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NO. 61226-3-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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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,

Appellants,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, PS; and PAUL  
SCHWAEGLER, MD,

Respondents.

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

### A. SUMMARY OF ARGUMENT

Had counsel for Dr. Schwaegler *directly* provided treating physician Dr. Kaj Johansen with Plaintiffs' Trial Brief, trial testimony of plaintiff's vascular surgery expert and defense counsel's outline of Dr. Johansen's direct testimony, such trial practice behavior unquestionably violates Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), Ford v. Chaplin, 61 Wn. App. 896, 812 P.2d 532 (1991) and Rowe v. Vaagen Brothers Lumber, Inc., 100 Wn. App. 268, 996 P.2d 1103 (2000), regarding prohibited *ex parte* contact with a treating physician. Instead, in an apparent attempt to evade Loudon and its progeny, defense counsel utilized Dr. Johansen's personal attorney as a direct conduit to Dr. Johansen, in order to favorably influence Dr. Johansen's trial testimony. To the extent not specifically set forth in Loudon, Ford and Rowe, a bright-line rule to prevent counsel from utilizing the treating physician's private attorney to circumvent established law precluding *ex parte* contact is appropriate. Such a bright-line rule is necessary because defense counsel argues that the Loudon court never addressed the issue of using a third party and that defense counsel's actions are "lawyers acting as lawyers." Brief of Respondents, p. 35. Instead, Dr. Schwaegler wishes this Court to authorize communications with a treating physician through

the treating physician's private counsel – all without the knowledge or awareness to the patient's counsel.

**B. ISSUES NOT ADDRESSED BY RESPONDENTS**

In evaluating Brief of Respondents and Appellant's Reply Brief, it is helpful knowing which portions of appellant's opening brief are not addressed by defendants.

1. NECESSITY OF A MOTION IN LIMINE OR AN ER 615 MOTION TO EXCLUDE WITNESSES.

The trial court noted that neither party sought a motion in limine to exclude witnesses from trial and then considered the absence of such a motion in limine or ER 615 motion to lessen the significance of defense counsels' contact with Dr. Johansen. (RP 11/19/07, pp. 59-60.) Appellant's brief argued that the prohibition against *ex parte* contact is a matter of public policy and exists independent of any evidentiary rule or trial motion in limine. (Appellant's Brief, p. 34.) Brief of Respondents fails to discuss the legal significance, if any, of the absence of a motion in limine or an ER 615 motion as a prerequisite for a Loudon violation. Appellant Smith respectfully submits the existence of any motion in limine or ER 615 motion to exclude witnesses would be additional and independent grounds for reversible error.

2. RESPONDENTS FAILED TO DISCUSS APPELLANT'S OUT-OF-STATE AUTHORITIES REGARDING EX PARTE CONTACT.

Appellant cited out-of-state cases McCool v. Gehret, 657 A.2d 269 (1995) and Meyer v. McDonnell, 392 A.2d 1129 (1978). In these cases, the defendant went through a third person to communicate with the treating physician. These courts found that the use of a third party to effectuate contact with a treating physician is prohibited *ex parte* contact. Respondents fail to discuss these important out-of-state cases where a third party was utilized in an attempt to circumvent prohibited defense counsel contact with a treating physician and the courts held those attempts unlawful.

3. RESPONDENTS FAILED TO DISCUSS THE TRIAL COURT'S FINDING OF LACK OF CANDOR.

In its November 19, 2007 hearing, the trial court noted that in a discussion in chambers, Mr. Otorowski made it very clear he was concerned that Dr. Johansen had had contact with defense counsel and information in some way, but was told by defense counsel that they had not *spoken* to Dr. Johansen. The trial court noted that this denial "was technically true," but it certainly led the court to believe that there had not been any communication between defense counsel and Dr. Johansen and concluded that in all candor, this information should have been disclosed to the plaintiffs. RP 11/19/07, pp. 62-63. (Emphasis added.)

It was discovered only during the offer of proof that Plaintiff's Trial Brief and the trial testimony of plaintiff's expert, Dr. Cossman, had been forwarded to Dr. Johansen for his trial testimony preparation. Later, it was learned that defense counsel provided Dr. Johansen, through his personal attorney, an outline of Dr. Johansen's proposed direct testimony, including expert opinion questions. The outline of Dr. Johansen's direct examination was never identified or produced until the conclusion of trial. This lack of candor demonstrates that defense counsel's behavior is an attempt to evade Loudon and obtain a tactical trial advantage, rather than any bona fide dispute regarding the extent of Loudon prohibitions.<sup>1</sup>

C. **LOUDON AND ITS PROGENY PROHIBIT ANY TYPE OF *EX PARTE* CONTACT BETWEEN DEFENSE COUNSEL AND A TREATING PHYSICIAN.**

Treating physicians such as Dr. Johansen are a special type of witness. A treating physician testifies based on knowledge and opinions derived solely from factual observations and does not qualify as a CR 26(b)(4)(B) "expert." Peters v. Ballard, 58 Wn. App. 921, 795 P.2d 1158 (1990). Defense counsel's providing Dr. Johansen Plaintiff's Trial Brief and the trial testimony of Dr. Cossman was a calculated measure to

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<sup>1</sup> In Loudon and Ford, the propriety of *ex parte* contact was the subject matter of motions where the patients' counsel had an opportunity to object and argue their position to the trial court prior to any *ex parte* contact.

expand Dr. Johansen's limited knowledge base of a treating physician to a *de facto* CR 34 expert. As noted by Justice Charles W. Johnson in his dissent:

Such testimony [testimony from treating physician that there is no malpractice] can wreak havoc with the plaintiff's case and possibly sound its death knell. The prejudicial impact of a treating physician's adverse expert testimony almost always outweighs the probative value of that testimony.

Carson v. Fine, 123 Wn.2d 206, 234, 867 P.2d 610 (1994).

In Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), defense counsel sought an order declaring that the physician/patient privilege had been waived and authorized *ex parte* communications with the decedent's treating physicians in Oregon. The trial court ruled that the physician/patient privilege had been waived, but that *ex parte* contact between defense counsel and the treating physician was prohibited. Id. at 676. The Supreme Court initially states that *ex parte* interviews should be prohibited as a matter of public policy. Id. at 677. After an analysis of the public policy, the Supreme Court concluded:

We hold the defense counsel may not engage in *ex parte* contacts with the plaintiff's physicians. [Emphasis added.]

Id. at 682.

Three years later, in Ford v. Chaplin, 61 Wn. App. 896, 812 P.2d 532 (1991), the defendant physician's counsel were permitted by the court to have *ex parte* contact. Defense counsel requested that the *ex parte* contact be permitted to prepare the treating physicians' trial testimony but the court ordered that defense counsel shall not discuss patient confidentialities or privileged matters undisclosed through prior discovery with these former treating physicians. Ford v. Chaplin, *supra.*, at 898. This was reversed on appeal. The Court of Appeals held that the *ex parte* contact between defense counsel and treating physicians was error. Id. at 898. The court stated:

Dr. Chaplin characterizes the *ex parte* contact between his counsel and Ford's treating physicians as necessary trial preparation of defense witnesses. We do not read Loudan [sic] to allow room for *ex parte* contact, even when so characterized. ...

Ford v. Chaplin, *supra.*, at 898.<sup>2</sup> Unlike plaintiff Ford, appellant's record in the present case shows harmful and prejudicial error requiring a new trial and exclusion of Dr. Johansen's court testimony. (Appellant's Brief, pp. 36-38.) *See also* Rowe v. Vaagen Brothers Lumber, Inc., 100 Wn. App. 268, 996 P.2d 1103 (2000).

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<sup>2</sup> In Ford v. Chaplin, the record did not permit the appellate court to determine whether the *ex parte* contact materially prejudiced plaintiff's case and therefore the court concluded that the *ex parte* contact, although error, was harmless. Id. at 899.

In Rowe, the employer's counsel had *ex parte* contact with two treating physicians prior to their depositions. The court held that this *ex parte* contact was a clear and inexcusable violation of discovery rules requiring a new trial and exclusion of the tainted testimony. The court simply and cogently stated:

*Ex parte* communication with a treating physician who testifies not as an expert but as a fact witness is prohibited as a matter of public policy.

Rowe v. Vaagen Brothers Lumber, Inc., at 278.

It is well-established Washington law that:

- (1) Loudon prohibits *ex parte* contact between defense counsel and a treating physician notwithstanding a statutory waiver of the physician/patient privilege;
- (2) Ford prohibits any *ex parte* contact between defense counsel and a treating physician for purported purposes of trial testimony preparation; and,
- (3) Rowe holds that *ex parte* communication with a treating physician who testifies not as an expert but as a fact witness is prohibited as a matter of public policy and the appropriate remedy is reversal and granting of a new trial with defense counsel precluded from calling plaintiff's treating physicians as expert witnesses at trial.

Nonetheless, defense counsel argues that utilizing Dr. Johansen's personal attorney as a conduit providing Plaintiff's Trial Brief, trial testimony of plaintiff's vascular surgery expert, Dr. Cossman, and an outline of defendant's direct testimony of Dr. Johansen, including key

opinion questions, is not a Loudon violation because the utilization of a third party was not specifically discussed and prohibited in Loudon or its progeny. This argument is untenable. Even if defense wishes to argue that the contacts with Dr. Johansen were for the purpose of preparing Dr. Johansen for trial testimony, this is clearly contrary to Ford v. Chaplin, supra. Defense counsel is aware that Dr. Johansen is a treating physician such that any direct *ex parte* contact with Dr. Johansen is prohibited by Rowe. Any suggestion that a retrospective analysis of defense counsels' contacts with Dr. Johansen via his private attorney is harmless does not diminish the significance of Loudon violations and the violation of state public policy. *See Ford v. Chaplin, supra*. Defendants' arguments that the utilization of a third party to circumvent Loudon and its progeny cannot be accepted. To the extent there is any uncertainty regarding *ex parte* contact via third persons after Loudon, Ford and Rowe, this Court should hold that any *ex parte* contact between defense counsel and a treating physician through a third party is prohibited as a matter of public policy. *See Rowe v. Vaagen Brothers Lumber, Inc., supra.*, at 278.

**D. RESOLUTION OF THE PRESENT CASE DOES NOT REQUIRE ANY RE-EXAMINATION OF THE PUBLIC POLICY BEHIND LOUDON, FORD AND ROWE.**

Respondents wish this Court to accept the argument that absent evidence that "confidential information" was disclosed, defense counsel's

*ex parte* contact with a treating physician through a third person is excusable. It is hardly an effective prohibition and deterrent to have defense counsel violate Loudon, Ford and Rowe and public policy, and then be allowed to argue harmless error and force trial courts to conduct an extensive evidentiary hearing to determine the significance of the *ex parte* contact. Nevertheless, Appellant has indicated to the trial court and to this Court instances where Dr. Johansen's testimony exceeded the limited factual scope expected of a treating physician. See Appellant's Brief, pp. 36-38.

Plaintiff respectfully submits that the Loudon, Ford and Rowe courts utilized the term "contacts" in discussing the prohibited actions between a treating physician and defense counsel to be expansive as possible to cover the potential permutations of communication – including third persons.

E. **THE ARGUMENTS THAT DEFENSE COUNSELS' SENDING PLAINTIFF'S TRIAL BRIEF, TESTIMONY OF PLAINTIFF'S VASCULAR SURGERY EXPERT AND A PROPOSED OUTLINE FOR THE TREATING PHYSICIAN'S DIRECT TESTIMONY IS JUST "LAWYERS ACTING AS LAWYERS" IS VACUOUS.**

Respondents argue that the sequence of events where defense counsel utilizes Dr. Johansen's personal attorney as a messenger or conduit of a trial brief, trial testimony and an outline for his own direct testimony by defense counsel eliciting opinion testimony on medical

events occurring prior to his medical care is communication between “lawyers acting as lawyers.” Dr. Johansen is not a party. He is a treating physician. *See Peters v. Ballard, supra.* There is no evidence of any review or meeting between Ms. Ringer and Dr. Johansen. Instead, it is a situation where information that defense counsel wanted Dr. Johansen to review was forwarded to Dr. Johansen in order to be a more effective witness for Dr. Schwaegler. This conduct ambushed plaintiff’s case in violation of established case law. Defense should not be allowed to do indirectly what defense is not allowed to do directly.

## II. CONCLUSION

Defense counsel’s sending Plaintiff’s Trail Brief, trial testimony of plaintiff’s expert and defendants’ outline for Dr. Johansen’s direct testimony to Dr. Johansen through Dr. Johansen’s personal attorney must be viewed as *ex parte* contact prohibited by Loudon, Ford and Rowe. As indicated in Rowe, the appropriate remedy is the granting of a new trial and the exclusion of Dr. Johansen’s testimony at retrial. The judgment on the verdict and denial of Smith’s CR 59 Motion for New Trial must be reversed.

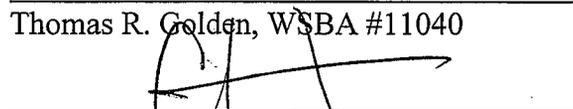
Respectfully submitted this 7 day of October 2008.

Otorowski Johnston Diamond & Golden



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Thomas R. Golden, WSBA #11040



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Christopher L. Otorowski, WSBA #8248

**CERTIFICATE OF SERVICE**

I certify that on the 7<sup>th</sup> day of October 2008, I caused a true and correct copy of the foregoing document to be served on the following counsel of record by ABC Legal Messenger Services:

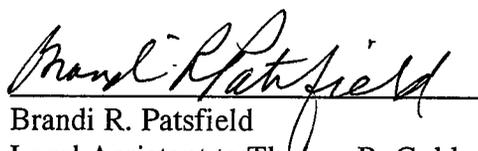
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