

No. 83038-0

83038-0

FILED

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

IN THE 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,

Plaintiffs/Petitioners,

v.

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

Defendants/Respondents.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION
AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

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On behalf of
Washington State Association for Justice Foundation

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSTLA and WSTLA Foundation name changes were effective January 1, 2009.

WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rules governing the conduct of the parties during the litigation process.

II. BACKGROUND

Jerry Smith, as surviving spouse and Personal Representative of Brenda Smith's estate (Smith), brought this wrongful death and survival action against Dr. Paul Schwaegler and his employer, Orthopedics International Ltd., P.S. (Orthopedics International), for medical negligence allegedly resulting in injuries to Brenda Smith, and ultimately her death. Prior to trial, Orthopedics International disclosed that it intended to call as a witness one of Brenda Smith's treating physicians, Dr. Kaj Johansen, who was not a party defendant in the case. No motions in limine were made before trial restricting witness access to the trial proceedings or to information disclosed during the course of the proceedings.

During trial, Smith learned that the lawyer for Orthopedics International had shared information with the lawyer for Dr. Johansen before his scheduled testimony. This information, which was passed along to Dr. Johansen, consisted of the trial testimony of one of Smith's experts and the text of Smith's trial brief.¹

Upon discovery of the sharing of this information, Smith moved to strike Dr. Johansen's trial testimony and for a mistrial. Smith contended that the contact by Orthopedics International's lawyer violated the no ex parte contact rule set forth in Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988).

These motions were denied, although the trial court offered Smith an opportunity to recall Dr. Johansen to cross-examine him regarding the documents he had received from defense counsel. Smith declined this invitation. The trial court fashioned a jury instruction informing the jury that Dr. Johansen had been given the above information without the knowledge of Smith. After a defense verdict, Smith unsuccessfully sought a new trial on the same grounds as the motions to strike and for a mistrial.

Smith appealed to the Court of Appeals, Division I, which affirmed, concluding that the trial court had not abused its discretion in denying Smith's motions for mistrial and new trial. The Court of Appeals held in pertinent part:

¹ There was evidence that the lawyer for Orthopedics International also provided Dr. Johansen's lawyer with notes outlining the forthcoming direct examination of Dr. Johansen as a witness for Orthopedics International, although it does not appear that Dr. Johansen's lawyer forwarded this document to Dr. Johansen.

After *Loudon*, counsel may not interview a plaintiff's non-party treating physician privately but must instead utilize the statutorily recognized methods of discovery as set forth in the civil rules. Essentially, that is what occurred here. Dr. Johansen was deposed and his testimony at trial tracked the information obtained during that deposition. Without more, the transmittal of public documents to a fact witness who is also a treating physician does not fall within the ambit of *Loudon*. Indeed, given the public nature of the documents, excluding the notes, we do not see how it can be.

Smith v. Orthopedics Int'l, Ltd., P.S., 149 Wn.App. 337, 342, 203 P.3d 1066 (2009), *review pending*. The court found it significant that defense counsel did not seek or solicit information from Dr. Johansen, and that, in any event, there was no showing of actual prejudice to Smith as a result of the ex parte contact. See id., 149 Wn.App. at 342-43. The court concluded that: "[w]hile the better course of conduct would have been to copy opposing counsel on the e-mails, the transmission of the documents does not constitute a *Loudon* violation." Id. at 343.

Smith has petitioned this Court for review and set forth the following issues for its consideration:

1. Is it a violation of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), for defense counsel to send Plaintiffs' Trial Brief, trial testimony of plaintiffs' vascular surgery expert, and a proposed outline of direct testimony and expert witness topics to a nonparty treating physician through the treating physician's personal attorney?
2. Whether a violation of a pretrial motion in limine or an ER 615 Motion to Exclude Witnesses is a requirement for a Loudon v. Mhyre violation where defense counsel provides trial testimony, trial documents, and an outline of direct testimony to a testifying nonparty treating physician?
3. What is the appropriate remedy for an in-trial Loudon v. Mhyre violation?

Smith Pet. for Rev. at 1-2.

III. ISSUE PRESENTED

Is the proper interpretation and application of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), prohibiting ex parte contact by defense counsel with a plaintiff's nonparty treating physician, an issue of substantial public interest under RAP 13.4(b)(4)?

IV. SUMMARY

The Court of Appeals opinion raises a host of issues involving interpretation and application of the Loudon prohibition against ex parte contact by defense counsel with a plaintiff's treating physician who is not a party to the action. These issues are of substantial public interest, and review should be granted pursuant to RAP 13.4(b)(4).

V. ARGUMENT IN SUPPORT OF REVIEW

A. Background regarding the *Loudon* no ex parte contact rule.

Loudon arose in a context similar to this one, a wrongful death action involving individual claims and claims by the personal representative of the decedent. See Loudon, 110 Wn.2d at 676. At the discovery stage of proceedings, defense counsel sought advance permission to conduct ex parte interviews with decedent's treating physicians, who were not parties to the action. See id.

In its unanimous opinion, this Court prohibited defense counsel from having such contact, stating without qualification:

We hold that defense counsel may not engage in ex parte contacts with a plaintiff's physicians.

Id. at 682. In formulating this rule, the Court explained that "[t]he unique nature of the physician-patient relationship and the dangers which ex parte interviews pose justify the direct involvement of counsel in *any contact* between defense counsel and a plaintiff's physician." Id. at 681 (emphasis added).

The Court imposed this rule "as a matter of public policy" for several reasons. Id. at 677. Initially, the Court voiced its concern that an ex parte interview between defense counsel and plaintiff's physician may "result in disclosure of irrelevant, privileged medical information." Id. at 678. It concluded the determination of the proper scope of disclosure is "better made in a setting in which counsel for each party is present and the court is available to settle disputes." Id. at 678 (quoting Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986)).

Furthermore, the Court noted "[t]he *mere threat* that a physician might engage in private interviews with defense counsel would, for some, have a chilling effect on the physician-patient relationship and hinder further treatment." Loudon at 679 (emphasis added). The Court found "it difficult to believe that a physician can engage in an *ex parte* conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." Id. (quoting Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 962 (Ill. App. 1986), *appeal denied*, 505 N.E.2d 361, *cert. denied sub nom.*, Tobin v. Petrillo, 483 U.S. 1007 (1987)). It

concluded that “[t]he presence of plaintiff’s counsel as the protector of a patient’s confidences will allay the fear that irrelevant confidential material will be disclosed and preserve the fiduciary trust relationship between physician and patient.” Loudon at 679-80.²

The Loudon opinion also reflects this Court's concern about judicial economy in fashioning the no ex parte contact rule. In response to Mhyre's argument that ex parte contact should be allowed, with plaintiff at liberty to seek a protective order, the Court observed:

We foresee that a protective order would usually be sought by plaintiff's counsel, which would involve the court system in supervision of every such situation. We reject such a procedure.

See Loudon at 679.

This Court re-affirmed and re-stated the rule of Loudon in Carson v. Fine, 123 Wn.2d 206, 210-11, 867 P.2d 610 (1994), as follows:

In Loudon, this court held that a plaintiff-patient’s waiver of the physician-patient privilege does not authorize ex parte communications between the defendant and the plaintiff’s treating physicians. This court thus prohibited *ex parte* interviews between a plaintiff’s physicians and defense counsel. Loudon at 682.

² The presence of plaintiff’s counsel also protects the physician from inadvertent improper disclosure and the attendant prospect of civil liability. See Loudon, 110 Wn.2d at 680. In Loudon the Court recognized without deciding that a cause of action may lie against a physician for improper disclosure. See id. That issue would now appear to be settled by Berger v. Sonneland, 144 Wn.2d 91, 26 P.3d 257 (2001), and the remedy provision of the Uniform Health Care Information Act, RCW 70.02.170.

Accord id. at 227 (“As stated earlier, this court held in *Loudon* that defense counsel may not communicate ex parte with a plaintiff’s treating physicians but must use formal discovery procedures”).³

This Court has not otherwise revisited Loudon, except to find the rule inapplicable in a workers' compensation context. See Holbrook v. Weyerhaeuser Company, 118 Wn.2d 306, 822 P.2d 271 (1992).⁴ Prior to the Court of Appeals opinion in this case, only two other intermediate appellate opinions have discussed in any detail this no ex parte contact rule. See Rowe v. Vaagen Bros. Lumber, Inc., 100 Wn.App. 268, 996 P.2d 1103 (2000); Ford v. Chaplin, 61 Wn.App. 896, 812 P.2d 532, *review denied*, 117 Wn.2d 1026 (1991).

B. The petition for review raises a number of questions of substantial public interest regarding proper interpretation and application of the *Loudon* rule.

Loudon prohibits any ex parte contact between defense counsel and a nonparty treating physician. See 110 Wn.2d at 681-82. Smith finds Loudon inapplicable and permits ex parte contact when defense counsel transmits information of a public nature to the physician’s lawyer and does not seek or solicit information from the physician. See 149 Wn.App. at 342-43. Whether this distinction is valid is a question of substantial public

³ The rule was not violated in Carson, however, because the initial ex parte contact occurred before Loudon was decided and was expressly authorized by plaintiff. See Carson, 123 Wn.2d at 227. Once Loudon was decided, defense counsel told the physician that he could not speak with him outside of a deposition, even though plaintiff did not withdraw her authorization to do so. See id.

⁴ Holbrook has been superseded, effective July 26, 2009, by the recent enactment of a new section to Ch. 51.52 RCW, which restricts ex parte contact with a worker’s treating physician. See Laws of 2009, ch. 391 § 1.

interest, the answer to which will have profound effect on the discovery process in personal injury litigation, and perhaps the physician-patient relationship itself. See RAP 13.4(b)(4).

Additionally, the Court of Appeals opinion in Smith, if allowed to stand, raises a number of related questions regarding proper interpretation and application of the Loudon rule. The uncertainty surrounding the Loudon rule sown by the opinion in Smith will likely have a destabilizing effect on pretrial discovery of treating physicians' information and opinions in personal injury actions, thus rendering these questions of substantial public interest. Questions left unanswered by the opinion below include the following:

- Loudon seemingly establishes a bright line rule by prohibiting "any contact" by defense counsel with a treating physician. See 110 Wn.2d at 681. Smith suggests that contact may be permissible when defense counsel does not "seek or solicit information" from the physician (or his or her lawyer). See 149 Wn.App. at 342. Further, Loudon appears to reject involving the court system in assessing ex parte contacts on a case-by-case basis. See Loudon at 679. On the other hand, Smith suggests that application of the Loudon rule may hinge upon a post-hoc analysis of the particular facts and circumstances of the ex parte contact. See Smith at 341-43. There is an issue of substantial public interest whether the approach countenanced in Smith is a proper interpretation of

Loudon, or whether Smith undermines what is meant to be a simple and categorical rule.⁵

Loudon holds that the only permissible informal contacts between defense counsel and plaintiff's treating physician are those where the plaintiff's lawyer is present. See 110 Wn.2d at 679-81. Smith, on the other hand, permits some ex parte contact through the physician's lawyer without notice to plaintiff's lawyer (notwithstanding the court's recognition that "the better course of conduct" would be to notify plaintiff's lawyer). See 149 Wn.App. at 343. In other words, Smith seems to hold Loudon inapplicable in some instances when a lawyer intermediary is involved. It is an issue of substantial public interest whether Smith is correct in concluding such circumstances fall outside of the Loudon rule.

In dicta, Smith suggests a plaintiff must prove actual prejudice resulting from a Loudon violation in order to justify relief such as a mistrial or an order granting a new trial. See Smith, 149 Wn.App. at 343.⁶ Loudon is silent on the consequences of a violation of the no ex parte contact rule. See 100 Wn.2d at 676, 682. There is an issue of substantial public interest regarding the proper remedy for a Loudon violation discovered mid-trial. Should plaintiff have to prove actual

⁵ To the extent that the Court intended Loudon to be a bright line rule covering all contact, the holding in Smith may also be viewed as in conflict with this reading of Loudon. See RAP 13.4(b)(1).

⁶ See also Rowe, 100 Wn.App. at 280 (concluding, where trial court found prejudice resulting from Loudon violation, "[t]his is grounds for a new trial by itself"); Ford, 61 Wn.App. at 899 (applying harmless error analysis to Loudon violation, and, without discussion, placing burden on plaintiff to establish prejudice).

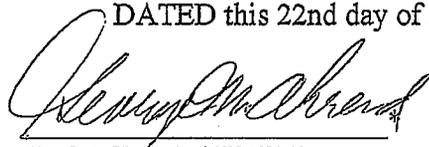
prejudice, even though his or her counsel was not present or involved in the prohibited informal contact? Or, should defendant have the burden of proving the lack of prejudice? If this Court grants review and finds a Loudon violation occurred, it will have the opportunity to address for the first time the issue of the proper remedy for such a violation.

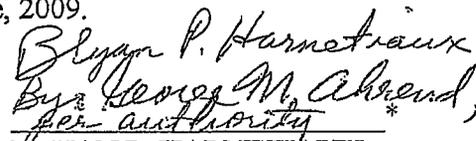
Lastly, this case presents the opportunity for the Court to comment on the interface between the Loudon rule and RCW 5.60.060(4), involving waiver of the physician-patient privilege as well as the potential for court-imposed limitations on the waiver. This statutory provision not at issue in either Loudon or Carson. See Loudon at 678 nn.1-2; Carson at 213 n.1. This, too, is a question of substantial public interest.

VI. CONCLUSION

The Court should grant review in this case because there are a number of issues involving interpretation and application of the Court's opinion in Loudon that are of substantial public interest under RAP 13.4(b)(4).

DATED this 22nd day of June, 2009.


GEORGE M. AHREND


BRYAN P. HARNETTAUX
per authority

On behalf of WSAJ Foundation

*Transmitted for filing by email; signed original retained by counsel.

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Cc: trg@medilaw.com; mspillane@williamskastner.com; sestest@kbmlawyers.com; Washington State Association for Justice; Shari Canet
Subject: Smith v. Orthopedics Int'l, Ltd., P.S., S.C. #83038-0
Attachments: Smith Ltr to Clerk 06-22-09.pdf; Signed Smith ACM.pdf

Dear Clerk Carpenter

An application for amicus curiae status and proposed amicus curiae memorandum in support of review on behalf of the Washington State Association of Justice Foundation are attached to this email for filing.

Respectfully submitted,

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