69556-8

69556-8

NO. 69556-8-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

RAYMOND GROVE,

Appellant.

v.

PEACEHEALTH ST. JOSEPH MEDICAL CENTER,

Respondent.

BRIEF OF RESPONDENT PEACEHEALTH

D. Jeffrey Burnham, WSBA # 22679
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I. INTRODUCTION

This "delayed diagnosis" case presents an unusual scenario where the hallmark symptom (severe pain) of a condition (compartment syndrome) was not present, yet the appellant Raymond Grove believed that the providers should have made the diagnosis anyway. In so doing, he argued the original surgeon (a PeaceHealth employee) is responsible for a condition diagnosed 10 days after the surgery, even though the surgeon was on Christmas vacation in New Jersey for the final five days of the 10. The reason he points to the surgeon? Their experts failed to identify and criticize any other PeaceHealth provider who cared for Mr. Grove during the last several days, so they had no one to point to at trial except the original surgeon and the generic "team".

The trial court properly held that the law did not allow such a claim and that Mr. Grove failed to provide proper, specific evidence of a provider at fault. The court held that the original surgeon is not responsible for non-specific, unidentified failure of the "team" during the entire 10 days in the hospital. The lower court thus properly reversed a confused jury verdict, which could have only found as they did by relying on evidence the court properly had stricken and on a theory that was improperly raised at trial during expert testimony.

II. ASSIGNMENTS OF ERROR

PeaceHealth disagrees with the statement of Issues Pertaining to the Assignments of Error by Appellant Mr. Grove. The issues on appeal are more properly stated as follows:

Issue One: Whether the trial court properly vacated the jury verdict, where:

1. A claim for medical malpractice requires proof of a breach of a standard of care by a health care provider and causation because of the breach;

2. That proof must include medical experts stating *the specific* breach of care and as *to specific providers* (not done here except as to the original surgeon);

3. The experts must be disclosed in pre-trial discovery and the providers they criticize must be disclosed (not done here except as to original surgeon);

4. At trial, Mr. Grove failed to provide proof that a specific health care provider fell below the standard of care and instead that Mr. Grove's general "team" of providers failed him; and

5. There is no authority extending a medical negligence claim to a "team management scheme".

Issue Two: Should the trial court have corrected a confused jury's decision, which could have only been based on a precluded theory, improper testimony (stricken by the court), and improper evidence? *Yes.*

III. COUNTER-STATEMENT OF THE CASE

A. Medical Care Provided to Mr. Grove

In 2006, Mr. Grove was diagnosed with an aortic aneurysm and was promptly referred for surgical consultation. On December 16, 2006, Mr. Grove was seen by Richard Leone, M.D., a cardiothoracic surgeon. Dr. Leone determined that Mr. Grove required an aortic root and valve replacement, which was done on December 21, 2006, at PeaceHealth St. Joseph Medical Center ("PeaceHealth") in Bellingham, Washington. (Dr. Leone RP [June 21], at 5) Following surgery, Mr. Grove was cared for around the clock by nurses and seen on December 22, 2006, by physicians' assistant Joe Guay, and twice on December 23, 2006, by Dr. Leone. He has consistent pulses in his feet and legs, was in no distress, and had no pain noted in his legs. (*Id.*, at 11-12) Dr. Leone left on Christmas Day to travel to New Jersey, leaving Mr. Grove to this partner Dr. Edward Zech (and later to Dr. James Douglas). (*Id.*, at 19)

Mr. Grove had numerous other critical issues as he recovered. (*Id.*, at 5-7; CP 406-20) These included critically low blood pressure, mental confusion, fever and infections around the new valve in the heart, pneumonia, acute kidney failure, abnormal liver functions, temporary diabetes, fluid overload, and respiratory failure. (*Id.*) This also included a diagnosis of cellulitis (CP 410-12) and then a late developing

compartment syndrome (CP 417-20). Mr. Grove, however, did not exhibit any of the normal signs or symptoms of a developing compartment syndrome, which is a lack of blood flow to the lower leg due to a blockage in the calf, usually, resulting in pressure causing severe pain and ultimately vessel and nerve damage. Because of the unusual presentation -- no pain, no other normal symptoms --, the infectious disease doctor Sara Mostad, MD (not employed by PeaceHealth), found the presentation "puzzling" and concluded it was likely a cellulitis infection. (CP 412)

His symptoms were consistent with cellulitis. It was the right diagnosis, at least as it appeared from all the numerous symptoms: redness in the leg, warmth, tenderness, then swelling in tissues, fever (indicative of infection), Leukocytosis (elevated white blood cells), and spreading redness to the foot. (CP 410-12; Mostad RP [June 14], at 25-26, 50-51) On the other hand, until December 31, he had *no classic symptoms for compartment syndrome*:

- **"Pain out of proportion", excruciating** (the hallmark symptom) -- none
- Paresthesia (numbness) -- none
- Pallor (paleness) -- none
- Pulselessness – he had consistent pulses in the feet
- Poikilothermy (cool, cold leg or feet) -- none

(Dr. Douville RP [June 19], 14-16; CP 411-16; Spears RP [June 26], at 20-24)

When Mr. Grove developed a lack of movement in his foot, with some pain (first time noted on December 31), and the cellulitis spreading to the foot, Dr. Douglas looked at other potential causes and asked for further consultation with Dr. Mostad. (CP 417-18) On December 31, the two doctors diagnosed a possible compartment syndrome, and Mr. Grove was referred to a general surgeon for consult, formal diagnosis, and surgery to treat the condition. (CP 420) Even the general surgeon noted that it was an "atypical" presentation, that Mr. Grove did not experience severe pain. (Dr. Douglas RP [June 19-20], at 102-03)

B. Mr. Grove's Shifting Theory of Liability

Initially, Mr. Grove contended that a sequential compression device used on Mr. Grove's leg after surgery was used improperly. He later abandoned this theory because of lack of expert support. Moreover, his complaint only specified Dr. Sara Mostad as a negligent actor. (CP 4-5; CP 766)

During discovery then, Mr. Grove named experts but limited the scope of his criticisms to two physicians -- the surgeon Dr. Leone (employed by PeaceHealth) and the infectious disease consultant Dr.

Mostad (not employed by PeaceHealth). Mr. Grove produced two experts, Dr. Carl Adams and Dr. Sean Ghidella.

During depositions, both experts confirmed that their criticisms were limited to Dr. Leone and Dr. Mostad. Dr. Ghidella could not even identify by name any other provider other than Dr. Leone. (Dr. Ghidella RP [June 20], at 43-44) Dr. Adams' criticisms were limited to the Drs. Mostad and Leone[1]. Neither expert named or provided criticism of Dr. Zech, who oversaw the follow-up care when his partner Dr. Leone left for Christmas holiday to New Jersey. Neither expert named or provided criticism of Dr. Douglas, who oversaw the care of Mr. Grove on December 29-31. Neither expert named or provided any criticism of the nursing staff or the physical therapist. Indeed, no criticism was ever disclosed of any of these providers from Dec. 27-31.

Dr. Adams did criticize Dr. Mostad, the non-PeaceHealth doctor. Just prior to trial, Mr. Grove withdrew his claims against Dr. Mostad, although during the trial he argued that the "team" included Dr. Mostad. (Dr. Mostad RP, at 52-53, 55; CP 675 "lack of communication" by Dr. Mostad)

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[1] Shane Spears was mentioned by expert Dr. Adams in his pre-trial report, but at trial, he gave no opinion of any specific act or omission Mr. Spears should or should not have done. **He did not use Mr. Spears' name at all**, only: "[If] the PAs make a mistake, it's the head of the ship's mistake? Correct." (CP 698)

C. Disclosures in Discovery

During discovery, Mr. Grove limited the scope of his claims to the physicians, namely Dr. Leone and Dr. Mostad:

- Interrogatories were non-responsive on expert criticisms.
- Disclosure of witnesses for trial: only that experts would "testify as to the breach of standard of care in the treatment of Mr. Grove which resulted in his injuries". (CP 368-69)
- Late-produced reports from their experts Dr. Carl Adams (CP 372) and Dr. Sean Ghidella (CP 376) were again non-specific and not critical of any staff members except arguably PA Shane Spears.
- In depositions, these experts confirmed that their criticisms were limited to mainly Dr. Leone. Dr. Ghidella could not even specifically name any other provider other than Dr. Leone. (CP 401) Dr. Adams limited his criticism to Dr. Leone and Dr. Mostad and to the PA Shane Spears, only. (CP 374)
- As to the nurses, Dr. Adams said: "[You] don't have any criticisms of the nurses, do you? No, I do not." (CP 404, at p. 86; CP 710) He agreed "this is not a nursing issue". (Id.)
- Neither expert was critical of the physical therapist.
- Neither expert was critical of Dr. Douglas in any respect. (See, e.g., CP 710)
- These opinions were not up-dated at any time prior to trial.

In response, knowing the scope of Mr. Grove's complaints, the defendants developed similar experts -- surgeons and a PA expert (and Dr. Mostad developed experts). PeaceHealth did not develop any nursing or PT expert – because there was no claim against these.

D. Trial Evidence

During the course of trial, Mr. Grove offered the same two expert witnesses in an attempt to establish the necessary proof to carry his burden on standard of care. Neither identified any specific PeaceHealth employee who failed to perform some action that caused the outcome. RCW 7.70, *et seq*. Indeed, their main criticism, as disclosed, was against Dr. Leone, who was not even in town at the time of the supposed "signs" of December 29 forward. (Dr. Leone RP [June 21], at 19) As to Dr. Douglas, who was the attending surgeon in charge on Dec. 29-31, Dr. Adams testified at trial that he had "no specific criticisms" of Dr. Douglas. (CP 710) As to the physician assistant Mr. Spears, he did not opine at trial as to anything he should or should not have done.

However, Dr. Adams did try to say that the physical therapist that saw Mr. Grove on Dec. 30 (CP 423, "foot drop" notation) should have raised a "red flag" and "needs to shoot of a rocket and tell somebody that the patient developed a new neurological symptom". (CP 675) On objection, on a motion to strike, and after lengthy augment on the scope of the appellant's pre-trial disclosures (CP 675-695), **the Court struck this testimony and told the jury specifically not to consider it**. (CP 695-96)

The Court precluded it because (1) Mr. Grove has never disclosed any criticism as to the physical therapy or nursing care, and (2) such care

was not at issue in this case. (CP 684) Unfortunately, once the bell is rung, it is difficult to have the jury ignore that improper evidence. Despite the court's instruction, that physical therapist's testimony and note was tainted, which the trial court recognized once the jury came back with a verdict for Mr. Grove.

Moreover, Mr. Grove's secondary expert Dr. Ghidella could provide no specific criticisms of any provider other than generally Dr. Leone – and he could not even name any other hospital provider, not even Dr. Douglas, let alone what they did wrong:

> Q. [At the time of your deposition] you actually told me that you can't tell who the individual was or the individuals who deviated from the standard of care who missed the compartment syndrome diagnosis, isn't that correct?
>
> A. That is correct.
>
> Q. And you believe ultimately, though, that it's the surgeon's responsibility, and therefore, Dr. Leone was the only individual that you specifically named, isn't that correct?
>
> A. That is the only person I named. However, I would also add that I've testified there is a team approach to this and there may be other people involved.
>
> Q. Just two months ago, you could not name any one of those people other than Dr. Leone, is that correct?
>
> A. That is correct.

(CP 401; Dr. Ghidella RP [June 20], at 43-44)

Thus, no expert (in admitted evidence) was critical of the PT or nursing staff for not informing the doctors and no such theory was disclosed. No testimony indicated this was a standard of care violation.

Rather, the Appellant in briefing here claims Dr. Adams was critical of Dr. Leone for "failing to adequately monitor" or having other instructed to monitor. The experts' testimony, actually, *does not say that at all* – does not even use the word "monitor", and does not at all suggest Dr. Leone should have instructed anyone to monitor. (*See, e.g.,* CP 698-99) Moreover, the doctors' testimony and the evidence presented to the jury more than shows extensive daily monitoring of the leg, any pain, swelling, and pulses, absolutely. (*See, e.g.*, CP 406-21; Dr. Leone RP [June 21], at 11-12)

In addition, the experts' trial testimony conflicted. Dr. Ghidella opined that Mr. Grove developed compartment syndrome while he was intubated shortly after surgery. Importantly, he could not say what caused the compartment syndrome. (Dr. Ghidella RP [June 20], at 48-49) In contrast, Dr. Adams testified that the signs of compartment syndrome developed much later, mainly on December 29, 2006. (CP 698-99) Neither expert could state what the recognized standard of care required of any individual provider during these time periods. Further, neither expert could identify any specific PeaceHealth employee who failed to perform

his or her role according to a recognized professional standard during those time periods. Indeed, Drs. Adams' and Ghidella's main criticism was against Dr. Leone, *who was in New Jersey at the time the "signs" of the compartment syndrome first appeared.*

Mr. Grove's theory of liability, therefore, was based on a generic "team" failure to diagnose due to unspecified, inadequate monitoring that violated the standard of care. (CP 432) However, no evidence was presented of a specific actor's negligence or that compartment syndrome does not occur following thoracic surgery but for someone's negligence.

The trial court agreed with PeaceHealth that the law in Washington does not impose liability based on Mr. Grove's theory of "team" negligence and to do so would expand existing law in such a way that would impose negligence simply because of a bad result. The court determined there was no evidence sufficient to support the verdict under CR 59(b) and granted PeaceHealth's motion to vacate the jury verdict. (CP 768-73)

IV. SUMMARY OF ARGUMENT

The trial court's October 16, 2012 Order Granting PeaceHealth Judgment as a Matter of law and vacating the jury verdict should be affirmed because:

(1) the law requires proof of an independent, specifically named health care provider's failure;

(2) the law further requires proof that the failure of that provider fell below the standard of care as established by competent expert medical testimony;

(3) Mr. Grove never disclosed or asserted that a specific health care provider *there at the time* (Dr. Leone was not treating after the first few days) failed to diagnose his compartment syndrome and instead argued that the entire health care "team" was negligent; and

(4) there is no authority extending medical negligence to a hospital "team" simply because of a bad outcome – the provider must be named and his or her individual failure must be specified.

V. ARGUMENT

A. The standard for review is abuse of discretion.

The trial court has the authority to vacate a jury verdict. *Benjamin v. Cowles Pub. Co.,* 37 Wash. App. 916, 923, 684 P.2d 739 (1984) ("court was correct in granting the judgment n.o.v."). On appeal, this Court considers the trial court decision on an abuse of discretion basis. *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005)(damages awards are given due deference, but may be disturbed when contrary to substantial evidence).

Here, the trial court properly applied the law, applied the allowed factual evidence, and corrected the jury's misguided decision. It was correct to do so, and the trial court did not abuse its discretion.

B. The trial court correctly vacated the verdict because medical claims require proof of the violation of a specific standard of care.

To establish a claim for medical malpractice, a plaintiff must prove that: (1) that the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances; and (2) such failure was a proximate cause of the injury complained of. RCW 7.70.040.

Medical standard of care violations must be established by medical expert testimony, not innuendo or even factual reasoning:

> It is well-settled that, before a physician or surgeon my be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by that standard. In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard. Negligence on the part of the physician or surgeon by reason of his departure from the recognized standard of practice must be established by medical testimony.

Versteeg v. Mowery, 72 Wn.2d 754, 755-59, 435 P.2d 540 (1967). The policy behind the rule requiring expert testimony on standard of care, in medical negligence actions, is to prevent speculation as to what is the standard of reasonable care in a highly technical profession. *Housel v. James*, 141 Wash. App. 748, 759, 172 P.3d 712 (2007).

Indeed, Washington Courts have held that medical experts must provide a jury with sufficient information "to establish a standard of care against which a jury must measure a defendant's performance. ..." *Adams v. Richland Clinic, Inc., P.S.*, 37 Wash. App. 650, 655, 681 P.2d 1305 (1984) (citation omitted) (holding "we are unable to find plaintiff presented evidence of a statewide standard of care rather than a local standard or mere personal opinion..."). The *Adams* court specifically discussed the insufficiency in the expert testimony in that case noting:

> The questions propounded were not in standard of care terminology; accepted practices in Washington were not identified either before or after the experts stated their opinions were personal. At no time did an expert express an opinion that a failure to conform to the Alden/Mason literature was conduct inconsistent with a recognized standard of care. ... We therefore affirm dismissal of the treatment claims. Having determined no Washington standard of care was presented to the trial court, it is unnecessary to address plaintiff's further premise that the 'reasonable prudence' standard and not the 'average practitioner' rule should be applied on remand to evaluate these claims.

Id. at 655-56.

In *Hayes v. Hulswit*, 73 Wn.2d 796, 440 P.2d 849 (1968), the Washington State Supreme Court addressed a similar issue and dismissed a plaintiff's case during trial because there was insufficient evidence to establish a standard of care offered by the plaintiff. There, the trial judge dismissed the plaintiff's case during trial because there was insufficient evidence to establish a standard of care:

> When the trial judge dismissed the jury, he explained that a case like this 'requires testimony by other physicians of a failure to live up to the standard of care of a doctor in this community, and basically my decision to dismiss the case is based on the failure of the medical testimony to come up to that requirement.'
>
> After a careful reading of the record, we agree with the trial court's conclusion.
>
> Keeping in mind that this action is not based upon defendant's negligence causing the original fracture when the impacted wisdom tooth was extracted, but upon the claim that defendant's subsequent treatment was negligent, we find nothing in the record to establish a medical standard of care that defendant breached during this period.

Id. at 797-99.

Next, a plaintiff must submit competent, expert testimony of the professional equals of the defendant. *Guile v. Ballard Community Hosp.*, 70 Wash. App. 18, 21, 851 P.2d 689 (1993). A health care provider's conduct is to be measured against the standard of care of a reasonably prudent practitioner possessing the degree of skill, care and learning possessed by other members of the same area of specialty in the State of

Washington. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (construing RCW 7.70, *et seq.*). The jury does not get to choose which standards will apply in their community. Rather, the standard is determined on a case-by-case basis as determined by a reasonably prudent physician acting in the same or similar circumstances as the defendants. This must be established through expert testimony. *Guile*, 70 Wash. App. at 21.

Here, Mr. Grove impermissibly invited the jury to come to the determination that *any care* resulting in harm to a patient is negligent. This is not the law. A provider does not guarantee the results of his or her care a treatment. WPI 105.07. A poor medical result is not, by itself, evidence of negligence. *See, Christensen v. Munsen*, 123 Wn.2d 234, 348, 867 P.2d 626 (1994).

C. Mr. Grove failed to disclose expert criticisms against specific providers or staff; he could not do so at trial.

Trial is not a game of blind man's bluff, but a fair contest of parties given a fair opportunity to use evidence. *Gammon v. Clark Equipment Co.*, 38 Wash. App. 274, 280, 686 P.2d 1102 (1984). Non-disclosed expert testimony cannot be raised for the first time at trial. *See Lancaster v. Perry*, 127 Wash. App. 826, 832-33, 113 P.3d 1 (2005).

Mr. Grove first failed to disclose the extent of the expert testimony he tried to present at trial. Instead, he relied on ambiguous references to responsibility for the "team", without properly establishing the team members, such as specific doctors or the nursing staff, and what each should or should not have done differently. He relied solely on the argument that the original surgeon (remember, his experts had no criticisms of Dr. Zech or Dr. Douglas) is the "captain of the ship", responsible for unidentified provider's unspecified failure to diagnose or facilitate diagnosis. (CP 698, expert Dr. Adams' reference) Even the time period when this elusive violation might have occurred remains indeterminate – his own experts disagreed on this. (CP 671; Ghidella RP [June 20], at 46-47)

Accordingly, Mr. Grove has failed to disclose and present the necessary evidence to establish a standard of care that the jury could properly measure Mr. Grove's providers against. The jury lacked sufficient evidence to make a determination that a violation of any standard occurred here, and obviously resorted to the consideration of inadequate evidence (such as Dr. Adams' stricken PT and nursing staff violations, CP 675, 695-96), as a matter of improper inference. The judge, who listened to all the evidence, recognized the error in the consideration of the jury's decision, and corrected that error. (CP 768-71)

Mr. Grove's theory is that the "team" failed to diagnose a complication of surgery without first identifying which team member failed, and whether such failure was a divergence from the standard of care. Even with a "team" approach, Grove was required to prove negligence on the part of the particular employee/provider. Were he not required to, then almost every bad outcome in a team setting like a hospital would result in liability. Our courts have long cautioned against imposing liability merely because of a bad outcome. *Christensen,* 123 Wn.2d at 348.

D. The law does not hold a physician legally responsible for the "team" of other providers.

Mr. Grove's sole claim is based on a premise, unsupported by authority, that because there was a "team" approach to his care, he did not need to present evidence of a standard of care nor a specific violation of that standard. The case law Mr. Grove cites does not support that novel legal theory of liability.

Mr. Grove cites *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937) and *Thompson v. Grays Harbor*, 36 Wash. App. 300, 675 P.2d 239 (1983). First, neither of these cases involved claims of professional negligence requiring standard of care be established by competent expert medical testimony under RCW 7.70, *et seq*. Second, neither supports his

argument that he was not required to name a specific negligent employee to make an employer liable under *respondeat superior*. Both cases are distinguishable -- they found the entities liable under *respondeat superior* where the negligent actor was **identified** but not **named** in the lawsuit. See, e.g., *Thompson*, 36 Wash. App. at 304.

Here, only Dr. Leone (on vacation when the compartment syndrome arose) and Dr. Mostad (not a PeaceHealth doctor and dismissed by Mr. Grove) were identified by their experts. Mr. Grove was thus limited in his proof at trial to the specific acts of Dr. Leone -- none, except ambiguously that he headed the "team". No other PeaceHealth provider was identified and criticized[2] as to some specific act he or she committed.

If this Court were to accept Grove's novel theory of liability, a hospital defendant will become liable for any bad outcome. A plaintiff would not have to prove negligence specific to a hospital provider. This outcome is flatly contrary to the plain language of RCW 7.70 *et seq.* and the legion of case law providing that claims of medical negligence require experts to establish standard of care and causation against a specific **health care provider.**

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[2] See Footnote 1 above. At trial, Dr. Adams did not mention the PA Mr. Spears' name at all: "[If] the PAs make a mistake, it's the head of the ship's mistake? Correct." (CP 698)

Under Grove's theory, the negligence of a nurse could be imputed to a surgeon, even if that surgeon had no supervisory control over that nurse, just because there was a "team" approach to the care. This case provides pointed evidence of the absurdity -- Dr. Leone is somehow responsible for the nurse or physical therapist even though he was on vacation with his family in New Jersey? This makes no sense.

E. The testimony supports the trial court's decision.

Each medical witness testified that this compartment syndrome case was extremely rare -- Mr. Grove's lack of pain was very unusual. (E.g., CP 712-13) Virtually all the witnesses also agreed that only the late neurological signs would have led them to a diagnosis, absent pain. (E.g., Dr. Mostad RP [June 14], at 44-45 -- "dramatically different" on Dec. 31) Those late signs – particularly foot drop – did not develop until late on Dec. 30 and was <u>not</u> known until early in the day by Dr. Douglas and Dr. Mostad on Dec. 31. (CP 417-18; Dr. Douglas RP [June 19-20], at 102-03) This was the day the compartment syndrome was diagnosed. And, even Dr. Adams admitted he had no specific criticism of Dr. Douglas here. (CP 710)

Rather, Dr. Adams and Mr. Grove relied heavily on the theory that the cardiac surgeon was responsible for everything the "team" did and that cumulatively the "team" failed to diagnosis the compartment syndrome in

time. First, even though (1) Dr. Leone was in New Jersey on vacation, (2) Dr. Adams could not be critical of anything specific that Dr. Douglas did or did not do (*Id.*), and (3) Dr. Ghidella did not even know who Dr. Douglas was (Dr. Ghidella RP [June 20], at 39), Mr. Grove argues the surgeons were still responsible for whatever was in the record and whatever the "team" did. This is misguided. Specifically, the trial court instructed the jury not to consider what the "team" failed to do – *because Mr. Grove did not disclose those acts of potential negligence.* (CP 695-96) The point we raise here is exactly this – a doctor cannot be held responsible, under RCW 7.70, for what other providers do or write, only for his own negligence or inaction.

Second, only doctors diagnose – not the rest of the "team". What the doctors know or do not know is critical. A nursing failure or a PT note not communicated to the doctors cannot serve as a failure of the doctor to diagnose. *Gates v. Jensen,* 92 Wn.2d 246, 251, 595 P.2d 919 (1979) (the relevant facts are those "the physician knows or should know"). Thus, the doctors' lack of knowledge about the PT findings late on Dec. 30 cannot serve as a basis for his failure to diagnose. The Appellant's option there was to disclose that claim of the failure to communicate by the nurse or PT, which they did not, and allow PeaceHealth to defend it. Mr. Grove did not choose to do so, even though he tried an ambush of the PT issue

through Dr. Adams, at trial.

He neither disclosed violations of nurses or staff members nor provided expert opinions critical of them. Thus, as a matter of law, Mr. Grove could not and did not meet the requirements of RCW 7.70, in that he failed to offer expert testimony establishing a standard of care violation by any PeaceHealth staff member, specifically as to the doctors or generally as to the nurses or PTs.

F. The "Captain of the Ship" theory is not applicable here.

The "captain of the ship" doctrine does not save him. It is applicable only in cases involving care that occurred in the operating room setting. Washington courts have not extended or expanded this theory to include any other type of medical care. *Van Hook v. Anderson,* 64 Wash. App. 353, 363-365, 824 P.2d 509, 514-15 (1992); *Kemalyan v. Henderson,* 45 Wash.2d 693, 700, 277 P.2d 372 (1954); *Thomas v. Hutchinson,* 442 Pa. 118, 275 A.2d 23, 27 (1971). Only in the OR is the purported "captain" *present with and exercising direct control over the other providers at issue.* The "captain of the ship" theory is, therefore, inapplicable beyond Mr. Grove's actual surgical procedure. Rather, each provider is responsible, legally, for his or her <u>own</u> negligence, if any (and, if a Hospital employee, the Hospital is responsible vicariously).

As the Court instructed the jury, a Hospital acts through individuals (WPI 105.02.01; CP 331, Jury Instruction 5). Logically, expert opinion necessary in a malpractice action must be critical of individual providers' actions or inactions, not generalities.

Here, Mr. Grove attempts to utilize this theory to compensate for the lack of a specific allegation of negligence against one or more of Mr. Grove's providers. His effort here attempts to gloss over his failure to disclose specific claims or "failures" by asserting the general "captain" argument; this makes no sense and it belies the facts and is contrary to the RCW 7.70, *et seq.*

Though PeaceHealth may have dedicated a team of providers, each worked independently and in accord with their own education, training and scope of practice. Though the surgeons viewed themselves as leaders, supervisors of the care, this does not form a basis for the application of the "captain of the ship" legal theory or agency principles. The theory does not apply in this setting, as argued here, to connect providers who were not under the direct control of one another. Its use here simply points out the insufficiency in Mr. Grove's evidence and expert testimony.

VI. CONCLUSION

The trial court was correct to grant PeaceHealth's motion to vacate the jury verdict. As a matter of law, a claim for medical negligence

requires identification of a health care provider whose conduct fell below the standard of care as established by competent expert medical testimony. On the Appellant's theory, no proper expert evidence was disclosed or raised at trial – a doctor who is across the country at the time of the supposed negligence is not responsible for unspecified and non-disclosed "team" negligence.

This Court should reject Mr. Grove's proposed theory that would create a generic liability for a hospital defendant providing multiple provider care, merely because of a bad outcome. Without more, the statutory scheme of RCW 7.70 would be ineffectual and irrelevant.

Respectfully submitted this 20th day of May, 2013.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP

By: _____

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on May 20, 2013, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

DATED this 20th day of May, 2013 at Seattle, Washington.

Sandra Cameron

Sandra Cameron, Legal Assistant