

X  
FILED  
MAY 22 2009  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*cap*

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2009 MAY 22 P 3:01  
BY RONALD R. CARPENTER  
\_\_\_\_\_  
CLERK

NO. 83038-0

SUPREME COURT OF THE STATE OF WASHINGTON

---

JERRY D. SMITH, as Personal Representative of the  
ESTATE OF BRENDA L. SMITH, Deceased, and on behalf of  
JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the  
ESTATE OF BRENDA L. SMITH,

Petitioners,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, P.S.; and  
PAUL SCHWAEGLER, M.D.,

Respondents.

---

ANSWER TO PETITION FOR REVIEW

---

Mary H. Spillane, WSBA #11981  
Daniel W. Ferm, WSBA #11466  
WILLIAMS, KASTNER & GIBBS PLLC  
Attorneys for Respondents

Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380  
(206) 628-6600

TABLE OF CONTENTS

I.	IDENTITY OF RESPONDING PARTIES .....	1
II.	COURT OF APPEALS DECISION .....	1
III.	COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW .....	1
IV.	COUNTERSTATEMENT OF THE CASE.....	2
	A. Nature of the Case and the Appeal .....	2
	B. Facts Concerning Dr. Johansen’s Trial Testimony .....	4
V.	ARGUMENT WHY REVIEW SHOULD BE DENIED.....	12
	A. The Court of Appeals Decision Is Not in Conflict with <i>Loudon v. Myhre</i> .....	12
	B. The Court of Appeals Decision is Not in Conflict with <i>Rowe v. Vaagan Bros. Lumber</i> .....	13
	C. The Petition Does Not Involve an Issue of Substantial Public Interest that Should Be Determined by This Court .....	14
VI.	CONCLUSION.....	19

TABLE OF AUTHORITIES

**CASES**

Aluminum Co. of America v. Aetna Casualty & Surety Co.,  
140 Wn.2d 517, 998 P.2d 856 (2000).....14

Ford v. Chapin,  
61 Wn. App. 896, 812 P.2d 532, rev. denied,  
117 Wn.2d 1026 (1991) .....13

Kimball v. Otis Elevator Co.,  
89 Wn. App. 169, 947 P.2d 1275 (1997).....14

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

Rowe v. Vaagan Brothers Lumber, Inc.,  
100 Wn. App. 268, 996 P.2d 1103 (2000).....13, 14, 16, 17, 19

Smith v. Orthopedics Intern., Ltd., P.S.,  
149 Wn. App. 337, 203 P.3d 1066 (2009).....1, 3, 5, 10, 12, 13, 14

**RULES**

RAP 13.4(b)(1) .....13, 14, 19

RAP 13.4(b)(2) .....13, 14, 19

RAP 13.4(b)(4) .....14, 18, 20

**OTHER AUTHORITY**

WSBA Formal Ethics Op. 180 (1985).....15

### I. IDENTITY OF RESPONDING PARTIES

Respondents Orthopedics International Limited, P.S., and Paul Schwaegler, M.D., ask the Court to deny the petition for review.

### II. COURT OF APPEALS DECISION

On March 23, 2009, the Court of Appeals, finding no violation of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), or prejudice to plaintiff, affirmed the denial of plaintiff's motions for mistrial and new trial in this medical malpractice action. Smith v. Orthopedics Intern., Ltd., P.S., 149 Wn. App. 337, 203 P.3d 1066 (2009).

### III. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals properly conclude that the trial court did not abuse its discretion in denying plaintiff's motions for mistrial and, post-verdict, for new trial based on defense counsel's sending of information about the trial to the attorney representing one of Brenda Smith's treating physicians, Dr. Kaj Johansen, who had been deposed and was scheduled to testify as a defense witness?

2. Did the Court of Appeals properly conclude, as did the trial court, that defense counsel's contact with the attorney representing Dr. Johansen was not misconduct or a violation of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988) (prohibiting defense counsel from conducting ex parte interviews of a plaintiff's treating physicians), when

defense counsel (a) did not conduct any *ex parte* interview of Dr. Johansen, (b) did not seek to obtain, or obtain, from Dr. Johansen or his lawyer any disclosure of information about Ms. Smith *ex parte* (instead only obtaining information from Dr. Johansen about Ms. Smith during Dr. Johansen's deposition and trial testimony), but (c) only provided Dr. Johansen's attorney with copies of plaintiff's trial brief and the trial testimony of one of plaintiff's experts, Dr. David Cossman, who was critical of Dr. Johansen's care (both of which Dr. Johansen's attorney forwarded to Dr. Johansen), and a copy of a two-page outline for defense counsel's planned direct examination of Dr. Johansen at trial (which there is no evidence that Dr. Johansen ever saw)?

3. Did the Court of Appeals properly conclude that the trial court's denial of plaintiff's motions for mistrial and for new trial should be affirmed not only on the grounds that there was no misconduct or violation of Loudon, but also on the grounds that plaintiff has not shown that the contact defense counsel had with Dr. Johansen's counsel materially prejudiced plaintiff's case?

#### IV. COUNTERSTATEMENT OF THE CASE

##### A. Nature of the Case and the Appeal.

Jerry Smith, as personal representative of Brenda Smith's estate, on behalf of himself and Ms. Smith's children, sued Dr. Paul Schwaegler,

an orthopedic surgeon who specializes in spine surgery, Dr. Schwaegler's employer, Orthopedics International Ltd., P.S., and Swedish Medical Center. CP 3-10. Mr. Smith claimed that Dr. Schwaegler and Swedish nurses were negligent in providing post-operative care to Ms. Smith following spine surgery on December 31, 2003, and that such negligence made it necessary for Ms. Smith to undergo leg fasciotomies on January 2, 2004, to restore blood flow to her legs, resulted in the partial amputation of one leg, and ultimately caused her death. CP 9.

Mr. Smith settled with Swedish before trial. CP 550-54. Judgment was entered for Dr. Schwaegler and Orthopedics International based on the jury's verdict finding that Dr. Schwaegler had not been negligent. CP 278, 329-30. Mr. Smith appealed from the denials of his motions for mistrial, 11/20 RP 4, and for new trial, CP 284-93, 320-26, both of which were based on his claim that defense counsel's contacts with the attorney for one of Ms. Smith's treating physicians, Dr. Kaj Johansen, was a violation of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988) (prohibiting defense counsel from conducting ex parte interviews of a plaintiff's treating physicians). The trial court found that there had been no "Loudon violation" or prejudice to plaintiff. The Court of Appeals affirmed in its published decision, Smith v. Orthopedics Intern., Ltd., P.S., 149 Wn. App. 337, 203 P.3d 1066 (2009).

B. Facts Concerning Dr. Johansen's Trial Testimony.

The principal issues at trial were what Dr. Schwaegler knew about signs of diminished blood flow in Ms. Smith's legs after her spine surgery, when he knew it, whether he should have ordered tests several hours before a nurse reported finding no signs of blood flow at 11:40 p.m. on January 1, 2004, and whether intervention a few hours earlier would have saved Ms. Smith's leg and life. Plaintiff's counsel deposed Dr. Johansen (the vascular surgeon who was called to attend to Ms. Smith early in the morning of January 2, 2004) before trial, CP 354-451, and the defense had listed Dr. Johansen as one of its witnesses, CP 149, 282. Defense counsel never conducted any *ex parte* interview of, and never met *ex parte* with, Dr. Johansen. 11/19 RP 47-48, 51-53, 55-56, 64-65, 72.

Even though Mr. Smith had not sued Dr. Johansen, one of plaintiff's expert witnesses, vascular surgeon Dr. David Cossman, gave trial testimony critical of the care Dr. Johansen provided in trying to save Ms. Smith's leg. 11/19 RP 47, 52-53, 70. Prior to Dr. Johansen's appearance as a scheduled witness during the defense case, defense counsel sent to Dr. Johansen's attorney, Rebecca Ringer, via e-mail, copies of a transcript of Dr. Cossman's trial testimony 11/19 RP 47, 52-53, 70; 12/19 RP 7, and of the plaintiff's trial brief (CP 104-117),<sup>1</sup> 11/19

---

<sup>1</sup> Plaintiff's "Trial Brief Re: Facts," CP 104-17, set forth in 11 pages a chronology of

RP 47-48, 69-70 (both of which Ms. Ringer forwarded to Dr. Johansen), as well as a two-page outline of defense counsel's planned direct examination of Dr. Johansen (which there is no evidence Dr. Johansen ever saw), 11/19 RP 49-50. No order had been sought or entered excluding witnesses or precluding the sharing of information about what was taking place at trial with witnesses.<sup>2</sup> 11/15 RP 3-4. At no time, other than during Dr. Johansen's deposition and trial testimony, did defense counsel seek or obtain any information about Ms. Smith or her medical care from Dr. Johansen or Ms. Ringer.

The testimony that defense counsel elicited from Dr. Johansen on direct examination at trial paralleled his deposition testimony, and accounted for what Dr. Johansen had been told and what he did when he was called in to attend Ms. Smith at Swedish shortly after Dr. Schwaegler was informed that a nurse, at 11:40 p.m. on January 1, 2004, had found Ms. Smith lacking signs of blood flow in her legs. His direct examination testimony thus amounted mostly to a plain-English explanation of what his

---

information from Ms. Smith's medical records and then two pages about Ms. Smith and the impact of her death on her family. It did not include any discussion of plaintiff's malpractice theory or preview the expected trial testimony of any medical witnesses.

<sup>2</sup> The trial was a public one. Thus, Dr. Johansen or his lawyer would have been free to attend the trial and, had either been present when Dr. Cossman testified, would have heard his testimony criticizing Dr. Johansen and suggesting the possibility that plaintiff's counsel might be planning to conduct a cross-examination of Dr. Johansen for the purpose of laying the groundwork for a lawsuit against him. The Court of Appeals recognized that Dr. Cossman's testimony at least suggested that "[Ms. Ringer's] client was technically at risk of being sued himself." Smith, 149 Wn. App. at 343.

reports in Ms. Smith's medical records said. 11/14 RP 13-48.

Plaintiff's counsel did not object to any questions until defense counsel asked Dr. Johansen what he would have done if he had been called in to see Ms. Smith at around noon on January 1.<sup>3</sup> 11/14 RP 35. The court sustained the objection as calling for speculation from a witness who was not being called as an expert. 11/14 RP 40-41. When defense counsel asked to make an offer of proof while Dr. Johansen was still on the witness stand, the court decided to wait until the end of his testimony and take the offer of proof outside the presence of the jury. 11/14 RP 42-44. Dr. Johansen then testified, without objection, that Dopplerable pulses, warm feet, and good color suggest to him that perfusion, or blood supply, is present and that, if the foot is warm, the blood supply is at least satisfactory. 11/14 RP 44.

Defense counsel next asked Dr. Johansen to explain "flow geometry," which Dr. Johansen did, without objection from plaintiff's counsel. 11/14 RP 45. He explained that, as a blockage develops, a drop in blood pressure does not occur until the artery is about 75 percent blocked, at which point "fairly quickly you'll start developing coolness or diminished . . . or even absent pulses." 11/14 RP 45-46. When defense

---

<sup>3</sup> At Dr. Johansen's deposition plaintiff's counsel had tried, but had been unable, to elicit testimony about earlier intervention that was helpful to plaintiff's case. CP 369, 372-73, 391-93, 396-99.

counsel then asked Dr. Johansen if he has an opinion when that change occurred with Ms. Smith,<sup>4</sup> the court sustained plaintiff's counsel's objection that the question sought expert testimony. 11/14 RP 46.

Asked how long it had taken, "from its very inception," for the clot he removed from Ms. Smith's aorta to get where he found it, Dr. Johansen explained at some length, without prior objection and consistent with his deposition testimony, CP 384-85, 433-34, that he thought it started during the spine operation but was "not significant, in terms of blocking blood supply, until there started being signs at the bedside of a problem, for example, a cool foot, pulses which initially could be felt with the fingers but no longer could be felt . . . ." 11/14 RP 46. At that point, plaintiff's counsel objected and moved to strike on the ground that Dr. Johansen was being asked to give expert testimony. Id. The court struck the testimony and instructed the jury not to consider it. 11/14 RP 47-48. That concluded Dr. Johansen's direct examination.

On cross-examination, plaintiff's counsel, among other things, elicited from Dr. Johansen testimony that, when he first arrived to take

---

<sup>4</sup> Dr. Johansen had testified in response to plaintiff's counsel's deposition questions, that embolization significant enough to cause occlusion had not occurred at any point while the artery had a pulse that was either palpable or "at least a diphasic Doppler signal," CP 442-43; that the arteries had become occluded by the time the vascular lab study was done (on the morning of January 2), CP 443-44; and that the occlusion occurred between then and whenever the nurses last detected a pulse, CP 446.

over Ms. Smith's care on January 2, it was his understanding that the stoppage of blood flow was only a couple of hours old. 11/14 RP 79.

During defense counsel's redirect examination of Dr. Johansen, the trial court sustained a lack-of-foundation objection by plaintiff's counsel to a question as to what an ankle brachial index (ABI) test administered at about 1:00 p.m. on January 1 would have disclosed about blood flow.<sup>5</sup> 11/14 RP 83.<sup>6</sup> When the defense later proceeded to make an offer of proof about what an earlier ABI test would have shown, the defense elicited from Dr. Johansen, outside the presence of the jury, the opinion that an ABI test done at 1:00 p.m. on January 1 would have been normal (and thus would not have alerted Dr. Schwaegler to a blood-flow (perfusion)

---

<sup>5</sup> Plaintiff's counsel had asked Dr. Johansen at deposition whether a developing occlusion of the aorta would have been diagnosed had an ABI been ordered earlier on January 1, and Dr. Johansen had responded that an ABI would have made sense only in the absence of good Doppler signals. CP 428-33. Thus, the subject of ABI testing did not come out of the blue at trial.

<sup>6</sup> Dr. Johansen testified also that, if it had been suggested to him that a vascular deficiency had developed by 7:00 p.m. the previous day (January 1), he would have acted differently, but that he did not know that a different nurse had noted a lack of pulses that early and believes Dr. Schwaegler did not know that, either. 11/14 RP 89. The court sustained objections to, and Dr. Johansen did not answer, questions as to what Dr. Johansen believes Dr. Schwaegler would have done had Dr. Schwaegler been given earlier notice of a vascular (blood-flow) problem. 11/14 RP 89-90. Dr. Johansen also testified – without objection by plaintiff's counsel and based on his own personal experience working at Swedish – that ICU nurses at Swedish hospital are competent to operate, and routinely to do operate, “a Doppler” to check patients' pulses in the lower extremities. 11/14 RP 84. Defense counsel asked Dr. Johansen whether he routinely relies on the ability of Swedish ICU nurses to accurately determine whether his patients have normal pulses. 11/14 RP 86. The court overruled plaintiff's counsel's objection to that question, and Dr. Johansen answered yes, and went on to explain that one reason he relies on the nurses at Swedish is that he personally trained them in use of the Doppler and considers their findings trustworthy. 11/14 RP 87.

problem). 11/14 RP 99-101.

Plaintiff's counsel then asked Dr. Johansen whether he had "some idea as to . . . what questions would be asked of you here today," asserting to the court that "if this doctor has some idea as to what questions were being asked, then there's been a violation of the law here." 11/14 RP 103. Dr. Johansen testified that he thought the questions would be "along the lines of those you had asked me in my deposition, and also . . . I was sent a thing called a plaintiff's trial brief." 11/14 RP 103-04 (referring to CP 104-17). Dr. Johansen had his file with him, and gave it to the court to examine; the court informed plaintiff's counsel that Dr. Johansen's file also included letters from his counsel and a transcript of Dr. Cossman's trial testimony. 11/14 RP 107.<sup>7</sup> Plaintiff's counsel suggested an evidentiary hearing or striking of defense expert testimony or a curative instruction, 11/15 RP 8-9. Trial resumed.

A telephone conference hearing was held on Saturday, November 17, 2007, to explore with Ms. Ringer what communication had occurred between her and defense counsel.<sup>8</sup> 12/19 RP 6-7. E-mails between

---

<sup>7</sup> The court also noted on the record that the trial brief in Dr. Johansen's file did not contain any "notations or anything that could have been from an attorney or anything like that," but that it did contain "fax information," which she let plaintiff's counsel see. 11/14 RP 105.

<sup>8</sup> The November 17 hearing was not reported. At a later hearing on December 19, 2007, which was reported and is of record, the court and counsel for the parties referred to and related facts that had been established at the earlier hearing, and about which there seems

defense counsel and Ms. Ringer were provided to the court and, along with Dr. Johansen's file, became exhibits for the record, 12/19 RP 8; Post Trial Exs. 1 and 2. Further discussion was had during trial on November 19. 11/19 RP 43-89. The inquiries of counsel for Dr. Johansen and defendants established that: (1) defense counsel had sent Ms. Ringer plaintiff's trial brief and Dr. Cossman's trial testimony; (2) defense counsel had sent Ms. Ringer a two-page outline for the planned direct examination of Dr. Johansen at trial; (3) Ms. Ringer had forwarded to Dr. Johansen the trial brief and transcript of Dr. Cossman's testimony; and (4) Ms. Ringer had no substantive conversations with defense counsel. Post Trial Exs. 1 and 2; 11/19 RP 47-48, 51-53, 55-56, 64-65, 72. Plaintiff's counsel mentioned mistrial, but did not move for one. 11/19 RP 76, 88. Trial proceeded.

The next day, November 20, plaintiff moved, orally, for a mistrial,<sup>9</sup> and that motion was denied. 11/20 RP 4. The court offered to let plaintiff's counsel recall Dr. Johansen and ask him whether he and Ms. Ringer had gone over a list of questions that she expected defense counsel to ask Dr. Johansen; plaintiff's counsel chose not to do so. 11/20 RP 14.

---

to have been no material dispute.

<sup>9</sup> The Court of Appeals decision incorrectly states that "Defense counsel moved to strike Dr. Johansen's testimony and for a mistrial." Smith, 149 Wn. App. at 340. It was plaintiff's counsel who so moved.

The court informed the jury that:

Dr. Johansen was provided a copy of Dr. Cossman's trial testimony by defense counsel. Plaintiff's counsel was unaware of this fact.

CP 209. Having found no misconduct by defense counsel and to avoid commenting on evidence, the trial court declined to give an instruction proposed by plaintiff. 11/20 RP 3. Plaintiff has not assigned error to the court's refusal to give that proposed instruction.

The jury was given a special verdict form asking, first, whether Dr. Schwaegler had been negligent and, then, if he had been negligent, whether such negligence was a proximate cause of injury to the plaintiff. CP 278-280. The jury found that Dr. Schwaegler had not been negligent, CP 278, and did not reach questions of causation or damages, CP 279.<sup>10</sup>

Plaintiff moved for a new trial based on what his counsel continued to claim had been a violation of Loudon. CP 284-293; 12/19 RP 6, 11-12. The trial court denied the motion, CP 320-22; 12/19 RP 31, and entered judgment on the jury's defense verdict, CP 327-30. The trial court made the following findings or conclusions:

1. Defense counsel did not engage in any misconduct by having contacts with Rebecca Ringer, attorney for Dr. Johansen;

---

<sup>10</sup> Nor did the jury reach the questions of negligence on the part of Swedish or apportionment of fault. See CP 278-280.

2. There was no order in limine excluding witnesses, thus there was no irregularity in the proceeding, misconduct or error in law that would justify a new trial;

3. To the extent that plaintiff's counsel claimed to be surprised by defense counsel's contact with Rebecca Ringer, the court addressed the issue of surprise at trial by providing plaintiff the opportunity to call Dr. Johansen back to trial for additional cross examination, as well as providing the jury with a special instruction addressing the contact;

4. Plaintiff's counsel was already aware of facts relevant to potential bias such [as] Dr. Johansen's working relationship with defendant Dr. Schwaegler, his frequent work as a defense expert, his marriage to a medical malpractice defense attorney, his awareness of the issues in malpractice cases, and that he likely knew about the facts leading up to his care of Ms. Smith because he could have been a defendant in this case given his role in the care of Ms. Smith. However, plaintiff made the strategic choice not to pursue a hostile witness cross examination of Dr. Johansen. Thus, the concern raised by plaintiff does not justify a new trial, in view of all the evidence.

CP 321-22. Plaintiff appealed. CP 331-39. The Court of Appeals affirmed, finding no "Loudon violation" or prejudice.

#### V. ARGUMENT WHY REVIEW SHOULD BE DENIED.

##### A. The Court of Appeals Decision Is Not in Conflict with *Loudon v. Myhre*.

As the Court of Appeals correctly recognized, Smith, 149 Wn. App. at 342-42, because defense counsel conducted no *ex parte* interview of Dr. Johansen, there was no "Loudon violation" during trial of this medical malpractice case. Thus, the Court of Appeals decision affirming the trial court thus does not "conflict" with Loudon, in which a defense lawyer had sought to conduct an *ex parte* interview of a treating

physician. Nor did defense counsel do anything else *ex parte* that was designed to, or that did, elicit information from Dr. Johansen about his patient, Ms. Smith. Neither Loudon, nor any other authority cited by Mr. Smith, prohibits what occurred here – communication between lawyers acting as lawyers. Because there is no “conflict” with Loudon, review is not warranted under RAP 13.4(b)(1).

B. The Court of Appeals Decision is Not in Conflict with *Rowe v. Vaagan Bros. Lumber*.

As the Court of Appeals also correctly recognized, Smith, 149 Wn. App. at 342-43, this case is factually unlike Rowe v. Vaagan Bros. Lumber, Inc., 100 Wn. App. 268, 278-279, 996 P.2d 1103 (2000) (“Here, unlike in Rowe, defense counsel did not seek or solicit information from Dr. Johansen or from his attorney. Rather, [defense counsel] sought to transmit largely public information to which Smith’s counsel was already privy”). For that reason alone, the Court of Appeals decision is not in “conflict” with Rowe, and review is not warranted under RAP 13.4(b)(2).

In addition, Rowe confirmed the holding in Ford v. Chapin, 61 Wn. App. 896, 898-99, 812 P.2d 532, rev. denied, 117 Wn.2d 1026 (1991), that, for a Loudon violation to require the grant of a new trial, there must not only have been *ex parte* contact with a plaintiff’s treating physician, but that contact must have “materially prejudiced plaintiff’s

case.”<sup>11</sup> Thus, Mr. Smith had to show not only that there was *ex parte* contact with Dr. Johansen that is prohibited by Loudon, but also that the contact materially prejudiced his case and denied him a fair trial. Ford, 61 Wn. App. at 898-99. He also had to show that it was an abuse of discretion for the trial judge to conclude otherwise. Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (ruling denying motion for new trial is subject to review for abuse of discretion); Kimball v. Otis Elevator Co., 89 Wn. App. 169, 178, 947 P.2d 1275 (1997) (abuse of discretion standard applies to review of ruling denying mistrial). As the Court of Appeals recognized, Smith, 149 Wn. App. at 342-43, what happened in Rowe did not happen here. There was no *ex parte* contact with Dr. Johansen; there was no prejudice to Mr. Smith; and there was no abuse of discretion by the trial court in denying plaintiff’s motions for mistrial and for a new trial.

C. The Petition Does Not Involve an Issue of Substantial Public Interest that Should Be Determined by This Court.

There is no conflict between the Court of Appeals decision and Loudon or Rowe warranting review under RAP 13.4(b) (1) or (2). Nor is review warranted under RAP 13.4(b)(4) so that this Court can consider

---

<sup>11</sup> See Rowe, 100 Wn. App. at 280 (“If, as the court concluded here, the *ex parte* communication prejudiced Mr. Rowe, the remedy is to ban the use of the evidence by the defense, in whole or in part . . . The problem, however, was [that g]iving Mr. Rowe the option of foregoing his doctors’ essential evidence is not a remedy. This is grounds for a new trial by itself”).

doing what petitioner is really asking it to do, which is extend Loudon to prohibit defense lawyers in personal injury cases not only from obtaining patient health information from treating physicians through *ex parte* interviews, but also from providing any kind of information about the trial of a case, including information that is public, to the *lawyer for* a treating physician whom the plaintiff's counsel has deposed and who is scheduled to testify at trial. What occurred in this case does not call for creation of a rule prohibiting lawyers for treating physician witnesses from accepting from defense lawyers, and forwarding to their clients, public information about a trial.

The Loudon rule was not adopted to police the behavior of personal injury defense lawyers, nor was it adopted because the Supreme Court considered *ex parte* contact between defense lawyers and treating physicians evil or unethical. Indeed, the Supreme Court acknowledged in Loudon, that *ex parte* interviews are *not* unethical, the Washington State Bar Association having opined that “[w]here no patient privilege exists or where the privilege has been declared waived . . . , a lawyer may interview a physician in the same manner as any other witness.” Loudon, 110 Wn.2d at 681 n.4 (quoting WSBA Formal Ethics Op. 180 (1985)).<sup>12</sup>

---

<sup>12</sup> The Loudon court also acknowledged that “[a] number of courts have approved *ex parte* contact due to its advantages over depositions and the claimed unfair advantage

What the Loudon rule does is express the Court's policy determination that it is unfair to patient and physician to ask the physician to figure out, in an informal setting, what medical information about the plaintiff is (or is not) relevant to pending litigation, such that it may (or may not) be disclosed. Loudon, 110 Wn.2d at 677-79. The court's limited concern was that, in *ex parte* interviews with defense counsel, physicians untrained in the law might disclose privileged medical information about their patients that should not be disclosed because the information is not relevant to the patients' lawsuits:

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. [Emphasis supplied.]

Loudon, 110 Wn.2d at 678.<sup>13</sup> Rowe stated the reason for the Loudon rule similarly:

---

given plaintiffs." 110 Wn.2d at 677 (citing decisions from a U.S. District Court and appellate courts in Alaska, Delaware, Missouri and New Jersey).

<sup>13</sup> The Loudon court found persuasive an Iowa decision that expressly disclaimed mistrust of lawyers:

*We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical conduct. We are concerned . . . 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*

*The primary concern is potentially prejudicial but irrelevant disclosures.* The defendant's lawyer cannot make the relevance determination because he or she does not know the nature of the confidential disclosure in advance. The doctor is not a lawyer. The plaintiff's lawyer needs to be present. [Loudon, 110 Wn.2d] at 678.

Rowe, 100 Wn. App. at 278-79. A secondary concern behind the Loudon prohibition against *ex parte* interviews is protection of the physician:

*In addition, a physician has an interest in avoiding inadvertent wrongful disclosures during ex parte interviews.* We recognize, without deciding, that a cause of action may lie against a physician for unauthorized disclosure of privileged information . . . The participation of plaintiff's counsel to prevent improper questioning or inadvertent disclosures enhances the accomplishment of the purpose of the physician-patient privilege by also providing protection to the physician. [Emphasis supplied.]

Loudon, 110 Wn.2d at 680 (citations omitted).<sup>14</sup>

Loudon did not involve and the Court's decision in Loudon neither prohibits nor implies disapproval of, lawyer-to-lawyer communications like those that occurred in this case, where a treating physician is represented by counsel who can watch out for his interests and who is in a

---

which counsel for each party is present and the court is available to settle disputes. [Emphases supplied.]

Loudon, 110 Wn.2d at 678 (quoting Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986)).

<sup>14</sup> To the extent the Loudon court expressed another secondary concern, *i.e.*, that "[t]he mere threat that a physician might engage in private interviews with defense counsel would, for some [patients], have a chilling effect on the physician-patient relationship and hinder further treatment." Loudon, 110 Wn.2d at 679, the court did not explain why that concern was pertinent to the case before it, which, like this case, was one in which the patient had died before suit was filed.

position to protect him from making inappropriate disclosures of patient health care information *if such disclosures are sought, which is not what happened here*. No one asked Dr. Johansen to disclose medical information about his late patient, Ms. Smith, behind the scenes, nor was Dr. Johansen ever in danger of being misled or tricked into disclosing such information behind the scenes.

Plaintiff insinuates that defense counsel, by sending not only Dr. Cossman's public trial testimony and plaintiff's trial brief, but also an outline of direct-examination questions, to Dr. Johansen's lawyer, improperly coached Dr. Johansen to give testimony favorable to Dr. Schwaegler, and asserts that plaintiff was unable to demonstrate that because an evidentiary hearing was "refused," *Pet. at 12*. Such charges are both unfounded and disingenuous, and raise no issues warranting review under RAP 13.4(b)(4) in any event. Plaintiff's counsel knew from having deposed Dr. Johansen that his testimony would not help plaintiff's case against Dr. Schwaegler. Plaintiff's counsel chose not to call Dr. Johansen as a trial witness for plaintiff, and knew Dr. Johansen was going to be a defense witness. There is no evidence that Dr. Johansen received or was informed of the questions defense counsel planned to ask him at trial, and plaintiff's counsel declined during trial the court's offer to let him recall Dr. Johansen and ask him, under oath – and after plaintiff's

counsel had heard defense counsel's actual and complete direct and redirect examinations of Dr. Johansen – whether he and Ms. Ringer had gone over a list of questions that she expected defense counsel to ask him. 11/20 RP 14. Nor has plaintiff been able to cite any surprise in the trial testimony Dr. Johansen gave – testimony that his deposition testimony had not included or had precluded – or link any such surprise to the direct examination outline. The charges of “Loudon violation” have been nothing more than a pretext for seeking a second chance to try a case based on allegations of malpractice that the facts do not support.

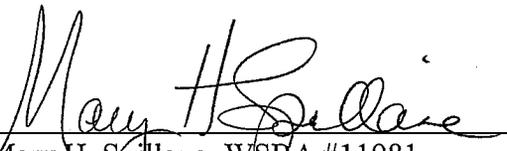
#### VI. CONCLUSION

The Court of Appeals correctly held that no “Loudon violation” occurred because defense counsel had no contact with Dr. Johansen except at deposition and trial, and neither sought nor elicited from Dr. Johansen, even indirectly through Ms. Ringer, any information concerning Ms. Smith. Thus, petitioner is incorrect in asserting that the Court of Appeals decision “conflicts” with Loudon or with Rowe, such that review should be granted under either RAP 13.4(b)(1) or (2). The policy concerns that led the Loudon court to prohibit *ex parte* interviews of treating physicians – protecting against inadvertent disclosure *by* the physician, in an informal setting, of irrelevant health care information – are not implicated in a situation where the only flow is of public information *to* the physician.

For the same reasons, the petition also does not present an issue of substantial public importance that the Supreme Court should accept review to decide pursuant to RAP 13.4(b)(4). Mr. Smith's petition for review should be denied.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of May, 2009.

WILLIAMS, KASTNER & GIBBS PLLC

By   
(Mary H. Spillane, WSBA #11981  
Daniel W. Ferm, WSBA #11466

Attorneys for Respondent

Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380  
(206) 628-6600

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 21<sup>st</sup> day of May, 2009, I caused a true and correct copy of the foregoing document, "ANSWER TO PETITION FOR REVIEW," to be delivered by U.S. Mail, postage prepaid, to the following counsel of record:

Counsel for Petitioners:

Thomas R. Golden, WSBA #11040  
Christopher L. Otorowski, WSBA #8248  
OTOROWSKI JOHNSTON DIAMOND & GOLDEN  
298 Winslow Way West  
Bainbridge Island, WA 98110  
(206) 842-1000

Co-counsel for Respondents:

John C. Graffe, WSBA #11835  
JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP  
925 Fourth Avenue, Suite 2300  
Seattle, WA 98104  
(206) 223-4770

DATED this 21<sup>st</sup> day of May, 2009, at Seattle, Washington.

  
\_\_\_\_\_  
Carrie A. Custer