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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARC YOUNGS, Petitioner

vs.

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

AOLANI GLOVER, a single individual, Respondent

v.

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

PETITIONER YOUNGS RESPONSE TO BRIEF OF AMICUS CURIAE
WASHINGTON DEFENSE TRIAL LAWYERS

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ARGUMENT

A. Application of *Loudon* to Non-Party Treating Physicians Employed by a Defendant does not Violate Principles of Equal Justice.

WDTL's amicus brief appeals to the "bedrock principles" of equal justice undergirding efforts to provide the poor and indigent access to legal representation. WDTL brief at 2. Citing the seminal Sixth Amendment case on the right to appointed counsel in criminal cases, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938), and evoking at least the spirit of the more famous *Gideon v. Wainwright*,¹ WDTL argues that the same right to legal representation and equal justice in those cases is at stake for health care providers in this case.

WDTL begins its appeal to equal justice by quoting with approval Justice Chambers' concurrence in *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 795, 30 P.3d 1261 (2001). WDTL brief at 1. However, WDTL's quotation stops one sentence short of the conclusion, highlighted below:

However imperfect our system of justice may be, there are certain goals of perfection for which we must strive. Equal justice for all is one of those elusive but desirable goals. We know that all people are not necessarily created equal; some are rich and some are poor, and some are given greater opportunities to develop their natural gifts and talents. The institution of our courts must be the great

¹ 372 U.S. 335, 83 S.Ct. 792 (1963).

leveler-where justice is blind and a pauper and a king are judged by the same standard. In our courts of law every party must be treated equally. *It is therefore contrary to the general principles of law that one party be granted a special set of rules not afforded to others.*

Id. (emphasis added). WDTL omits this last sentence from its brief.

Justice Chambers articulated lofty and admirable principles. But the Court should treat with caution the assertion that Washington health care providers are being denied equal justice. For no group of tort defendants has received more benefit in the form of special and favorable statutes, or in the words of Justice Chambers, “a special set of rules not afforded to others,” than Washington health care providers. In assessing WDTL’s claim that health care providers are not receiving equal treatment, the Court should consider the following examples of benefits provided health care defendants, but not other defendants.

1. Quality Assurance Statutes, RCW 70.41.200 & 4.24.250.

These statutes protect hospitals and other health care providers from discovery and admission into evidence of a hospital’s internal investigation into the root causes of suspected medical negligence or error, or other failure resulting in injury. *See generally Lowy v. Peacehealth*, 174 Wn.2d 769, 775-76, 280 P.3d 1078 (2012); *Fellows v. Moynihan*, 175 Wn.2d 641, 285 P.3d 864 (2012). Other civil defendants enjoy no such privilege. For instance, when Boeing or Weyerhaeuser investigate a

product which can cause or has caused injury to a customer or member of the public, that investigation and its results are fully discoverable and admissible at trial. In the not infrequent situation in which medical device or drug manufacturers and health care providers are co-defendants in cases involving health care injury, the root cause investigation of the manufacturer can provide powerful evidence of fault. If a similar investigation is conducted by the hospital pursuant to the QA statutes, the investigation and its results are not discoverable. *See e.g., Singh v. Edwards Lifesciences Corp.*, 151 W. App. 137, 210 P.3d 337 (2009) (internal investigation by medical device company into root cause of failure of heart monitor device supported allocation of fault of 99.9% to company and 0.1% to hospital).

2. **Collateral Source Rule, RCW 7.70.080.** The collateral source rule has been law in Washington for one hundred years, and prohibits evidence of payments the injured party received from a source collateral to or independent of the tortfeasor. *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998). By statute, however, the collateral source rule does not fully apply in medical negligence cases. RCW 7.70.080 allows the admission of evidence of collateral source compensation already received by plaintiff to reduce a health care provider's damages.

3. **Discovery Rule, RCW 4.16.350(3).** The three year statute of limitations in tort actions under RCW 4.16.080 does not begin until the client discovers or should have discovered the facts which give rise to the cause of action. *Peter v. Simmons*, 87 Wn.2d 400, 404-05, 552 P.2d 1053 (1976). The Washington Products Liability Act (WPLA) similarly provides for a three year statute of limitations from the time of discovery of a products liability claim. RCW 7.72.060(3).

These rules do not apply to medical malpractice cases. The three year statute of limitations for a medical malpractice action begins on the date of the act or omission which caused the injury, not on the date of discovery. RCW 4.16.350(3). A patient relying on the discovery rule has only one year from the time of discovery to bring an action. *Id.*

4. **Tolling of Actions for Minors, RCW 4.16.190.** RCW 4.16.190(1) tolls the statute of limitations for minors until the minor reaches the age of 18. This tolling statute, however, does not apply to health care claims. RCW 4.16.190(2).

5. **Statute of Repose, RCW 4.16.350(3).** Medical malpractice defendants enjoy an eight year statute of repose after which they may not be sued regardless of whether the injury has actually occurred, or whether the plaintiff has had reason to discover the malpractice or the injury. RCW 4.16.350(3); *see Unruh v. Cacchiotti*, 172

Wn.2d 98, 257 P.3d 631 (2011). Other defendants do not have the benefit of such a rule.²

6. **Evidence of Apologies and Sympathy, RCW 5.64.010.**

A special statute, RCW 5.64.101, governs the admission of evidence of apology, sympathy or fault, in actions against health care providers. Other tort defendants are governed by RCW 5.66.010 which is limited to “benevolent gestures.” As Tegland rightly points out: “In medical malpractice cases, the exclusionary principle is much broader. RCW 5.64.010 bars evidence of a broad range of sympathetic acts and gestures by health care providers.” Tegland, 5 Wash. Prac., Evidence Law and Practice § 402.5 (5th ed.).

In short, health care providers enjoy an especially favorable legal landscape in defending tort suits. Health care defendants would undoubtedly defend these statutes on grounds relating to the specific and unique exigencies, requirements and issues related to health care. And there are special exigencies, requirements and issues applying with

² Products liability claims, for instance, may be brought at any time within the “useful safe life” of a product. RCW 7.72.060(1). While there is a presumption that a product’s useful safe life is 12 years, sometimes referred to as a statute of repose, that presumption can be overcome by evidence of a longer useful safe life, a longer warranty or similar evidence. RCW 7.72.060(1)(b) & (2). Unlike RCW 4.16.350(3), the twelve year presumption under the WPLA does not categorically bar a claim.

particularity to health care.³ One of these unique issues is the *Loudon* rule. It specifically implicates health care, and grew out of the special physician-patient relationship. It makes no sense outside the context of the particular duties and concerns of health care.

Loudon protects the “the fiduciary confidential relationship which exists between a physician and patient.” *Loudon v. Myhre*, 110 W.2d 675, 681, 225 P.3d 203 (1988). It is predicated upon “the unique nature of the physician-patient relationship.” *Id.* Treating physicians are unlike other corporate employees in that they have a unique relationship with their patients to whom they owe fiduciary duty. The employee physician owes that duty personally, regardless of who pays the salary. This is one area in which a special rule is warranted and indeed demanded.

Does this consideration mean that the attorney for a corporate health care employer will have to conduct himself or herself differently than, say, an attorney for a hardware store? Of course, because the

³ Plaintiff does not mean to suggest that the foregoing statutes do not violate the privileges and immunities clause or other provisions of the Washington constitution. This Court has recognized, without deciding, that at least some of these statutes are subject to serious constitutional attack. See *Unruh v. Cacchiotti*, 172 Wn.2d at 111 n. 9 (elimination of tolling for minors), 118 n. 15 (statute of repose). In recent years, this Court has stricken statutes specifically benefitting health care defendants on various constitutional grounds. See *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009); *Waples v. Yi*, 169 W.2d 152, 234 P.3d 187 (2010). Whether the statutes discussed above are wise or even constitutional is not now before the Court.

hardware store is not in the business of providing health care or employing physicians or caring for patients.⁴ But this consideration does not mean that the health care provider is denied effective representation. Nothing in the rule Plaintiff is urging prevents an attorney's investigation of a case. It will not require counsel to disclose work product or breach attorney-client communications. The attorney will be in no different position than the defense attorney in *Smith v. Orthopedics*, 170 Wn.2d 659, 244 P.3d 939 (2010), who could talk ex parte to the physicians whose conduct was at issue, but who could not communicate ex parte with a subsequent treating physician.

To return to the bedrock principles initially cited by WDTL, the efforts of the judicial system to provide meaningful legal representation for the poor and indigent in criminal cases is and remains a serious and challenging issue, as this Court knows too well. But there is a vast chasm between the legal representation Clarence Gideon sought with his handwritten petition for review, and WDTL's assertion of the loss of the right to counsel and equal justice if *Loudon* is enforced against employee treating physicians.

⁴ However, if the hardware store's attorney is investigating the injuries of a customer in a slip and fall case, the attorney will be bound by *Loudon*. Like the hospital attorney, the store's attorney will not be able to talk to the treating physician ex parte.

It is more than a little ironic when groups with the power and influence capable of shaping favorable legislation, and with the obvious ability to assert and vindicate their rights in the judicial system, appeal to the same right of equal treatment on which the courts have based the right to appointed counsel in criminal cases for the poor and indigent. There is of course no right to appointed counsel in civil cases. But there is a right at issue. The poor do share with the rich and powerful the equal right to choose to retain and pay for the services of quality legal counsel. WDTL's position with respect to this right calls to mind the remarks of Anatole France that the poor "must labour in the face of the majestic equality of the law, which forbids rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." *Washington State Republican Party v. Washington State Public Disclosure Com'n.*, 141 Wn.2d 245, 303, 4 P.3d 808 (2000) (Talmadge J., dissenting).(quoting ANATOLE FRANCE, *THE RED LILY* 75 (1917 ed.) (1894)).

Plaintiff suggests that the groups represented by WDTL are not being deprived of that right. Their attempt to stand in the shoes of Clarence Gideon is simply not credible. The attempt should be rejected.

B. A Corporate Attorney has no Right to Interview Ex Parte any Corporate Employee

Plaintiff Young in his Reply brief presented extensive argument explaining why a corporate attorney has no *right* to interview ex parte any employee of a corporation. See Appellant Young's Reply Brief at 3-12. WDTL asserts such a right, but it makes no reference to the prior briefing on this issue, nor does it make any attempt to come to grips with or counter the arguments presented in the reply brief. WDTL's argument that this right can be found in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981) is not supported by *Upjohn* itself or Washington cases citing *Upjohn*. *Upjohn* creates no such right. The rule proposed by Plaintiff will violate no such right.

Considered in light of its actual holding, *Upjohn* provides no support for WDTL's argument. *Upjohn* addressed the questions if and under what circumstances the attorney-client privilege attached when a corporate counsel communicates with an employee. *Upjohn* did not hold that every communication by corporate counsel with an employee is privileged. To the contrary, *Upjohn* expressly refused to adopt a specific rule for determining when communications with an employee are privileged, opting instead for a case-by-case or flexible approach. "While such a 'case-by-case' basis may to some slight extent undermine desirable

certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.” *Upjohn*, 449 U.S. at 396-97. *Wright* accurately interpreted *Upjohn*, noting with caution that under *Upjohn*, “the attorney-client privilege may in certain instances extend to lower level employees . . .” *Wright v. Group Health*, 103 Wn.2d 192, 195, 691 P.2d 964 (1984). *Wright* ultimately rejected *Upjohn*’s flexible test in determining who was a party, in favor of the managing-speaking agent rule. *Wright*, 103 Wn.2d at 201-02.

One of the difficulties in utilizing cases like *Upjohn* is that it arises out of a context which is foreign to the context for the rule in *Loudon*. The “case-by-case” analysis in *Upjohn* arose out of an investigatory subpoena delving into potential regulatory and criminal violations committed by the corporation. The holding cannot be divorced from that context, nor can it be readily applied to a completely different context. It was after all a flexible, case by case, test.

The *Loudon* rule responds to a specific issue, ex parte communication with a non-party treating physician, in a specific type of case, personal injury cases. “The issue presented is whether defense counsel in a personal injury action may communicate ex parte with the plaintiff’s treating physicians when the plaintiff has waived the physician-patient privilege.” *Loudon v. Mhyre*, 110 W.2d 675, 676, 225 P.3d 203

(1988). *Upjohn* provides no assistance in resolving the issue of *Loudon* if the treating physician is a corporate employee. On the other hand, the context in *Loudon* was identical to the context of *Wright v. Group Health*, a medical malpractice case in which the issues, as here, were the permissible scope of ex parte conversations and the determination of who is to be considered a party when a corporation is a party.

C. **The Defense of a Medical Malpractice Claim does not Require Ex Parte Communications with Treating Physicians whose Conduct is not at Issue.**

WDTL argues that defense counsel must be able to speak ex parte with any employee with knowledge of any of the four elements required to prove negligence. WDTL Brief at 5. It criticizes Plaintiff's proposal for "artificially" focusing on the violation of the standard of care.

While there are four elements to a tort, the linchpin for liability is the violation of a standard of care. It is easily understandable, an action or the failure to act. In the ordinary negligence case, "It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances." W.P.I. 10.01. It is the bright line for the statute of limitations which in medical negligence cases begins to run at the time of the "act or omission." RCW 4.16.350(3). Certainly as a practical matter, the doctor

whose conduct and professional competence is expressly at issue is in an entirely different position in terms of the need for counsel, than a treating physician not charged with wrongdoing, and who simply testifies as to that treatment.

Of course, defense counsel must also investigate damages. But the argument that defense counsel must be able to speak *privately* with physicians who only treated the patient after the violation of the standard of care has no foundation in law, and is belied by reality. In the ordinary auto accident or in the medical malpractice case in which the plaintiff is treated at a different hospital or by a different doctor, the denial of ex parte interviews is the rule because of *Loudon*. Yet no one has suggested this rule results in the loss of quality legal representation.⁵ WDLT's contention that a corporate medical defendant would be denied quality legal representation if it could not conduct these same interviews ex parte simply lacks plausibility.

The judicial system assumes that attorneys will not be able to obtain all the information to defend or prosecute a case from private interviews. An essential part of the civil justice system is a system of discovery. As this Court stated in *Putman*, a medical malpractice action,

⁵ Though perhaps that result will be suggested in the future as part of an effort to overturn *Loudon* in its entirety.

“[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense.” *Putman*, 166 Wn.2d at 979. That observation fully applies here.

WDLT is silent as to any explanation why quality legal representation requires that the interview with the treating physician employee with evidence of damages must be secret and private, while discussion with a non-employee treating physician on depositions may take place only in the presence of Plaintiff’s counsel. They are both damages witnesses, albeit damage witnesses who draw their paychecks from different sources.

The University of Washington Medical Center, however, has rectified the omission, candidly explaining the purpose of the ex parte interview. While *Loudon* and *Smith* are intended to prevent defense counsel from meeting ex parte to enlist a treating physician as a partisan for the defense, that consideration according to the UW has no validity if the treating physician is an employee treating physician. The ex parte conversation permits the employee treating physician to act as a partisan because of the duty of loyalty to and cooperation with the corporate employer.

To the extent that there is validity to the notion that contact with defense counsel produces these effects, the logical weight of that notion largely vanishes in the present

circumstances. All of the providers—whether “targeted or not—are employees of the University and colleagues in UW Medicine and, in addition to duties to patients, each of them owes a duty of loyalty to the University, which would include a duty to cooperate in the defense of this case. The situation is far different from the circumstance where counsel may try to enlist an independent physician as a partisan for defense.

Glover Appellant’s Brief at 17; See *Smith v. Orthopedics Intern.*, 170 Wn.2d 659, 668 & 669 n. 2, 244 P.3d 939 (2010) and Appellant’s Brief at 8-9 regarding this purpose for the *Loudon* rule in medical malpractice cases.

WDTL does not acknowledge that one of the purposes of the *Loudon* rule discussed and approved by *Smith*, is to prevent defense counsel from privately and improperly shaping a treating physician’s testimony. Yet WDTL does point out that the treating physician who is not charged with a violation of the standard of care may give expert testimony against the patient. Amici at 17; *Carson v. Fine*, 123 Wn.2d 206, 216, 867 P.2d 610 (1994). With the private meeting between defense counsel and the employee treating physician, the treating physician can be well prepared for the deposition testimony against the patient.

D. The Application of Ordinary Rules of Agency in *Adamski* does not Justify Abandonment of the Loudon Rule.

WDTL argues that the use of ordinary agency principles in *Adamski v. Tacoma General Hosp.*, 20 Wn. App. 98, 579 P.2d 970 (1978)

treating hospitals “no different than other employers” means that hospital attorneys should be permitted to speak with employees to the same extent as any other employee. This argument stretches the holding in *Adamski*, that hospitals can be found liable under the ostensible agency theory, beyond recognition. For most purposes, medical malpractice cases are treated like any other tort claim (leaving to the side the special statutes discussed above providing favorable treatment to healthcare providers).. The courts apply the ordinary rules of tort, negligence, agency and corporate law, as well as the ordinary rules of evidence and civil procedure. As the Court noted in *Putman*: “Medical malpractice claims are fundamentally negligence claims, rooted in the common law tradition.” *Putman, supra*, 166 Wn.2d at 982.

Loudon is an exception to these rules because of the special nature of the physician-patient relationship. The application of agency law in *Adamski* some 10 years before the decision in *Loudon*, in no way warrants a decision discarding *Loudon* where the treating physician is a corporate employee of the defendant.

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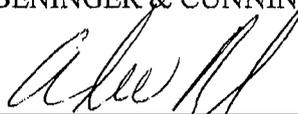
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DATED this 7th day of February, 2013.

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Supreme Court No. 87811-1

Attached please find **Petitioner Youngs Response to Amicus Curiae Brief of Washington Defense Trial Lawyers** for filing in the above-referenced matter.

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