NO. 1041365

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 83526-2-I

COURT OF APPEALS, DIVISION ONE OF THE STATE OF WASHINGTON

MICHAEL A. SNYDER, individually,

Petitioner

v.

VIRGINIA MASON MEDICAL CENTER,

Respondent,

JARED BRANDENBERGER, MD, AND JOHN AND JANE DOE PHYSICIANS, UNKNOWN JOHN AND JANE DOE NURSES,

Defendants.

VIRGINIA MASON'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court should deny review of both sets of issues Mr. Snyder raises. Regarding his request to reverse the Court of Appeals' holding that a *Loudon*[1] violation does not automatically create a presumption of prejudice, the decision below is consistent with the lead opinion in *Smith v. Orthopedics Int'l,* 170 Wn.2d 659, 672-73, 244 P.3d 939 (2010) as well as *Rowe v. Vaagen Bros Lumber, Inc.,* 100 Wn. App. 268, 278-80, 996 P.2d 1103 (2000) and *Ford v. Chaplin,* 61 Wn. App. 896, 812 P.2d 532 (1991). It is also consistent with settled law regarding other sorts of litigation transgressions, *e.g*. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570 582, 220 P.3d 191 (2009).

Furthermore, the issue is not procedurally ripe. This matter comes to the Court on an interlocutory basis, with unresolved issues and limited review by the Court of Appeals. Below, after motion practice, review by a special master, and *in camera*

[1] *Loudon v. Mhyre*, 10 Wn.2d 675, 756 P.2d 138 (1988).

review by the trial court, Mr. Snyder obtained records deemed relevant to his *Loudon* claims. CP 1153, 1241, 1619. Based on those records, he moved for default, asserting that they established prejudice. CP 3656-58. He made no lesser request for relief, arguing instead that default was the only appropriate remedy for the prejudice caused by Virginia Mason Medical Center (VMMC)'s purported *Loudon* violations. *Id.* The trial court denied the motion without prejudice, stating that it could not find substantial prejudice based on the information available. CP 4158-60. Mr. Snyder did not ask the trial court to rule that a *Loudon* violation is *per se* prejudicial. *Id.* That argument surfaced only at the Court of Appeals.

Regarding the second issue he asks this Court to review, Mr. Snyder sought to bolster his claim of prejudice by asking the trial court to review *in camera* the documents that the special master deemed not relevant. CP 1706-23. The trial court initially reserved ruling on this issue, after which Mr. Snyder shifted his focus from the request for *in camera* review, to a request that

each of the documents reviewed by the special master be produced directly to him. CP 2460-84. The trial court did not grant that request, but did grant Mr. Snyder's later request that the documents be provided to the trial court to perfect the record. CP 3573-79. It directed the special master to provide the documents to the trial court, where they remain filed under seal. CP 4206. It did not address Mr. Snyder's request for *in camera* review of those documents, however. *Id.*

In part because of these circumstances, discretionary review was denied on the question of whether a *Loudon* violation voids privilege protections. Commissioner's Ruling (5/9/2022). Specifically, the Court of Appeals' Commissioner stated:

> If Snyder prevails on review, he may ask the trial court to review in camera the documents submitted to the special master to determine whether any of the documents are relevant to the hospital's Loudon violations and whether the documents are protected by any privilege.

Id. at 18. For this reason, this issue is also not ripe for review.

Mr. Snyder's request to review the Court of Appeals' unpublished holding that contact between the hospital's Chief Medical Officer ("CMO") and a formerly employed physician directly involved in the care in question did not waive statutory quality improvement (QI) protections suffers from the same procedural defects. First, the predicate issue of whether the documents in question are subject to QI protections was not reviewed or decided by the Court of Appeals. Further, even assuming the meeting between the hospital's Chief Medical Officer and a former resident violated *Loudon*, which VMMC maintains it did not, no authority supports the proposition that the CMO's actions voided the statutory protections provided by RCW 70.41.200(3).

Second, Mr. Snyder's effort to obtain review of this issue based on a supposed conflict between the Court of Appeals' decision and this Court's decision in *Youngs* is unavailing. Neither case supports the notion that contact between a hospital leader and the potential target of a lawsuit against the hospital,

who is represented by counsel, constitutes a *Loudon* violation or warrants voiding statutory QI protections.

II. FACTS

A. Facts relevant to the prejudice question.

Mr. Snyder's primary factual theory is that VMMC's in-house and third-party claims personnel conspired to circumvent *Loudon*'s prohibitions by serving as a conduit between VMMC's counsel and counsel for the non-party physicians. The record directly rebuts this theory. In addition to the facts stated in VMMC's own Petition, the following bear emphasis.

As their insurer, VMMC realized that the non-party physicians should have counsel to protect their interests and offered them separate counsel, which they accepted. CP 1532, 1247, 1255, 3971-72. The hospital's counsel and counsel for the non-party physicians reported to the same claims personnel but VMMC's claims managers did not share their work product, strategy, or direct or coordinate their efforts. CP 501-504, 1113, 1760, 1835-36, 3390-91, 3971-72. In short, there was no "secret

scheme" to violate *Loudon* as Mr. Snyder repeatedly suggests.

B. Facts relevant to QI protections.

At all relevant times, VMMC had a Department of Health-approved Coordinated Quality Improvement Plan (CQIP), which included a system by which any staff member can trigger a quality review by submitting "patient safety alert" or "PSA." CP 2981–82, 2995.[2] When such an alert is received, "the Patient Safety Office creates and reports PSA information to" the hospital's Quality Oversight Committees ("QOC"), which is a "quality improvement committee" for purposes of RCW 70.41.200. CP 2982-83, 2995. The QOC utilizes the information collected as a result of the PSA investigation to

[2] Like most hospital systems that have affiliated physician groups and outpatient clinics, VMMC obtained Department of Health approval pursuant to RCW 43.70.510 for its CQIP. Approval allows for system-wide sharing of otherwise protected information, including information and documents created, collected and maintained by a hospital QI committee under RCW 70.41.200. RCW 43.70.510(6). The discovery protections and evidentiary privileges are the same under each statute, however. For simplicity, we will refer only to the hospital statute, RCW 70.41.200.

evaluate "the effectiveness of VMMC's systems for improving quality and safety for patients and staff." CP 2991.

The privilege log[3] provided by VMMC lists documents showing Mr. Snyder's January 16, 2018, surgery was flagged for review via a PSA received by the hospital's Patient Safety Office on January 17, 2018. CP 2976-77. Consistent with its CQIP, this alert triggered an investigation by the Patient Safety Office and preparation of documents for use by the QOC. The hospital asserted that the PSA and records prepared by the Patient Safety Office for use by the QOC were protected QI records. *Id.*

The QOC reviewed Mr. Snyder's surgery on July 23, 2018. CP 2927. VMMC asserted that the agenda and minutes for that meeting are immune from discovery under the QI statutes. CP 2976. At the time of the Oversight Committee's review,

[3] VMMC asserted that these documents were not discoverable under RCW 70.41.200(3) but provided a privilege log describing them. It also answered interrogatories by providing the information required by *Coburn v. Seda*, 101 Wn.2d 270, 277-79, 677 P.2d 173 (1984).

Dr. Michael Glenn was VMMC's CMO and a member of the committee. CP 1831-32. The VMMC personnel who later managed Mr. Snyder's claim did not participate in the QI review. CP 2147-48, 2919-23, Slip Op. at 28, n. 13.

Dr. Glenn's responsibilities as CMO also included oversight of its training program for resident physicians. CP 1831-32. In the latter capacity, he learned that Dr. Weslee Chew, a general surgery resident who was directly involved in Mr. Snyder's surgery, "took the complications in the surgical case very hard and was going to give up on being a surgeon," but had been convinced to complete training. CP 1832, 4243-44.[4]

[4] Physicians, particularly surgeons in training, often struggle to deal with poor patient outcomes, regardless of cause. Ginzberg SP, Gasior JA, Passman JE, *et al*. *Surgeon and Surgical Trainee Experiences After Adverse Patient Events*. JAMA Netw Open. 2024 Jun 3;7(6) (available at: https://pmc.ncbi.nlm.nih.gov/articles/PMC11148685/ accessed 5/21/2025). Senior physicians are expected to help their colleagues navigate unanticipated poor outcomes. Carlie Arbaugh, MD, MS and Kimberly E. Kopecky, MD, MS, *How Should Senior Surgeons Help Junior Colleagues and Trainees Experiencing Regret?* AMA J Ethics. 2025;27(3) (available at https://journalofethics.ama-assn.org/article/how-should-senior-

When he learned that Mr. Snyder had commenced suit, which happened on March 8, 2019 (CP 1-4), Dr. Glenn thought that Dr. Chew would be "really upset" and wanted to support him. CP 1832. After learning that VMMC would appoint separate counsel for him, Dr. Glenn became particularly concerned that Dr. Chew might believe that, by offering him a different lawyer, the hospital was blaming him or "hanging him out to dry." *Id.* Dr. Glenn decided he should meet with Dr. Chew to reassure him that this was not true. *Id.*

Dr. Glenn arranged to meet with Dr. Chew and his lawyer, Jennifer Oetter, at Dr. Chew's Prosser office on December 11, 2019. CP 1833. Contrary to Mr. Snyder's recitation of events, Dr. Glenn traveled to Prosser alone and did not discuss the case with Dr. Chew's lawyer, either before or after the meeting with Dr. Chew. *Id;* CP 1642.

During the meeting, Ms. Oetter (who had only recently

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surgeons-help-junior-colleagues-and-trainees-experiencing-regret/2025-03 accessed 5/21/2025).

agreed to represent Dr. Chew)[5] explained the reasons for separate representation. CP 1833. Dr. Glenn then expressed VMMC's support for Dr. Chew and tried to assess his mental state. *Id.* They did not discuss the specifics of the lawsuit, the surgery, or the QI review. *Id*. After being assured that Dr. Chew was okay, Dr. Glenn returned to Seattle. *Id.* He had no contact with Dr. Chew or Ms. Oetter thereafter. *Id.*

Mr. Snyder suggests that Dr. Glenn was given a set of "talking points" for his meeting with Dr. Chew, which were prepared by VMMC's defense counsel. Petition at 10-11. Dr. Glenn denied receiving any talking points, stating that his plan was simply to express support for Dr. Chew but not to discuss the details of the surgery. CP 1832. The documents cited by Mr. Snyder for the contrary proposition indicate that—before Ms. Oetter was engaged and before any meeting was scheduled—VMMC's defense counsel sent "talking points for

[5] CP 1642 (indicating Ms. Oetter agreed to represent Dr. Chew on November 20, 2019).

Dr. Chew" to VMMC's claims managers. CP 2006. There is no evidence that this document or its contents were communicated to Dr. Glenn. Rather, as Mr. Snyder's own briefing shows, the timing and context suggests that the document was intended to help VMMC's claims managers explain to Dr. Chew why separate counsel was appropriate. CP 2827.

C. Decisions Below.

1. Motion for default and to compel production of attorney-client and work product documents.

As noted in the introduction, Mr. Snyder sought discretionary review of several interlocutory trial court orders including denial of his default motion without prejudice, CP 4158-60, and his attempts to obtain *in camera* review by the court of additional documents to bolster his claims of prejudice resulting from alleged *Loudon* violations. CP 1706-23; 2460-84.

Neither issue is procedurally ripe. Mr. Snyder never asked the trial court to find that a *Loudon* violation establishes prejudice *per se*, but instead argued that prejudice had been

established. CP 3656-58. The trial court never ultimately ruled on his motion for *in camera* review, likely because he shifted his focus throughout motion practice on this issue from a request the documents be reviewed *in camera,* to a request for the documents to be produced directly to him. *See* CP 2460; 2475. The Court of Appeals Commissioner ruled that, if Mr. Snyder ultimately prevails on his *Loudon* claim, he can ask the trial court to revisit his request. Commissioner's Ruling (5/9/2022) at 18.

2. Motion to compel production of quality improvement documents.

After VMMC asserted that certain records were not discoverable under the QI statutes (CP 2927), Mr. Snyder moved to compel their production, focusing on the "Patient Safety Alert" that triggered the QI review. CP 2901-12. One paragraph was devoted to Dr. Glenn's involvement. CP 2911. The trial court denied his motion, finding that "the documents created by or for use by the QOC via the PSA are protected and non-discoverable under RCW 70.41.200(3)." CP 3968.

Mr. Snyder sought discretionary review of this ruling, which was granted only in part, limited to the question of "whether and to what extent a quality improvement (QI) committee member's participation in the litigation precludes the hospital's assertion of the QI privilege." Commissioner's Ruling (5/9/2022). The Court of Appeals ultimately rejected Mr. Snyder's argument that a *Loudon* violation voids those protections, characterizing his argument as "overly sweeping and unavailing". Slip Op. at 29. Consistent with its limited review of the issue, the Court of Appeals did not address whether the documents in question were subject to QI protection.

III. ARGUMENT

A. The fact that the record does not show prejudice is not a reason to presume prejudice.

Even assuming that this issue was procedurally ripe, the Court of Appeals holding that a *Loudon* violation does not create a presumption of prejudice does not meet any of the criteria for review under RAP 13.4(b). The appeals court's conclusion is

consistent with all prior precedent, including *Smith,* 170 Wn. 2d at 672, which places the burden of demonstrating prejudice on the party alleging it.

As the lead opinion in *Smith* reasoned, "[i]t makes sense for the moving party to carry this burden of proof on this issue because that party has the greatest interest in perceiving and defending against prohibited *ex parte* contact between opposing counsel and a nonparty treating physician." *Smith,* 170 Wn. 2d at 672. *Smith* further held that a rule of presumed prejudice would also be "unnecessarily harsh," because "there are circumstances where such a violation does not affect the fundamental fairness or outcome of a trial." *Id*.

While two justices in *Smith* found no *Loudon* violation and did not reach the issue of which party bears the burden of proof, they also did not dissent from the lead's requirement that the plaintiff prove prejudice. *See id.* at 674-77. As such, the lead opinion is controlling on this issue.

Even if *Smith* was not controlling, the lead opinion referred to several opinions of the Court of Appeals which also placed the burden of proof on the party alleging the violation without explicitly stating that it was doing so. *See, e.g., Smith v. Orthopedics Intern, Ltd.,* 149 Wn. App. 337, 343, 203 P.3d 1066 (2009); *Rowe.,* 100 Wn. App. at 278-80; *Ford,* 61 Wn. App. at 899.

As recognized by the Court of Appeals here, and by the Supreme Court in *Smith*, the effect of a *Loudon* violation is highly "fact-specific," and whether any prejudice was caused by the violation will depend on the degree of any violation and when it occurred. *See Smith,* 170 Wn.2d at 672 (noting that a rule of presumed prejudice "would not take into consideration the nuances of particular cases"). And, the remedy available will depend on the degree of prejudice demonstrated. *Smith,* 10 Wn.2d at 672, fn. 4 (discussing potential remedies).

This reasoning is also consistent with established case law placing the burden on a party seeking sanctions for a discovery

violation to demonstrate prejudice. *See, e.g., Teter v. Deck,* 174 Wn.2d 207, 216-17, 274 P.32d 336 (2012); *Magana,* 167 Wn.2d at 584; *Burnett v. Spokane Ambulance,* 131 Wn.2d 484, 494, 922 P.3d 1036 (1997) (requiring a showing of substantial prejudice to support imposing severe discovery sanction); *Carroll v. Akebeno Brake Corporation,* 22 Wn. App. 2d 845, 866, 514 P.3d 720 (2022).

In advocating for a new rule placing the burden of disproving prejudice on the nonmoving party, Mr. Snyder asserts that a *Loudon* violation is not in fact a discovery violation at all. However, the cases cited by Mr. Snyder in support of this argument are inapposite. None concerned *Loudon* or its reach, or even the reach of physician/patient privilege. Each involved the application of fiduciary obligations in other, unique circumstances based on the particular jurisprudence applicable. *See, e.g., Kurbitz v. Kurbitz,* 77 Wn.2d 943, 946, 468 P.2d 673 (1970) (attorney conflict of interest in taking case adverse to prior client); *Endicott v Saul,* 142 Wn. App. 899, 922, 176 P.2d

560 (gift accepted from impaired individual by power of attorney); *Safeco Ins. Co. v. Butler,* 118 Wn.2d 383, 390–91, 823 P.2d 499 (1992) (insurer bad faith); *Mut of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.,* 161 Wn.2d 903, 920-21, 169 P.2d (2007) (insurer bad faith).

Moreover, Mr. Snyder ignores that *Loudon* has been consistently characterized as a rule of discovery, and *Loudon* violations as discovery violations. *See, e.g., Loudon,* 110 Wn.2d at 680 ("the argument that depositions unfairly allow plaintiffs to determine defendants' trial strategy does not comport with a purpose behind the discovery rules—to prevent surprise at trial."); *Carson v. Fine,* 123 Wn.2d 206, 227, 867 P.2d 610 (1994) (*Loudon* requires defense counsel to use "formal discovery procedures" for communications with treating physicians); *Rowe,* 100 Wn. App. at 279 (characterizing a *Loudon* violation as a "violation of the discovery rules").

Loudon's prohibition against *ex parte* contact with non-party treating providers by defense attorneys is indeed a rule of

discovery because *Loudon* requires defendants to use formal discovery mechanisms in particular circumstances, and only when litigation is pending. *Loudon*'s prohibition is a creation of our courts and, as such, it governs the conduct of parties to litigation only. It does not operate outside of the litigation context. *See, e.g., Youngs v. PeaceHealth,* 179 Wn.2d 645, 658-59, 316 P.3d 1035 (2014) (noting that the patient's statutory waiver of physician-patient privilege when filing a personal injury suit, under RCW 5.60.060(4)(b) "triggers, rather than cancels, the *Loudon* protections."); *Carroll,* 22 Wn. App. 2d at 865 ("[N]either our Supreme Court nor the superior courts are authorized to … impose duties on nonlitigants before a lawsuit commences.").

In this case, for example, the Court's interpretation of *Loudon* to prohibit *ex parte* contact with former employees who are blamed for the plaintiff's injuries imposes restrictions on contact in the discovery context that do not exist outside of litigation, where such contacts would be otherwise permitted.

See 45 CFR §164.506(c)(1); RCW 70.02.050(1)(b) (permitting health care providers to use or disclose protected health information, without a patient's authorization, for "health care operations"); 45 CFR §164.501; RCW 70.02.050(1)(b); RCW 70.02.010(18)(b) and (d) ("Health care operations" include communications concerning competence and qualifications of health care professionals, evaluation of provider performance, and medical review and legal services, including the defense of malpractice claims).

The trial court correctly found that Mr. Snyder failed to meet the high burden for imposition of the severe sanction he sought—default judgment—because he was unable to demonstrate any harm. *See Marina Condo Homeowners Ass'n,* 161 Wn. App. 249, 260, 254 P.3d 827 (2011) (imposition of default is an "extremely harsh remedy" reserved for egregious misconduct and willful violation of court order). It is this absence of any harm to Mr. Snyder that explains his efforts to advocate for a new rule of presumed prejudice.

While Mr. Snyder claims generally that VMMC used "secret *ex parte* contacts" to "shape and influence" the testimony of the providers he blamed for his injuries and who were defending their care, there is no evidence in the record to support this. Nor is there any evidence, and Mr. Snyder has made no assertion, that the providers' deposition testimony was false, slanted, or "shaped" in any specific respect whatsoever due to any prohibited *ex parte* contacts. He has never alleged, for example, that there is any inconsistency between the testimony of these providers and the medical records, which might create an inference that their testimony was improperly influenced by their counsel.

While Mr. Snyder now apparently asserts that it was a violation of *Loudon* for VMMC to assign separate counsel to represent the unnamed but blamed physicians, counsel for Mr. Snyder knew of this arrangement at the time but raised no objection. Counsel for plaintiff specifically corresponded with Ms. Oetter about scheduling, and she appeared for the physicians

at their depositions. CP 590-91. Mr. Snyder's counsel understood that counsel was being assigned for the doctors at the time, understood that assigned counsel represented the doctors, not VMMC, and did not object to her doing so. CP 2856. Mr. Snyder's counsel expressed no opinion at that time that Ms. Oetter's involvement, including her presumed preparation of her clients for deposition, was somehow violative of *Loudon*. They also raised no concern during or immediately following the depositions that the independent representation of the physicians amounted to impermissible "shaping" of their testimony by VMMC.

Mr. Snyder claimed a *Loudon* violation only after one of the physicians, Dr. Aranson, moved to intervene and supported that motion with portions of the deposition transcripts of providers critical of the care provided by him; Mr. Snyder claimed that VMMC violated *Loudon* by providing the transcripts to his counsel. CP 550. But this was months after the depositions of the doctors and, as such, their review of expert

testimony critical of them could not have "shaped" their prior testimony. CP 691, 4073.

In reality, what VMMC did, and what Mr. Snyder now characterizes as *Loudon* violations, was to undertake limited steps to comply with its contractual and fiduciary obligations to the providers by assigning separate counsel, Ms. Oetter, to represent them in a lawsuit where VMMC had every reason to believe they might be substituted for the Doe defendants named in Mr. Snyder's Complaint, or although not named, blamed as agents of VMMC. Thereafter, Ms. Oetter independently prepared her clients for deposition with the assistance of a witness consultant, as is typical and permitted in litigation and which is protected work product. *See, e.g., Nutramax Labs, Inc. v. Twin Labs, Inc.,* 183 F.R.D. 458, 461 (D. Md. 1998) ("the work product doctrine protects legitimate efforts to prepare the case, which include preparation of witnesses for deposition and trial testimony"). VMMC did not direct Ms. Oetter's efforts or attempt to dictate strategy, and there is no evidence to the

contrary. CP 3390-91; 3971-73; 4078-7. Throughout this process, VMMC's counsel had no *ex parte* contacts with Ms. Oetter's clients and Ms. Oetter's work product was not shared with the lawyer representing VMMC. CP 1113, 1244-45.

Mr. Snyder does not, and cannot, explain how assigning an attorney to represent the targeted physicians, so that they could prepare to defend their clinical decision-making in a case where their personal and professional interests are clearly at stake, amounts to improperly "shaping" or influencing their testimony. As addressed in further detail in VMMC's Petition, *Loudon* has never been extended to bar such arrangements. Mr. Snyder's attorneys have no inherent right to take the depositions of these providers regarding a patient they treated years prior when they are unrepresented, unaware that they are targets in the case, and unprepared to answer the allegations impugning their work and reputation, and potentially endangering their license and future ability to practice. Neither

Loudon nor its progeny calls on physicians to put the privilege held by their patients ahead of their own due process rights.

Moreover, even if *Loudon* were violated, there was no prejudice to Mr. Snyder. As the lead opinion in *Smith* recognized, a rule presuming prejudice where a *Loudon* violation "does not affect the fundamental fairness or outcome of a trial" would be "unnecessarily harsh." *Smith,* 170 Wn. 2d at 672. The Court of Appeals holding is consistent with this principle and there is no reason to review it.

B. The trial and appeals courts' decisions to protect quality improvement records do not warrant this Court's review.

Without specifically addressing the criteria for review under RAP 13.4(b), Mr. Snyder raises two issues related to discovery of records that the trial court found were subject to QI protection. His first issue is whether the 14 documents listed in VMMC's privilege log (CP 2976-80) fall under the QI statutes' protection for "[i]nformation and documents, including complaints and incident reports, created specifically for, and

collected and maintained by, a quality improvement committee." Pet. at 7 (Issue 3). The second is whether Dr. Glenn's contact with Dr. Chew voids those protections. *Id.* (Issue 4).

1. The Court of Appeals did not address whether specific records are entitled to QI protection.

Although the trial court found that the records listed on VMMC's privilege log were entitled to QI protection (CP 3967), discretionary review was not granted on this issue. Commissioner's Ruling (5/9/2022). Therefore, the Court of Appeals did not address it. Slip Op. at 26. Rather, it said the alleged *Loudon* violation based on Dr. Glenn's contact with Dr. Chew did not "warrant a complete waiver of the QI privilege," while allowing Mr. Snyder to seek discovery of specific information or documents on remand. Slip Op. at 29 and n. 14. Accordingly, this issue remains open. There is no need for this Court to address it now.

2. The trial court's finding that the documents in question are subject to QI protections is consistent with the governing statute and case law.

On the merits, Mr. Snyder's argument that the 14 documents in question are not subject to QI protections is based on a misreading of the key cases, which he mistakenly suggests have somehow narrowed the plain meaning of the statute. Based on this misconception, he entirely fails to address whether those records, "including complaints and incident reports," were "created specifically for, and collected and maintained by, a quality improvement committee."[6]

Accordingly, the evidence upon which the trial court relied to find that these records were subject to QI privilege (CP 2981-83 in particular) is unrebutted. That evidence shows that a VMMC worker submitted a Patient Safety Alert, which triggered

[6] Although he assigned error to the entry of the order denying his motion to compel, Mr. Snyder did not assign error to the trial court's finding that the records in question were "created by and for use by the OOC." Response/Cross-Appeal Brief, p. 31.

a review and collection of data by the hospital's Patient Safety Office, for the express purpose of providing that information to the QOC for its use in reviewing the care in question. *Id.* These are precisely the steps outlined in the hospital's CQIP. CP 2995.

Mr. Snyder's argument that the statute only protects records of the QOC's internal discussions about his surgery not only defies the language of the statute, but it also ignores the facts of the cases he cites for that proposition. None of the cases he cites come remotely close to holding that incident reports, such as the PSA submitted in this case, or records of a subsequent investigation by the Patient Safety Office, all of which were prepared expressly for and used by the Quality Oversight Committee, are not protected.

The cases Mr. Snyder cites do not help him. *Seattle Children's Hosp. v. King Cnty.,* 16 Wn. App. 2d 365, 376, 483 P.3d 785 (2020), involved communications between a hospital and external agencies not involved in the hospital's QI activities. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 773, 280 P.3d 1078

(2012), held that a hospital was required to query a database, maintained for QI purposes, "in order to locate and produce discoverable information." *Lowy* did not require the hospital to produce any QI protected records, however. It simply required the hospital to use its QI database to identify events like those experienced by the plaintiff in that case. *Id.* at 788. In contrast, the PSA, follow-up investigation, and the agenda and minutes of the QAC meeting are precisely the type of records that the plain language of statute protects and which reflect the "inner workings" of the committee.

3. The Court of Appeals' holding that failure to screen Dr. Glenn did not result in a waiver of QI protections does not meet RAP 13.4 criteria.

Mr. Snyder's suggestion that the Court of Appeals' decision conflicts with *Youngs*, 179 Wn.2d at 657, is mistaken. The relevant circumstances in *Youngs* arose in the companion case, *Glover v. Harborview Med. Ctr.*, where the trial court prohibited any contact between non-involved UW physicians and University of Washington "risk managers." At the time, as

described in the briefing,[7] the University used the term "risk manager" to describe both personnel employed to manage liability claims and those involved in quality improvement activities. This Court held that *Loudon* did not apply to those who were carrying out quality improvement activities, but that they should be screened from the hospital's defense counsel. *Id.* at 671.

Youngs did not address a situation like that presented here, where VMMC's CMO's responsibilities included participation in QI activities, oversight of the hospital's residency program, and overall leadership of its physician staff. Years after he participated in a legitimate QI review, Dr. Glenn was simply affording emotional support to a young physician who he knew would be upset by his involvement in a lawsuit. Dr. Glenn's expression of empathy and support without discussing the

[7] Available at: https://www.courts.wa.gov/content/Briefs/A08/878111%20reply%20in%20Glover.pdf (accessed 6/1/2025).

specifics of the case did not implicate any interest protected by *Loudon*.

Moreover, no authority supports the proposition that in circumstances like these it is permissible or appropriate to void statutory QI protections based on violation of the judge-made rule in *Loudon*. Proper respect for separation of powers indicates that the Court cannot do so. *See Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). The only legitimate basis by which Mr. Snyder can gain access to information asserted to be protected by the QI statutes is to show that a specific record was not "created specifically for, and collected and maintained" by a QI committee. The Court of Appeals left it open for him to make this showing on a document-specific basis. Nothing in that ruling warrants this Court's review.

IV. CONCLUSION

VMMC respectfully requests that this Court deny review of the issues raised by Mr. Snyder.

I certify that this petition is in 14-point Times New Roman font and contains 4,988 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Respectfully submitted this 4th day of June, 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that I am now, and at all times material hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

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DATED this 4th day of June, 2025.

/s/ Cooper Smith
Legal Assistant

Appendix to:

Virginia Mason Medical Center's Answer to M. Snyder's Petition for Review

FILED
5/9/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL K. SNYDER, individually, Respondent, v. VIRGINIA MASON MEDICAL CENTER, Petitioner, JARED BRANDENBERGER, MD., and JOHN and JANE DOE PHYSICIANS, UNKNOWN JOHN and JANE DOE NURSES, Defendants.	No. 83526-2-I COMMISSIONER'S RULING GRANTING DISCRETIONARY REVIEW
MICHAEL K. SNYDER, individually, Petitioner, v. VIRGINIA MASON MEDICAL CENTER, Respondent, JARED BRANDENBERGER, MD., and JOHN and JANE DOE PHYSICIANS, UNKNOWN JOHN and JANE DOE NURSES, Defendants.	No. 83812-1-I COMMISSIONER'S RULING GRANTING DISCRETIONARY REVIEW IN PART

This is a medical negligence case. In No. 83526-2, defendant Virginia Mason Medical Center seeks interlocutory review of trial court orders regarding the scope of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), which prohibits defense counsel

in a personal injury case from communicating ex parte with plaintiff's non-party treating physicians. Specifically, Virginia Mason seeks review of November 19, 2021 and January 7, 2022 trial court orders to the extent the court concluded that Loudon prohibits the hospital's counsel from communicating ex parte with three non-party physicians who were employed by the hospital at the time of the surgical procedure at issue, participated in the procedure, but later left the hospital employment, when plaintiff seeks to hold the hospital liable for the physicians' allegedly negligent care. The hospital argues the trial court's conclusion is inconsistent with Loudon and "handcuffs" the hospital and the physicians from engaging in communications necessary to defend their joint interests.

In No. 83812-1, plaintiff Michael Snyder seeks review of a series of trial court orders entered in February and March 2022, to the extent the court denied "without prejudice" his motion for default judgment against the hospital for violating Loudon and denied his motions seeking production of documents relevant to the Loudon violations. Snyder argues the trial court erred in refusing to sanction Virginia Mason without a showing of prejudice and allowing the hospital to assert privileges. He argues the trial court's decisions limit his ability to prepare for a truthful trial with untainted evidence.

Snyder's motion for discretionary review is premised on Virginia Mason's Loudon violations, the subject of the hospital's motion for discretionary review. As explained below, Virginia Mason's motion for discretionary review is granted. Snyder's motion is granted in part: he may brief, for consideration by the panel as appropriate, whether a showing of prejudice is required for sanctions for Loudon violations and whether and to what extent a quality improvement (QI) committee member's participation in the litigation precludes the hospital's assertion of the QI privilege.

FACTS

This case arose from a surgery Snyder received at Virginia Mason on January 16, 2018. Four physicians employed by Virginia Mason were involved in the surgical procedures at issue, including the three non-party physicians who later left the hospital's employment: Dr. Nathan Aranson; Dr. Wesley Chew; and Dr. Molley Downey. Dr. Chew and Dr. Downey were surgical residents and participated in the placement of a dialysis catheter at issue in this litigation under the supervision of defendant Dr. Jared Brandenberger. During the catheter placement, Dr. Aranson, a vascular surgeon, was called to assist. Snyder experienced an abrupt drop in blood pressure and became unstable. It was later discovered that an arterial puncture occurred during the catheter placement. The doctors were able to stop his bleeding and save his life.

On March 8, 2019, Snyder filed this medical negligence lawsuit against Virginia Mason and Dr. Brandenberger in King County Superior Court, alleging that the catheter was misplaced and that as a result, he suffered permanent injuries.

In April 2020, Virginia Mason disclosed a list of about 100 treating health care providers who might testify in this case, and the list included the three non-party physicians at issue. Virginia Mason did not identify the physicians' roles in the surgery. It stated: "The identity of those persons and the relevant knowledge they may possess is more readily available to plaintiff's counsel than defense counsel because plaintiff knows the involvement of those providers have had, and plaintiff's counsel can contact those providers *while defense counsel cannot*." Parties' Combined Appendices (App.) 566 (emphasis added). Virginia Mason acknowledges that this statement was inaccurate as to the three non-party physicians at issue.

The parties later developed a dispute regarding Virginia Mason's counsel's ex parte communications with the three non-party physicians who provided allegedly negligent care. The communications occurred before any of the discovery depositions took place in the case and before Virginia Mason disclosed that Dr. Chew and Dr. Downey were responsible for the catheter placement. Under its employment agreement, Virginia Mason had a duty to provide professional liability insurance and legal counsel to physicians for any cause resulting from the medical services rendered on its behalf. The physicians had a continuing duty to fully cooperate with the hospital in defense. Virginia Mason's then counsel notified the physicians that as they were employees at the time of Snyder's surgery, they were covered by its insurance for the case and were provided with separate counsel, Jennifer Oetter at a separate law firm. The hospital's counsel introduced the physicians to its risk management team and third-party claims administrator Western Litigation. The hospital's counsel told the doctors their discussions were confidential and discouraged them from talking to people outside of the group. A document later produced to Snyder indicated that the hospital's counsel provided "talking points" to Dr. Chew before his deposition. Virginia Mason argues its counsel did not participate in the preparation of the non-party physicians' depositions; the hospital argues the physicians' separate counsel Oetter did so. Snyder argues the hospital created a "team" defense strategy to evade the Loudon prohibition. The hospital disputes this claim and argues its cooperation with Oetter is within the scope of its fiduciary duty as the physicians' insurer and protected by the common interest privilege.

In April 2021, after Snyder indicated his position that Dr. Aranson was negligent during his surgery, the doctor sought to intervene as a party with counsel Oetter. Dr.

Aranson argued that any finding of negligence would adversely affect his profession and that Snyder's allegations of negligence against both him and Dr. Brandenberger created a potential conflict of interest for the hospital's counsel to adequately represent both. Over Snyder's objection, Dr. Aranson was allowed to intervene. Shortly afterwards, on his unopposed summary judgment motion, the trial court dismissed Dr. Aranson from the case, while stating that the dismissal does not preclude Snyder's claim against the hospital based on Dr. Aranson's care or evidence of his negligence at trial.

Snyder sought discovery of communications he argued violated Loudon. Virginia Mason sought a protective order, arguing Loudon does not apply to the non-party physicians whose care is directly at issue. The trial court appointed a special master (retired Judge Palmer Robinson) to "identify any responses that are relevant to the issue of Virginia Mason's ex parte communication with Plaintiff's non-party treating physician(s)." App. 437-38. Virginia Mason, through new counsel at a different firm, provided responsive documents to the special master, who issued a ruling on July 12, 2021 identifying relevant documents and provided them to the court. The court allowed the parties to assert any privilege, and Virginia Mason did so. On August 31, 2021, the court entered an order directing the hospital to produce all of the identified documents, overruling its privilege log, and the documents were produced.

On October 8, 2021, Snyder filed a motion to direct the special master to transfer to the court all of the documents the special master had reviewed, including the documents she found were not relevant to Virginia Mason's ex parte communications with the non-party treating physicians. Snyder asked the court to review the documents concerning any privilege. Virginia Mason opposed the motion. On October 29, 2021, the

trial court entered an order reserving ruling on in camera review while clarifying its "understanding" of the parties' rights and obligations under Loudon. The court's understanding set forth in the order rejected Virginia Mason's argument that Loudon did not apply to its counsel's ex parte communications with the three non-party physicians. The court set a hearing for November 12, 2021 to discuss the steps necessary to ensure all documents related to Loudon violations were property reviewed and disclosed.

On November 19, 2021, the trial court entered an order continuing to reserve ruling on in camera review while directing Virginia Mason to produce the privilege log provided to the special master and also produce to the court for in camera review any correspondence from the hospital's counsel to the special master that had not already been provided to Snyder's counsel. The court directed the parties to meet and confer if necessary to discuss the sufficiency of the privilege log or the validity of any privilege asserted. The court ruled that the parties were "bound by the Court's analysis of the scope of the Loudon privilege, as set forth in the Court's October 29, 2021 Order." After the procedures set forth in the order, Snyder would be allowed to renew his motion for production of documents submitted to the special master for the court to decide whether the court or the special master should conduct any further in camera review.

On December 20, 2021, Virginia Mason filed a notice for discretionary review of the November 19 order to this Court. No. 83526-2. This matter was stayed pending the trial court's decision on Virginia Mason's motion to allow ex parte and privileged communications with the three non-party physicians. On January 7, 2021, the trial court denied the motion as having already been resolved. Virginia Mason amended its notice to include the January 7 order.

Meanwhile, pursuant to the November 19 order, Virginia Mason produced a privilege log of all of the documents it had provided to the special master. The privilege log included communications between Virginia Mason or its third-party claim administrator Western Litigation and the hospital's counsel and between the hospital or Western Litigation and attorney Oetter representing the non-party physicians.

On January 6, 2022, Snyder filed a renewed motion to direct the special master to produce all submitted documents. He asked the court to order that all of the documents submitted to the special master be "fully produced." App. 934. He argued that any privilege may not shield the hospital's Loudon violations, that exceptions to the attorney-client privilege applied, and that the hospital waived any privilege. Virginia Mason filed a response. On February 11, 2022, the trial court denied Snyder's motion. Snyder filed a motion for reconsideration, asking the court to direct the special master to transmit a full record of documents for the court record for open administration of justice under article 1, section 10 of Washington's Constitution. On March 24, 2022, the court granted reconsideration and directed the special master to submit all of the documents received in connection with her review to the court to be filed under seal. Snyder seeks review of both February 11 and March 24 orders.

Meanwhile, on February 4, 2022, Snyder filed a motion to enforce and compel regarding quality assurance documents. He sought to enforce a prior order that required Virginia Mason to provide a privilege log, which Virginia Mason did, identifying fourteen documents withheld as QI documents privileged under RCW 70.41.200(3) ("Information and documents, including complaints and incident, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or

disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action."). On February 22, 2022, the trial court denied Snyder's motion and found the documents created by or for use by the hospital's quality oversight committee protected. Snyder seeks review of the February 22 order as well.

On March 7, 2022, Snyder filed a motion for default judgment against Virginia Mason as sanctions for violating Loudon, arguing "default is the only remedy." App. 1153. On March 18, 2022, the trial court denied the motion "without prejudice," noting that it currently lacked "the information to determine if the violation substantially prejudiced plaintiff." Snyder seeks review of the March 18 order as well.

Virginia Mason's motion for discretionary review was initially set for expedited consideration on April 8, 2022. Meanwhile, Snyder filed a conditional notice for discretionary review of two trial court orders and later filed an amended notice to include three more orders. No. 83812-1. On March 29, 2022, he filed a motion to consolidate or link the two matters for joint consideration. Virginia Mason opposed consolidation, arguing that it was premature because Snyder's motion for discretionary review was conditioned on review in No. 83526-2. By ruling of April 7, 2022, I agreed with Virginia Mason and denied consolidation. On April 8, 2022, I entered a ruling denying Virginia Mason's motion for discretionary review. In No. 83812-1, Snyder filed a reply in support of consolidation, informing this Court that his motion for discretionary review is not conditioned on review in No. 83526-2. I later withdrew both April 7 and 8 rulings. On May 6, 2022, I heard oral argument on both parties' motions for discretionary review.

DECISION

In No. 83526-2, Virginia Mason seeks discretionary review of the November 19,

2021 and January 7, 2022 orders to the extent the trial court concluded that Loudon and its progeny prohibit the hospital's counsel from communicating ex parte with the non-party physicians whose allegedly negligent care gives rise to the hospital's vicarious liability. In No. 83812-1, Snyder seeks review of the February 11 and 22 and March 18, 22, and 24 orders to the extent the trial court denied without prejudice his motion for default judgment and denied his motions seeking production of withheld documents.

"Interlocutory review is disfavored." Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010); Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). This Court accepts pretrial review only on the four narrow grounds set forth in RAP 2.3(b). Virginia Mason seeks review under (b)(1)and (2), which set forth the following criteria:

> [D]iscretionary review may be accepted only in the following circumstances:
>
> (1) The superior court has committed an obvious error which would render further proceedings useless [or]
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]

RAP 2.3(b)(1), (2). Snyder seeks review under (b)(2). As explained below, Virginia Mason's motion for discretionary review is granted under (b)(2) on the applicability of Loudon. Although Snyder's motion fails to meet the criterion, review is granted in part in the interests of judicial economy on certain issues as described below.

A. Applicability of *Loudon* (No. 83526-2)

Virginia Mason argues the trial court erred in concluding Loudon and its progeny prohibit its counsel from communicating ex parte with the non-party physicians whose allegedly negligent care gives rise to its liability. As I stated in my April 8 now-withdrawn

ruling, the issue requires interpretation of evolving case law and implicates significant policy considerations. I now conclude review is warranted at this time.

Loudon addressed "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" and held defense counsel may not do so but must go through formal discovery methods. Loudon, 110 Wn.2d at 676-77 (emphasis added). Loudon did not involve communications with a non-party physician who provided allegedly negligent care on behalf of defense hospital. Loudon is a wrongful death case and addressed defense counsel's communications with two non-party providers who saw the decedent *after* defense doctors provided allegedly negligent care. In holding "ex parte interviews should be prohibited as a matter of public policy," the Supreme Court reasoned: "The danger of an ex parte interview is that it may result in disclosure of *irrelevant*, privileged medical information." Loudon, 110 Wn.2d at 677-78 (emphasis added). In a later wrongful death case, our Supreme Court applied Loudon to prohibit ex parte *non-verbal* contact where defense counsel sent documents to a non-party physician who saw the decedent *after* defense doctor provided allegedly negligent care. See Smith v. Orthopedics Int'l, Ltd., 170 Wn.2d 659, 665-69, 244 P.3d 939 (2010).

The Supreme Court later addressed whether Loudon applies to non-party physicians employed by corporate defendant. Youngs v. Peacehealth, 179 Wn.2d 645, 316 P.3d 1035 (2014). In Youngs, the plaintiffs did not object to defense counsel's ex parte communications with non-party physicians whose care gave rise to their claims. See Youngs, 179 Wn.2d at 654, 656. The court addressed communications with other physicians whose care was not at issue. The court balanced the attorney-client

privilege against the physician-patient privilege to hold corporate defense counsel "may engage in privileged (ex parte) communications with the corporation's physician-employee where the physician-employee has firsthand knowledge of the alleged negligent event and where communication are limited to the facts of the alleged negligent event." Youngs, 179 Wn.2d at 664. The court adopted the reasoning of Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1881), which extended corporate attorney-client privilege beyond the control group: "in the context of corporate liability, low- and mid-level employees might well be the only source of information relevant to legal advice, since they can, 'by actions within the scope of their employment, embroil the corporation in serious legal difficulties,'" and without talking to them, "corporate counsel 'may find it extremely difficult, if not impossible, to determine what happened' to trigger potential corporate liability." Youngs, 179 Wn.2d at 662 (quoting Upjohn, 449 U.S. at 392). "If Loudon conflicts with a defendant's corporate attorney-client privilege . . . it must yield to that privilege." Id. at 671.

The trial court relied on Newman v. Highland School District No. 203, 186 Wn.2d 769, 81 P.3d 1188 (2016), as controlling on the parties' Loudon dispute here. Newman was not a medical negligence case. There, a high school quarterback suffered a permanent brain injury at a school game one day after an alleged head injury at practice. He sued the school district for negligence in violation of the Lystedt law, which required the removal from practice of a student athlete suspected of having a concussion. Our Supreme Court held the corporate attorney-client privilege did not extend to the district's counsel's communications with its *former* football coaches who were employed at the time of the plaintiff's injury but were not represented by defense

counsel. See Newman, 186 Wn.3d at 779-83. In distinguishing Youngs, the court reasoned that "the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation" and "is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party." Id. at 780-81. The district argued the privilege should be extended to its former coaches because they "may possess vital information about matters in litigation, and . . . their conduct while employed may expose the corporation to vicarious liability." Id. at 781. The court rejected this argument: "These concerns are not unimportant, but they do not justify expanding the attorney-client privilege beyond its scope." Id.

The Supreme Court later applied the corporate attorney-client privilege to defendant's non-party independent contractor and non-physician employees. See Hermason v. MultiCare Health Sys., Inc., 196 Wn.2d 578, 590-92, 475 P.3d 484 (2020). In Hermason, plaintiff was transported to a hospital after his car crashed into a utility pole. He later sued the hospital and others for disclosing his blood test showing a high blood alcohol level to the police, resulting in his criminal charges. In rejecting his argument that Youngs is limited to non-party employees, not independent contractors, the Supreme Court stated: "Youngs was not decided based on this distinction but was, instead, based on corporate counsel's ability to determine what happened to trigger the litigation." Hermason, 196 Wn.2d at 587 (quoting Youngs, 179 Wn.2d at 664) (internal quotation marks and brackets omitted). The court also stated: "Furthermore, pursuant to our holding in Newman, the non-party contractor still maintains a principal-agent relationship with [corporate defendant] such that they should be allowed to have ex parte communications limited by our holding in Youngs." Id. at 587-88.

Virginia Mason argues Newman is distinguishable because the hospital does not rely on the existence of the attorney-client privilege between its counsel and the non-party physicians. It argues the Loudon prohibition does not apply in the first instance to these "target" physicians whose alleged negligence gives rise to its liability. Youngs did not address physicians whose care was directly at issue. Newman did not address communications with non-party treating physicians and thus does not appear to directly govern the applicability of Loudon to the physicians whose care is directly at issue.

Previously, Commissioner Jennifer Koh granted discretionary review in a different case on almost identical issue. Jia v. King County Public Health District, No. 82643-3. Jia, like this case, is a medical negligence case, and this Court granted review of a trial court order that prohibited defense hospital's counsel from communicating ex parte with a non-party nurse who was formerly employed by the hospital and provided allegedly negligent care on its behalf. The appeal was later dismissed after the trial court vacated the order on review. The issue appears recurring. Without immediate review, the hospital may lose the benefit of a successful appeal. Virginia Mason argues that by not naming the physicians who provided allegedly negligent care, Snyder seeks to block the hospital from fully investigating and defending the events giving rise to its alleged liability. The Loudon issues have been decided on interlocutory discretionary review. See Loudon, 110 Wn.2d at 676; Youngs, 179 Wn.2d at 656; Hermanson, 196 Wn.2d at 584.

Virginia Mason makes a sufficient showing warranting review under RAP 2.3(b)(2). Although whether the trial court's decision is a probable error is a close call, review is appropriate when both parties now appear to agree that appellate guidance is necessary on the issue at this time. Discretionary review is granted as to whether Loudon prohibits

defense hospital's counsel from communicating ex parte with the non-party physicians whose allegedly negligent care gives rise to the hospital's liability.

B. *Loudon*-Related Sanctions and Privileges Issues (No. 83812-1)

Snyder seeks review of a series of trial court orders regarding sanctions and production of documents based on Virginia Mason's contested Loudon violations, on which review is granted as discussed above. He primarily challenges the trial court's March 18 order that denied "without prejudice" his motion for default judgment. He argues the trial court erred in refusing to sanction Virginia Mason for Loudon violations *without a showing of prejudice*. The trial court denied his motion "without prejudice" when he argued default judgment was "the only remedy." App. 1153. The court explained that it currently lacked the information to decide if the violations substantially prejudiced Snyder.

In asserting an error in the trial court's decision not to impose a default judgment against Virginia Mason at this time without a showing of prejudice, Snyder relies on a concurring and dissenting opinion signed by four justices in Smith, who criticized the lead opinion as requiring a showing of prejudice for a new trial based on a Louden violation. See Smith, 170 Wn.2d at 678-79 (Johnson, J., concurring and dissenting). The lead opinion signed by three justices affirmed the denial of a new trial because the plaintiff failed to show prejudice. The lead opinion declined to presume prejudice in every Loudon violation and concluded that a trial court should decide "on the basis of the particular circumstances before it, whether the plaintiff suffered actual prejudice from defense counsel's prohibited ex parte contact with a nonparty treating physician or the physician's counsel and to impose a remedy that is appropriate to the degree of prejudice." Id. at 672. The two other justices concurred in the result by finding no Loudon violation and

thus did not address prejudice. See Smith, 170 Wn.2d at 674 (Fairhurst, J., concurring). As Virginia Mason points out, a plurality opinion is not binding on the courts.

Snyder argues that unlike the situation in Smith, where the lead opinion found no prejudice by comparing the treating physician's trial testimony affected by defendant's Loudon violation and his deposition testimony given before the violation, he cannot make such a comparison because Virginia Mason communicated ex parte with the non-party physicians *before* their depositions. He argues the physicians' testimony was "spoiled from the outset," and the "clock cannot now be turned back to ascertain what the former employees' testimony would have been on the key liability issues in the case had they not been improperly influenced and coached." Snyder Motion for Discretionary Review at 22. He argues he is in the same position as the plaintiff in Magaña v. Hyundai Motor America, 167 Wn.2d 570, 220 P.3d 191 (2009), a case involving a defendant's willful and egregious refusal to respond to discovery requests for years, resulting in the loss of evidence. There, our Supreme Court affirmed the finding of substantial prejudice and a default judgment against the defendant. See Magaña, 167 Wn.2d at 587-92.

But there appear unresolved factual disputes on the nature and the extent of the hospital's ex parte communications subject to the Loudon prohibition.

Snyder argues the trial court's refusal to order production of certain withheld documents limits his ability to show prejudice or rebut Virginia Mason's declarations on the nature and the extent of its ex parte communications. He challenges the trial court's February 11 order that denied his renewed motion to direct the special master to produce submitted documents. Virginia Mason has produced all communications between its counsel and the non-party physicians. Snyder's renewed motion sought full production

of the documents that were not identified by the special mater as relevant to Virginia Mason's ex parte communications with the non-party physicians. He argues the special master applied "an erroneously narrow interpretation of Loudon" to exclude all communications "between [the hospital] and attorney Oetter." Snyder Motion for Discretionary Review at 11. The hospital points out Snyder did not challenge the special master's July 12 ruling until more than a month after the trial court's August 31 order that ordered production of documents based on the special master's ruling. Snyder seeks production of documents, including the hospital's communications with its own counsel. He fails to explain why such communications are subject to discovery. The special master has found these documents not relevant to the hospital's ex parte communications, and the trial court has not reviewed them in camera to determine whether they are relevant to the hospital's Loudon violations. Snyder requested in camera review only in his reply in support of his motion, which Virginia Mason argues was too late for consideration and does not show a probable error in the trial court's decision denying his motion requesting full production of all of the documents.

Snyder also challenges the trial court's February 22 order that denied his motion to compel production of fourteen documents withheld under the QI statutes, RCW 70.41.200(3). He argues this error further limits his ability to show prejudice from Virginia Mason's Loudon violations.

"Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to . . . discovery or introduction into evidence in any civil action." RCW 70.41.200(3). The statute is intended "to encourage health care providers to report

adverse medical outcomes and to allow them to freely discuss, debate, and analyze the competence and conduct of peers." Lowy v. PeaceHealth, 174 Wn.2d 769, 787, 280 P.3d 1078 (2012). The QI privilege protects "documents created as part of the inner workings of the committee," but not "what goes into or comes out of" the committee. Lowy, 174 Wn.2d at 787. The language "created specifically for, and collected and maintained by" a QI committee serves as a limit on the protection and prevents a hospital from "funneling records" through its QI committee to prevent disclosure. Seattle Children's Hospital v. King County, 16 Wn. App.2d 365, 375, 483 P.3d 785 (2020) (quoting Fellows v. Moynihanm, 175 Wn.2d 641, 285 P.3d 864 (2012)). "Records created for and maintained by quality improvement committees are privileged," and "the burden of disclosure is upon the party who is requesting to disclosure." Lowy, 174 Wn.2d at 789.

Snyder argues the trial court granted a blanket protective order "without in camera review." Snyder Motion for Discretionary Review at 13. But he did not request in camera review. He requested production of all documents listed in the hospital's QI privilege log.

Snyder argues Virginia Mason is not entitled to the QI privilege because the hospital failed to screen its QI committee members, particularly Chief Medical Officer Dr. Michael Glenn, from the litigation. He points out Dr. Glenn's ex parte meeting with Dr. Chew, one of the three non-party physicians at issue. He argues Youngs requires the hospital to screen all QI committee members from litigation and defense counsel to preserve Loudon protections. In Youngs, the Supreme Court made the following statement in rejecting the defendant hospital's argument in reliance on the QI statute that it had the right to communicate ex parte with any of its employees at any time.

> The QI statute precludes restrictions on communications between a hospital's QI committee and its physicians, but the committee members can

> be screened from defense counsel in a malpractice action. Such screening will preserve Loudon's protections for patient-plaintiffs, while also allowing hospitals to meet statutory requirements for quality improvement.

Youngs, 179 Wn.2d at 669. But Virginia Mason disputed Snyder's assertion regarding Dr. Glenn's participation in the litigation. Dr. Glenn stated in his declaration that he never had any substantive conversation about the case with Dr. Chew. Dr. Glenn stated he met Dr. Chew and his counsel Oetter only to explain the hospital's support of Dr. Chew and why the hospital had to retain separate counsel for him as his insurer. Virginia Mason argues Youngs does not hold that a hospital's asserted failure to screen its QI committee member will require the hospital to disclose otherwise protected QI documents.

The sanctions and the other issues raised by Snyder fail to show a probable error that substantially alters the status quo or substantially limits his freedom to act for immediate review under RAP 2.3(b)(2). This Court's opinion on the scope of Loudon will likely shed light on or help resolve these issues. If Snyder prevails on review, he may ask the trial court to review in camera the documents submitted to the special master to determine whether any of the documents are relevant to the hospital's Loudon violations and whether the documents are protected by any privilege. The parties may ask the trial court to revisit its prior rulings based on this Court's opinion.

However, because the issues may return on interlocutory review, in the interests of judicial economy, I allow Snyder to brief, for consideration by the panel as appropriate, whether a showing of prejudice is required for sanctions for Loudon violations and whether and to what extent a QI committee member's participation in the litigation precludes the hospital's assertion of the QI privilege.

Discretionary review is granted in No. 83526-2. Discretionary review is granted in

part in No. 83812-1 as follows. Snyder may brief, for consideration by the panel as appropriate, whether a showing of prejudice is required for sanctions for Loudon violations and whether and to what extent a QI committee member's participation in the litigation precludes the hospital's assertion of the QI privilege. No. 83526-2 and No. 83812-1 are consolidated under No. 83526-2. The clerk shall issue a perfection schedule.

Masako Hayashi, Commissioner

BENNETT BIGELOW & LEEDOM P.S.

June 04, 2025 - 2:35 PM

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