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NO. 67013-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARC YOUNGS,

Petitioner,

v.

PEACEHEALTH, a Washington corporation d/b/a PEACEHEALTH ST.
JOSEPH MEDICAL CENTER and d/b/a PEACEHEALTH MEDICAL
GROUP and UNKNOWN JOHN DOES,

Respondents.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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

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

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I. IDENTITY OF RESPONDING PARTY

This answer is filed on behalf of Respondent PeaceHealth.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Do the 1986 and 1987 amendments to RCW 5.60.060(4), which added to that statute a sentence providing that “Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules,” supersede the rule of *Loudon v. Mhyre* for cases filed after 1986, and do those amendments require retraction, for this and other pending and future cases, of the holding in *Smith v. Orthopedics Intern. Ltd. P.S.*, which is predicated on *Loudon* but in which the Supreme Court did not consider the effect of the amendments?

2. Should, the holdings in *Loudon* and *Smith*, if still viable despite the 1986-1987 amendments to RCW 5.60.060(4), be expanded to prohibit “contact” between defense counsel for a defendant hospital corporation and a medical malpractice plaintiff’s treating physicians who also are employed by the defendant hospital corporation and through whom the defendant hospital corporation provided health care to the plaintiff, if the answer is yes, would applying those holdings to prohibit such?

3. If the holdings of *Loudon* and *Smith* were to be so expanded would the prohibition of ex parte “contact” with the defendant hospital corporation’s treating physician employees impermissibly infringe on the defendant hospital corporation’s right under the United States and/or Washington Constitutions to be represented by counsel of its choosing in a civil case, which necessarily includes being able to communicate privately and confidentially with any and all corporate employees who may have knowledge of facts potentially relevant to the litigation or the hospital corporation’s defense?

4. When a medical malpractice plaintiff propounds discovery that seeks information from the defendant hospital corporation that the defendant must, or ordinarily would, seek from one or more of its employees who also may have been the plaintiff’s treating physicians, does the plaintiff thereby waive any right to invoke the holdings of *Loudon* and *Smith* to preclude “contact” by defense counsel with such physicians?

III. COUNTERSTATEMENT OF THE CASE

PeaceHealth disagrees with, and takes exception to, much of what Mr. Youngs says to characterize and relate the history of, and issues in, this case. However, in light of PeaceHealth’s position, explained below, that review should be granted pursuant to RAP 2.3(b)(4), PeaceHealth

believes it is unnecessary at this juncture to set forth all of its disagreement with Youngs' assertions of fact.

IV. ARGUMENT

PeaceHealth agrees with Mr. Youngs only that it is appropriate for the Court of Appeals (or the Supreme Court on certification by the Court of Appeals) to address, on an interlocutory basis under RAP 2.3(b)(4) – but *not* under RAP 2.3(b)(1), (2), or (3) – the issue of whether the holdings in *Loudon* and *Smith* should be expanded to prohibit defense counsel for a defendant hospital corporation in a medical malpractice case from having *ex parte* “contact” with some or all of the physicians in the hospital corporation’s employ who were involved in treating the plaintiff. The issue is a recurring one as certain plaintiff’s counsel now fairly regularly seek to preclude defense counsel (and even risk managers) for corporate health care providers from communicating with some or all of the corporate health care provider physician employees who treated the plaintiff, and thereby disrupt defense counsel’s ability to effectively represent the defendant corporate health care entity.

The issue will continue to be a recurring one unless and until the appellate courts resolve the issue of whether *Loudon* and *Smith* should be so expanded. Because the issue needs to be resolved, so that defense counsel for corporate health care providers know whether and to what

extent their ability to engage in private and confidential communications with the corporate health care provider's employees in order to investigate and defend against plaintiff's claims or even to respond to discovery requests will be constrained, PeaceHealth agrees that interlocutory review of issues raised by the trial court's order granting PeaceHealth's motion for reconsideration and allowing defense counsel to have ex parte communications with plaintiffs' treating physicians employed by PeaceHealth should be granted pursuant to RAP 2.3(b)(4).

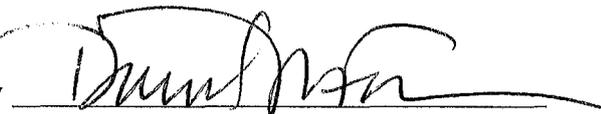
PeaceHealth does not agree with Mr. Youngs that interlocutory review is appropriate under RAP 2.3(b)(2)'s "probable error" standard. No Washington appellate decision, including *Loudon* and *Smith*, holds that counsel for a corporate health care provider sued for medical malpractice may not "contact" employees of the corporation who provided health care to the plaintiff.

Nor does *Wright v. Group Health*, 103 Wn.2d 192, 691 P.2d 564 (1984) purport to limit which employees of a corporate defendant defense counsel may speak with privately and confidentially in order to effectively represent the corporate entity. *Wright* was concerned only with the question of what, if any, employees or a defendant corporate health care provider plaintiff's counsel could interview ex parte without violating disciplinary rules prohibiting ex parte contact with represented parties.

Given the absence of any clear controlling authority in Washington for the question of law at issue, and given Mr. Youngs' concession in seeking certification of the trial court's order granting PeaceHealth's motion for reconsideration that the question of law at issue is one for which there is substantial ground for a difference of opinion, it can hardly be said the trial court's order was probable error.

RESPECTFULLY SUBMITTED this 19th day of May, 2011.

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
(206) 628-6600

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 19th day of May, 2011, I caused a true and correct copy of the foregoing document, "Answer to Motion for Discretionary Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Petitioner:

Joel D. Cunningham, WSBA #05586
J. Andrew Hoyal, II, WSBA #21349
LUVERA LAW FIRM
701 5th Ave Ste 6700
Seattle WA 98104-7016
Ph: (206) 467-6090
joel@luveralawfirm.com
andy@luveralawfirm.com

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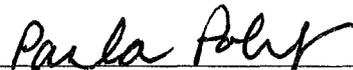
Co-counsel for Respondent:

John C. Graffe, JR, WSBA #11835
Heath S. Fox, WSBA #29506
JOHNSON GRAFFE KEAY MONIZ
& WICK, LLP
925 4th Ave Ste 2300
Seattle WA 98104-1145
Ph: (206) 223-4770
john@jgkmw.com
heath@jgkmw.com

SENT VIA:

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DATED this 19th day of May, 2011, at Seattle, Washington.



Paula Polet, Legal Assistant