

No. 67350-5-I

87811-1

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IN THE COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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AOLANI GLOVER, a single individual,  
Respondent

v.

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

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RESPONDENT'S ANSWER TO MOTION FOR DISCRETIONARY  
REVIEW

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**A. IDENTITY OF RESPONDENT**

Respondent Aolani Glover contends the trial court's Order Re: Defendant's Motion for Protective Order is correctly decided and is in accord with Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988) and Smith v. Orthopedics International, 170 Wn.2d 659, 244 P.3d 939 (2010). Aolani Glover does not oppose this Court accepting review, but disputes petitioner's characterization of the issues presented for review. Aolani Glover agrees that the Loudon/Smith prohibition against defense counsel ex parte contact with nonparty physicians *within the same health group or corporation* requires clarification and affirmation by the appellate court.

**B. DECISION**

Petitioners State of Washington d/b/a Harborview Medical Center and Lulu M. Gizaw, PA-C (hereafter "HMC") correctly identify the certified trial court orders presented for review as well as the pending Court of Appeals case, Youngs v. PeaceHealth No. 67013-I-I, which present the same issue.

**C. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether this court should uphold the unambiguous rule that defense counsel may not have ex parte contact with a nonparty treating physician established in Loudon v. Mhyre, 110 Wn.2d 675, 676, 756 P.2 138,

189 (1988), and most recently Smith v. Orthopedics International, 170 Wn.2d 659, 244 P.3d 939 (2010), when a nonparty treating physician is an employee at another institution operated by the corporate defendant.

2. When a medical negligence action is filed against a health care provider, group, corporation or organization, is there an attorney-client relationship created with all nonparty employees and nonparty treating physicians not participating in the negligent care, and if so, whether this claimed attorney-client relationship is an exception to the Loudon and Smith prohibition against ex parte contact with treating physicians.

3. Whether Wright v. Group Health, 103 Wn.2d 192, 691 P.2d 564 (1984) which held, *inter alia*, that current and former employees of a corporation are not “clients” of the law firm for purposes of the attorney-client privilege is dispositive on this issue.

#### **D. SUMMARY OF ARGUMENT**

Aolani Glover contends that HMC was negligent in the delayed diagnosis of her cardiac condition because of the over five hour delay in being seen by a physician assistant and/or physician and that this five hour delay was further exacerbated by the negligent diagnosis when finally seen by Lulu Gizaw, PA-C. Ms. Glover was at the HMC Emergency Department for approximately eight hours before her evolving cardiac condition was first

recognized. This eight-hour delay prevented early and controlled intervention to prevent the subsequent massive right-sided heart damage, kidney damage and was a proximate cause of her subsequent heart transplant.

At no time has Aolani Glover ever alleged any negligent medical care at any other institutions or at any other time than that occurring at HMC on April 2, 2008. Aolani Glover has never alleged any negligence against UWMC or it's physicians who cared for her beginning August 5, 2008, and who have continuously cared for her in both inpatient and outpatient settings and continue to do so presently. Nevertheless, HMC counsel erroneously argues that he is legally entitled to have ex parte contact with any and all of Aolani Glover's nonparty treating UWMC physician as well as any other RCW 7.70 defined healthcare providers within the University of Washington medical system because of a purported attorney-client privilege. This same argument was specifically rejected by our Supreme Court in Wright v. Group Health, 103 Wn.2d, 192, 691 P.2d 564 (1984). HMC's argument is also a clear subterfuge to nullify the unambiguous principles and public policy of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988) and Smith v. Orthopedics International, 170 Wn.2d 659, 244 P.3d 939 (2010) prohibiting defense counsel from having any direct or indirect ex parte contact with a patient's treating physician.

The trial court's denial of the Motion for Protective Order does not impair HMC's ability to defend the action. Any questions that HMC's counsel wishes to ask of Aolani's treating physician can be asked in a deposition. Petitioner HMC and its counsel can consult with other experts in transplant centers across the country for forensic expert witnesses, just as Ms. Glover must do. Finally, reversal of the trial court's order will fundamentally prejudice Aolani Glover's right to a fair trial. Justice Charles W. Johnston recognized the prejudicial impact of utilizing a treating physician as a defense expert witness:

Such testimony can wreak havoc with a 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 the testimony.

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

(J. Johnson, dissent).

While strong legal and public policy considerations support affirmation of the trial court's denial of HMC's Motion for Protective Order, this Court should clarify and confirm the applicability of Loudon and Smith to other physicians and health care providers within the same group, corporation or organization.

**E. COUNTERSTATEMENT OF THE CASE**

In early 2008, Aolani Glover was 28 years of age and otherwise good health. Aolani was in the early stages of pursuing a law enforcement career and in fact, was scheduled to undergo a physical fitness test on April 2, 2008, which is a component for the employment application with the Kent Police Department. Aolani had informal discussions with and encouragement from members of the Kent Police Department to apply.

On the morning of April 2, 2008, Aolani Glover had chest pain, which she had not previously experienced. When the pain did not subside, Aolani's father, Mr. John Glover, took her to Harborview Medical Center (HMC). They arrived at approximately 11:00 am and proceeded to the Emergency Department. Aolani Glover waited 1½ hours for her initial registration. The HMC patient registration record confirms Aolani Glover being registered at 12:34 pm. Notwithstanding her chest pain complaint, Aolani was directed to wait. Aolani was not taken from the waiting room for triage until 15:12 hours.

From the waiting area, Aolani Glover was not taken to an examining room. Aolani was parked on a gurney in the hallway under a letter "H" to wait at least another hour to be seen by defendant Lulu Gizaw, PA-C, a physician's assistant. A nurse took vital signs of pulse, blood pressure, respirations, temperature and recorded a pain scale. Initial "labs" or blood

work and electrocardiogram (EKG) were ordered as part of an initial treatment plan. Part of the blood tests includes testing for Troponin.<sup>1</sup> At 16:43, laboratory results of the first set of cardiac enzymes were available and indicated an abnormal Troponin-I of 5.89 ng/ml. The HMC laboratory normal reference range is < .40 ng/ml. The abnormal Troponin level is indicative of cardiac muscle damage and requires immediate cardiac consultation. Notwithstanding abnormal Troponin-I result, Mr. Gizaw discharged Aolani Glover at an unknown time, believed to be approximately 18:30 hours.<sup>2</sup>, Aolani was told by Mr. Gizaw that she was not having a cardiac event and that she was probably experiencing stress, A. Glover deposition, p. 32.

Mr. Gizaw's purported explanation of Ms. Glover's premature and inappropriate discharge is that he reviewed another patient's laboratory test results, including Troponin levels, and wrote them on Aolani Glover's *original* Emergency Room Record. The lab values of this purported unknown patient were supposedly normal. Mr. Gizaw advised supervising Emergency Room attending physician Alice Brownstein, M.D., that Aolani Glover's laboratory test, including Troponin level, were normal prior to discharge.

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<sup>1</sup> Troponin is a complex of three proteins integral to contraction of cardiac muscle. Troponin levels are used to test for heart disorders including myocardial infarction.

<sup>2</sup> HMC has no documentation, electronic medical record or any paper records confirming when Aolani Glover was discharged. This information would have been and should have been entered on the *original* hand written emergency room record.

Regardless of the credibility of Mr. Gizaw's explanation, it is undisputed that he did not ever review Aolani Glover's laboratory test prior to discharge.

Following her initial discharge, Mr. Gizaw found Aolani and her father at the outpatient pharmacy and urgently requested that Aolani return to the Emergency Department. Upon her return to the Emergency Department, Aolani was reexamined, and at 19:20 hours there was a redraw of blood for cardiac enzymes. The second Troponin level increased over four fold to 24.58 ng/ml. Aolani Glover was taken to the HMC Cardiac Catheterization Room, where it was first discovered that Aolani Glover had been experiencing a right coronary artery dissection.<sup>3</sup> Upon admission to the cardiac catheterization room, Aolani Glover still had good vital signs but quickly experienced multiple cardiac arrests requiring cardiopulmonary resuscitation (CPR), cardioversion (electric shock) and placement of a balloon pump to maintain blood pressure. The HMC interventional cardiologists were never able to successfully stent the right pulmonary artery and reintroduce blood flow through the right coronary artery. Aolani Glover's critical medical conditions included 1) cardiogenic shock; 2) right coronary artery dissection, unsuccessfully stented; 3) acute respiratory distress

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<sup>3</sup> Coronary artery dissection results from a tear in the inner layer of the artery, the tunica intima. This allows blood to penetrate and cause an intramural hematoma in the central layer of the artery, the tunica media, and a restriction in the size of the lumen, resulting in reduced blood flow, which in turn causes myocardial infarction and can later cause sudden cardiac death.

syndrome; 4) ventilator assisted pneumonia; and 5) acute renal failure.

On April 5, 2008, Aolani Glover was transferred to the University of Washington Medical Center (UWMC) in critical condition with multi-organ system failure for consideration of possible heart transplant. Aolani remained hospitalized at UWMC until April 22, 2008. A subsequent dissection in a left coronary artery required hospitalization at UWMC on May 6, 2008. Aolani underwent a heart transplant on June 27, 2008 at UWMC.

F. **APPLICABLE LAW**

1. **LOUDON UNAMBIGUOUSLY STATES THAT A DEFENSE COUNSEL MAY NOT, AS A MATTER OF PUBLIC POLICY, HAVE EX PARTE CONTACT WITH A PLAINTIFF'S TREATING PHYSICIAN, EVEN THOUGH PATIENT-PHYSICIAN PRIVILEGE WAS WAIVED.**

In a unanimous decision, our Supreme Court stated:

We hold that the defense counsel may not engage in *ex parte contact*, but is limited to the formal discovery methods provided by court rule.

Loudon at 676. The Supreme Court did not recognize or consider there to be an exceptions to this rule. Loudon and Smith v. Orthopedics International, 170 Wn.2d 659, 244 P.3d 939 (2010) are clear that the prohibition on ex parte contact applies to all “nonparty” treating physicians. In a key paragraph summarizing the holding in Loudon, and identifying the situation to which Loudon applies; the Smith court states:

In Loudon, we established the rule that in a personal injury action, “defense counsel may not engage in ex parte contacts with a plaintiff’s physicians.” Loudon, 110 Wash.2d at 682, 756 P.2d 138. Underlying our decision was a concern for protecting the physician-patient privilege. Consistent with that notion, we determined that a plaintiff’s waiver of the privilege does not authorize ex parte contact with a plaintiff’s *nonparty* treating physician. In limiting contact between defense counsel and a plaintiff’s *nonparty* treating physicians to the formal discovery methods provided by court rule, we indicated that “the burden placed on defendants by having to use formal discovery is outweighed by the problems inherent in ex parte contact.” Id. At 667, 756 P.2d 138. We rejected the argument that requiring defense counsel to utilize formal discovery when communicating with a *nonparty* treating physician unfairly adds to the cost of litigation and “gives plaintiffs a tactical advantage by enabling them to monitor the defendants’ case preparation.”

Smith at 665 (emphasis added).

The Smith court recognized the importance of prohibiting defense ex parte contact with treating physicians, and especially so in medical negligence actions. The Supreme Court stated:

Courts have recognized that, in the past, permitting “ex parte contacts with an adversary’s treating physician may have been a valuable tool in the arsenal of savvy counsel. The element of surprise could lead to case altering, if not for case dispositive

results.” *Law v. Zuckerman*, 307 F.Supp.2d. 705, 711 (D.Md.2004) (citing *Ngo v Standard Tools & Equip., Co.*, 197 F.R.D. 263 (D.Md 2000)); see also *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo.1989) (acknowledging that **ex parte contact in medical malpractice cases between defense counsel and a nonparty treating physician creates risks that are not generally present in other types of personal injury litigation**, including the risk of discussing “ ‘the impact of a jury’s award upon a physician’s professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued,’” amount others (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F.Supp. 585, 594-95 (M.D.Pa1987))), *abrogated on other grounds by Brant v. Pelican*, 856 S.W.2d 658, 661 (Mo.1993).

Smith, at 669 n. 2 (emphasis added).

Additionally, the Smith court recognized that defense ex parte contact transforms a treating physician into an expert witness advocating for the defense. The Supreme Court stated:

“Furthermore, permitting contact between defense counsel and a nonparty treating physician outside the formal discovery process undermines the physician’s roll as a fact witness because during the process the physician would improperly assume a roll akin to that of an expert witness for the defense. Fact witness testimony is limited to ‘those opinions or inferences which are (a) rationally based on the perception of the

witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other special knowledge within the scope of rule 702.’”

ER 701. Smith, supra at 668. See also Peters v. Ballard, 58 Wn. App. 921, 795 P.2d 1158 (1990) [A treating physician testifies based on knowledge and opinions derived solely from factual observation and does not qualify as a CR 26(b)(4)(B) “expert.”]

In the present case, Aolani Glover seeks only an order prohibiting ex parte contact with nonparty treating physicians. Aolani Glover is not suggesting or arguing that the facts and opinions of the UWMC treating physicians cannot be obtained. Loudon and Smith specifically provide that such factual testimony from treating physicians shall be done through the discovery process. Loudon at 680. [We are unconvinced that any hardship caused the defendants by having to use formal discovery procedures outweighs the potential risk involved with ex parte interviews]. Had Aolani Glover's follow-up cardiology care and all other care been provided at Swedish Medical Center, there would be no motion before this court and the opinions of treating physicians would be elicited by deposition. Continuing the prohibition against ex parte contact by defense counsel and limiting contact only through the discovery process ensures that both counsel, and

more importantly the trial court and jury, will receive untainted and impartial testimony from treating physicians based solely on their treatment of Aolani Glover.

**2. HMC SHOULD NOT BE ALLOWED TO EVADE THE HOLDINGS OF LOUDEN AND SMITH BY CONTENDING UWMC TREATING PHYSICIANS AND HEALTHCARE PROVIDERS ARE SOMEHOW A PARTY TO THE LITIGATION**

Aolani Glover's subsequent treating physicians at UWMC are not parties to the action when a corporation is a defendant. Aolani Glover respectfully submits that if a treating physician is not a "party", whether a named party or a person whose conduct give rise to liability, then Louden and Smith must apply. This question of who is a "party" was clearly answered in Wright v. Group Health, 193 Wn.2d 192, 691 P.2 564 (1984), which stated:

We hold the best interpretation of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, *i.e.*, those employees who have "speaking authority" for the corporation.

Id. at 200.

Wright also arose in the context of a medical negligence action. The Supreme Court in Wright rejected a claim by Group Health that all of its employees were "parties" in a lawsuit brought against the corporation. Id. at

194. Only those employees who are speaking agents for the corporation are parties. Id. at 200-201.

In particular, HMC counsel contends that Dr. Larry Dean, Dr. Dan Fishbein and “possibly” Dr. Edward Verrier and Dr. Charles Murray are speaking agents by virtue of their position in management. The involvement by doctors Dean, Fishbein, Verrier and Murray encompassed providing care to Aolani Glover within their function and capacity as a direct healthcare providers. Thus, any expected testimony is limited to their interactions with Aolani Glover as treating physicians. As previously noted, there is no claim against any UWMC healthcare provider, no claim against the UWMC institution itself or any institutional liability issue where a “speaking agent” issue arises.

Further, the trial court made no determination of whether any UWMC treating physician is a managing or speaking agent. No evidence was submitted establishing that Dr. Dean, Dr. Fishbein, Dr. Verrier and Dr. Murray are somehow presently authorized within their alleged administrative capacity to legally bind the State of Washington and Harborview Medical Center in any issue in this case. There is no evidence or a court finding that UWMC physicians Dean, Fishbein, Verrier or Murray are responsible for or set any Emergency Department policy at HMC. Whether any UWMC physicians have neither the administrative position nor day-to-day experience

at HMC to be a “speaking agent” and legally bind the State of Washington and HMC is a decision yet to be determined by the trial court.<sup>4</sup>

In Young v. Group Health, 85 Wn.2d 332, 534 P.2d 1349 (1975). The Supreme Court did allow the opinion of a Group Health physician to opine on the material facts regarding the risk of a vaginal delivery with the fetus in a breech presentation as an ER 801(d)(2) admission against Group Health. In Young, the testifying physician was also the managing agent for Group Health and was a participant in the management of Dylan Young’s birth. *Id.* at 337. [“The plaintiffs argue that Dr. Malan was the managing agent for Group Health”]. The admissibility of an agent’s admissions, which are made in the form of opinions, are dependent upon a finding by the trial court that the declarant is qualified as an expert within the area to which his testimony pertains; that the declarant was a speaking agent for the principal at the time when the statement was made, and that the admission is otherwise necessary, reliable and trustworthy. Young at 337-338 citing Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961). In the present case, it is undisputed UWMC physicians Dean, Fishbein, Verrier or Murray were not involved in Aolani Glover’s care at HMC’s Emergency Department, nor is there any evidence before this Court that they currently

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<sup>4</sup> Respondent Glover submits that the resolution of whether the claimed attorney-client relationship extends to all University of Washington Medicine employees would greatly influence the trial court’s legal analysis. A recognition of an attorney-client relationship as to all employees would obviate any need for a “speaking agent” analysis.

possess the management authority at HMC – let alone UWMC – sufficient to bind the defendants in the facts of this case. The “speaking agent” exception as to any UWMC physician is not properly before this Court.

**3. AN ATTORNEY-CLIENT RELATIONSHIP DOES NOT EXIST BETWEEN DEFENSE COUNSEL AND NONPARTY TREATING PHYSICIANS AND OTHER HEALTHCARE PROVIDERS MERELY BECAUSE THE STATE OF WASHINGTON IS A MAIN PARTY**

Petitioner wishes to make every UW Medicine physician, nurse, therapist, medical technician or any other RCW 7.70 health care provider who cared for Aolani Glover at any time, at any of its locations, and for any condition a “client” to permit otherwise prohibited ex parte contact. This argument was specifically rejected in Wright v. Group Health, 103 Wn.2d 192, 691 P.2d 564 (1984):

Group Health argues that as a corporation represented by counsel, its current and former employees are “client” of the law firm for purposes of the attorney-client privilege. ...We disagree.

Id. at 194. The defense makes no attempt to distinguish Wright and its applicability to the present case. In its 2009 report to the community, UW Medicine and University of Washington Medical Center stated that they had 1,823 physicians and 4,359 employees. (Petitioner’s Appendix A. 68-72). This issue and the other legal issues before this Court impact most all medical negligence actions in this state as well as the public policy considerations

behind Loudon and Smith and justify discretionary review.

**G. CONCLUSION**

For the forgoing reasons, Aolani Glover submits that strong legal precedent and public policy support the trial court's denial of the Motion for Protective Order but does not oppose the granting of discretionary review. Thus, petitioner is asserting an attorney-client relationship with over six thousand physicians and employers as well as the overruling of Wright.

DATED this 3 day of August, 2011.

Respectfully submitted,

OTOROWSKI JOHNSTON MORROW &  
GOLDEN, PLLC

By 

Thomas R. Golden, WSBA # 11040  
Attorneys for Respondent

**G. CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that she is now, and at all times material hereto, was a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to, or interested in, the above-entitled action, and competent to be a witness herein. I caused to be served on the 3<sup>rd</sup> day of August, 2011, a copy of the pleading entitled: Respondent's Answer to Motion for Discretionary Review:

Michael Madden  
Bennett Bigelow & Leedom, P.S.  
1700 Seventh Avenue, Suite 1900  
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- Legal Messenger
- Hand Delivered
- Facsimile
- First Class Mail
- UPS, Next Day Air
- Email

Signed at Bainbridge Island, Washington this 3<sup>rd</sup> day of August, 2011.

  
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Michelle Apodaca, Legal Assistant

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