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SUPREME COURT OF THE STATE OF WASHINGTON

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MARC YOUNGS, Petitioner,

v.

PEACEHEALTH, et al., Respondents.

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AOLANIE E. GLOVER, Respondent,

v.

THE STATE OF WASHINGTON, et al., Petitioners.

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**BRIEF OF *AMICUS CURIAE***  
**WASHINGTON DEFENSE TRIAL LAWYERS**

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 ORIGINAL

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## **I. IDENTITY AND INTEREST OF *AMICUS CURIAE***

Washington Defense Trial Lawyers (“WDTL”) is a nonprofit organization of attorneys who devote a substantial portion of their practice to representing defendants, companies, or entities in civil litigation. WDTL appears *pro bono* in this and other courts as *amicus curiae* to pursue its mission of fostering justice balance in the civil courts.

As *amicus curiae* in this case, WDTL will assist the Court by critically analyzing the competing policy interests at issue. WDTL will also provide information regarding the real world implications of the rule Plaintiffs propose.

## **II. STATEMENT OF THE CASE**

WDTL adopts the health care providers’ Statements of the Cases.

## **III. ARGUMENT**

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 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.

*Babcock v. Mason County Fire Dist.*, 144 Wn.2d 774, 795, 30 P.3d 1261

(2001) (Chambers, J., concurring). Moreover,

Access to justice is a fundamental right in a just society.

Access to justice requires an opportunity for meaningful participation and deliberation whenever legal needs, rights, and responsibilities are affected. Legal issues must be adequately understood, presented, and dealt with in a timely, fair, and impartial manner.

Access to justice depends on the availability of affordable legal information and services, including assistance and representation when needed.

*Access to Justice Statement of Principles and Goals*, Washington Access to Justice Board (May 8, 2003).

These bedrock principles are perhaps most often discussed in the modern day context of efforts to increase access to counsel and legal assistance for those who struggle to afford legal services. But these principles apply to all litigants in our courts. This includes the health care systems involved in the cases before this Court, and in countless cases like them. The question at the heart of this appeal is the health care systems' right to meaningful legal representation.

**A. “That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.”<sup>1</sup>**

In litigation, attorneys serve as advisor, advocate, negotiator, spokesperson, and evaluator. Each of these roles is different, but related. “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer conscientiously and ardently asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.” WA RULES OF PROFESSIONAL CONDUCT, Preamble: A Lawyer’s Responsibilities.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a conscientious and ardent advocate on behalf of a client and at the same time assume that justice is being done.

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<sup>1</sup> *Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S. Ct. 1019 (1938).

*Id.* In other words, our system of justice is dependent upon lawyers on both sides of a case doing their jobs for their clients, and doing them well.

**B. Appropriate investigation and analysis is essential to quality legal representation.**

There are many ingredients to excellent legal representation, but first and foremost is preparation. No lawyer can do an excellent job for the client without strong preparation. A key part of preparation is investigation of the case – the claims being asserted and the facts underlying those claims. This self-evident truth was articulated by the U.S. Supreme Court:

Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

*Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385 (1947).

In the health care context, when the defendant is a health care system, as with the systems involved in the cases at bar, this means that once an attorney agrees to represent the defendant, investigation must begin in earnest. The investigation is not artificially limited to “liability”

as the Plaintiffs here would suggest.<sup>2</sup> The statutory proof requirements for claims against health care providers encompass the four traditional elements of negligence: duty, breach, cause, and harm. *Caughell v. Group Health Coop. of Puget Sound*, 124 Wn.2d 217, 233, 876 P.2d 898 (1994).

In order to properly fulfill his or her duties to a health care provider facing a malpractice lawsuit, the lawyer must investigate every element of the claim being asserted. Properly advising the client depends upon it. Quality advice includes opinions not just about whether there was a violation of the standard of care or not, but if there was, did it cause any harm to the patient? If it did not, the lack of causally related harm and the lack of resulting damages is an important defense to be asserted. It can make or break a case for the parties.<sup>3</sup>

In addition, lawyers are called upon to give opinion and advice to their clients on potential exposure in a case – not just the monetary value, but also which providers within the system might be alleged to have

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<sup>2</sup> In the briefing, Plaintiffs have tended to use the term “liability” to mean a violation of the standard of care, but of course there is no liability unless the plaintiff has carried the burden on each and every element of the claim, not just on a violation of the standard of care. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986) (plaintiff must support every element of the claim with admissible evidence or the case should be dismissed).

<sup>3</sup> For this reason, among others, it is imperative that defense counsel learn what knowledge all of the defendant health care system’s employees have, including those who only treated the patient after the alleged violation of the standard of care.

violated the standard of care (at times, plaintiffs are less than clear about this in their initial pleadings and discovery responses, and even more commonly the plaintiff's theories may change as the case progresses). Lawyers also advise on appropriate settlement values. In addition, a discussion that may not be readily apparent to outsiders but that often occurs just the same when a plaintiff is seriously injured but still living is, "How can we help this person as he/she moves past the lawsuit and goes on to live his/her life?"

When the defendant is a health care system, another important area of inquiry is, "How does the care for this patient look overall – not just the care alleged to have been in violation of the standard of care, but all of it? How will our providers present when discussing their care? And what can we do to help them to be the best witnesses possible?" These are important questions that pertain to each and every witness who will testify as an employee of the defendant health care system. The jury may focus most intently on the individual provider who stands directly accused of malpractice, but the entire health care system is a defendant, also accused, and the jury knows this. The entire defendant system is represented by each and every one of its employees who takes the stand to discuss any aspect of the plaintiff's care and the entire defendant system is judged by the performance of each of these employees.

These are all questions defense attorneys are called up on to evaluate and answer for their clients, and they are all questions that cannot be appropriately analyzed without information gleaned from a thorough and proper investigation, which necessarily includes a discussion of the care provided with the employees of the defendant system who provided it.

**C. Equal justice requires health care systems to be able to confidentially speak with their employees when faced with litigation, just like any other employer is entitled to do.**

Over 40 years ago, Washington courts confirmed that health care systems are no different than other employers. This question arose in the context of an “ostensible agency” argument.<sup>4</sup> As part of its reasoning on that issue (which is not presented here), the Court of Appeals reviewed the law of liability for hospitals and the fact that, historically, *respondeat superior* liability did not to apply in the hospital setting. *Adamski v. Tacoma General Hosp.*, 20 Wn. App. 98, 105, 579 P.2d 970 (1978). However, in an opinion labeled “masterful” by the Washington Court of Appeals, all that had changed in 1957 in the case of *Bing v. Thunig*. *Id.*

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<sup>4</sup> “Ostensible agency” is a theory on which plaintiffs seek to hold health care systems liable for the actions of independent contractors who provide services at their facilities. *See, e.g., Adamski v. Tacoma General Hosp.*, 20 Wn. App. 98, 579 P.2d 970 (1978).

(discussing *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (NY Ct. of App. 1957)).

The *Bing* court had discussed at length the nature of a hospital's relationships with its providers and noted that then-present day hospitals "regularly employ on a salary basis a large staff of physicians, nurses, and internes [sic]...." *Bing*, 2 N.Y.2d at 666. The Court saw no reason to treat these employees of a hospital any differently in the law than how employees of any other business were treated. *See Bing*, 2 N.Y.2d at 655-666.

Indeed, in modern litigation in Washington, it is not questioned that employed physicians can give rise to *respondeat superior* liability for the health care systems in which they work. It is accepted that health care systems and the physicians who are employed by them are employer-employees, like any other. While Plaintiffs presumably appreciate that fact in pursuing their cases against health care systems, they fail to recognize in their briefing that this has broader implications than simply vicarious liability.

The employer-employee relationship affects what a lawyer for the employer can and should do in investigating a claim, and it affects what happens to information gleaned by the lawyer during the investigation.

The landmark case describing these effects is *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981).

*Upjohn* arose out of a general counsel for a pharmaceutical manufacturing company receiving information that a subsidiary may have made questionable payments to a foreign government in order to secure business. *Id.* at 386. An investigation was initiated; lower level employees who were not considered within the control group of the company were asked for their knowledge and information on the topic. *Id.* at 387. Subsequently, the company voluntarily reported the questionable payments to the Securities and Exchange Commission and the Internal Revenue Service. *Id.* The IRS issued a summons demanding production of all files related to the company's internal investigation. *Id.* at 387-388. A fight over the propriety of the request ensued, with the company asserting the attorney-client privilege and the work product protection over some of the requested materials. *Id.* at 388. The issue made its way to the U.S. Supreme Court.

In analyzing the proper scope of the attorney-client privilege in an employer-employee context, the Court explained:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961). Its purpose is to

encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

*Upjohn*, 449 U.S. at 389.

Put another way, the attorney-client privilege serves the most fundamental purpose in the legal system. It allows the lawyer to complete the preparation and to conduct the investigation that is necessary for the lawyer to fulfill his or her role. See *Upjohn*, 449 U.S. at 390-391 ("The first step in the resolution of any legal problem is ascertaining the factual

background and sifting through the facts with an eye to the legally relevant.”). And it is only when the lawyer is properly fulfilling his or her role, conducting the necessary investigation and analysis, that true justice can be had.

In determining the best application of the attorney-client privilege to the employer-employee setting, the U.S. Supreme Court acknowledged that it is often lower level employees or employees who are not at the heart of liability allegations who have important information needed by the employer’s lawyers. *Id.* at 391. The Court acknowledged the violence that would be done to the lawyer’s ability to prepare and to provide sound legal advice to his or her client, if the lawyer was not allowed to confidentially interview and learn information from all employees with pertinent knowledge. *See id.* at 391-393. As such, the Court held that the employer’s attorney-client privilege applied to the interviews and related contacts with the employees.<sup>5</sup> *Id.* at 397. In *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 194-95, 691 P.2d 564 (1984), this Court expressly confirmed that *Upjohn* had stated the correct rule regarding the attorney client privilege’s application to employees.

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<sup>5</sup> Plaintiff’s efforts in the briefing to assert that the Bennett Bigelow lawyers would claim every UW Medicine employee as a client reflect nothing more than a misreading of *Upjohn*.

In discussing the work product protection for lawyers' investigatory materials, the Washington Supreme Court has also acknowledged:

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion.... Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. ... Were [the work product of an attorney] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.

*Soter v. Spokane Sch. Dist. No. 81*, 162 Wn.2d 716, 734, 174 P.3d 60 (2007) (quoting *Hickman*, 329 U.S. at 510-511).

Applying these understandings of a lawyer's duty to the client and of a lawyer's role in the American judicial system, it becomes clear that the following essential tenets apply to the cases before this Court:

- A health care system is an employer like any other;
- Employers have a right to have their lawyers contact employees within their organization to obtain information pertinent to legal matters;
- Making these contacts with employees who hold the employer's knowledge about the matter at hand is so important to a just legal system that they are properly cloaked in secrecy – not carried out in front of the adversary's eyes as part of

formal discovery;

- Anything less would prevent the lawyer from properly carrying out his or her duties and ultimately from properly advising his or her client;
- This, in turn, would cripple the fundamental principles on which our justice system is built, and would prevent both equal justice and access to justice in a meaningful fashion for health care systems.

Nevertheless, Plaintiffs argue that this logical application of the most essential protections in the American legal system should be cast aside, and that defense attorneys and risk managers of a defendant, who in many cases is facing claims seeking millions of dollars, should be prevented from fully investigating their cases and preparing for trial. Plaintiffs argue that these employers should not be allowed to contact any employees outside of a formal discovery process other than those whom Plaintiffs select or approve. Plaintiffs could not be more wrong.

**D. Nothing about *Louden* or *Smith* prevents a health care systems' *ex parte* contact with its own employees.**

Plaintiffs' argument focuses largely on two cases that restrict contact that a defendant in medical malpractice litigation can have with unaffiliated providers who also treated the Plaintiff. The first is *Louden v.*

*Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988). The second is *Smith v. Orthopedics Int'l, Ltd. PS*, 170 Wn.2d 659 (2010).

*Louden* was a medical malpractice case during which the plaintiff had provided medical records to the defendants voluntarily. *Louden*, 110 Wn.2d at 676. The defendants moved for an order determining that the voluntary production had waived the physician-patient privilege. *Id.* The defendants also requested the court to allow *ex parte* communication between the defendants and the physicians whose records had been provided. *Id.* The trial court ruled that the physician-patient privilege had been waived, but that *ex parte* contact was prohibited. *Id.*

When the matter made its way to the Washington Supreme Court, the issue before it had nothing at all to do with an attorney for a defendant being able to contact his or her client's own employees. The Court analyzed the case within the framework of defendants looking for an easier and less formal way to obtain information about a plaintiff from a health care provider unaffiliated with (and certainly not employed by) the defendants. *See, e.g., id.* at 676. The Court held that in those circumstances, *ex parte* interviews were prohibited as a matter of public policy. *Id.* at 677.

The policies the Court identified in support of the decision were:  
(1) the danger that a physician would disclose irrelevant, privileged

information. *Id.* at 678; (2) the danger of inadvertent wrongful disclosure by the physician. *Id.* at 680; (3) the “threat that a physician might engage in private interviews” might have a chilling effect on the physician-patient relationship. *Id.* at 679; and (4) the potential for disputes at trial over what the doctor said in an informal interview. *Id.* at 680.

None of these concerns applies to a situation where the contact at issue is between a defendant health care system’s attorney and an employed provider in that system. The first two address “wrongful” disclosures by the employee to the attorney. In the case of an employed physician, the information that physician holds about the patient is already, as a matter of law, the information of the institution. *See Goodman v. Boeing Co.*, 75 Wn. App. 60, 86, 877 P.2d 703 (1994), *review denied*, 120 Wn.2d 1005, 838 P.2d 1142 (1992) (citation omitted) (agent/employee’s knowledge imputed to principal/employer if it relates to the subject matter of the agency/employment and was acquired while acting within the scope of the agency/employment). Portions of this information are also already documented within the health care system’s own medical records.

Indeed, in a recent case, the Arizona Court of Appeals addressed this issue directly. *Phoenix Children’s Hosp., Inc. v. Grant*, 228 Ariz. 235, 265 P.3d 417 (Ct. App. 2011). The Arizona courts had previously

cited *Louden* with approval. See *Duquette v. Superior Court*, 161 Ariz. 269, 277, 778 P.2d 634 (Ct. App. 1989). But in analyzing a plaintiff's attempts to extend the rule to employed physicians of a hospital system, the court found that the unique agency relationship between an employed physician and his employer gave rise to a shared knowledge between the physician and the employer. *Phoenix Children's Hosp., Inc.*, 228 Ariz. at 239. It continued on to hold:

...a hospital's right to discuss a plaintiff/patient with its own employees exists because the employment relationship exists.

\* \* \*

We see no reason why the filing of a lawsuit expands the physician-patient privilege to bar communications that are otherwise allowed.

*Id.*

The *Phoenix Children's Hospital* court also explained that the third concern that gave rise to *Louden* also had no bearing on this analysis:

Nor do we believe this rule violates the settled expectations of the patient. *Duquette* noted that "the public has a widespread belief that information given to a physician in confidence will not be disclosed to third parties absent legal compulsion." 161 Ariz. at 275, 778 P.2d at 640. We cannot conclude that the public has the same belief with regard to a physician employed by a hospital where the patient has gone for treatment.

*Id.* This is particularly true where the patient has sued the health care system where her health care provider works.<sup>6</sup>

Finally, the concern that the defense attorney may need to testify as an impeachment witness does not justify preventing a defendant hospital system from preparing its case. In reality, rules of professional conduct already direct the actions of an attorney when a conflict develops between or among a client and its representatives. Equally importantly, when the communication with the employee is privileged, it is not clear that this could occur; the client is the holder of the privilege, not the attorney. *E.g.*, *Olson v. Haas*, 43 Wn. App. 484, 487, 718 P.2d 1 (1986) (the attorney-client privilege is personal to the client). But even if it were to occur in an extremely unusual circumstance, it could certainly be dealt with; the

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<sup>6</sup> The *Smith* case extended *Louden*, holding that a defendant's attorney may not provide information about the case to a non-affiliated health care provider's attorney. *Smith*, 170 Wn.2d at 661. The Smith Court raised a concern about a non-affiliated health care provider serving as an unretained expert witness, stating again that this could result in the patient declining to disclose information to the provider. *Id.* at 668. For the same reasons discussed above, this concern is not the same in the employed-physician scenario. The patient must presume that information will be shared between the health care employee and employer. Moreover, represented plaintiffs should be aware that their own providers may testify adversely to their case. *See Carson v. Fine*, 123 Wn.2d 206, 216, 867 P.2d 610 (1994) (treating health care provider may give opinion testimony adverse to the patient/plaintiff).

concern is not of sufficient weight to undermine the other policy concerns at issue in these situations.

#### IV. CONCLUSION

While Plaintiffs may view these cases as merely a way to gain tactical advantage in litigation, there is much more at stake here than that. At the heart of this case are the fundamental protections the American system of justice affords every party and the lawyer's proper role in that system. This case challenges a defendant's right to fully and fairly participate in the American system and to fully and fairly defend itself in court. These challenges must be defeated.

For the policy, legal, and practical reasons described, WDTL requests that this Court reject Plaintiffs' call for an artificial wall between health care systems and their employees and the resulting irreparable harm such a wall would do to the health care providers' right to equal justice under the law.

Respectfully submitted this 22nd day of January, 2013.



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Dear Mr. Carpenter:

Pursuant to our prior application please find attached WDTL's Brief of Amicus Curiae in the above matter.

I am contemporaneously serving electronically, by copy of this message, counsel for the parties, and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew Estes  
Chair, WDTL Amicus Committee

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