here demonstrates that privileged communications with the social worker and nurses here are permissible under *Youngs.* This point is well demonstrated by the Illinois Court of Appeals' decision in *Caldwell v. Advocate Condell Medical Center*, 87 N.E.3d 1020 (Ill. App. 2017). There, the daughter and administrator of the decedent patient filed a medical malpractice action against a hospital, alleging that its agents failed to adequately monitor the patient, resulting in her death. *Id.* at 1024. During discovery and perpetuation depositions of the treating nurse manager, one

of which occurred after the nurse retired, hospital counsel objected to several questions on attorney-client grounds. *Id*. at 1024-25. The plaintiff later unsuccessfully moved to exclude the nurse's testimony on the ground that contact between hospital counsel and the nurse was improper under Illinois's *Loudon*-equivalent, known as the *Petrillo* rule.[23] *Id*. at 1025.

On appeal, the Illinois court rejected the plaintiff's argument that the hospital counsel violated *Petrillo*. The court first took note of the exception to *Petrillo* established by *Morgan v. County of Cook*, 625 N.E.2d 136 (Ill. 1993), which held that a hospital's counsel may engage in *ex parte* communications with healthcare employees who were alleged to be negligent "and **whose negligence the plaintiff sought to impute to the hospital**." *Id.* at 1037 (emphasis added). It then held it was "clear that no *Petrillo* violation occurred," because, although the nurse manager was not a named defendant, she was in charge when the event occurred and allegations related to actions of her subordinates. 87 N.E.3d at 1038. Further, the hospital could be vicariously liable for her actions. *Id*. at 1039.

Likewise here, plaintiff seeks to hold MultiCare vicariously liable for the alleged actions of the social worker, Ms. Van Slyke, and it is not reasonably disputable that the two nurses have knowledge of the events

[23] *Petrillo v. Syntex Laboratories*, 499 N.E.2d 952 (Ill. 1986).

giving rise to the litigation. The corporate attorney client privilege extended to all of these direct employees of MultiCare under these circumstances, and neither *Loudon* nor *Youngs* hold to the contrary.

IV. CONCLUSION

For the reasons stated, the Court should reverse the Court of Appeals as to communications between MultiCare and Dr. Patterson and Trauma Trust, holding that such communications were privileged as a result of their joint representation, and not barred by *Youngs.* The Court should affirm as to communications with social worker and nurses, but on the basis that *Loudon* does not apply to non-physicians.

RESPECTFULLY SUBMITTED this 24th day of April, 2020.

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