

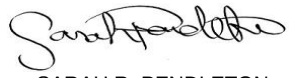
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IN CLERK'S OFFICE
SUPREME COURT, STATE OF WASHINGTON

OCTOBER 1, 2026


CHIEF JUSTICE

THIS OPINION WAS FILED
FOR RECORD AT 8 A.M. ON
OCTOBER 1, 2026


SARAH R. PENDLETON
SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL K. SNYDER,	)	
individually,	)	No. 104136-5
	)	
Petitioner/Cross-Respondent,	)	
	)	
v.	)	En Banc
	)	
VIRGINIA MASON MEDICAL	)	
CENTER,	)	
	)	
Respondent/Cross-Petitioner,	)	
	)	Filed: <u>October 1, 2026</u>
JARED BRANDENBERGER, M.D.	)	
and JOHN and JANE DOE	)	
PHYSICIANS, UNKNOWN	)	
JOHN and JANE DOE NURSES,	)	
	)	
Defendants.	)	
_____	)	

GONZÁLEZ, J.—Decades ago, in *Loudon*, this court established a mechanism to protect two values our society holds dear: first, a doctor's long-standing obligation to protect their patients' confidentiality, and second, a defendant's right to investigate claims against them. *See Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988). *Loudon* establishes that defendants in personal injury cases must use

formal discovery rules to communicate with a plaintiff's nonparty doctors, essentially meaning such communications must be done with the plaintiff's knowledge and, in some circumstances, consent.

We have recognized one exception to *Loudon*. When the defendant is a corporation, corporate counsel may have privileged conversations with the corporation's current employees (and individuals who are the functional equivalents of current employees), including the plaintiff's nonparty doctors, without going through the formal discovery process. Conversations regarding care provided to the plaintiff are limited to the facts that gave rise to the claim.

In this case, Michael Snyder suffered a catastrophic injury during an operation at Virginia Mason Medical Center (Virginia Mason). He sued Virginia Mason and the lead surgeon. Virginia Mason's investigation identified three nonparty doctors who participated in the surgery and who may have contributed to Snyder's injuries. These three doctors no longer work at Virginia Mason, but Virginia Mason is contractually obligated to defend and indemnify them in this case.

Virginia Mason communicated with those doctors without going through the formal discovery process and without Snyder's knowledge or consent. In addition, Virginia Mason's chief medical officer (who was also a member of the hospital's

quality improvement committee) traveled across the state to speak with one of the doctors about this case.

Virginia Mason contends that its communications with those three doctors was not improper because, in its view, it is allowed to have privileged, ex parte communication with Snyder's nonparty doctors without his knowledge or consent under a variety of theories. We affirm the courts below that it is not.

Snyder contends that Virginia Mason's failure to screen a member of its quality improvement committee from this litigation precludes the hospital from asserting the statutory privilege established by RCW 70.41.200. We conclude that Virginia Mason at least partially waived the statutory privilege under these facts. We vacate the trial court's denial of Snyder's motion to compel production of such materials and remand for further proceedings, including in camera review where necessary.

Snyder also contends that he is entitled to default judgment on liability as a remedy because Virginia Mason's secret communications with his three doctors has so tainted critical evidence that he has been denied a fair trial. We conclude that Snyder is not required to demonstrate litigation prejudice in order to receive remedies for Virginia Mason's *Loudon* violation, as the violation is not simply a discovery violation. The violation itself is prejudicial, though a trial court exercises discretion to determine an appropriate remedy based on the extent of

prejudice shown, which may include consideration of the *Loudon* violation's impact on the litigation. We vacate the trial court's denial of Snyder's motion for default judgment and remand for reconsideration. The trial court's determination of an appropriate remedy should be based on a full review of records identified in relation to the *Loudon* violation, including in camera review where necessary to assess Virginia Mason's claims of privilege. Accordingly, we affirm the courts below in part and remand this case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

Snyder had major surgery at Virginia Mason in January 2018. Dr. Jared Brandenberger was the lead surgeon. Two residents, Drs. Molly Downey and Weslee Chew, were responsible for threading a needle and wire through Snyder's jugular vein as part of placing a catheter. At some point, it appears that the tip of that line passed through an artery and into Snyder's chest.

When Dr. Brandenberger realized that the tip of the line was not where it was supposed to be, he called Dr. Nathan Aranson, a vascular surgeon, to assist. Initially, Dr. Aranson suggested that the surgical team inject a contrast dye while taking imaging to determine the exact location of the tip. When that failed, he suggested the surgeons slowly withdraw the catheter line.

Almost immediately, Snyder began to bleed heavily. Snyder suffered a massive hemorrhage in his chest and a prolonged cardiac arrest, among other things. The medical team was able to save Snyder's life, but Snyder was left with permanent, disabling injuries.

Snyder sued Virginia Mason and Dr. Brandenberger, and John and Jane Doe physicians and nurses, in March 2019. Snyder did not name Drs. Chew, Downey, and Aranson as defendants, and at the time he filed this case, it appears Snyder had no reason to believe any of them might have contributed to his injuries.

Not long after Snyder filed his lawsuit, Virginia Mason's counsel determined that Drs. Downey, Chew, and Aranson were involved in the care that gave rise to this lawsuit. None of these doctors still worked at Virginia Mason, but Virginia Mason is still responsible for providing them with a defense and covering any liability they may have for Snyder's injuries. Virginia Mason arranged for these three doctors to be represented by separate counsel, Jennifer Oetter. Virginia Mason's legal defense team and its three former doctors also worked with the same risk managers and third-party claims administrators at Western Litigation.¹

¹ Western Litigation is not a party to this case but has worked closely with Virginia Mason and has been subject to court orders regarding its communications with the nonparty doctors and Virginia Mason. *See, e.g.*, Clerk's Papers at 1218 (Ord. Granting Pl.'s Mot. to Compel Compliance with Subpoena Duces Tecum and to Find W. Litig., a Div. of Gallagher Bassett, in Contempt).

Virginia Mason's chief medical officer, Dr. Michael Glenn, traveled across the state in December 2019 to talk with Dr. Chew and assure him that Virginia Mason supported him with regard to Snyder's surgery. Dr. Glenn also served on Virginia Mason's quality oversight committee and had learned about Snyder's suit through someone on Virginia Mason's legal team. Virginia Mason's defense team worked with Dr. Glenn in coordinating the trip and provided him with talking points for that conversation. Dr. Glenn later testified in a deposition that he had not discussed the surgery or the litigation details with Dr. Chew at that meeting and had not received talking points in writing.

The separate counsel Virginia Mason had retained to represent the three nonparty doctors, Oetter, was present for the meeting and had discussed traveling there with Dr. Glenn. After the two doctors spoke, Oetter met with Dr. Chew for about an hour, followed by another discussion between the two doctors.

Snyder's attorney learned that Drs. Chew and Downey placed the catheter that may have caused Snyder's injuries months later, in February 2020. Two months later, Virginia Mason included Drs. Chew and Downey in a witness disclosure of over 100 potential witnesses without explaining their roles in the surgery.

In that witness disclosure, Virginia Mason stated that "[t]he identity of those persons and the relevant knowledge they may possess is more readily available to

plaintiff's counsel than defense counsel because plaintiff knows the involvement those providers have had, and plaintiff's counsel can contact those providers while defense counsel cannot." CP at 1669.

This statement was, at least, misleading.

By the time it made that statement in April 2020, Virginia Mason's legal team had been in active communication with the three doctors' lawyer concerning Snyder's case, both directly and through Western Litigation. For example, shortly before Virginia Mason told Snyder it could not contact his former doctors, Virginia Mason's risk manager had an hour conversation with Dr. Aranson and had informed him that he was "essential in prepping the case." CP at 1662-63.

Virginia Mason's risk manager discussed her conversation with Dr. Aranson in an e-mail string with Oetter. A privilege log listed more than 400 separate instances of communication that potentially violated Snyder's right to have his attorney present during communications with his nonparty doctors.

Snyder did not know about these ongoing communications for the first few years of litigation.

Then, in early 2021, two of Snyder's experts, Drs. John Moriarty and Shawn Tsuda, were deposed by the defense. Both experts suggested that the three nonparty doctors might have been negligent. Dr. Tsuda stated that allowing residents to participate in the surgery was unreasonable given its high risk. Dr.

Moriarty was critical of Dr. Chew's placement of the catheter line. Dr. Tsuda also suggested that Dr. Aranson's advice might have been negligent, though Dr. Tsuda was careful to say he was not a vascular specialist and was not offering a direct opinion on that point. Dr. Moriarty was also critical of Dr. Aranson's decision to withdraw the line.

Not long afterward, Oetter asked Snyder's counsel for transcripts of any expert depositions where Dr. Aranson was discussed. When Snyder's counsel declined, Oetter obtained the transcripts from Western Litigation. Dr. Aranson moved to intervene in the case and be represented by separate counsel. Dr. Aranson's motion referred to Dr. Tsuda's deposition and attached transcripts of that deposition.

Dr. Aranson contended that he should be allowed to intervene because he might be found negligent, such a finding could affect him professionally, and his interests, he believed, could not be adequately represented by the existing parties. Virginia Mason supported his motion on several grounds, including that their interests might conflict and, again, that it "did not have access" to Dr. Aranson, despite the fact it appears its agents had been in close communication with his

attorney. CP at 4427. Over Snyder's objection, Dr. Aranson was allowed to intervene.²

Meanwhile, Snyder sought Virginia Mason's communications with Dr. Aranson, among other things related to Virginia Mason's communications with nonparty doctors. Virginia Mason responded by moving for a protective order. Virginia Mason argued that its communications with the nonparty doctors was privileged and not limited by *Loudon*.³

The trial court expressed surprise, observing that "it's not clear to me how a communication which is disallowed by law would be protected under the cloak of privilege." The court went on to say:

So to summarize, I don't understand what the privilege is. I don't understand why it's being raised now for the first time. And from my vantage point, which, in a moment I'm going to stop talking so you can correct me, there seems to be a pretty major ethical violation here—I don't say that lightly—that it would be wiser for everyone to just acknowledge and address rather than creating smokescreens around it that aren't particularly compelling.

. . . .

² Later, the trial court dismissed Dr. Aranson as a defendant based on the statute of limitations, while allowing Snyder to argue that Virginia Mason was vicariously liable for any negligence on Dr. Aranson's part. Dr. Brandenberger was also dismissed as a defendant on the plaintiff's motion. Virginia Mason is the sole remaining defendant.

³ Virginia Mason also argued that Snyder had waived any objection to ex parte contact between the defendant hospital and Dr. Aranson by waiving any objection to Virginia Mason's attorney representing Dr. Aranson after Dr. Aranson moved to intervene. These arguments are not before us.

That said, I will say to the defense, and I say this with a heavy heart and I do not say it lightly, there is some pretty considerable trust lost at this point between you collectively and me. The communications here it seems to me were per se a violation of Washington state law conducted by people who frankly know that law about 20 times better than I do and who are statewide experts on that law.

So we have a pretty huge problem here, the extent of it is not yet known to me. The way to fix it is not yet understood by me, but the gravity of the situation I think cannot be understated.

CP at 2378, 2380.

The trial court directed the defense to produce communications between Virginia Mason's defense counsel and nonparty health care providers for review by a special master.⁴ Virginia Mason produced hundreds of responsive documents and thousands of pages for the special master's review. The special master identified 30 documents that they believed should be disclosed, which, over Virginia Mason's strong objection, the trial court ordered.

Dissatisfied with the limited document disclosure, Snyder moved the court to direct the special master to produce all of the documents for the trial court's review. Before ruling, the judge directed Virginia Mason to produce a privilege log of all documents provided to the special master, as well as any correspondence with that special master, for in camera review. That privilege log described 467 documents.

⁴ The trial court did not require Virginia Mason to disclose communications with Dr. Aranson after the time he moved to intervene.

Much earlier in the lawsuit, Snyder had asked Virginia Mason if it had investigated the accident, for the names of anyone involved in such an investigation, and to identify material related to any such investigation. Originally, Virginia Mason acknowledged that its quality improvement program had investigated the accident but declined to give details, invoking RCW 70.41.200. This statute makes information and documents created for and collected and maintained by quality improvement committees exempt from discovery. In November 2021, Virginia Mason supplemented its answer to acknowledge that among others, Dr. Glenn, who had traveled to Prosser to meet with Dr. Chew in relation to the lawsuit, had been part of that quality improvement investigation.

Snyder moved for production of Virginia Mason's relevant quality improvement documents in February 2022. That motion was denied. A month later, Virginia Mason's risk manager submitted a declaration saying that "[o]utside of the quality improvement process, [Virginia Mason] has never conducted an ex parte interview with Drs. Chew, Downey, or Aranson regarding any care they provided to Plaintiff." CP at 3972 (*italics omitted*).

Meanwhile, in January 2022, Virginia Mason moved for leave to have ex parte communication with the three doctors. It contended that *Loudon* should not apply to situations where the nonparty doctor provided the allegedly negligent care. Virginia Mason also argued that it should be able to share privileged ex parte

communications with its three former employees under the common interest doctrine. The trial court denied the motion on the grounds that the issue had already been extensively litigated, and Virginia Mason had offered no new law or facts.

Virginia Mason sought discretionary review of the trial court's ruling directing it to produce documents, directing a CR 26(i) conference, and reserving ruling on the plaintiff's motion to direct the special master to produce documents.⁵ Later, Virginia Mason moved for discretionary review of whether it was allowed to have ex parte contact with former employees whose care may have given rise to liability and whether counsel was permitted to invoke the common interest privilege.

Virginia Mason argued that *Loudon* did not apply to doctors whose conduct may give rise to the hospital's liability. Virginia Mason also argued that review was necessary because without it, it was "forced to defend this case through verdict without access to those very providers whose care is alleged to form the basis of vicarious liability against it." Mot. for Discr. Rev. at 31. (Wash. Ct. App. No. 83526-2-I (2022)).

While that motion was pending, Snyder moved for production of the documents provided to the special master and quality assurance documents. After

⁵ Virginia Mason did not seek this court's review of these issues.

those motions were denied, Snyder moved for a default judgment on liability. Snyder contended that Virginia Mason was “secretly educating, preparing and coaching . . . critical fact witnesses, directly and through third parties,” as well as willfully violating *Loudon*. CP at 3656. Snyder stressed that Virginia Mason represented it was unable to contact his nonparty doctors while actively doing so. He argued that Virginia Mason “secretly provided strategy, litigation information and coaches to [Drs. Chew, Downey, and Aranson] for months, to shape and influence their testimony for deposition and trial” and that their testimony was irretrievably spoiled. CP at 3657-59. “Because that evidence is ‘spoiled and lost forever’ due to the improper actions of [Virginia Mason],” he contends, default judgment is the only remedy. CP at 3659.

The trial court found Virginia Mason had violated *Loudon*. The court denied the motion for default judgment on the grounds that the record lacked sufficient information to determine whether Snyder had been substantially prejudiced. The trial court indicated it would entertain a renewed motion.

Snyder filed a conditional motion for discretionary review, contending that a defendant who violated *Loudon* has the burden of disproving prejudice, that communications in violation of *Loudon* are not protected by privilege, and that only communications that reflect the inner workings of a quality improvement

committee are protected from discovery when the committee includes a participant who was not screened from the litigation at issue.

A Court of Appeals commissioner granted review of Virginia Mason’s motion in full and of Snyder’s motion in part. She limited Snyder’s issues to “whether a showing of prejudice is required for sanctions for *Loudon* violations and whether and to what extent a quality improvement (QI) committee member’s participation in the litigation precludes the hospital’s assertion of the QI privilege.” Comm’r’s Ruling Granting Discr. Rev., *Snyder v. Virginia Mason Med. Ctr.*, No. 85326-2-I, at 2 (Wash. Ct. App. May 9, 2022).

The Court of Appeals affirmed. *Snyder v. Virginia Mason Med. Ctr.*, 34 Wn. App. 2d 146, 566 P.3d 873, *review granted*, 5 Wn.3d 1001 (2025). The Court of Appeals concluded that Virginia Mason had violated *Loudon* by communicating ex parte without Snyder’s consent, that Snyder bore the burden of establishing prejudice, that his ability to establish prejudice is a factor in the appropriate sanction, and that the failure to screen Dr. Glenn from this litigation did not waive the protections of the quality improvement statute. *Id.* at 152-53.

Both sides petitioned for review. We granted both petitions.⁶

⁶ The Washington Defense Trial Lawyers; the University of Washington and the University of Washington School of Medicine; the Washington State Healthcare Defense Law Firms; and the Washington State Medical Association, Washington State Hospital Association, and the American Medical Association have submitted amici briefs in support of Virginia Mason. The Washington Association for Justice Foundation has submitted an amicus brief in support of Snyder.

ANALYSIS

A trial court's discovery rulings are generally reviewed for abuse of discretion. *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013) (citing *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006)). We review the trial court's interpretation of law de novo. *Hermanson v. MultiCare Health Sys., Inc.*, 196 Wn.2d 578, 585, 475 P.3d 484 (2020).

This case is part of a long line of cases concerning the scope of the doctor-patient privilege in personal injury and wrongful death actions, the scope of corporate attorney-client privilege in such actions, and the scope of the corporate attorney-client privilege once the employment relationship has ended. We begin with a brief discussion of the leading cases.

Loudon was a wrongful death action brought by the father of a son who had been seriously injured in a car accident in Washington. *See* 110 Wn.2d at 676. After doctors in Washington had released the son from the hospital, he returned home to Oregon and saw other doctors. *Id.* Not long afterward, the son died of complications related to the accident. *Id.* His father brought a wrongful death action against his son's Washington doctors and hospital, alleging that their medical negligence caused his son's death. *Id.* He did not sue the Oregon doctors and voluntarily provided their records to the defense. *Id.* Contending that doctor-

patient confidentiality had been waived, defense counsel also moved for ex parte contact with the son's Oregon doctors. *Id.*

Loudon surveyed cases from around the country, which were split on whether defense counsel was allowed to have ex parte communications with the plaintiff's nonparty doctors. *Id.* at 677 (collecting cases). The *Loudon* court concluded limiting such contact was appropriate for three reasons. First, allowing defense counsel to communicate with the plaintiff's nonparty doctors without the plaintiff's knowledge and consent could have a chilling effect on the doctor-patient relationship because at least some patients would be less likely to seek medical aid. *Id.* at 679. Second, doctors themselves have an interest in avoiding inadvertent improper disclosure of patient confidence in such ex parte conversations, especially as such disclosures could give rise to liability. *Id.* at 680. Third, such ex parte conversations could lead to disputes when counsel's recollection differs from the doctor's, which may require defense counsel to testify as an impeachment witness. *Id.* To avoid these consequences, the court unanimously adopted the *Loudon* rule, which requires the defense to use formal discovery rules.

Based on *Loudon*, this court concluded ex parte contact between defense counsel and a nonparty doctor's attorney is also improper. *Smith v. Orthopedics Int'l, Ltd.*, 170 Wn.2d 659, 668, 244 P.3d 939 (2010) (Alexander, J., lead opinion); *id.* at 678 (C. Johnson, J., concurring/dissenting). *Smith* was a wrongful death

action brought by the surviving husband of a woman who contracted a deadly infection after a spinal surgery. The defense called one of the plaintiff's doctors, Dr. Johansen, as a fact witness. *Id.* at 663. During trial, it became clear that defense counsel had sent Dr. Johansen's lawyer the plaintiff's trial brief and a copy of the deposition of the plaintiff's expert, among other documents relevant to the case, and that the doctor had reviewed some of that material before testifying. *Id.* Defense counsel had also left a voicemail for the doctor's attorney telling her that the plaintiff's expert had been critical of the care Dr. Johansen had provided. *Id.* at 679 (C. Johnson, J, concurring/dissenting).

Seven justices agreed that the communications violated *Loudon*. *Id.* at 661 (Alexander, J., lead opinion); *id.* at 678 (concurring & dissenting opinion of C. Johnson, J., concurring/dissenting). The lead opinion, signed by three justices, emphasized that *Loudon* and subsequent cases prohibited not just ex parte interviews, but ex parte contact and communications. *Id.* at 666 (citing *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 309, 822 P.2d 271 (1992); *Carson v. Fine*, 123 Wn.2d 206, 227, 867 P.2d 610 (1994)). "[T]he prohibition on ex parte contact, which we set forth in *Loudon*, is broad and not confined to merely limiting interviews by defense counsel with a plaintiff's treating physician." *Id.*

The lead opinion also emphasized two reasons to apply the *Loudon* rule broadly: first, to protect the sanctity of the doctor-patient relationship, and second,

to protect the treating doctor's role as a fact witness by guarding them from becoming a witness for the defense. *Id.* at 667-68.

Four justices joined the lead opinion in concluding that the defendant hospital's contacts with the plaintiff's doctor violated *Loudon*. *Id.* at 678 (C. Johnson, J., concurring/dissenting). Two justices would have limited *Loudon* to prohibiting defense counsel from directly seeking or soliciting information from the plaintiff's nonparty doctors ex parte. *Id.* at 675 (Fairhurst, J., concurring).

The rule set forth in *Loudon* and *Smith* has been limited in the context of a hospital's current employees in light of the corporate attorney-client privilege. *See Youngs v. PeaceHealth*, 179 Wn.2d 645, 664, 316 P.3d 1035 (2014). The plaintiffs in *Youngs* had brought medical malpractice actions against hospitals that had provided them care. *Id.* at 651, 653-54. They objected to the defendant having ex parte contact with nonparty doctors who still worked at the defendant hospital. *Id.* at 654. The court allowed such contacts but with significant limitations. When a doctor-patient relationship exists between the plaintiff and an employee of the defendant hospital, *Youngs* limits such ex parte contact communications to the facts of the alleged negligent event. *Id.* at 664, 671.

Youngs is grounded in the statutory attorney-client privilege and *Upjohn Co. v. United States*, 449 U.S. 383, 386, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). *Youngs*, 179 Wn.2d at 651; *see also* RCW 5.60.060(2)(a). The court rejected the

hospital's argument "that *Upjohn* completely trumps *Loudon*." *Youngs*, 179 Wn.2d at 652. Instead, it harmonized the attorney-client and doctor-patient privileges into a new rule:

To protect the values underlying both the physician-patient and the attorney-client privileges, we adopt a modified version of the *Upjohn* test in this context. Under this test, an attorney hired by a defendant health care provider to investigate or litigate an alleged negligent event may conduct privileged ex parte 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*.

Id. at 179 Wn.2d at 653 (footnote omitted) (citing *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 90 (3d Cir. 1992)).

We have declined to extend *Youngs* to former employees. *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 777, 782, 381 P.3d 1188 (2016). In *Newman*, a high school student sustained a head injury during a football practice, was allowed to play the game even though he showed signs of a concussion, and consequently suffered a permanent brain injury. *Id.* at 774-75. Before trial, the school's counsel interviewed several former football coaches and appeared on their behalf at depositions. The school argued that these former employees should be treated the same as current employees for the purposes of the corporate attorney-client privilege. *Id.* at 783.

While recognizing that some courts had accepted the argument that former employees should be treated the same as current employees for purposes of corporate attorney-client privilege, this court rejected that argument. *Id.* at 782 (citing *In re Allen*, 106 F.3d 582, 605-06 (4th Cir. 1997) (collecting cases)).

Newman reasoned:

Highland'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. The underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (i.e., the corporation), not its former employees. *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983). This purpose is preserved by limiting the scope of the privilege to the duration of the employer-employee relationship. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2). Upon termination of the employment relationship, the interests of employer and former employee may diverge. But the attorney-client privilege belongs solely to the corporation, and it may be waived or asserted solely by the corporation, even to the detriment of the employee.

Id. at 781 (footnote omitted).

Most recently, in *Hermanson*, the court extended *Youngs* to a hospital's nurses and social workers, and to independent contractors working at a hospital who are deemed the functional equivalent of employees. *Hermanson*, 196 Wn.2d at 581. The court held that a defendant hospital's legal team could have privileged

ex parte communications with nurses, social workers, and Dr. Patterson, an independent contractor, subject to the limitations imposed in *Youngs*. *Id.*

Hermanson analogized Dr. Patterson to an employee covered by corporate attorney-client privilege for several reasons. First, it recognized that Dr. Patterson himself had a principal-agent relationship with the hospital because the hospital had the right to control the details of his work. *Id.* at 587-88. These facts distinguished Dr. Patterson from the former employees in *Newman*, who did not have a principal-agent relationship with their former employer, “c[ould] no longer bind the corporation and no longer owe[d] duties of loyalty, obedience, and confidentiality.” *Id.* at 588 (alterations in original) (quoting *Newman*, 186 Wn.2d at 780). Second, the court concluded Dr. Patterson was the functional equivalent of an employee due to the nature of his work and his contract with his direct employer and the hospital. *Id.* at 589-90. Thus, the court concluded the hospital was entitled to have privileged ex parte contact with Dr. Patterson. *Id.*

MultiCare, the defendant in *Hermanson*, had argued that since the plaintiff was attempting to hold it vicariously liable for Dr. Patterson’s conduct, it was entitled to have privileged ex parte contact with Dr. Patterson. *Id.* at 590 (citing court document). The court rejected that approach. *Id.* Instead, it concluded that whether the hospital could have limited, privileged ex parte communications with Dr. Patterson was a separate question from whether the hospital was vicariously

liable for Dr. Patterson’s conduct. *Id.* The court also rejected MultiCare’s argument that it should be allowed to have ex parte communications with a treating physician when it had entered into a representation agreement with that physician. *Id.* at 590 n.1. The court observed that “MultiCare’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.” *Id.*

In a separate line of cases, Washington courts have recognized a “common interest doctrine.” Under this doctrine, “when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group.” *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010) (citing *Broyles v. Thurston County*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008)). The doctrine is an exception to the general rule that sharing attorney-client privileged communications or documents waives the attorney-client privilege. *Id.* at 853-54.

With this history in mind, we turn to the issues before us.

1. Did Virginia Mason violate *Loudon*?

The trial court concluded Virginia Mason violated *Loudon* through its ex parte communications with Drs. Chew, Downey, and Aranson. We agree.

Virginia Mason does not deny that these communications occurred. Instead, it offers several different arguments for why *Loudon* should not apply. In essence, it, strongly supported by amici, argues that *Loudon* should be limited to cases where the nonparty doctor was not potentially implicated in the plaintiff's injury.

First, Virginia Mason attempts to distinguish *Loudon* and its progeny on the theory that in those cases, the nonparty doctors were not implicated in the care that gave rise to the cause of action.

But we note that in *Smith*, the improper ex parte communications began with a phone call from the hospital's counsel to the nonparty doctor's counsel informing him that the plaintiff's expert was critical of the doctor's work. 170 Wn.2d at 679 (C. Johnson, J., concurring/dissenting). That fact was not enough to defeat application of *Loudon* in the minds of a majority of the court. Virginia Mason also suggests the plaintiff in *Youngs* conceded that defense counsel could have ex parte contact with doctors whose conduct was at issue, regardless of whether those doctors were parties to the case. Virginia Mason's Suppl. Br. at 3 n.2 (citing *Youngs*' response to an amicus brief). We find no clear concession in that brief. But even if the party made such a concession—which is far from clear—the rule articulated in *Youngs* did not turn on whether the corporate employees' conduct was at issue. Put plainly, this court has never made application of the *Loudon* rule turn on whether the nonparty doctor was potentially at fault, and to allow the

protection afforded by *Loudon* to be evaded by the defense counsel without leave of the court would gut our holding in that case.

More importantly, nothing in *Loudon* or subsequent cases suggests that the doctor-patient privilege has less force when the doctor may have been negligent or otherwise at fault. *Loudon* gave three reasons for its holding—to prevent chilling the doctor-patient relationship, to avoid inadvertent improper disclosure of patient confidences, and to avoid a situation where defense counsel might be called upon to be an impeachment witness. 110 Wn.2d at 678-80. None of these three reasons have any different force when the doctor might have been at fault.

Second, Virginia Mason argues that once a doctor is allegedly at fault, there should no longer be any concern about the defense shaping their testimony through ex parte contact. Regardless of whether that is true in the abstract, Snyder himself has not alleged that these doctors are at fault or named them as parties. Adopting Virginia Mason’s approach would also gut *Loudon* by effectively allowing the defense to decide which doctors might be at fault and thus outside of *Loudon*’s scope.

Third, Virginia Mason contends, prior to *Newman*, it was generally understood that “corporate attorney-client privilege extends to communications between corporate counsel and former employees with respect to relevant knowledge gained during their relationship with the company.” Virginia Mason’s

Suppl. Br. at 4 & n.3 (citing *In re Coordinated Pretrial Procs. in Petrol. Prod. Antitrust Litig.*, 658 F.2d 1355, 1361 (9th Cir. 1981); *In re Allen*, 106 F.3d 582, 605-07 (4th Cir. 1997); *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005)). But none of the three cases it cites attempted to harmonize a corporate attorney-client privilege with a doctor-patient privilege. Instead, these cases concerned antitrust, a civil rights suit between a government watchdog group and a state attorney general, and a debtor-creditor dispute, respectively. Whatever the general understanding in the industry might have been, such communications are inconsistent with the clear mandates of *Loudon* and *Newman*.

Fourth, Virginia Mason argues that it is entitled to privileged ex parte contact with the plaintiff's nonparty doctors because these doctors have a contractual duty under their employment agreements to cooperate with Virginia Mason and the defense counsel Virginia Mason provides to them to defend against claims accruing from their work at the hospital. *Contra Newman*, 186 Wn.2d at 782. In support, Virginia Mason cites a federal district court case concerning an interlocutory discovery matter in a dispute between a business and former employees. *See Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000). Virginia Mason calls our attention to this passage:

The Court . . . concludes that counsel's communications with a former employee of the client corporation generally should be treated

no differently from communications with any other third-party fact witness. Admittedly, there are exceptions to this general rule. As noted earlier, privileged communications which occur during the period of employment do not lose their protection when the employee leaves the client corporation. Moreover, there may be situations where the former employee retains a present connection or agency relationship with the client corporation, or where the present-day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communications with this former employee must be cloaked with the privilege in order for meaningful fact-gathering to occur.

Id. at 306 (citations omitted) (citing *Valassis v. Samelson*, 143 F.R.D. 118, 124

(E.D. Mich. 1992)); *see also* Virginia Mason's Suppl. Br. at 23. From this,

Virginia Mason reasons, it should be allowed privileged ex parte contact with its former employees it has a duty to defend and indemnify, even though they have a doctor-patient relationship with Snyder.

But *Infosystems* did not involve a doctor-patient privilege, and this court was aware when it decided *Newman* that some other courts had extended corporate attorney-client privilege to former employees. *Newman*, 186 Wn.2d at 782. We find no reason to distinguish *Newman* here. Limiting privileged ex parte contact with nonparty doctors, as required by our precedent, does not prevent cooperation with Virginia Mason and the defense counsel Virginia Mason provides them to defend against claims accruing from their work at the hospital. *Youngs*, 179 Wn.2d at 670.

Fifth, Virginia Mason argues that its communications with the three nonparty doctors should be deemed privileged under the common interest doctrine as recognized in *Sanders*, 169 Wn.2d 827. Under this doctrine, parties who share common interests are allowed to share communications and documents with each other without waiving attorney-client privilege. *Id.* at 853. The Court of Appeals did not resolve this issue because it concluded the record did not establish that Virginia Mason had a common interest or joint representation agreement. *Snyder*, 34 Wn. App. 2d at 166. Virginia Mason argues, correctly, that the doctrine may apply even in the absence of a joint representation agreement. *See, e.g., Kittitas County v. Allphin*, 195 Wn. App. 355, 368, 381 P.3d 1202 (2016).

Sanders concerned (among other things) the scope of the Public Records Act exception for attorney-client privileged documents. 169 Wn.2d 827. The court concluded that the attorney-client privilege exception could apply to documents shared between government agencies so long as the common interest doctrine applied. *Id.* at 840, 853. Nothing in *Sanders* considered the doctor-patient privilege or anything analogous.

Virginia Mason and its supporting amici urge this court to graft this “common interest” doctrine into the *Loudon/Newman* line of cases and create an exception for cases where the defendant hospital and the plaintiff’s nonparty doctors’ interests align. In essence, Virginia Mason asks the court to use the

common interest doctrine to do in this case what it declined to do with the corporate attorney-client privilege doctrine in *Youngs*—hold that the defendant’s interest in privileged ex parte communications with the plaintiffs’ doctors completely trumps *Loudon*.

But Snyder has not named the three doctors as defendants or identified them in his complaint or his default judgment motion as at fault. And while no formal joint representation agreement is required, Virginia Mason must make a sufficient factual showing of a common legal interest and shared expectation of confidentiality between itself and the ex-employee doctors before this doctrine might apply. *See Kittitas County v. Allphin*, 190 Wn.2d 691, 713-15, 416 P.3d 1232 (2018). The trial court found that Virginia Mason had made no such showing. CP at 1243. We therefore reject Virginia Mason’s argument as factually unsupported and because extending this doctrine to any doctor the defendant hospital decides might be implicated in a plaintiff’s injury, at least without leave of the court, would undermine *Loudon*.

Sixth, Virginia Mason argues that it should be allowed to have privileged ex parte contact with Snyder’s nonparty doctors under the corporate attorney-client privilege recognized in *Youngs*. But the privilege recognized in *Youngs* was limited to the functional equivalent of current employees. 179 Wn.2d at 653; *see*

also *Newman*, 186 Wn.2d at 774-75; *Hermanson*, 196 Wn.2d at 581.⁷ We have explicitly declined to extend it in *Newman*, and Virginia Mason does not show that case is distinguishable or should be overruled.

We stress that under the *Loudon* line of cases, defense counsel is permitted to speak with any or all of the plaintiff's nonparty doctors. These cases merely require the defense to have those communications either with the plaintiff's knowledge and consent or through the formal discovery rules.⁸

We conclude that *Loudon* governs this case and none of the reasons Virginia Mason gives to depart from *Loudon* are persuasive. We affirm the courts below that *Loudon* applies and that Virginia Mason's ex parte contact with Snyder's nonparty doctors violated the principles that case set forth.⁹

⁷ Even if *Youngs* applied, the case limited privileged communications to the facts of the alleged incident. See 179 Wn.2d at 653. The record suggests much more than that happened here.

⁸ We respectfully disagree with our dissenting colleagues that *Loudon* and its progeny do not apply to former employees whose conduct is at issue. These cases set forth general rules and, in several cases, were applied in situations where the former employees' conduct was at issue. See *Newman*, 186 Wn.2d 769; *Smith*, 170 Wn.2d at 679 (C. Johnson, J., concurring/dissenting); *Loudon*, 110 Wn.2d at 677-78. We also disagree that *Youngs* can be extended to these facts given our clear holding to the contrary in *Newman*. 186 Wn.2d at 781. By their plain terms, these cases apply and, as Virginia Mason has not shown either that they are incorrect and harmful or that their basis has been eroded, they remain good law.

We also respectfully disagree with our dissenting colleagues that the limitations imposed by *Loudon* and its progeny prevent defendants from fully investigating their own potential liability, or from fulfilling their indemnification responsibilities. Nothing in our case law prevents defendants from communicating with their former employees. They merely require the defense to do so either with the consent of the plaintiff or through formal discovery rules. We leave for another day whether a trial court could grant the defendant leave for privileged ex parte communications with former employees as Virginia Mason did not first seek such leave.

⁹ For the first time on review, Virginia Mason argues that limiting communications between the nonparty doctors and the defendant hospital violates the nonparty doctors' equal protection and

2. Is default judgment on liability warranted?

We review a trial judge's decisions on discovery sanctions for abuse of discretion. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds," such as an application of the incorrect legal standard. *Wash. State Physicians Ins. Exch.*, 122 Wn.2d at 339. Discovery sanctions should be calculated to deter, punish, compensate, and educate. *Id.* at 356. Generally, the sanction should be proportional to the violation and should be the least severe sanction that is adequate. *Magaña*, 167 Wn.2d at 590.

In this case, the trial judge denied Snyder's motion for a default judgment as a sanction for violating *Loudon* without prejudice, remarking that the record was not sufficiently developed to determine the appropriate sanction. The Court of Appeals granted review limited to whether the plaintiff bears the burden of establishing prejudice. It concluded that the moving party bore the burden of establishing prejudice. *Snyder*, 34 Wn. App. 2d. at 171. However, "[t]he extent to

due process rights. We decline to reach this issue under RAP 2.5(a) because it was not presented to the trial court and Virginia Mason does not establish that it falls within an exception to the general rule that courts will not consider issues raised for the first time on appeal.

which the patient can show prejudice remains a factor bearing on the appropriate sanction.” *Id.*

Snyder argues that he has been deprived of the ability to try his case without the hospital influencing witnesses through ex parte contacts. Snyder argues that he should not bear the burden of showing he was prejudiced by improper ex parte contact in order to be entitled to relief. Instead, he contends, he should be entitled to relief unless Virginia Mason can show he was not prejudiced.

We faced a somewhat similar situation in *Smith*. There, the hospital’s defense counsel violated *Loudon* through ex parte contacts with one of the plaintiff’s nonparty doctors, Dr. Johansen, who the defense had called as a fact witness at trial. *Smith*, 170 Wn.2d at 661 (Alexander, J., lead opinion); *id.* at 678 (C. Johnson, J. concurring/dissenting). This came to light at trial. Plaintiff’s counsel learned of this improper ex parte contact during trial while cross-examining Dr. Johansen. *Id.* at 663-64. *Smith* unsuccessfully moved for a mistrial. *Id.*

After the jury returned a defense verdict, the plaintiff unsuccessfully moved for a new trial where Dr. Johansen would be excluded, arguing ““there’s no way to unring the bell.”” *Id.* at 664. The trial court denied the motion. *Id.* The Court of Appeals affirmed on several grounds, including its own conclusion that the plaintiff had not established prejudice. *Id.*

On review, the plaintiff argued she was entitled to a new trial regardless of whether she could demonstrate prejudice. The lead opinion rejected that approach, arguing that the moving party must show harm in order to be entitled to relief. *Id.* at 672 (citing *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 831, 123 P.3d 102 (2005)). It also rejected the plaintiff's argument that in such cases, automatically excluding Dr. Johansen's testimony on a retrial was necessarily appropriate. "To require a new trial and exclusion of the nonparty treating physician's testimony as an automatic response to all *Loudon* violations, in our judgment, would be an unnecessarily harsh result and would not take into consideration the nuances of particular cases." *Id.*

The two justices who joined the lead opinion concluded that to warrant a new trial, the plaintiff had to show harm and had the burden of making that showing. *Id.* The four-justice concurrence/dissent would have ordered a new trial whenever *Loudon* was violated. *Id.* at 679 (C. Johnson, J., concurring/dissenting). It concluded that to do otherwise would be to put an insurmountable burden on an innocent party. *Id.* at 678-79. As the remaining justices did not reach the issue, there was no controlling majority on the question.

Snyder argues that it is inequitable to put the burden on him to show he was prejudiced under these facts instead of on Virginia Mason to show he was not. He contends that putting the burden on the plaintiff incentivizes violations of *Loudon*.

He notes that the privilege log produced in relation to the *Loudon* violations lists over 400 items that have not been disclosed, which, he says, indicates extensive efforts to shape the testimony of his nonparty doctors.

The trial court denied Snyder’s motion for default judgment because it “lacks the information to determine if the violation substantially prejudiced plaintiff.” CP at 4214. The Court of Appeals affirmed, finding that “[a]s a *Loudon* violation is a type of discovery violation, we see no basis for crafting a different standard that shifts the burden to the party that violated the rule to prove the absence of some degree of prejudice for every *Loudon* violation.” *Snyder*, 34 Wn. App. 2d at 171.

Treating a *Loudon* violation as merely a discovery violation is insufficient to safeguard the policies underlying *Loudon* that go beyond the discovery context. The *Loudon* rule serves to “protect[] the doctor-patient fiduciary relationship” and to “protect[] the physician’s ‘interest in avoiding inadvertent wrongful disclosures,’” in addition to “aid[ing] in proper trial administration, preventing the occasion from arising where defense counsel might be called to testify as an impeachment witness.” *Youngs*, 179 Wn.2d at 659-60 (quoting *Loudon*, 110 Wn.2d at 680). *Loudon* rests on the premise that ex parte contact with a plaintiff/patient’s health care providers is harmful to the fiduciary relationship, to the trust it is built on, and ultimately to health care outcomes. For this reason, it is appropriate to

recognize a baseline of prejudice that flows from any *Loudon* violation, regardless of whether it negatively impacts a plaintiff's litigation interests. The *Magaña* test for discovery sanctions, which the Court of Appeals applied here, requires that "the opposing party was substantially prejudiced in its ability to *prepare for trial*," 167 Wn.2d at 584 (emphasis added)—but that inquiry is simply insufficient to account for the significant interests protected by the *Loudon* rule.

Four justices in *Smith* recognized that harm to the physician-patient fiduciary relationship inheres in every *Loudon* violation, and we now adopt a presumed prejudice standard to capture the inherent harm of *Loudon*. We hold that upon finding a *Loudon* violation, prejudice is presumed and plaintiffs need not prove an actual impact on the litigation in order to obtain relief. Imposing such a burden would "mudd[y] [*Loudon*'s policy] choice by condemning what occurred in this case but then concluding no remedy should be available to the 'innocent' party" and "plac[ing] an almost insurmountable burden on the party that has done nothing wrong." *Smith*, 170 Wn.2d at 678 (C. Johnson, J., concurring/dissenting).

In determining the appropriate remedy, the trial court has discretion to weigh the extent of prejudice, which can certainly include litigation impact. Depending on the degree of prejudice shown, an appropriate remedy might range from a monetary sanction on the low end to a default judgment of liability on the high end.

In this case, related to the question of determining prejudice and assessing an appropriate remedy is the need to examine the records Virginia Mason withheld on grounds of privilege in relation to the *Loudon* violation. Snyder contends that under the principles embraced in *Cedell*, he is entitled to at least in camera review of the documents disclosed in Virginia Mason's privilege log, and not merely the handful the trial court reviewed on the special master's recommendation. We agree.

Cedell concerned an insurance bad faith claim where the plaintiff sought production of the insurance company's claim file. 176 Wn.2d at 690. Bruce Cedell's home had been severely damaged in a fire. He contended his insurance company delayed processing his claim for months and, once it did act, made an offer well below that which its own investigation estimated the covered damages to be. The court concluded, relevantly, that once the insured made a showing that the insurer acted in bad faith, the court would review the materials that the insurer claimed to be privileged. *Id.* at 700. If the court concluded that there was a foundation to permit a bad faith claim to proceed, the attorney-client privilege would be deemed waived. *Id.*

Cedell turned on the insurance company's quasi-fiduciary obligation to its insured. *Id.* at 698. The quasi-fiduciary obligation of an insurer to its insured is analogous to the obligation a doctor has to their patient not to disclose privileged

information. Indeed, the risk of such disclosure is part of the harm that *Loudon* seeks to protect against. Requiring proof of prejudice flowing from a *Loudon* violation while at the same time denying access to relevant facts imposes an “insurmountable burden” on the plaintiff. *Smith*, 170 Wn.2d at 678 (C. Johnson, J., concurring/dissenting). While the trial court has discretion to determine remedies, this discretion cannot be properly exercised without a reasonable assessment of all relevant records that could establish prejudice. We vacate the trial court’s denial of Snyder’s motion for default judgment and remand for reconsideration with a presumption of prejudice from Virginia Mason’s *Loudon* violations. The trial court’s reconsideration of remedy should be based on a full review of records in relation to the *Loudon* violation, including in camera review where necessary.

3. Did Virginia Mason waive the protection of the quality improvement statute?

Virginia Mason asserts the quality improvement committee privilege in this case. Washington’s quality improvement statute directs hospitals to “maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice.” RCW 70.41.200(1). The purpose of the quality improvement statute is to improve health care by creating a system where health care professionals can candidly review their own work and the work of their

colleagues. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 774, 280 P.3d 1078 (2012) (citing *Coburn v. Seda*, 101 Wn.2d 270, 275, 279, 677 P.2d 173 (1984)).

This statute “requires that hospitals collect information concerning their patients’ ‘negative health care outcomes’ and protects this information from civil discovery.” *Youngs*, 179 Wn.2d at 666 (quoting and citing RCW 70.41.200(1)(e), (3)). The legislature was concerned that making this information subject to discovery would create a disincentive for effective reporting and candid discussion. *Lowy*, 174 Wn.2d at 774. To attempt to guard against that

[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee.

RCW 70.41.200(3).

While the information specifically prepared for and collected by a quality improvement committee is privileged and not subject to disclosure, that privilege is limited. *Lowy*, 174 Wn.2d at 787. It does not extend to information that “is completely external to the hospital’s ‘careful self-assessment.’” *Id.* (quoting *Coburn*, 101 Wn.2d at 274). The privilege also does not apply to documents that simply went in or out of the quality improvement committee. *Id.* “But documents

created as part of the inner workings of the committee are privileged and disclosure of those documents may not be compelled.” *Id.*

To prevent the quality improvement committee from becoming a way for hospitals to avoid their discovery obligations, “members of the committee must be screened from defense counsel in an action against the hospital for negligence or medical malpractice.” *Youngs*, 179 Wn.2d at 657. “Such screening will preserve *Loudon*’s protections for patient-plaintiffs while also allowing hospitals to meet statutory requirements for quality improvement. This screening preserves the integrity of the [quality improvement] process, allowing the [quality improvement] committee to meet its statutory requirement to collect and maintain information ‘specifically for’ [quality improvement] purposes.” *Id.* at 669.

Dr. Glenn serves on Virginia Mason’s quality improvement committee. The quality improvement committee investigated Snyder’s surgery. Snyder contends that Dr. Glenn was not screened from the litigation. There is evidence in the record that suggests this is true. Dr. Glenn received talking points from defense counsel before meeting with one of Snyder’s nonparty doctors after Snyder filed this case, and Dr. Glenn is on Virginia Mason’s witness list.

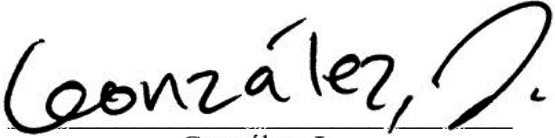
“Waiver occurs because the purpose of the privilege no longer exists.” *Carson*, 123 Wn.2d at 214. As we noted in *Lowy*, “[t]he legislature was concerned that if the data and other information generated by quality improvement

committees could be used against a hospital, it would create a disincentive for hospitals to report effectively and evaluate candidly information concerning the hospital's experience." 174 Wn.2d at 775. But that purpose—to avoid disincentives for candor—no longer takes precedence where the quality improvement committee's inner workings have been tainted by the involvement of personnel or the receipt of information that by law clearly should not have been there in the first place. Here, the involvement of Dr. Glenn tainted the quality improvement committee's work, as it is clear he cannot act as both a member of the quality improvement committee and a participant in the litigation. The record demonstrates that he consulted with litigation counsel in the course of talking with former Virginia Mason employees, and the trial court found a *Loudon* violation. At this juncture, neither the trial court nor a special master has reviewed the records relating to this violation. Information relating to Dr. Glenn's involvement as a litigation witness and any records arising from his conversations with former employees whose treatment of Snyder is at issue in the litigation cannot be shielded under the quality improvement committee statutory privilege.

We vacate the trial court's denial of Snyder's motion to compel production of quality improvement materials and remand for further proceedings including in camera review where necessary.

CONCLUSION

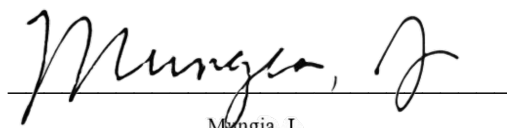
Under *Loudon*, Virginia Mason was required to either use the formal discovery procedures or obtain Snyder's consent before communicating with his nonparty doctors. Snyder, as the party seeking relief, does not bear the burden of establishing prejudice; rather, prejudice is presumed. A hospital waives the quality improvement statute privilege by failing to screen a doctor who sits on the quality improvement committee from being involved in litigation. We affirm the courts below in part and remand to the trial court for further proceedings consistent with this opinion.


González, J.

WE CONCUR:


Stephens, C.J.


Johnson, J.


Mangia, J.


Melody, J.


Montoya-Lewis, J.

No. 104136-5

GORDON McCLOUD, J. (dissenting)—In *Loudon v. Mhyre*, this court held that defense counsel may not communicate privately with a personal injury plaintiff’s nonparty doctors who treated the plaintiff after the alleged negligence occurred.¹ Instead, the defendant must use formal discovery rules to communicate with those doctors. To reach this result, we weighed competing and important values: a patient’s interest in the privacy of their medical information and a defendant’s right to investigate claims against them, communicate with counsel, and prepare a defense. We held that the risks to patients’ privacy interests outweighed the burden on the defendant of using formal discovery to communicate with a plaintiff’s nonparty doctors who treated the plaintiff after the allegedly negligent incident.

In this case, we are faced with very different facts than those in *Loudon*. In *Loudon*, the defendants sought ex parte (private) contact with doctors who treated the plaintiff after the allegedly negligent incident. The plaintiff had not alleged that those subsequent doctors were negligent, and those subsequent doctors had no relationship to the defendants.

¹ 110 Wn.2d 675, 756 P.2d 138 (1988).

By contrast, in this case, plaintiff Michael Snyder sued Virginia Mason Medical Center (VMMC) for injuries resulting from surgery performed by doctors employed by VMMC. The basis of Snyder's claim is that the doctors involved in the surgery were negligent, and he seeks to hold VMMC vicariously liable for those doctors' conduct. Snyder argues that VMMC's ex parte contacts with these allegedly negligent nonparty doctors violated *Loudon*.

But unlike *Loudon*, this case involves a defendant's ability to communicate with the very doctors whose care the plaintiff challenges in the lawsuit. And unlike *Loudon*, this case involves a claim of vicarious liability based on that allegedly negligent care. Thus, in this case, the nonparty doctors are both former employees of the defendant and also essential witnesses for the defendant because their acts put the defendant at risk of liability. Applying *Loudon* to bar free communication between the defendant employer and its nonparty former employee doctors in this context prevents the defendant from investigating or defending itself. It also prevents the nonparty doctor accused of negligence from fully protecting their own interests.

The *Loudon* rule protects important interests. But the rule's reach is not unlimited. I would hold that *Loudon* does not bar ex parte contact between a defendant and nonparty treating doctors who are employees or former employees of the defendant and whose care gave rise to the plaintiff's claim against the defendant.

Additionally, even if *Loudon* did apply to such contact, I would hold that defense counsel may engage in privileged, ex parte communication with such doctors under our decision in *Youngs*,² even if the doctors are former employees of the defendant.

I therefore respectfully dissent.

FACTS AND PROCEDURAL HISTORY

In 2018, Snyder underwent surgery at VMMC. Clerk's Papers (CP) at 2. As alleged in the complaint, a catheter was misplaced during surgery; when it was removed, Snyder experienced serious complications and ultimately suffered permanent, disabling injuries. *Id.* at 2-3. Snyder later filed a medical malpractice lawsuit against VMMC, alleging vicarious liability and corporate negligence, among other claims. *Id.* at 3.³ Both claims are based on the acts of VMMC's then-employee doctors.

It is now undisputed that first-year medical resident Dr. Molly Downey, fifth-year resident Dr. Weslee Chew, and vascular surgeon Dr. Nathan Aranson were involved in the procedure. *Id.* at 2210, 2217 (deposition of Dr. Brandenberger). By the time Snyder filed the lawsuit, all three doctors had left VMMC for other jobs.

² *Youngs v. PeaceHealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014).

³ The complaint originally named lead surgeon Dr. Jared Brandenberger as a codefendant. Snyder later successfully moved to dismiss Dr. Brandenberger as a named defendant. VMMC is the sole remaining named defendant.

VMMC is a self-insured teaching hospital that provides professional liability insurance to its employee doctors. VMMC has a contractual duty to indemnify the employee doctor for any claims resulting from medical services the doctor renders on behalf of VMMC, even if the claim is filed after termination of employment. *See, e.g., id.* at 1532 (Dr. Aranson's employment contract). The doctor has a contractual duty to cooperate with VMMC in its investigation and defense of such claims, even after termination of employment. *Id.*

After Snyder filed the lawsuit, VMMC's defense counsel determined that Drs. Aranson, Downey, and Chew had direct knowledge of the facts giving rise to the complaint and would likely be deposed. *Id.* at 3972 (declaration of Karen Markwith). VMMC contacted the doctors to notify them of the lawsuit and, pursuant to its contractual obligation, arranged for separate counsel Jennifer Oetter to represent each of them. *Id.*

During discovery, Snyder learned that ex parte communications had occurred between VMMC (through its defense counsel, risk managers, and/or third-party claims manager) and the nonparty doctors or their attorney Oetter. *See id.* at 1549-1607 (VMMC's privilege log listing 460 items). Snyder also learned that a member of VMMC's quality improvement committee had personally visited Dr. Chew to reassure him that VMMC supported him.

Snyder argued that these communications violated *Loudon*. He sought disclosure of the communications. VMMC moved for a protective order, arguing that *Loudon* does not bar a defendant's ex parte contact with nonparty doctors whose care is at issue in the lawsuit and that the communications at issue were protected from disclosure by the attorney-client privilege, the work product doctrine, and/or the common interest privilege. *Id.* at 494-99.

The trial court rejected VMMC's argument that *Loudon* does not apply to former employee nonparty treating doctors whose care is at issue in the litigation. *Id.* at 2089. It ruled that VMMC had violated *Loudon* and its progeny to the extent that it engaged in ex parte communication with the former employee nonparty doctors and/or those doctors' counsel. *Id.* at 2090-91.

The trial court also denied VMMC's motion for an order allowing it to have ex parte, privileged communications with the nonparty doctors. *Id.* at 2187, 2557.

Snyder moved for default judgment as a sanction for the alleged *Loudon* violations. *Id.* at 3656. The trial court denied the motion without prejudice, ruling that at that time, the record lacked evidence to support a finding that any *Loudon* violations substantially prejudiced Snyder. *Id.* at 4159. The trial court also denied Snyder's motion to compel production of certain documents that VMMC had

identified as protected by the statutory quality improvement committee privilege. *Id.* at 2905, 3964.

Both parties sought discretionary review. The Court of Appeals affirmed the trial court's determination "that the *Loudon* rule applies and prohibits ex parte contact between VMMC counsel and the former employee nonparty physicians." *Snyder v. Virginia Mason Med. Ctr.*, 34 Wn. App. 2d 146, 152, 566 P.3d 873 (2025) (published in part).⁴ That court also held that VMMC's failure to screen a quality improvement committee member from defense counsel did not automatically waive the statutory privilege against the compelled disclosure of quality improvement documents. *Id.* at 153. Both parties sought review in this court, which we granted. 5 Wn.3d 1001 (2025).

⁴ The appellate court also held that the extent to which the plaintiff can show prejudice is a factor bearing on the appropriate sanction for a *Loudon* violation. The majority takes a different approach; it adopts a new rule that presumes prejudice from a *Loudon* violation. Because I conclude that VMMC's contacts with the nonparty treating doctors in this case did not violate *Loudon*, I do not address the majority's decision to change the law on this issue.

ANALYSIS

- I. *Loudon*, *Smith*,⁵ and *Youngs* do not bar a defendant from having ex parte contact with an employee or former employee nonparty treating doctor whose care gives rise to the plaintiff’s claim against the defendant

Today, the majority extends *Loudon* way beyond its facts to bar a defendant from having any ex parte contact with a plaintiff’s nonparty treating doctor, even when the plaintiff seeks to hold a defendant vicariously liable for allegedly negligent care that the doctor provided while employed by the defendant. The majority’s holding ignores important distinctions between this case and *Loudon*, including the fact that this case implicates the statutory attorney-client privilege and an insurer’s fiduciary relationship with its insured. The majority stretches *Loudon*’s rationale far beyond its facts. And even if *Loudon* did apply in this context, I would extend the rule in *Youngs*—which never considered this situation—to allow corporate counsel to have confidential, privileged communications with former employee nonparty doctors who have direct knowledge of the facts giving rise to the litigation.

A. Loudon and Smith involved a defendant’s contact with subsequent treating doctors whose care was not implicated in the lawsuit

Our legislature has enacted a physician-patient privilege statute, which “prohibits examining a physician in a civil action as to any information acquired in

⁵ *Smith v. Orthopedics Int’l, Ltd.*, 170 Wn.2d 659, 244 P.3d 939 (2010) (plurality opinion).

attending a patient without his or her consent.” *Carson v. Fine*, 123 Wn.2d 206, 212, 867 P.2d 610 (1994) (citing RCW 5.60.060(4)). This statutory privilege serves important purposes. It “aims to ‘protect[] the sanctity’ of the doctor-patient relationship; to recognize that the ‘relationship between physician and patient is a fiduciary one of the highest degree . . . involv[ing] every element of trust, confidence and good faith’; to ‘surround patient-physician communications with a cloak of confidentiality to promote proper treatment by facilitating full disclosure of information’; and ‘to protect the patient from embarrassment or scandal which may result from revelation of intimate details of medical treatment.’” *Youngs*, 179 Wn.2d at 651 (alterations in original) (internal quotation marks omitted) (quoting *Smith*, 170 Wn.2d at 667).

But the privilege is not absolute. “Once a patient decides to file a medical malpractice action and disclose that which had been confidential, he or she cannot insist on continued confidentiality from her physicians regarding the condition at issue based on the fiduciary nature of their relationship.” *Carson*, 123 Wn.2d at 219. Thus, when a patient voluntarily places their physical or medical condition in issue in litigation, the patient waives the privilege as to that condition and as to all doctors who treated the patient for that condition, subject to limitations imposed by court

rule. *Youngs*, 179 Wn.2d at 658 (quoting LAWS OF 1986, ch. 305, § 101(4)(b)); RCW 5.60.060(4)(b).⁶

In *Loudon*, we added a gloss to the privilege statute and the waiver rule. We considered “whether defense counsel in a personal injury action may communicate ex parte with the plaintiff’s treating physicians when the plaintiff has waived the physician-patient privilege.” *Loudon*, 110 Wn.2d at 675-76. In that case, the plaintiff sued two doctors, alleging malpractice. The defendant doctors sought ex parte contact with the plaintiff’s subsequent treating doctors. These subsequent treating doctors had no relationship to the defendant doctors, and the plaintiff did not allege that their care was negligent. This court concluded that as a matter of public policy, defense counsel could not have ex parte contact with these nonparty doctors and must use formal discovery procedures to contact them.

To reach this conclusion, we weighed the potential risks to the patient-plaintiff in allowing ex parte defense contact with the plaintiff’s treating doctors against the burden on the defendant of communicating with those doctors only through formal discovery. We described the risks as follows: the risk that the doctor would

⁶ This waiver rule was originally a judge-made rule that courts applied on a case-by-case basis. *Youngs*, 179 Wn.2d at 657. However, the legislature codified the waiver rule in 1986. The statute now expressly provides that a plaintiff waives the privilege 90 days after filing an action for personal injuries or wrongful death. RCW 5.60.060(4)(b).

inadvertently disclose irrelevant, privileged medical information to defense counsel (i.e., medical information *outside* the scope of the plaintiff's waiver of physician-patient privilege); the related risk that such an inadvertent disclosure could expose the doctor to personal liability; and the risk of chilling the physician-patient relationship if a patient knows their doctor may communicate in litigation with the patient's opponent.⁷ We concluded that these "potential risks" outweighed "any hardship caused the defendants by having to use formal discovery procedures." *Id.* at 680. Thus, we held that "defense counsel may not engage in ex parte contacts with a plaintiff's physicians." *Id.* at 682.

To be sure, the language we used in *Loudon* was broad. But, like in any case, the facts are critical to understanding the limits of our holding. The *Loudon* defendants sought ex parte contact with doctors whose care was not at issue in the lawsuit and with whom the defendants had no relationship that would give rise to vicarious liability. Further, the defendants in *Loudon* had no basis to assert that their communications with the subsequent treating doctors were protected by the attorney-client privilege. Under those facts, we concluded that the hardship to the defendants

⁷ In passing, we also noted the risk that ex parte contact with treating doctors may result in defense counsel becoming an impeachment witness if the doctor's ex parte statements conflict with his or her later testimony. *Loudon*, 110 Wn.2d at 680. In a later case, we appropriately observed it was not clear "why this is a greater concern with medical witnesses than with any other witness." *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 313, 822 P.2d 271 (1992).

of having to use formal discovery procedures was outweighed by the risks to the plaintiff.

The facts in this case are very different. Here, the defendant is a corporate hospital. The doctors whose care is challenged were employees of that corporation, so the defendant's contacts with those employees over litigation-related issues may be protected by the corporate attorney-client privilege. The plaintiff has sued the hospital, alleging that it is vicariously liable for the negligence of its former employee doctors who treated the plaintiff. The conduct of those doctors forms the entire basis of the lawsuit against the defendant; the doctors are critical witnesses for the defense. And the hospital defendant has a fiduciary relationship with those doctors as their insurer, *see Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986), along with mutual contractual obligations with the doctors that endure beyond the termination of the employment relationship—obligations that require ongoing communication.

In these distinct circumstances, the balance of interests changes. A defendant has the “right to fully investigate its potential liability” and to defend itself. *Youngs*, 179 Wn.2d at 665. Here, barring ex parte contact with the doctors prevents the defendant from effectively exercising those rights. Barring ex parte contact with the doctors also interferes with the defendant's contractual obligations and its fiduciary

duties as the doctors' insurer. In this context, the hardship to the defendant of being denied free and privileged communication with the doctors outweighs the potential risks to the plaintiff. Further, unlike in *Loudon*, the nonparty doctors here have a strong interest in the outcome of litigation in which their conduct may be deemed negligent, and thus they may have their own interests in communicating with the defendant. The rationales behind the *Loudon* rule do not apply here.

In a later case, *Smith*, we articulated another rationale supporting the *Loudon* rule: a concern that defense counsel's ex parte contact with nonparty doctors poses the risk that defense counsel will improperly influence the nonparty doctor's testimony. 170 Wn.2d at 688. But *Smith*, like *Loudon*, dealt with a *subsequent* treating physician whose care was not at issue, and *Smith* contained no discussion of the attorney-client privilege.⁸ The court in *Smith* had no reason to consider the special hardships posed by applying the *Loudon* rule to the context presented in this case. *Smith*'s additional rationale does not outweigh the defendant's interest in fully

⁸ In *Smith*, plaintiff sued Dr. Schwagler and Orthopedics International, contending that Dr. Schwagler was negligent in performing a spine surgery. 170 Wn.2d at 662. Prior to trial, defense counsel sent the transcript of the deposition of one of plaintiff's experts to the attorney for Dr. Johansen, a nonparty doctor who treated Smith *after* Dr. Schwagler performed spine surgery. *Id.* at 663. The majority appears to state that Dr. Johansen's care was implicated in the lawsuit against Dr. Schwagler and Orthopedics International. Majority at 23. I find nothing in *Smith* to suggest that.

investigating and preparing a defense to a claim of vicarious liability under these circumstances.

B. Youngs did not address the distinction between nonparty treating doctors alleged to be at fault and those not alleged to be at fault because the distinction was not presented in that case. But because our decision failed to note that distinction, some courts—and the majority here—apply its rule barring ex parte communication between corporate counsel and treating doctors to both groups. Youngs does not support such an application

In the two consolidated cases in *Youngs*, plaintiffs sued the hospitals where they alleged they received negligent treatment from the hospitals' employee doctors. The plaintiffs argued that *Loudon* barred defense counsel from ex parte contact with certain nonparty treating doctors. The hospitals countered that the *Upjohn* corporate attorney-client privilege⁹ permitted and protected ex parte conversations between hospital defense counsel and the hospitals' employee doctors. Thus, *Youngs* again required this court to balance important, conflicting interests.

Notably, neither of the plaintiffs in *Youngs* asserted that *Loudon* barred defense counsel from ex parte contact with their allegedly negligent doctors. In fact,

⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

contrary to the majority's assertion, both plaintiffs acknowledged that they did *not* seek to bar such contact.¹⁰ *Contra* majority at 23.

However, the *Youngs* opinion announced a rule that fails to distinguish between doctors whose care is at issue in the lawsuit and doctors whose care is not at issue. We considered the purposes of the attorney-client privilege and the physician-patient privilege—without considering the distinction between those two sets of doctors—and concluded that “corporate defense counsel may have privileged *ex parte* communications with a plaintiff’s nonparty treating physician *only* where

¹⁰ Plaintiff Aolani Glover limited her allegations of negligence to the care she received in the Harborview Medical Center emergency room and objected only to *ex parte* contact with providers who treated her *after* that allegedly negligent ER care. Resp’t’s Br., *State v. Glover*, No. 67350-5-I, at 5-6 (Wash. Ct. App. 2011). Plaintiff Marc Youngs explained that he did not seek to bar employers from contact with employee doctors whose conduct was at issue in the lawsuit. Pet’r Youngs’ Resp. to Br. of Amicus Curiae Wash. Def. Trial Laws., *Youngs v. PeaceHealth*, No. 87811-1, at 7 (Wash. 2013) (“Nothing in the rule Plaintiff is urging prevents an attorney’s investigation of a case. . . . The attorney will be in no different position than the defense attorney in *Smith* . . . , *who could talk ex parte to the physicians whose conduct was at issue, but who could not communicate ex parte with a subsequent treating physician.*” (emphasis added)), 11 (heading in brief titled “The Defense of a Medical Malpractice Claim does not Require Ex Parte Communications with Treating Physicians *whose Conduct is not at Issue.*” (emphasis added) (boldface and underlining omitted)); Appellant’s Opening Br., *Youngs v. PeaceHealth*, No. 67013-1-I, at 4 (Wash. Ct. App. 2011) (Youngs contended that *Loudon* “prohibited defense counsel from engaging in *ex parte* contact with Mr. Youngs’ treating physicians, *other than [two] treating physicians whose conduct is at issue.*” (emphasis added)). WSAJF, amicus for the plaintiffs, agreed with this characterization: “Youngs and Glover also appear to concede that *ex parte* contact is permitted with physicians whose conduct may subject the corporate defendant to vicarious liability.” Br. of Amicus Curiae Wash. State Ass’n for Justice Found., *Youngs v. PeaceHealth*, No. 87811-1, at 5 (Wash. 2013)). I disagree with the majority’s contrary presentation of the facts and concessions in *Youngs*.

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.*” *Youngs*, 179 Wn.2d at 664 (first emphasis added) (footnote omitted). Read literally, *Youngs* states a broad rule that is based on the presumption which *Loudon* would otherwise apply—even when the nonparty treating doctor’s care is at issue in the litigation.

Once again, while our rule was expressed broadly, it must be understood in context. Defendant-hospital’s communications with allegedly negligent doctors were not at issue in *Youngs*; hence, the court did not have a reason to consider whether the *Loudon* rationale applies equally to that category of doctors. I would hold that the *Youngs* rule is properly understood more narrowly as applying only to doctors whose care is not implicated in the lawsuit.¹¹

¹¹ In *Hermanson v. MultiCare Health System, Inc.*, this court appropriately applied the *Youngs* rule to permit a hospital defendant to communicate ex parte with an independent contractor who is the agent of the defendant and the “functional equivalent” of an employee. 196 Wn.2d 578, 581, 637 P.2d 956 (2020) (citing *Youngs*, 179 Wn.2d at 671). The independent contractor at issue in *Hermanson* was a doctor whose care was at issue in the lawsuit. Thus, this case also presented an opportunity for the court to consider whether the *Loudon* rule applies at all to nonparty doctors whose conduct forms the basis of the plaintiff’s vicarious liability claim against the hospital. However, the *Hermanson* court stated that it was unnecessary to decide that issue. *Id.* at 590. By declining to consider the hospital’s argument that *Loudon* should not apply to an allegedly at-fault doctor, *Hermanson* compounded the error made in *Youngs*.

Now, considering that issue directly, I would course correct and hold that the rationale underpinning the *Loudon* rule applies to the *Loudon* context—and does not apply to nonparty treating doctors whose conduct forms the basis of the claim against the defendant.¹²

The majority disagrees. It dismisses the important distinctions between the facts in *Loudon* and *Youngs* and the facts in this case. It states that “nothing in *Loudon* or subsequent cases suggests that the doctor-patient privilege has less force when the doctor may have been negligent or otherwise at fault.” Majority at 24. As discussed above, that is not accurate.

But even if that were accurate, the plaintiff’s interests are only half of the equation—*Loudon* balanced both the risks to the plaintiff and the hardship to the

¹² *Loudon*’s rationale is especially inapplicable where, as here, the defendant is also the doctors’ insurer. Applying *Loudon* to such contacts strays far from the facts of that case and implicates additional legal issues that *Loudon* had no reason to consider. I agree with VMMC that *Loudon* does not apply to communications made with the doctors or their attorney in VMMC’s capacity as the doctors’ insurer and that such communications may be protected by the attorney-client and common interest privileges, if the other prerequisites to application of those privileges are met. *See Barry v. USAA*, 98 Wn. App. 199, 204-05, 989 P.2d 1172 (1999) (communications between insured, insurer, and defense counsel are privileged); *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010) (common interest doctrine “provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group” (citing *Broyles v. Thurston County*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008))). I would remand to the trial court to consider VMMC’s attorney-client privilege and common interest privilege arguments in light of the fact that *Loudon* does not apply to VMMC’s communications with the doctors.

defendant. In the context presented in this case, the balance of interests favors the defendant's right to freely investigate and effectively defend itself against a claim of vicarious liability. To hold otherwise creates an unfair result that bears little rational relationship to *Loudon*'s purpose.

Consider the ways that the majority's application of *Loudon* and *Youngs* in this distinct context create the opportunity for unfair gamesmanship. A plaintiff can limit the hospital defendant's ability to freely communicate with key witnesses by deciding not to name a doctor as a defendant, while still seeking to hold the hospital liable for that doctor's care. Or, a plaintiff can strategically dismiss a doctor as a named defendant at any point, thereby abruptly cutting off the hospital defendant's ability to communicate freely with that doctor—even when the hospital and the doctor are jointly represented by the same counsel.¹³

¹³ VMMC argues that is what happened in this case, where the plaintiff dismissed Dr. Brandenburg as a named defendant close to the original scheduled trial date. Under the majority's rule, plaintiff's decision would cut off VMMC's ability to communicate freely with Dr. Brandenburg, even though he and VMMC were jointly represented by the same counsel.

- II. Even if *Youngs* applied to allegedly at-fault nonparty doctors, I would extend *Youngs*' application of the attorney-client privilege to communications between plaintiff's nonparty doctors who are former employees of the defendant and shared an attorney-client privilege with the defendant. *Newman*¹⁴ is distinguishable

Alternatively, even accepting *Youngs* as the majority understands it (as applying to all of plaintiff's nonparty doctors, regardless of whether the doctor's care is at issue), I would clarify that *Youngs*' application of the attorney-client privilege extends to former employee doctors, not just current ones. *Youngs*' rationale regarding the corporate attorney-client privilege applies with equal force to those doctors, since they possess critical information that defense counsel needs to provide sound legal advice to the corporate client. *Newman*, a later case that held that the corporate attorney-client privilege did not extend to former nonmedical employees of a school district, is distinguishable. 186 Wn.2d 769.

A. Youngs focused on corporate counsel's duty to gather information about incidents that expose the corporate client to liability to provide sound legal advice to the client; this rationale applies with equal force whether the nonparty doctor is a current or former employee

As mentioned above, *Youngs* presented a situation where the *Upjohn* corporate attorney-client privilege would protect certain ex parte communications between a hospital's corporate defense counsel and hospital employees, but *Loudon*

¹⁴ *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016).

would bar those same communications. 179 Wn.2d at 663. To resolve this conflict, we had to “balance the values underlying the attorney-client privilege against those underlying the physician-patient privilege” (even though the physician-patient privilege had been waived). *Id.* at 650.

We acknowledged the important privacy values supporting the physician-patient privilege and the risks of ex parte contact described in *Loudon*, as discussed above. We then considered the purposes of the attorney-client privilege, codified at RCW 5.60.060(2)(a), and focused on the seminal United States Supreme Court decision in *Upjohn*. In *Upjohn*, the Court had to determine whether the attorney-client privilege could apply to nonmanagerial employees of a corporation. The *Upjohn* Court unanimously rejected the narrow “control group” test adopted by some lower courts, which limited corporate attorney-client privilege to communications between corporate counsel and the corporation’s officers and top management. Instead, it adopted a flexible, functional approach to determining when communications between corporate counsel and nonmanagerial employees enjoy the protection of attorney-client privilege. That approach requires courts to consider

whether “the underlying purposes of the attorney-client privilege” would be served by protecting the communications. 449 U.S. at 395.¹⁵

The *Upjohn* Court described some of those purposes. It “sought to protect counsel’s ability to ‘ascertain[] the factual background’ of a ‘legal problem,’ and it rejected the narrow ‘control group’ test because that test would frustrate the lawyer’s *investigative* abilities.” *Youngs*, 179 Wn.2d at 664 (alteration in original) (quoting *Upjohn*, 449 U.S. at 390). It recognized that the attorney-client privilege “exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn*, 449 U.S. at 390. In the corporate setting, nonmanagerial or lower-level employees “might well be the only source of information relevant to legal advice, since they can, ‘by actions within the scope of their employment, embroil the corporation in serious legal difficulties.’” *Youngs*, 179 Wn.2d at 662 (quoting *Upjohn*, 449 U.S. at 391). Without talking to those employees, corporate counsel “‘may find it extremely difficult, if not impossible, to determine what happened’ to trigger potential corporate liability.” *Id.* (quoting *Upjohn*, 449 U.S. at 392).

¹⁵ In *Upjohn*, the Court considered several factors and concluded that the purposes underlying the attorney-client privilege would be served by protecting the communications at issue. 449 U.S. at 394. The Court left open the question whether posttermination communications with former employees about matters occurring during employment would retain the privilege. *Id.* at 394 n.3.

In *Youngs*, we expressly adopted *Upjohn*'s reasoning and its "'flexible'" test. *Id.* (quoting *Wright v. Grp. Health Hosp.*, 103 Wn.2d 192, 201-02, 691 P.2d 564 (1984)). And we expressly relied on this reasoning to resolve the conflict in *Youngs*. *Id.* at 665. We held that "the corporate attorney-client privilege trumps the *Loudon* rule where an ex parte interview enables corporate counsel 'to determine what happened' to trigger the litigation." *Id.* at 664 (internal quotation marks omitted) (quoting *Upjohn*, 449 U.S. at 392). Such communications must be limited to the facts of the alleged negligent event. *Id.* at 665. This rule "strikes the proper balance between the attorney-client and physician-patient privileges, limiting *Loudon*'s prophylactic protections to the extent necessary to protect a corporate defendant's right to fully investigate its potential liability." *Id.*

Youngs' reasoning on the attorney-client privilege applies with equal force to the plaintiff's nonparty treating doctors who are former employees of the defendant. In fact, it applies with even greater force where, as here, the alleged conduct of those nonparty doctors forms the basis of the lawsuit against the corporate defendant. After all, *Upjohn* extended the attorney-client privilege beyond the control group precisely *because* lower-level employees, while acting in their capacity as agents of the employer (even if they were not "speaking agents"), may expose the employer to

liability. 449 U.S. at 391.¹⁶ Obviously, corporate counsel’s need to determine what happened when an employee is accused of negligence does not disappear simply because that employee moves on to another job. For this reason, “[v]irtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment.” *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005).¹⁷

Limiting corporate counsel’s ability to fully investigate and defend against alleged negligence based merely on employment status does not serve the policy goals of *Youngs* or *Loudon*. Instead, it creates an unwarranted burden on the statutory attorney-client privilege and on a corporate defendant’s “right to fully investigate its potential liability.” *Youngs*, 179 Wn.2d at 665. If *Youngs* covers allegedly negligent

¹⁶ A “speaking agent” is a person who “can speak and act for the entity and can settle controversies on its behalf.” *Wright*, 103 Wn.2d at 202 (quoting Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government “Party”*, 61 MINN. L. REV. 1007, 1017 (1977)). By rejecting the “control group” test, *Upjohn* makes clear the attorney-client privilege can extend even to agents of a corporation who are not speaking agents.

¹⁷ See also *Hanover Ins. Co. v. Plaquemines Parish Gov’t*, 304 F.R.D. 494, 498-500 (E.D. La. 2015) (noting that “every federal court to address the issue, with the exception of a single district court decision in 1985, has held that the privilege extends to former employees in certain contexts”).

nonparty employee doctors, it should cover those doctors even when they are no longer current employees.

B. Newman is distinguishable

The majority opines that this court already decided, in *Newman*, that the corporate attorney-client privilege can never apply to former employees under any circumstances. But *Newman* is distinguishable.

In *Newman*, decided a few years after *Youngs*, a student sued a school district for negligence after suffering a serious injury playing football. The plaintiff sought disclosure of certain communications between the school district's counsel and former employee football coaches—not medical providers. The school district asserted that those communications were protected by attorney-client privilege.

In a 5-4 decision, the *Newman* majority held that those communications were not privileged because “former employees categorically differ from current employees with respect to the concerns identified in *Upjohn* and *Youngs*.” 186 Wn.2d at 780. *Newman* focused on the fact that a former employee “generally” no longer has an agency relationship with the employer, “can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation.” *Id.* It held—in the context of that case, which did not involve doctors, hospitals, ongoing insurance obligations or ongoing contractual cooperation

and indemnification promises—that extending the attorney-client privilege to such former employees would not serve the purposes of the privilege.

In my view, *Newman*’s narrow focus on an individual’s current employment status as the determinative factor in justifying application of the attorney-client privilege conflicts with *Youngs* and *Upjohn*. First, neither of those decisions based the corporate attorney-client privilege on the employee’s duties of loyalty or obedience to the employer. Instead, those decisions emphasized corporate counsel’s investigatory duty and justified the corporate attorney-client privilege because it would promote the free and frank exchange of information that would allow corporate counsel to provide sound legal advice to the client. Second, both *Youngs* and *Upjohn* emphasized that the corporation’s “need to know” certain information supported extending the privilege to nonmanagerial employees. *Newman* unduly minimizes the importance of these considerations.

But even accepting the *Newman* majority’s holding, *Newman* itself recognized that in some cases, an employer and former employee continue to owe each other duties and that some courts have therefore extended the privilege to communications with such former employees. *Id.* at 780 n.2 (citing *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 n.1 (D. Conn. 1999); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D.

303, 306 (E.D. Mich. 2000)), 781 n.3 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. e (A.L.I. 2000)).

This case presents that precise situation. VMMC has a continuing contractual duty to defend its former employee doctors, regardless of their current employment status, against claims arising from their acts during their employment. And the former employee doctors have a continuing contractual duty to cooperate with the hospital's investigation and defense of such claims. Given this fact, *Newman's* rationale does not logically apply to this case. Instead, this fact supports extending the attorney-client privilege to corporate counsel's communications with its former employees, if the other requirements for attorney-client privilege are met. *See Youngs*, 179 Wn.2d at 653 n.4 (citing *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (attorney-client privilege "extends to verbal statements, documents and tangible objects conveyed by both individual and corporate clients to an attorney in confidence for the purpose of any legal advice")).¹⁸

¹⁸ The majority rejects the above analysis in passing by stating that this court has already applied "*Loudon* and its progeny" "to former employees whose conduct is at issue." Majority at 29 n.8. But the cases the majority cites do not support that assertion. First, the majority cites *Newman*, but as discussed, that case had nothing to do with medical providers or with the *Loudon* rule; it certainly cannot be read as an instance of this court applying the *Loudon* rule to a former employee doctor whose conduct is at issue in a lawsuit. Next, the majority cites Justice Johnson's partial concurrence in *Smith*, but, again, there is no suggestion that the nonparty doctor at issue in that case was a former employee of the defendant. Finally, the majority cites *Loudon* itself, but as established, the doctors at

III. VMMC did not waive the statutory quality improvement privilege by failing to screen a quality improvement committee member from this litigation

RCW 70.41.200(1) requires hospitals to maintain “a coordinated quality improvement program” aimed at improving the quality of health care services rendered and preventing medical malpractice. Among other requirements, quality improvement programs must collect and maintain “information concerning the hospital’s experience with negative health care outcomes and incidents injurious to patients.” RCW 70.41.200(1)(e). Materials “created specifically for, and collected and maintained by, a quality improvement committee” are protected from civil discovery. RCW 70.41.200(3).

The statutory quality improvement privilege is narrow. “The privilege does not protect what goes into or comes out of the quality improvement committees. But documents created as part of the inner workings of the committee are privileged and disclosure of those documents may not be compelled.” *Lowy v. PeaceHealth*, 174 Wn.2d 769, 787, 280 P.3d 1078 (2012).

issue in *Loudon* were not former employees of the defendant and their conduct was not at issue in the lawsuit.

In this case, VMMC argues that the quality improvement privilege protects some of the documents on its privilege log. The trial court denied Snyder's motion to compel disclosure of these documents.

In *Youngs*, we explained that a hospital employer could comply with the quality improvement statutes and avoid violating *Loudon* by screening quality improvement committee members from malpractice litigation. Snyder argues that VMMC has waived any claim to quality improvement privilege because it failed to screen a member of the quality improvement committee, Dr. Michael Glenn, from the litigation in this case.

The Court of Appeals correctly rejected this argument. It explained, "*Youngs* proposes screening as a possible preventative for ex parte communications, but does not require it under threat of waiver of the privilege. If this screening is not done, and the result is a *Loudon* violation, then the trial court must determine the proper remedy based on the nature of the prejudice and the particular circumstances." *Snyder*, No. 83526-2-I, slip op. (unpublished portion) at 29, <https://www.courts.wa.gov/opinions/pdf/835262%20Order%20and%20Opinion.pdf>.

Here, the record suggests that VMMC did not screen Dr. Glenn from the litigation. But, as discussed above, this did not result in a *Loudon* violation because *Loudon* does not bar a hospital employer's ex parte communications with former

employee doctors whose care is at issue in litigation. Thus, I find no basis to conclude that VMMC has waived the quality improvement privilege. I would affirm the trial court's denial of Snyder's motion to compel disclosure of materials covered by the quality improvement privilege.¹⁹

CONCLUSION

I would affirm in part and reverse in part.

First, I would hold that *Loudon* does not bar a defendant's ex parte contact with plaintiff's nonparty doctors whose allegedly negligent conduct gives rise to the plaintiff's claim against the defendant. Thus, I would reverse the Court of Appeals ruling that those contacts violated *Loudon*.

Second, I would remand to the trial court to address certain other issues that depend on the resolution of the *Loudon* issue. Specifically, I would hold that the corporate attorney-client privilege may extend to defense counsel's communications with the former employee doctors. Here, neither the trial court nor the Court of Appeals assessed whether the privilege applies to those communications because it

¹⁹ The majority concludes that VMMC "at least partially waived the statutory privilege" by failing to shield Dr. Glenn from litigation. Majority at 3. In doing so, the majority creates a brand-new waiver rule that conflicts with the plain language of the quality improvement statute. The legislature's intent is clear in that statute: materials created specifically for, and collected or maintained by, a hospital's quality improvement committee are not subject to compelled disclosure. RCW 70.41.200(3); *Lowy*, 174 Wn.2d at 787 (noting that RCW 70.41.200(3) does not "list any exception to the protection from discovery").

first concluded that any such communications violated *Loudon*. I would therefore remand to the trial court to determine in the first instance whether VMMC has met the other prerequisites to application of the attorney-client privilege to its communications with the former employee doctors or their counsel (e.g., confidentiality, communication for the purpose of obtaining legal advice). I would further instruct the trial court to consider VMMC's arguments about the common interest privilege in light of its conclusion about whether the prerequisites to application of the attorney-client privilege were met, given that *Loudon* does not bar VMMC's communications with the nonparty doctors.

Third, I would reverse the Court of Appeals holding that VMMC's violation of *Loudon* led to a violation of the quality improvement privilege—because I don't think that VMMC violated *Loudon*. Given the majority's holding on that point, though, I would affirm the Court of Appeals holding that the extent to which the plaintiff can show prejudice is a factor bearing on the appropriate sanction for a *Loudon* violation and that failure to screen a quality improvement committee member from defense counsel in a malpractice action does not automatically waive statutory quality improvement protections.

Finally, given this resolution, I would not reach VMMC's additional constitutional arguments.²⁰

The majority's decision today expands the *Loudon* rule far beyond its original context. It creates an unwarranted burden on a corporate defendant's "right to fully investigate its potential liability" and to defend itself. *Youngs*, 179 Wn.2d at 665. It erodes the statutory attorney-client privilege. And it fails to fully address how its broad rule will apply to the specific facts of this case. I therefore respectfully dissent.

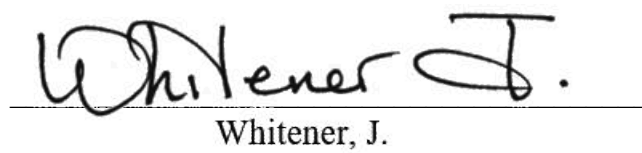
²⁰ VMMC argues that applying *Loudon* in this context violates the equal protection and due process rights of both VMMC and the doctors. Because I would hold that *Loudon* does not apply to VMMC's communications with the allegedly negligent, former employee nonparty doctors, I would not reach these additional arguments. But I note some disagreements with the majority's approach to these arguments.

The majority declines to consider VMMC's argument that the application of *Loudon* in this context violates the nonparty doctors' due process and equal protection rights because it says VMMC made those arguments for the first time on appellate review. Majority at 29 n.9. I agree that VMMC does not appear to have made the equal protection arguments (regarding either VMMC or the doctors) in the trial court. But VMMC did make the argument about doctors' due process rights in the trial court, so it is preserved for review. *E.g.*, CP at 1773 (VMMC's Opp'n to Pl.'s Mot. to Direct Special Master), 2196 n.41 (VMMC's Mot. Allowing for Ex Parte & Privileged Commc'ns).

Likewise, VMMC's separate argument that applying *Loudon* in this context violates VMMC's own due process right to prepare a defense is preserved because VMMC made this argument in the trial court. CP at 2196 n.41 (VMMC's Mot. Allowing for Ex Parte & Privileged Commc'ns). The majority does not mention or address this argument.

Snyder v. Virginia Mason Med. Ctr., No. 104136-5
(Gordon McCloud, J., dissenting)


Gordon McCloud, J.


Whitener, J.


Madsen, J.P.T.