

NO. 87811-1

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**SUPREME COURT FOR THE STATE OF WASHINGTON**

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MARC YOUNGS, Petitioner,

v.

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

and

UNKNOWN JOHN DOES, Defendants

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AOLANI E. GLOVER, a single individual, Respondent,

v.

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

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**JOINT BRIEF IN ANSWER TO AMICUS BRIEF OF  
WASHINGTON STATE ASSOCIATION OF JUSTICE  
FOUNDATION**

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Michael F. Madden, WSBA #8747  
Carol Sue Janes, WSBA #16557  
Bennett Bigelow & Leedom, P.S.  
Two Union Square  
601 Union St, Suite 1500  
Seattle WA 98101  
(206) 622-5511  
Special Assistant Attorneys  
General for State of Washington  
and Gizaw

Mary H. Spillane, WSBA #11981  
Daniel W. Ferm, WSBA # 11466  
Williams, Kastner & Gibbs, PLLC  
Two Union Square  
601 Union St, Suite 4100  
Seattle, WA 98101  
(206) 628-6600  
Attorneys for PeaceHealth

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## I. SUMMARY OF ANSWER

Amicus Washington State Association of Justice Foundation (“WSAJF”) gives singular focus to the protection of patient privacy, without considering the actual scope of that protection or giving consideration to the other legally-recognized interests at stake here—the attorney-client privilege and the employment relationship. In giving undivided attention to *Loudon*, WSAJF ignores state and federal case law that gives significant weight to these other interests, which must be balanced against the limited patient privacy interests at stake. WSAJF also ignores state and federal authority that identifies reasonable limits to the scope of protections for patient privacy, including recognition of the appropriateness of uninhibited communications between counsel for a health care system and its employed providers for the purpose of providing legal services. WSAJF’s proposal for a “screening mechanism” to limit a health care systems’ communications between counsel, quality improvement, risk management, and health care providers is both unprecedented and unworkable.

## II. ANSWER

### A. Answer to Statement of the Case.

WSAJF devotes the first six pages of its overlength brief to an unnecessary, incomplete, and somewhat inaccurate<sup>1</sup> recounting of the underlying events and positions of the parties. The Court would be better served by unfiltered review of the parties' own briefing.

### B. Answer to Argument.

#### 1. WSAJF Ignores Precedent Inconsistent with Its Position.

In limiting its case law analysis solely to *Loudon v. Myhre*, 110 Wn.2d 675, 756 P.2d 138 (1988), and related Washington law, WSAJF ignores the substantial body of case law from other jurisdictions that has resolved the issue presented here by concluding that a prohibition on *ex parte* contact does not limit communications within an integrated health

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<sup>1</sup> For example, WSAJF first asserts that defendant PA-C Gizaw "discovered his error [reading another patient's test results] two hours later" and then retrieved Ms. Glover from "a pharmacy." WSAJF Br. at 4. To the contrary, the record establishes that PA-C Gizaw quickly discovered his error "within about 5-10 minutes" of Ms. Glover's 6:30 p.m. discharge, located Ms. Glover in the Harborview outpatient pharmacy, and immediately returned with her to the Harborview emergency department "at about 6:40 p.m." CP 78. Second, WSAJF erroneously asserts that the University "claims that four of Glover's treating physicians at UWMC are managing-speaking agents." WSAJF Br. at 6. The University's brief explained that the superior court's order prohibited the University's counsel from communication with a long roster of University health care providers, and provided as illustrative examples these four physicians. The University has never taken the position that these four physicians are the only health care providers who would qualify as managing-speaking agents for the University as to this or other actions.

system, or between an attorney and employees of an institutional client. University Br. at 33-34; University Reply Br. at 12-16; PeaceHealth Br. at 19-22; *see also* WSMA/WSHA Amicus Br. at 15-20 and WDTL Amicus Br. at 15-16 (both discussing *Phoenix Children's Hospital, Inc. v. Grant*, 228 Ariz. 235, 265 P.3d 417 (Ariz. Ct. App. 2011), which reversed a trial court prohibition on contact between hospital counsel and hospital-employed treating physicians). Just as *Loudon* engaged in extensive review of the decisions from other jurisdictions in reaching its conclusions (*Loudon*, 110 Wn.2d at 677), the Court here will find such review relevant to its analysis of the issue at stake here.

## **2. WSAJF Ignores the Varied Interests at Stake.**

After recounting at length the list of interests articulated in *Loudon*, WSAJF concludes that “the preeminent rationale for the *Loudon* rule is protection of the physician-patient relationship.” *See* WSAJF Br. at 13. WSAJF rejects the possibility that the circumstances here require consideration of any other interests not presented by the *Loudon* facts. Unlike in *Loudon* or in *Smith v. Orthopedics Int'l*, 170 Wn.2d 659, 244 P.3d 939 (2010), which involved only physician-patient relationships, these cases involve the intersection of three separate types of relationships: (1) physician-patient, (2) employer-employee, and (3) attorney-client, each of which presents its own set of legally-recognized interests.

*Employer-Employee.* WSAJF entirely ignores the significant interests and duties that arise from the employer-employee relationship between the defendant health care system and its “non-targeted”<sup>2</sup> employed treating physicians. For example, an employed health care provider has a duty of loyalty to his/her employer. *E.g., Kiebert & Associates, Inc. v. Rehn*, 68 Wn. App. 260, 266 n.2, 842 P.2d 985 (1992) (“[o]ur courts have acknowledged the duties involved in employee-employer and principal-agent relationships” including the duty of loyalty; citing case law).

Further, the knowledge of an employed health care provider is imputed to his/her employer. *See* discussion in WSMA/WSHA Amicus Br. at 16. An employer has a duty during litigation to identify and produce witnesses with information “known or reasonably available to the organization.” CR 30(b)(6); *see* PeaceHealth Br. at 47-50. A hospital may be held liable for the acts of its employed physicians. 6 Washington Practice: Washington Pattern Jury Instructions: Civil 105.02.01 (6<sup>th</sup> ed. 2013) (“[a]ny act or omission of an officer, employee, or agent is the act or omission of the hospital corporation”).

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<sup>2</sup> Who is the “target” of a claim or suit is an elastic concept. Very often, as in the Glover action, plaintiff’s “targets” change over the life of the case (University Br. at 9), sometimes during trial. Allowing plaintiff’s counsel to control the scope of privileged communication in this way is unworkable and unfair.

A rule prohibiting an employer hospital from having communication with its employed physicians would serve solely to disadvantage the hospital in preparing its defense. Neither WSAJF nor the plaintiffs have offered a single example of such a disadvantage—imposing both liability for employees and a prohibition on protected conversations with employees—having been imposed on any other type of employer or corporate entity.

*Attorney-Client.* To the extent that WSAJF acknowledges the existence of interests arising from the attorney-client relationship, WSAJF concedes that these interests weigh convincingly in favor of allowing privileged communications to take place between the health care provider’s managing or speaking agents and hospital defense counsel. *See* WSAJF Br. at 18. This is a significant concession. Where WSAJF and the hospitals in this case differ is not in recognition of the interests at stake, or in how they should be weighed, but solely in defining the scope of the protection afforded by the attorney-client relationship. WSAJF acknowledges that some physicians “with managing authority” (*see* WSAJF Br. at 19) may be speaking agents for a defendant health care system, but balks at the idea of this protection also extending to “any” treating physician. *See* WSAJF Br. at 20. WSAJF fails to address the analysis in *Wright* that recognizes that “a doctor had ‘speaking authority’

for [a] hospital.” *Wright v. Group Health*, 103 Wn.2d 192, 201, 691 P.2d 564 (1984). *See* University Br. at 22; PeaceHealth Br. at 27-28.

WSAJF also completely ignores *Upjohn v. United States*, 449 U.S. 383 (1981), which rejected the idea of limiting application of the attorney-client privilege solely to communications with management-level employees, and *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), which recognized and relied upon the rule in *Upjohn*. Both *Wright* and *Sherman* deferred to *Upjohn* to define the boundaries of the privilege protecting communications between organizational counsel and employees. *Wright*, 103 Wn.2d at 195; *Sherman*, 128 Wn.2d at 190. *Upjohn* expressly rejected the idea of limiting the scope of the attorney-client privilege solely to communications between counsel and those in a “control group” of the organization. *Upjohn*, 449 U.S. at 391-92.

Because case law has reflected that the interests protected by the attorney-client privilege are of sufficient significance that interference with these interests raises constitutional concerns (*see* University Br. at 32; PeaceHealth Br. at 21-24), these interests cannot simply be cast aside in order to give higher priority to the physician-patient privilege, a privilege solely of statutory origin, which evaporates or is of limited application in litigation where the patient’s medical condition has been

placed at issue, RCW 5.60.060(4)(b), and the defense already has full access to the plaintiff's confidential medical information.

WSAJF concedes that *Loudon* did not decide this issue, but suggests that the Court should “harmonize[]” *Loudon* with *Wright*. See WSAJF Br. at 7, 21. WSAJF then, however, makes the contradictory assertion that *Loudon* did address the balancing of these interests and rejected “similar” arguments. See WSAJF Br. at 20. To be clear, the only issue that *Loudon* addressed was *ex parte* communication between defense counsel and a third party treating physician. It did not address communications between a health care system's defense counsel and the health care system's own employees. *Loudon*'s limited reference to *Wright* was not a rejection of *Wright* or of the significance of the interests in protecting the attorney-client privilege, but rather a recognition that *Wright* was “not concerned with the fiduciary confidential relationship which exists between a physician and patient.” *Loudon*, 110 Wn.2d at 681. *Loudon*, conversely, was not concerned with the issues that *Wright* addressed regarding protection of the attorney-client privilege, and cannot be said to have decided the issue. Nor did *Loudon* have occasion to be concerned with the issues raised in *Upjohn* regarding the *scope* of the protection of the attorney-client privilege in the context of an organizational client. *Sherman*, decided after *Loudon*, specifically relied

upon *Upjohn*. Courts and legislatures that have addressed the balancing of these issues have recognized that patient interests in privacy protections can be met without having to ignore the significant interests in protection of the attorney-client privilege or the significant rights and duties that arise from the employment relationship.

**3. State and Federal Legislation Recognizes an Appropriate Balance Between Patient Privacy and Attorney-Client and Employer-Employee Interests.**

WSAJF's assertion that neither RCW 5.60.060, the state Uniform Health Care Information Act (UHCIA, RCW 70.02), nor HIPAA,<sup>3</sup> *prohibit* the Court from expanding the *Loudon* rule to apply to attorney-client privileged communications within a health care system is beside the point: the Court's formulation of a rule based on policy must consider the policies articulated in these statutes, and not adopt common law rules that conflict with those policies. A serious, if not dispositive, consideration is that none of these laws provide any support for expansion of *Loudon*.

RCW 5.60.060(4), as amended in 1987 after the events at issue in *Loudon*, establishes that the patient *waives* the physician-patient privilege "as to all physicians and conditions" by filing an action for personal injuries. *See* PeaceHealth Br. at 32-39. *Loudon* cited RCW 5.60.060 as the source of the physician-patient privilege, and any analysis of whether

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<sup>3</sup> Health Care Insurance Portability and Accountability Act (HIPAA), P.L. 104-191.

to expand the *Loudon* rule must take into consideration changes to the authorities upon which the *Loudon* court it relied, in particular the amendment to RCW 5.60.060(4). The amendment established the legislative adoption of an unlimited waiver independent of the common law waiver. WSAJF asserts that the “subject to” language in RCW 5.60.060(4)(b) means that “the plaintiff has the right to limit the scope of discovery based on principles of relevance” under CR 26. *See* WSAJF Br. at 8. To the contrary, the “subject to” language in RCW 5.60.060(4)(b) establishes that any protection of the physician-patient privilege in the context of litigation must be accomplished through court rule,<sup>4</sup> rather than by a common law expansion of the rule. But court rules such as CR 26 defining the scope of discovery between adversaries during litigation have never been applied to define the scope of an attorney’s informal investigation through communications with employees of the attorney’s own institutional client, particularly where the investigation of the underlying event can and frequently does precede the initiation of formal litigation.

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<sup>4</sup> RCW 5.60.060(4)(b) provides that the waiver of privilege is “subject to such limitations as a court may impose pursuant to court rules.”

WSAJF further asserts that the legislative waiver contained in RCW 5.60.060(4) does not diminish a plaintiff's "substantive privacy interest" in health care information arising from the UHCIA and HIPAA. WSAJF fails to acknowledge that these state and federal laws reflect that well-reasoned protections for patient privacy can still allow for uninhibited flow of communications between a health care system, its physicians, counsel, and risk managers. The UHCIA, while recognizing the interests in avoiding improper disclosure,<sup>5</sup> nevertheless specifically allows disclosure of patient health care information by a health care provider for the purpose of obtaining legal services and for the purpose of health care operations. RCW 70.02.050(1)(b). It specifically authorizes communication of the kind at issue here,<sup>6</sup> and recognizes a distinction between it and the type of communication protected in *Loudon*, where the defense counsel was not providing legal services to the third-party

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<sup>5</sup> RCW 70.02.005 provides in part:

The legislature finds that:

(1) Health care information is personal and sensitive information that if *improperly* used or released may do significant harm to a patient's interests in privacy, health care, or other interests.

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(3) In order to retain the full trust and confidence of patients, health care providers have an interest in assuring that health care information is not *improperly* disclosed and in having clear and certain rules for the disclosure of health care information. [Emphasis added.]

<sup>6</sup> "A health care provider or health care facility may disclose health care information about a patient without the patient's authorization ... if the disclosure is ... to provide ... legal ...services." RCW 70.02.050(1), (1)(b).

physician, but solely engaging in discovery. Similarly, HIPAA regulations, while recognizing that one of their key purposes is “controlling the *inappropriate* use of [protected health] information,”<sup>7</sup> nevertheless specifically allow for disclosure of protected health information for “conducting or arranging for medical review [or] legal services.” 45 C.F.R. § 164.501.

Unlike communications between defense counsel and a third-party treating physician, any health care information obtained by counsel for a health care entity remains subject to HIPAA privacy protections, which further minimize the impact on the patient’s privacy interests. 42 U.S.C. § 17931 (applying HIPAA security standards directly to business associates); 45 C.F.R. § 160.103 (defining HIPAA business associates to include attorneys).

All three statutes (RCW 5.60.060(4)(b), UHCIA, HIPAA) are consistent with or specifically authorize confidential communication of the type at issue here between a hospital’s counsel and its employees for the purpose of providing legal services, in recognition of other legally protected interests arising from the attorney-client and employment relationships. Two of these statutes—RCW 5.60.060(4) and HIPAA—

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<sup>7</sup> 65 Fed. Reg. 82463 (Dec. 28, 2000) (emphasis added).

post-date *Loudon*, reflecting that legislative action since *Loudon* does not support expansion of its rule. WSAJF asserts that the RCW 5.60.060(4)(b) waiver of the legislative protection of the physician-patient privilege “is all the more reason why the *Loudon* rule is necessary.” See WSAJF Br. at 17. This invitation to re-visit the statute begs the question, “under what authority?” These statutes provide none.

**4. WSAJF’s Proposed “Screening Mechanism” and Analogy to *Ellwein* Is Flawed Because It Does Not Address the Attorney-Client and Employment Interests Presented Here, and Has Never Been Applied Outside the Insurance Context.**

WSAJF proposes an unprecedented new, artificial barrier between a hospital’s ability to present a liability defense and its responsibility to engage in quality improvement, but cites no authority that has ever imposed such a barrier. The sole case that WSAJF does cite, *Ellwein v. Hartford Acc. & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), *overruled on other grounds*, *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003), found “troubling” a commingling of an automobile insurer’s liability representation file with its UIM file. 142 Wn.2d at 782. The issue arose after an insurer had hired an accident reconstruction expert, William Cooper, to support the defense of its insured against a third party claim. 142 Wn.2d at 769, 781-82. The insurer then, however, asserted that Cooper was its *own* expert in its adversarial dispute with the

insured to resolve the insured's UIM claim. 142 Wn.2d at 771. The Court concluded that Cooper had been retained during the course of litigation solely "to defend the insured" and in that circumstance the insurer "should be prohibited from using or manipulating the expert." 142 Wn.2d at 782. Unlike the treating physicians here, the expert in *Ellwein* had no existing employer-employee relationship with the defendant insurer before the litigation, nor was he the client of the defendant's counsel. The *Ellwein* facts did not present, and the court had no occasion to consider, the duties of an employer to its employee, the scope of communications between defense counsel and the employees of its organizational client, or the consequences that an artificial barrier on communications would have for the ongoing activities of a health care system.

The imposition of a new barrier on communications between defense counsel and the employees of its health care system clients would be unprecedented. It would create artificial and unworkable barriers to communications within an integrated health care system, interfering with the health care system's mandatory risk management and quality improvement functions. See *University Br.* at 29-31; *PeaceHealth Br.* at 39-47.

**5. WSAJF Ignores the Multiple Types of Communications at Issue.**

WSAJF addresses only the policy interests related to confidential communications from a patient to a physician. In a single-minded focus on protecting this one type of communication, however, the superior court's order in the Glover action imposes prohibitions on other categories of communication:

- from the client's employed physician to defense counsel—about his/her knowledge and expertise independent of confidential patient health information, medical knowledge relevant to the case, possible causes of the patient's condition, the physician's own observations and assessment of the patient's diagnosis and prognosis, as well as insights into possible measures to prevent future bad outcomes, all of which knowledge is already imputed to the employer;
- from defense counsel to the client's employed physician—to answer questions about the litigation process, advise about managing ongoing relationships with a patient who has sued the physician's employer, and advise about preparing for possible testimony in the case even as a “non-targeted” employee whose testimony will inevitably reflect on the defendant employer;

- from risk management personnel to employed physicians<sup>8</sup>—about the litigation, about quality improvement, about managing any ongoing relationship with the plaintiff, or perhaps even about other patients in the physician’s care;<sup>9</sup>
- from employed physicians to risk management—about the plaintiff, liability and risks, quality improvement, or perhaps even about other patients.

Plaintiff’s counsel in the Glover action also apparently interpreted the *Loudon* prohibition to allow plaintiff to bar communications between the “targeted” health care providers and the “non-targeted” health care providers. *See Glover Br.* at 9. Giving effect to this type of prohibition would create an otherwise non-existent barrier in communications among health care providers who are co-workers for the same employer, and who make entries into and have access to the same integrated health care record. *See University Br.* at 6; *PeaceHealth Br.* at 18-19, 22-23, 25-26, 46-47, 49.

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<sup>8</sup> WSAJF concedes that this prohibition “may be unnecessary.” *See WSAJF Br.* at 25 n.21.

<sup>9</sup> As written, the superior court’s order in the Glover action, which prohibited risk management communications with treating physicians, could be interpreted to prohibit communications even as to other patients in the care of that physician, or even other risk management or quality improvement communications unrelated to specific individual patients.

Each of these categories of communications is associated with recognized policy interests. But WSAJF casts aside all of these interests in its unwavering focus on just the physician-patient privilege, as it would have the Court redefine and protect it notwithstanding RCW 5.60.060(4)(b)'s waiver provision. This failure to engage in necessary and appropriate balancing of competing policy interests is antithetical to the judiciary's obligation to engage in such balancing.<sup>10</sup>

#### **6. Additional Policy Considerations.**

The relevant interests here are not, as WSAJF contends, solely related to patient privacy. Patients also have an interest in quality and efficiency in the delivery of health care, which result from more, not less, communication and interaction within an integrated health care system. In fulfilling its "multifaceted" responsibilities "for the quality of medical care and treatment rendered," a hospital must engage in ongoing oversight of quality.<sup>11</sup> Given the complex regulatory environment for health care, the

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<sup>10</sup> See *Estate of Bruce Templeton ex rel. Templeton v. Daffern*, 98 Wn. App. 677, 687, 990 P.2d 968 (2000) (development of common law requires consideration of "'logic, common sense, justice, policy, and precedent;' earlier 'constitutional, legislative, and judicial expressions of public policy;' and a 'balancing of interests' that well may compete"; citing, *inter alia*, *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976)).

<sup>11</sup> *Pedroza v. Bryant*, 101 Wn.2d 226, 231, 677 P.2d 166, 169 (1984). The *Pedroza* court observed:

The patient treated in [a community hospital] ... is not merely treated by a physician acting in isolation....[I]n response to demands of the public, the

(continued on next page)

policy interests in effective and uninhibited communication and collaboration between counsel, management, risk management, and front line employees should be given greater weight than they might be given with respect to other industries. Patients benefit from these ongoing communications, and are not served by the imposition of artificial barriers within that existing framework.

### III. CONCLUSION

WSAJF, like counsel for Youngs and Glover, characterize the communications at issue here as “*ex parte*,” (see WSAJF Br. at 21-24) and, therefore, immediately subject to *Loudon*. Communications between counsel for a health care system and its employed health care providers are

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hospital is becoming a community health center. The purpose of the community hospital is to provide patient care of the highest possible quality. To implement this duty of providing competent medical care to the patients, it is the responsibility of the institution to create a workable system whereby the medical staff of the hospital continually reviews and evaluates the quality of care being rendered within the institution ... The hospital's role is no longer limited to the furnishing of physical facilities and equipment where a physician treats his private patients and practices his profession in his own individualized manner....Hospitals are also in a superior position to monitor and control physician performance.

*See generally* Nat'l Public Health & Hosp. Inst., Literature Review, Integrated Health Care, at 1, 17-18 (posted Apr. 26, 2012) (accessible at <http://tc.nphhi.org/sp/Search.aspx?SearchMode=1&SearchPhrase=literature+review>) (last accessed February 7, 2013) (“[i]ntegrated health care delivery is a critical tool for ... improving cost-efficiency, quality and population health”; noting that integrated medical groups achieve a higher level of clinical quality and are more likely to use electronic health records, follow quality improvement strategies, collect patient satisfaction data, and offer health promotion programs).

not “*ex parte*” communications; rather, they are confidential communications between a client’s counsel and the client’s employees, protected by the corporate attorney-client privilege. Because WSAJF fails to acknowledge the important differences between the *ex parte* communications at issue in *Loudon* and the communications at issue here, and the interests in protecting those communications, its brief provides an incomplete analysis of the issues, and proposes a result that would be harmful to the interests of patients and health care providers alike.

Respectfully submitted this 7<sup>th</sup> day of February, 2013.

BENNETT BIGELOW & LEEDOM, P.S.

By: 

Michael F. Madden, WSBA #8747  
Carol Sue Janes, WSBA #16557  
Special Assistant Attorney General  
Attorneys for State of Washington and  
Gizaw

WILLIAMS KASTNER & GIBBS PLLC

*with authorization*

By: 

Mary H. Spillane, WSBA #11981  
Daniel W. Ferm, WSBA #11466  
Attorneys for PeaceHealth

**CERTIFICATE OF SERVICE**

I certify under penalty under the laws of the State of Washington that on February 7, 2013, I caused a true and correct copy of the foregoing JOINT BRIEF IN ANSWER TO AMICUS BRIEF OF WASHINGTON STATE ASSOCIATION OF JUSTICE FOUNDATION to be delivered as follows:

Thomas R. Golden	<input type="checkbox"/>	Hand Delivered
Otorowski Johnston Morrow & Golden, PLLC	<input type="checkbox"/>	Facsimile
298 Winslow Way West	<input checked="" type="checkbox"/>	Email
Bainbridge Island, WA 98110	<input checked="" type="checkbox"/>	1 <sup>st</sup> Class Mail
Fax: (206) 842-0797	<input type="checkbox"/>	Priority Mail
email: trg@medilaw.com	<input type="checkbox"/>	Federal Express, Next Day

**Participants for Linked Case # 67350-5-I**

Joel D. Cunningham	<input type="checkbox"/>	Hand Delivered
J. Andrew Hoyal, II	<input type="checkbox"/>	Facsimile
Luvera Law Firm	<input type="checkbox"/>	Email
701 5 <sup>th</sup> Ave, Ste 6700	<input checked="" type="checkbox"/>	1 <sup>st</sup> Class Mail
Seattle, WA 98104-7016	<input type="checkbox"/>	Priority Mail
joel@luveralawfirm.com	<input type="checkbox"/>	Federal Express, Next Day
andy@luveralawfirm.com		

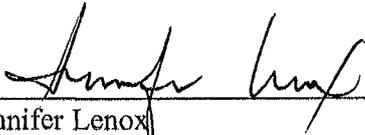
James L. Holman	<input type="checkbox"/>	Hand Delivered
Attorney at Law	<input type="checkbox"/>	Facsimile
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John C. Graffe, Jr.  
Heath S. Fox  
Johnson Graffe Keay Moniz & Wick,  
LLP  
925 4<sup>th</sup> Ave, Ste 2300  
Seattle, WA 98104-1145  
johng@jgkmw.com  
heath@jgkmw.com

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Mary Spillane  
Daniel W. Ferm  
Williams, Kastner & Gibbs, PLLC  
Two Union Square  
601 Union St, Suite 4100  
Seattle, WA 98101  
mspillane@williamskastner.com  
dferm@williamskastner.com

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\_\_\_\_\_  
Jennifer Lenox  
Legal Assistant

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Dear Clerk of the Court –

Attached for filing in the referenced case is: **Joint Brief in Answer to Amicus Brief of Washington State Association of Justice Foundation** (with attached Certificate of Service).

Case Name: Youngs v. PeaceHealth, et al. **and** Glover v. State of Washington d/b/a Harborview, et al.  
Case No. 87811-1  
Filer: Carol Sue Janes, WSBA #16557 – Tel. 206-622-5511 – E-mail: [csjanes@bllaw.com](mailto:csjanes@bllaw.com)

Attorneys named in the caption of the Brief are copied on this message.

**JENNIFER LENOX**  
Legal Assistant

**BENNETT BIGELOW & LEEDOM P.S. | [BLLAW.COM](http://BLLAW.COM)**

601 Union Street, Suite 1500  
Seattle, Washington 98101-1363  
T 206.622.5511 F 206.622.8986

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