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No. 87811-1

SUPREME COURT
OF THE STATE OF WASHINGTON

MARC YOUNGS, Petitioner,

v.

PEACEHEALTH, a Washington corporation,
d/b/a PEACEHEALTH ST. JOSEPH MEDICAL CENTER
and d/b/a/ PEACEHEALTH MEDICAL GROUP, Respondents

AOLANIE E. GLOVER, a single individual,
Respondents

v.

THE STATE OF WASHINGTON d/b/a HARBORVIEW
MEDICAL CENTER; AND LULU M. GIZAW, PA-C
PETITIONERS

BRIEF OF AMICI CURIAE
WASHINGTON STATE MEDICAL ASSOCIATION AND
WASHINGTON STATE HOSPITAL ASSOCIATION

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I. INTRODUCTION

The issue in this consolidated case is whether a lawyer for a hospital defendant in a malpractice case may have *ex parte* contacts with the defendant's own employees who are, or who become, treating physicians for the plaintiff, whether they are only clinicians or also are managers, or whether the rule in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), will be expanded to effectively preclude a hospital defendant from defending itself. Since a hospital can only act through its agents and employees and also is liable for their acts, it must be able to talk with those employees holding relevant knowledge and conduct its investigation for both defense and required quality of care and peer review within the statutory and attorney-client privileges, or it is denied a defense.

II. IDENTITY, INTEREST, AND SUMMARY POSITION OF *AMICI CURIAE*

The Washington State Medical Association (“WSMA”) is a statewide professional association of medical and osteopathic physicians, surgeons and physician assistants with over 9800 physician and physician assistant members. Its advocacy is physician-driven and patient-focused. The WSMA is

knowledgeable and interested in matters impacting the practice of medicine, and, in particular, issues that impact quality of care for patients. The WSMA has been in existence for over 100 years, is very familiar with the essential features of medical practice, and has filed numerous *amicus curiae* briefs in this Court. Throughout that century the WSMA has actively worked with the Washington State Legislature on legislation affecting the practice of medicine and participated in court cases both as a party and as a friend of the court because of its comprehensive historical and contemporary knowledge of how healthcare is delivered.

The Washington State Hospital Association (“WSHA”) is a nonprofit membership organization representing Washington's 97 community hospitals which maintain quality improvement programs under RCW 70.41.200, and several health-related organizations. The WSHA works to improve the health of the people of the State by being involved in all matters affecting the delivery, quality, accessibility, affordability, and continuity of health care. The WSHA recognizes the critical role of continuing communication within institutions and with an institution's employees in insuring quality patient care. The WSHA is acutely aware of the impact of

this issue on the ability of hospitals to address quality of care issues, both for patients and to insure each institution can fully and properly represent and defend itself when confronted with allegations of malpractice by any of its employees.

The WSMA and the WSHA (collectively “Health Care *Amici*”) wish to assist the Court by addressing from a broader perspective two propositions that they believe are important to a well-reasoned decision because the Court’s resolution of these cases will have application to the members of Health Care *amici* in nearly every situation of potential or alleged medical malpractice involving a treating physician employed by a defendant hospital, in addition to affecting the day-to-day operations and procedures of the members of Health Care *Amici*, both large and small.

First, the Court should respect and give effect to the public policy established by the Legislature in RCW 5.60.060(4)(b), RCW 70.02.050(1)(b), and RCW 70.41.200, and resolve these cases on that basis. The first statute provides for waiver by a plaintiff of the physician-patient privilege “as to all physicians or conditions” 90-days after filing a personal injury lawsuit. The second statute allows health care providers to disclose patient health care information to

persons with a need to know, including for the provision of quality assurance, peer review, administrative, or “legal services.” The third requires quality assessment programs in each hospital, which in turn requires communications within hospitals among a range of personnel about care issues, including negative outcomes, communications which are privileged under RCW 70.41.200(3).

The statutes give a clear rule that internal, privileged communications are permitted and protected, easily applicable by plaintiffs and defendants alike, with the salutary virtue of coming from the examination and debate of the legislative process, which allows for consideration of a wider range of facts from interested individuals and groups than in court cases.

Second, if the Court does not find the statutes dispositive, Health Care *Amici* suggest as a model the well-reasoned resolution of the issue by the Arizona Court of Appeals in *Phoenix Children's Hospital, Inc., v. Grant*, 228 Ariz. 235, 265 P.3d 417 (Ariz. Ct. App. 2011), particularly as it is an intellectual descendant of *Loudon*. The *Phoenix* decision held that the physician-patient privilege does not bar communications outside of formal discovery between a defendant hospital and/or its counsel and treating physicians who are

employed by the defendant hospital. The *Phoenix* decision also builds on the 1989 Arizona Court of Appeals decision which itself explicitly adopted and built on the rationale of *Loudon* and its reliance on a 1986 Iowa Supreme Court decision, the critical rationale adopted by this Court in *Loudon*.

In sum, Health Care *Amici* respectfully submit two logical approaches to resolution of the issue before the Court: one based on the explicitly adopted public policy of the State as embodied by the statutes; the other based on the logical progression—the intellectual descendant of the *Loudon* decision itself.

Our health care system and its institutions cannot be weakened by either unworkable rules that compromise hospitals' ability to legitimately defend themselves or impose procedures which interfere with assuring the best possible care for our patients. There is no need to impose such procedures because under the circumstances here involving the physician employees of defendant hospitals, as the *Phoenix* case recognized, the underlying concerns that required the *ex parte* prohibition in *Loudon* simply do not exist. Non-existent concerns do not justify a rule that compromises a hospital's required quality assurance programs or its own defense.

III. STATEMENT OF THE CASE

This consolidated case asks whether a lawyer for a hospital defendant in a malpractice case may have *ex parte* contacts with employees of that hospital who also are treating physicians for the plaintiff, including physicians who are managers of the defendant hospital whose normal duties include consulting on such matters and subsequently treated the plaintiff or consulted on the plaintiff's care.

In *Youngs v. PeaceHealth*, the Superior Court in Whatcom County answered “yes” by ultimately denying the plaintiff’s motion for a protective order, ruling that “counsel for PeaceHealth may have *ex parte* contact with PeaceHealth employees who provided health care to plaintiff Marc Youngs.” *Youngs* CP 9, 12; PeaceHealth Response Brief, p. 5. Youngs sought discretionary review in Division One, which was granted.

In *Glover v. State of Washington d/b/a Harborview Medical Center and Gizaw, PA-C* (“*Glover*”), the Superior Court in King County answered “no” by entering an order prohibiting the defendant University¹ from engaging in attorney-client privileged conversations

¹ Health Care *Amici* adopt the naming convention in the briefs and refer to the hospital defendant in the *Glover* case as “University.”

with physicians it employs, including some who, as managers, normally would consult on such a case, because those physicians later treated or consulted on plaintiff Glover's care. However, the trial court certified the decision for immediate discretionary review, stating: "There is no Washington authority addressing the specific issue of whether the rule in *Loudon v. Mhyre* and *Smith v. Orthopedics International* . . . applies to treating physicians employed by the defendant." *Glover* CP 172; University's Reply Brief, p. 1. Health Care *Amici* agree with the University and PeaceHealth that *Loudon* and *Smith* do not control here because neither case addressed "contact" between a personal injury defense lawyer and employees of the lawyer's corporate client. *See, e.g.*, University's Reply Brief, p. 1-2; PeaceHealth's Response Brief, pp. 1-2 & fn. 1, pp. 24-26. Health Care *Amici* otherwise accept the parties' statements of the case.

IV. ARGUMENT

A. Summary of Argument and Specific Issues Addressed by the Health Care *Amici*.

The parties focus primarily on whether and how the *Loudon*, *Smith v. Orthopedics International*, and *Wright v. Group Health*

cases control the outcome.² As noted, Health Care *Amici* agree with PeaceHealth and University, and the Superior Courts, that *Loudon* and *Smith* do not control, nor does *Wright*.

Health Care *Amici* submit two approaches to resolution of the issue before the Court which they respectfully suggest are appropriate: one based on the explicitly adopted public policy of the State as embodied by RCW 5.60.060(4)(b), RCW 70.02.050(1)(b), and RCW 70.41.200; the other based on the recent decision by the Arizona Court of Appeals in *Phoenix Children's Hospital*, which is an intellectual descendant of *Loudon* and focuses on the employer-employee relationship. The Court must make sure that our health care system and its institutions are not hurt by unnecessary rules that compromise their ability to legitimately defend themselves, or inhibit providing and assuring the best possible care for patients, particularly where, as here, the requested rule it is not necessary to stay true to the policies underlying *Loudon*.

The Court is reminded that the rule from this case will apply to all hospital defendants around our State—urban, suburban, and

² *Smith v. Orthopedics Int'l.*, 170 Wn.2d 659, 244 P.3d 939 (2010), and *Wright v. Group Health*, 103 Wn.2d 192, 691 P.2d 564 (1984).

rural alike, and all manner of state health care institutions including mental health care and prison facilities. While the defendant hospitals before the Court in this case have significant resources, Health Care *Amici* include many small community hospitals and associated physicians, both suburban and rural, in which the physicians and administrators perform many roles and wear numerous hats. The kind of blanket prohibition on all *ex parte* contact that is sought would be crippling to many of these hospitals. It would compromise their quality of care and deprive them of a reasonable ability to defend themselves, negatively affecting their operation and the overall quality of health care.

The specific issues Health Care *Amici* address herein are:

1. Should this Court give effect to the public policies established by the Legislature in RCW 5.60.060(4)(b), RCW 70.02.050(1)(b), and RCW 70.41.200 which explicitly provide for 1) waiver by a plaintiff of the physician-patient privilege “as to all physicians or conditions” 90-days after filing a personal injury lawsuit; and 2) for health care providers’ disclosure of patient health care information to persons with a need to know, including for the

provision of quality assurance, peer review, administrative, or legal services, and to conduct quality assurance programs?

2. If the statutory provisions do not resolve the matter, should this Court adopt the essential reasoning of *Phoenix Children's Hospital*, to hold the physician-patient privilege does not bar communications outside of formal discovery between a defendant hospital and/or its counsel and treating physicians who are employed by the defendant hospital, which reasoning was built on *Loudon* and its underlying principles?

B. The Court Should Resolve the Case Based on the Established Public Policies Embodied in RCW 5.60.060(4)(b), RCW 70.02.050(1)(b), and RCW 70.41.200, Which Provide That Plaintiffs Waive Their Physician-Patient Privilege 90-Days After Filing Suit and for Disclosure of Patient Health Care Information on Need-to-Know Basis, Including for Quality Assurance, Peer Review, Administrative, and Legal Services.

Washington statutes provide a reasonable and common sense framework for protecting privileged and private patient information while allowing disclosure as necessary for the proper operation and improvement of the health care system, as well as to allow a meaningful defense against claims. There is no compelling reason to compromise or change this statutory scheme, as discussed by the

parties, which will not be repeated;³ *however*, Health Care *Amici* emphasize this point is very important for all of them and their operations. A few additional points are in order.

Both RCW 5.60.060(4)(b) and 70.02.050(1)(b) were adopted after this Court's decision in *Loudon* so that the Legislature is presumed to have taken that decision into account when passing the statutes; they are properly seen as the most recent statement of public policy on the issue and limiting later judicial change. They were not addressed in either the lead opinion or in Justice Charles Johnson's concurring-dissenting opinion in *Smith* that yielded a majority, and thus were not applied in the ultimate decision.⁴ Both statutes were discussed briefly in Justice Fairhurst's concurrence:

Expanding *Loudon* to include all ex parte contacts is contrary to the very statute that created the privilege . . . RCW 5.60.060(4) . . .

#

. . . a bright line rule prohibiting ex parte contact is contrary to state law that allows disclosure in some circumstances of health care information without the plaintiff's authorization. In RCW 70.02.050(1)(b) the legislature permits disclosure of health care information without a patient's authorization "[t]o any other person who requires health care information . . . to

³ See PeaceHealth Response Brief, pp. 31-47 (discussing the statutes and their post-*Loudon* history); University Opening Brief, pp. 15-17, 29-31; Reply pp. 10-12, 17-19.

⁴ See University's Opening Brief, pp. 19-21, explaining how the controlling decisions avoided addressing these statutes.

provide . . . legal . . . services, or other health care operations for or on behalf of the health care provider or health care facility.

Smith, 170 Wn.2d at 674, 677. Health Care *Amici* respectfully suggest that Justice Fairhurst is correct. The kind of *ex parte* rule being advocated here is contrary to the statutory structure governing hospitals and privileges, as laid out well in the PeaceHealth Response Brief and the University's briefs. There is no convincing reason to make a rule contrary to the statutes. They should be applied here to affirm in *Youngs* and reverse in *Glover*.

C. The Arizona Rule Is the Intellectual Descendant of *Loudon v. Mhyre* and Should Be Followed If the Statutes Do Not Fully Resolve the Issue.

The core rationale for prohibiting *ex parte* interviews in *Loudon* was preservation of the physician-patient relationship, specifically the need to insure the protection of confidences obtained in that treatment relationship by protecting against "inadvertent disclosure" of irrelevant but privileged medical information in the course of an interview of the plaintiff's treating physician to a person not entitled to that information.

The danger of an *ex parte* interview is that it may result in disclosure of irrelevant, privileged medical information. The harm from disclosure of this confidential information cannot, as

defendants argue, be fully remedied by subsequent court sanctions. The plaintiff's interest in avoiding such disclosure can best be protected by allowing plaintiff's counsel an opportunity to participate in physician interviews and raise appropriate objections. We find the reasoning of the Iowa Supreme Court persuasive:

. . . We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes.

Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d [353] at 357 [(Iowa 1986)].

Loudon, 110 Wn.2d at 678-80. The circumstances in the Iowa case and *Loudon* help explain the language used and the limits of both decisions to the cases now before the Court, as neither involved employees.⁵

⁵ The issue in the Iowa case was the defendant's attempt to get a court order waiving any patient privilege or confidentiality with a non-defendant, treating physician for purposes of *requiring* an *ex parte* interview, rather than a deposition. See *Roosevelt Hotel, supra*, 394 N.W. 2d at 354-55. A major aspect to why the defendant's request for the order for an *ex parte* interview was denied was because the Iowa "discovery rules do not provide for such a procedure" and that "we see the forced consent to private interviews with plaintiffs' health care providers as inconsistent with our discovery rules generally." *Id.* at 357. Similarly, in *Loudon*, the treating physicians of concern were from Oregon, not the Seattle area where Mr. Loudon had received his immediate care after his auto accident that was at issue. Nothing in the decision indicates the treating physicians in *Loudon* were affiliated with the defendants, much less were employees of the hospital defendant.

The core concern in *Loudon* was to assure that a patient's "irrelevant confidential material" will not be disclosed to a person who does not have a right or a need to know. That is not the situation in either the *Youngs* or *Glover* case here as no disclosure is proposed to a person who does not have a right or need to know; there is no breach of a patient's confidences. Nothing in *Loudon* prohibits the kinds of *ex parte* contacts at issue here between attorneys for a defendant hospital and its own employees who 1) are the basis for its actions and any potential liability and, thus, the basis for its defense; and 2) are also the basis for and must be communicated with as part of the hospital's required quality assurance and peer review programs, as Justice Fairhurst's concurrence in *Smith* notes. This brings us to Arizona.

Shortly after *Loudon* was decided, the Arizona appellate court agreed with this Court's *Loudon* rule, quoting both *Loudon* and the Iowa Supreme Court in *Duquette v. Superior Court*, 161 Ariz. 269, 277, 778 P.2d 634 (Ariz. Ct. App. 1989). The Arizona court agreed "wholeheartedly with the Supreme Court of Washington when it stated" that "the unique nature of the physician-patient relationship and the dangers of *ex parte* interviews" justify the rule against *ex parte* contact with treating physicians. *Id.* *Duquette* was the law of Arizona.

contact with treating physicians. *Id.* *Duquette* was the law of Arizona until the 2011 decision in *Phoenix*, which relied and built on *Duquette*.

In *Phoenix* the defendant hospital filed a motion to allow contact between its counsel and hospital employees who had treated and were treating the plaintiff. The trial court denied the motion and the hospital filed for interlocutory relief. *Phoenix*, 228 Ariz. at 236-37. The issue on appeal was whether the *Loudon* rule adopted in *Duquette* barred communications outside of formal discovery between the defendant hospital, its counsel, and the hospital's own employees who provided treatment to the plaintiff.⁶ First, the Arizona court had to decide if the *Loudon-Duquette* rule was dispositive or if the case presented a different context that required clarification of the earlier rule. *Id.*, 238-39. The Arizona court held:

¶ 13 We begin by finding that *Duquette* did not decide the issue before us. *Duquette* did not consider the issue of access by defense counsel to treating physicians in the context of physicians employed by an institutional defendant. The parties here disagree whether it was possible or likely that some of the physicians involved in *Duquette* were in fact hospital employees, but it is plain that any employment relationship did not enter into the court's careful balancing of the interests at stake.

⁶ The Arizona court quoted the portion of *Duquette* that referenced and quoted *Loudon*. See *Phoenix Children's Hospital*, 228 Ariz. at 238.

Phoenix Children's Hospital, 228 Ariz. at 238-39. Review of *Loudon* itself shows the same also was true there as noted *supra*—no employment relationship existed, it did not enter into the analysis.

¶14 The issue raised in this special action is different from *Duquette* because the implied waiver is not the source of PCH's authority to discuss Alesha's medical condition with her treating physicians. The treating physicians are employees of PCH. Their knowledge of Alesha exists because they are treating her as agents and employees of the hospital, and that knowledge is presumptively shared with their employer. Our supreme court has stated:

[T]he knowledge of a corporate agent is imputed to the corporation if it is acquired by the agent within the scope of his or her employment and relates to a matter within his or her authority.

Id. at 239 (citations and footnotes omitted). Washington law on corporate knowledge of its agents is the same, and forms a basis for vicarious liability of a hospital for the acts and omissions of its agents and employees. See 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 105.02.01 (6th ed. 2013), and comments thereto.

The Arizona court then held communications are allowed for the core reason that the physicians obtained the information not due to an implied waiver of the patient-physician privilege, but due to the employer-employee relationship. As the court explained in depth, the

rationale is that public policy does not create a wall between employees and employers regarding a plaintiff patient because the employer is inextricably involved in the relationship between the employee and the plaintiff patient:

¶ 15 . . . a hospital's right to discuss a plaintiff/patient with its own employees exists because the employment relationship exists. That right is not dependent on the implied waiver arising from the filing of the malpractice lawsuit. We see no reason why the filing of a lawsuit expands the physician-patient privilege to bar communications that are otherwise allowed. Therefore, we conclude that *Duquette* does not apply to treating physicians who are employees of a corporate defendant that is itself a defendant in a medical malpractice action.

¶ 16 The [plaintiffs] argue, however, that the policies relied upon in *Duquette* for barring ex parte communications between defense counsel and treating physicians also exist when those physicians are hospital employees. We disagree. The policies discussed in *Duquette* served to control the information available to defense counsel from the implied waiver of the physician-patient privilege. **The information at issue here does not flow from the implied waiver, but from the employer-employee relationship itself. The relationship gives rise to obligations of the employees to the employer that are not present when the treating physician is not an employee, and equally impose obligations on the employer to the patients and employees. Because the employer is inextricably involved in the relationship between an employed physician and a patient, we cannot conclude that public policy creates a wall between the employees and their employer regarding that patient.**

¶ 17 Nor do we believe this rule violates the settled expectations of the patient. *Duquette* noted that "the public has

a widespread belief that information given to a physician in confidence will not be disclosed to third parties absent legal compulsion.” 161 Ariz. at 275, 778 P.2d at 640. We cannot conclude that the public has the same belief with regard to a physician employed by a hospital where the patient has gone for treatment.

Phoenix Children’s Hospital, 228 Ariz. at 239 (emphasis added).

The Arizona court further dismissed as over-broad the plaintiffs’ assertion of a broad definition of treatment for purposes of seeking application of the attorney-client privilege within the hospital to forbid *ex parte* contacts with some employees who were not involved in treatment. What the Arizona court found constituted part of a patient’s treatment within a hospital is consistent with the statutory scheme that Washington hospitals operate under, as discussed *supra*:

Their view of treatment would exclude any hospital activity not directly engaged in treatment. This could include billing, quality control, risk management, peer reviews, and, indeed, legal services. These are each normal functions ancillary to providing patient care. Given the general rule that knowledge of an employee is imputed to the employer, we cannot read the physician-patient privilege as barring an employee from communicating with his or her employer regarding those functions.

Phoenix Children’s Hospital, 228 Ariz. at 239-40.

In sum, *Phoenix* based its holding on agency principles, reasoning that the treating doctor employees have knowledge about the plaintiff patient because they are treating her as agents of the hospital, and as agents their knowledge is presumptively shared with their employer. The opinion dismisses concerns about the physician-patient privilege and about the expectations of the patient—the employer-employee relationship trumps those concerns. *Id.* at 239-40.⁷

Health Care *Amici* respectfully submit that the Arizona analysis is a well-thought-out balanced approach the Court can use should it find the statutory policies are not dispositive. Just as this Court relied on the Iowa Supreme Court in *Loudon*, it would be fitting for it to rely on the straight-line intellectual descendent of the Iowa decision and *Loudon* in *Phoenix Children's Hospital*.

V. CONCLUSION

Health Care *Amici* respectfully suggest that the Court resolve these cases by applying existing public policy as established by the

⁷ The *Phoenix Children's Hospital* case had amicus briefs from the plaintiffs' bar and the health care community, including the Arizona Medical Association and the Arizona Hospital and Healthcare Association. The Arizona court thus had full participation and the ability to consider the impact beyond the immediate parties to that case.

Legislature in RCW 5.60.060(4)(b), RCW 70.02.050(1)(b), and RCW 70.41.200 to affirm in *Youngs* and reverse in *Glover*.

To the extent the matter cannot be resolved on that basis, Health Care *Amici* encourage the Court to embrace the analysis in Arizona's *Phoenix* decision, which itself draws on and is the intellectual descendent of this Court's decision in *Loudon*, as the approach that best balances the competing interests and of plaintiffs, defendants, and patients. The approach also is realistic, practical, and consistent with state and federal disclosure and quality of care statutes and requirements. It allows an accurate assessment of questioned outcomes and permits such investigations to proceed apace, rather than get side-tracked or delayed while litigation is pending, to the potential detriment of other patients.

Respectfully submitted this 23rd day of January, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty under the laws of the State of Washington that on the 23rd day of January, 2013, I caused a true and correct copy of the foregoing Brief of Amici Curiae Washington State Medical Association and Washington State Hospital Association to be delivered as follows:

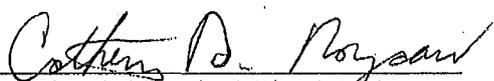
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Attached for filing per the previously filed motions is: Brief of *Amici Curiae* Wash State Med Assn/Wash State Hosp Assn Brief with Certificate of Service.

Case Name: Marc Youngs v. Peacehealth and Aolanie E. Glover v. The State of Washington d/b/a Harborview Medical Center, et al.
Case No.: 87811-1
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