IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the ESTATE OF BRENDA L. SMITH, deceased, and on behalf of JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L. SMITH, Petitioners, v. ORTHOPEDICS INTERNATIONAL, LIMITED, P.S.; PAUL SCHWAEGLER, M.D.; and SWEDISH HEALTH SERVICES d/b/a SWEDISH MEDICAL CENTER/PROVIDENCE CAMPUS, Respondents.	)	No. 83038-0 En Banc Filed December 16, 2010

ALEXANDER, J.—This case presents the following questions: (1) whether counsel for defendants in a personal injury action engaged in prohibited ex parte contact with a nonparty treating physician fact witness, per our decision in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), by sending documents to the physician's counsel prior to the physician's testimony at trial, and (2) if that conduct is proscribed by *Loudon*, is the grant of a new trial the proper remedy for the violation? Although we conclude that the defendants' attorney violated the *Loudon* prohibition on ex parte

contact, we hold that the violation caused no prejudicial effect, and thus, the grant of a new trial was not warranted. We, therefore, affirm the Court of Appeals' decision upholding the trial court's denial of a motion for a new trial.

I

In 2003, Brenda Smith (Brenda) underwent a spine operation performed by Dr. Paul Schwaegler. Shortly after Brenda's surgery, Dr. Kaj Johansen, a vascular surgeon, was consulted about vascular problems Brenda was experiencing in her legs. To deal with these problems, Dr. Johansen performed blood clot removal surgery. After complications arose, he performed fasciotomies[1] on Brenda's legs. The fasciotomies were not successful and, as a result, Brenda underwent multiple repeated surgical procedures, some of which were performed by Dr. Johansen. Brenda's left leg was eventually partially amputated, and she continued to experience problems in her right leg. During her hospitalizations, Brenda contracted methicillin resistant Staphylococcus aureus (MRSA). On March 10, 2005, she died of complications related to the MRSA.

Jerry Smith, Brenda's surviving spouse and the personal representative of Brenda's estate, brought suit on behalf of the estate, himself and his children (collectively Smith) against Dr. Schwaegler and Orthopedics International Limited, P.S. (collectively Orthopedics). The complaint alleged that Orthopedics' negligence was the

[1]Dr. Johansen described a fasciotomy as "open[ing] up . . . muscle compartments so that swelling [can] occur without killing off the muscle." Verbatim Report of Proceedings (Nov. 14, 2007) at 24-25.

proximate cause of Brenda's death. The complaint contained the following limited waiver of physician-patient privilege:

> [T]he defendants are not to contact any treating physician, past, present, or subsequent, without first notifying counsel for the plaintiff so that she might bring the matter to the attention of the Court and seek appropriate relief, including imposing limitations and restrictions upon any desire or intent by the defendants to contact past or subsequent treating physicians ex parte, pursuant to the rule announced in *Loudon v. Mhyre*, 110 Wn.2d 675 (1988).

Clerk's Papers (CP) at 10.

Prior to trial, Orthopedics indicated that it intended to call Dr. Johansen as a fact witness. Smith's counsel then took Dr. Johansen's deposition. During trial, when Smith's counsel asked Dr. Johansen on cross-examination what kind of questions he expected to be asked at trial, he stated, "I thought the questions would be along the lines of those you had asked me in my deposition, *and also, if I may look, . . . I was sent a thing called a plaintiffs' trial brief.*" Verbatim Report of Proceedings (VRP) (Nov. 14, 2007) at 103-04 (emphasis added). Smith's counsel responded, "Oh, really. Where did you get that from?" *Id.* The record reveals that at the time Dr. Johansen presented his testimony, he had with him a file that contained Smith's trial brief, a verbatim report of proceedings of the testimony of Smith's expert, Dr. David Cossman, a letter from his counsel, Rebecca Ringer, and a copy of the transcript of his deposition together with a cover letter from Orthopedics' counsel. The trial judge indicated that she was "concerned about the situation" and indicated that Dr. Johansen should contact his counsel. *Id.* at 104. The following day, attorney Ringer informed the court and counsel

for the parties that Orthopedics' counsel had sent her an e-mail containing the above described documents, together with an outline of questions that had been prepared for direct examination of Dr. Johansen. She said that she transmitted these documents to her client, except for the direct examination outline.

Smith's counsel thereafter requested an evidentiary hearing. In response to the request, the trial court conducted a telephone conference and two hearings at which counsel for all parties participated. At the conclusion of these proceedings, the trial court denied Smith's motion for a full evidentiary hearing. Although the trial court declined to permit Smith to review e-mails that had been sent or received by Dr. Johansen's counsel, it stated that it would permit Smith to (1) reexamine Dr. Johansen and (2) propose a jury instruction stating that Smith was unaware that defense counsel provided Dr. Johansen with Smith's expert's trial testimony. Although Smith's counsel decided not to reexamine Dr. Johansen, he did move for a mistrial and to strike Dr. Johansen's testimony. The trial court denied both motions but instructed the jury that "Dr. Johansen was provided a copy of Dr. Cossman's trial testimony by defense counsel" and Smith's "counsel was unaware of this fact." CP at 209.

At the conclusion of the trial, the jury found for the defendants. Smith then moved for a new trial, contending that the ex parte contact was wrongful and that the appropriate remedy for the transgression was a new trial at which Dr. Johansen's testimony should be excluded because "there's no way to unring the bell." VRP (Dec. 19, 2007) at 12. The trial court denied the motion.

Smith appealed to Division One of the Court of Appeals. The Court of Appeals affirmed the trial court's denial of the motion for a new trial, holding that "the transmittal of public documents to a fact witness who is also a treating physician does not fall within the ambit of *Loudon*. . . . given the public nature of the documents." *Smith v. Orthopedics Int'l, Ltd.*, 149 Wn. App. 337, 342, 203 P.3d 1066 (2009). The Court of Appeals added that even if there was a *Loudon* violation, Smith failed to show prejudice because Dr. Johansen's trial testimony paralleled his deposition, evidencing the fact that the documents did not "'influence'" his testimony. *Id.* at 343. Smith then petitioned this court for review of that decision, and we granted the petition. *Smith v. Orthopedics Int'l, Ltd.*, 166 Wn.2d 1024, 217 P.3d 337 (2009).

II

We review orders granting or denying a new trial for abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). If, however, the trial court's reasons are based on issues of law, our review is de novo. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257 (1988).

III

A

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 Wn.2d at 682. 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 677. 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." *Id.*

On the issue of whether the *Loudon* rule was violated here, we begin our analysis by addressing the argument advanced by Smith and amicus curiae Washington State Association for Justice Foundation (WSAJ) to the effect that *Loudon* established a bright-line rule prohibiting *all ex parte contact* with nonparty treating physicians. Pet. for Review at 11-12; Br. of Amicus WSAJ at 13. Orthopedics has responded to this assertion by suggesting that *Loudon* prohibits *only ex parte interviews, not ex parte contacts.* It contends that the "policy concerns that led the *Loudon* court to prohibit ex parte interviews of treating physicians—protecting against inadvertent disclosure *by* the physician, in an informal setting, of irrelevant health care information—are not implicated in a situation where the only flow is of public information *to* the physician." Answer to Pet. for Review at 19.

Orthopedics does not accurately characterize our holding. While it is correct in

noting that in a portion of the opinion, we focused on the dangers inherent in permitting ex parte interviews, we went on to unequivocally state that "defense counsel may not engage in ex parte *contacts* with a plaintiff's physicians." *Loudon*, 110 Wn.2d at 682 (emphasis added). Moreover, we have indicated in subsequent cases that *Loudon* generally prohibits such ex parte *contact* and *communications*. *See Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 309, 822 P.2d 271 (1992) (explaining that *Loudon* frames the ex parte issue as 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'" (emphasis added) (quoting *Loudon*, 110 Wn.2d 675-76)); *Carson v. Fine*, 123 Wn.2d 206, 227, 867 P.2d 610 (1994) (discussing *Loudon* in terms of prohibiting defense counsel from *communicating* with or *contacting* a plaintiff's treating physician). We conclude that the prohibition on ex parte contact, which we set forth in *Loudon*, is broad and not confined to merely limiting interviews by defense counsel with a plaintiff's treating physician.

Orthopedics next contends that transmitting the documents to Dr. Johansen's counsel did not amount to ex parte contact because it was "communication between lawyers acting as lawyers." Answer to Pet. for Review at 13. To determine whether defense counsel is permitted to indirectly contact a nonparty treating physician through the physician's counsel, we again turn to the policy concerns underlying our decision in *Loudon*. One concern was that "ex parte interview[s] . . . may result in disclosure of irrelevant, privileged medical information," and the harm from such disclosure cannot

be fully remedied by court sanctions. *Loudon*, 110 Wn.2d at 678. We also noted that "[t]he mere threat that a physician might engage in private interviews with defense counsel would, for some, have a chilling effect on the physician-patient relationship and hinder further treatment." *Id.* at 679. Additionally, we observed that "a physician has an interest in avoiding inadvertent wrongful disclosures during ex parte interviews" as a cause of action may lie against a physician for such disclosures. *Id.* at 680 (citing *Smith v. Driscoll*, 94 Wash. 441, 442, 162 P. 572 (1917) (dictum)). Requiring parties to use formal discovery processes when contacting nonparty treating physicians, we said, would not be overly burdensome because "[d]efendants could still reach relevant medical records; cost and scheduling problems of depositions could be minimized by using depositions pursuant to CR 31; plaintiff's counsel might agree to an informal interview with both counsel present; and the purpose behind the discovery rules—to prevent surprise at trial—was maintained." *Holbrook*, 118 Wn.2d at 310 (citing *Loudon,* 110 Wn.2d at 680).

As we have indicated above, the fundamental purpose of the *Loudon* rule is to protect the physician-patient privilege and to that end, we emphasized the importance of protecting the sanctity of that relationship, saying, "The relationship between physician and patient is 'a fiduciary one of the highest degree . . . involv[ing] every element of trust, confidence and good faith.'" *Loudon*, 110 Wn.2d at 679 (alterations in original) (quoting *Lockett v. Goodill*, 71 Wn.2d 654, 656, 430 P.2d 589 (1967)). The purpose of the physician-patient privilege, set forth in RCW 5.60.060(4), is twofold: (1)

to "surround patient-physician communications with a 'cloak of confidentiality' to promote proper treatment by facilitating full disclosure of information" and (2) "to protect the patient from embarrassment or scandal which may result from revelation of intimate details of medical treatment." *Carson*, 123 Wn.2d at 213 (quoting *Dep't of Soc. & Health Servs. v. Latta*, 92 Wn.2d 812, 819, 601 P.2d 520 (1979)). Here, Smith's counsel was not notified of the ex parte contact with one of Brenda's treating physicians and therefore had no way to monitor or review the exchange. That very risk of disclosure of intimate detail without the knowledge of Smith's counsel was a risk we intended to minimize when we adopted the *Loudon* rule.

Furthermore, permitting contact between defense counsel and a nonparty treating physician outside the formal discovery process undermines the physician's role as a fact witness because during the process the physician would improperly assume a role 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' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701. Although a treating physician fact witness may testify as to both facts and medical opinions in an action for alleged medical negligence, such testimony is limited to "the medical judgments and opinions *which were derived from the treatment*." *Carson*, 123 Wn.2d at 216 (emphasis added) (citing *Richbow v. District of Columbia*,

600 A.2d 1063, 1069 (D.C. 1991)). If a nonparty treating physician receives information from defense counsel prior to testifying as a fact witness, there is an inherent risk that the nonparty treating physician's testimony will to some extent be shaped and influenced by that information.

If there is a risk that a nonparty treating physician testifying as a fact witness might assume the role of a nonretained expert for the defense, it may result in chilling communication between patients and their physicians about privileged medical information. We attempted to limit that possibility in *Loudon* by restricting contact between defense counsel and nonparty treating physicians. We reaffirm that intent here and apply the rule to prohibit ex parte contact through counsel for the nonparty treating physician. If we were to do otherwise, we would be permitting defense attorneys to accomplish indirectly what they cannot accomplish directly.[2]

Here, Dr. Johansen's trial testimony evidenced that he had been provided with information pertaining to the trial, which led the judge to comment, "I was listening to

[2]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 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,'" among others (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.,* 676 F. Supp. 585, 594-95 (M.D. Pa. 1987))), *abrogated on other grounds by Brandt v. Pelican*, 856 S.W.2d 658, 661 (Mo. 1993).

[the testimony], thinking [the nonparty treating physician] certainly knows an awful lot about what's happened in the trial. I definitely saw that." VRP (Nov. 15, 2007) at 6. During a subsequent hearing, the trial judge indicated that the tone of the e-mails made it "clear that the lawyers are helping each other out," despite the fact that "there is nothing substantive in [the e-mails] other than the proposed line of questioning." VRP (Nov. 19, 2007) at 74. It seems obvious that even the mere threat that these kinds of communications may occur—where defense counsel and counsel for the nonparty treating physician are "helping each other out"—necessarily "'endanger[s] the trust and faith invested'" in a physician by a patient. *Loudon*, 110 Wn.2d at 679 (quoting *Petrillo v. Syntex Labs., Inc.*, 148 Ill. App. 3d 581, 595, 499 N.E.2d 952 (1986)).

In support of its argument that the contact here did not run afoul of our *Loudon* decision, Orthopedics asserts that the contact was limited to transmitting public documents. *See Smith*, 149 Wn. App. at 342; Resp'ts' Answer to Amicus WSAJ's Mem. at 3-4. Notably, however, the contact between defense counsel and counsel for Dr. Johansen also included transmission of a *nonpublic* document, i.e., the outline of questions that defense counsel intended to ask Dr. Johansen on direct examination.[3] Orthopedics concedes this fact. *See* Answer to Pet. for Review at 13 (stating that

[3]Although it is unclear whether Dr. Johansen actually read the outline, it is undisputed that his counsel received the document from defense counsel.

defense counsel "sought to transmit *largely* public information" (emphasis added)). However, even if the documents that were transmitted were entirely public information, we would have the same concerns. We say that because, as a practical matter, a nonparty treating physician would generally not see that information unless it were called to his or her attention. In our view, contact of this kind is within the ambit of what we contemplated in *Loudon* when we prohibited ex parte contact between defense counsel and nonparty treating physicians.

As noted above, the Court of Appeals affirmed the trial court's denial of Smith's motion for a new trial based, in part, on its conclusion that the rule in *Loudon* prohibiting ex parte contact does not extend to counsel for a nonparty treating physician or to documents of the nature transmitted here. We disagree with the Court of Appeals on this issue and hold that, under *Loudon*, Orthopedics' defense counsel engaged in prohibited ex parte contact by transmitting the above described documents to Dr. Johansen's counsel.

B

Because we conclude there was a *Loudon* violation, we must next discuss the appropriate remedy for this violation. Smith contends that the Court of Appeals "erroneously interposed a 'prejudice' analysis in its determination of whether defense counsel violated *Loudon*" and, in that regard, asserts that the only appropriate remedy is the granting of a new trial and the exclusion of Dr. Johansen's testimony at retrial. Appellant's Answer to Amicus WSAJ's Mem. at 2-3; *see* Pet. for Review at 15. This

position is supported by amicus WSAJ, which asks this court to adopt a per se prejudice rule because a "case-by-case analysis of the consequences of a *Loudon* violation will not sufficiently deter" misconduct and will "unduly tax the resources of trial courts." Br. of Amicus WSAJ at 19. Orthopedics responds that a new trial should be ordered only if there is actual prejudice because a per se rule would "encourage the plaintiffs' bar to . . . cry foul about any perceived 'contact' defense counsel can be characterized as having had with a treating physician or a treating physician's lawyer." Resp'ts' Answer to Br. of Amicus WSAJ at 3-4. Orthopedics goes on to say there was no prejudice here because the contact was between lawyers and that the nature of the information exchanged was inconsequential to the outcome of the trial. It asks us to conclude that the *Loudon* rule was created to prevent inadvertent disclosure of private information from the physician to opposing counsel and that the instant nonprejudicial contact between attorneys does not fall within that definition.

Although we did not address the issue of prejudice in *Loudon*, there have been three Court of Appeals cases that have interpreted *Loudon*'s prohibition of ex parte contact, all of which indicate that a finding of prejudice is central to the determination of a remedy for a *Loudon* violation. *See Smith*, 149 Wn. App. at 343, 344 (noting that even if a *Loudon* violation occurred, there was no showing of prejudice to plaintiff, and rejecting Smith's request for the court to adopt "a bright line rule for granting a new trial where ex parte contact occurs"); *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 278-80, 996 P.2d 1103 (2000) (holding that the mere redaction of certain portions

of trial testimony after a *Loudon* violation was not an effective cure for the violation because it could not cure the inherent prejudice that had already occurred); *Ford v. Chaplin*, 61 Wn. App. 896, 812 P.2d 532 (1991) (finding a *Loudon* violation to be harmless error because the record on appeal did not permit the court to determine whether ex parte contact materially prejudiced plaintiff's case).

Like the Court of Appeals in *Smith*, we are not inclined to presume prejudice in every case where there has been a *Loudon* violation. We reach that conclusion because there are circumstances where such a violation does not affect the fundamental fairness or outcome of a trial. To require a new trial and exclusion of the nonparty treating physician's testimony as an automatic response to all *Loudon* violations, in our judgment, would be an unnecessarily harsh result and would not take into consideration the nuances of particular cases.[4] In our view, the more reasonable approach is for the trial court to determine, 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. In the cases noted above, the Court of Appeals approved that kind of case-specific inquiry, and we agree with that approach.

[4]This is not to say that a *Loudon* violation could not merit sanctions, exclusion of evidence, or a new trial. If prejudice is caused by a *Loudon* violation, there are a range of remedies available to the trial court, including sanctioning of defense counsel, striking the nonparty treating physician's testimony, or granting a new trial. Additionally, a jury instruction similar to the one given here may cure any potential prejudice resulting from prohibited ex parte contact.

To establish prejudice, the moving party must show that some actual harm resulted from the violation. *See Ferry County v. Concerned Friends*, 155 Wn.2d 824, 831, 123 P.3d 102 (2005) (holding that the superior court properly placed the burden of proof of prejudice on the moving party). It makes sense for the moving party to carry the 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. *See Rowe*, 100 Wn. App. at 280 (explaining that a prejudice inquiry was conducted due to plaintiff's continued objections to defense counsel's actions). As a practical matter, it would be very difficult for the nonmoving party to prove a lack of prejudice to the moving party.

Our independent review of the record before us leads us to conclude that the Court of Appeals correctly upheld the trial court's determination that Smith was not prejudiced by the actions of Orthopedics' counsel. In reaching this decision, we find ourselves in agreement with the Court of Appeals that Dr. Johansen's deposition paralleled his trial testimony. Thus, there was no showing that the ex parte contact either influenced his testimony or resulted in surprise testimony.[5] Smith's counsel pointed out, to both the trial court and the Court of Appeals, portions of Dr. Johansen's testimony that he claims show that Dr. Johansen was influenced by defense counsel's ex parte contact. This contention, however, is unfounded. As we explained above, a

[5]Smith expressed surprise that defense counsel had transmitted documents to Dr. Johansen's counsel but did not otherwise indicate any surprise from the substance of his testimony. *See* VRP (Nov. 14, 2007) at 104.

treating physician fact witness may testify as to both facts and medical opinions in an action for alleged medical negligence, so long as the testimony is limited to "'the medical judgments and opinions *which were derived from the treatment*.'" *Carson*, 123 Wn.2d at 216 (emphasis added) (quoting *Richbow*, 600 A.2d at 1069). Smith does not adequately explain how Dr. Johansen's trial testimony differed from his deposition, nor is it clear what part of Dr. Johansen's testimony regarding his medical judgments and opinions was not derived from treating Brenda. Dr. Johansen's unique position as a treating physician fact witness allows him more latitude to testify about his expertise than what other fact witnesses are permitted.

Because we conclude that Smith suffered no harm from the ex parte contact, we cannot say that the trial court abused its discretion in denying Smith's motion for a new trial.

IV

We hold that although defense counsel for Orthopedics engaged in improper ex parte contact with a nonparty treating physician fact witness, Dr. Johansen, the contact did not prejudice Smith. Accordingly, we affirm the Court of Appeals' decision affirming the trial court's denial of Smith's motion for a new trial.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:

Justice Susan Owens

Justice James M. Johnson