71497-0

NO. 71497-0-I
(Consolidated with Nos. 71498-8-I and 71553-4-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

OLIVER L. WUTH, a minor, through his Guardian Ad Litem Keith L. Kessler; and BROCK M. WUTH and RHEA K. WUTH, husband and wife,

Plaintiffs-Respondents,

v.

LABORATORY CORPORATION OF AMERICA, a foreign corporation; KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a VALLEY MEDICAL CENTER, et al.,

Defendants-Appellants,

and

JAMES A. HARDING, M.D.; and OBSTETRIX MEDICAL GROUP OF WASHINGTON, INC., P.S., a domestic corporation

Defendants.

BRIEF OF *AMICUS CURIAE* WASHINGTON STATE HOSPITAL ASSOCIATION

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I. INTRODUCTION

WSHA respectfully submits that to the extent the lower court decision relied on the doctrine of corporate negligence to hold Appellant Valley Medical Center ("Valley") liable for the Wuths' damages, the decision is inconsistent with other cases in which the doctrine has been applied and with the statutory scheme adopted in this state in 1976 and codified in Chapter 7.70 RCW. Under both the cases and RCW 7.70.040, the plaintiff must prove the four elements of duty, breach, causation, and damages, in order to prevail in a claim of corporate negligence. *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984). The Respondents have not done so here.

At its core, this case revolves around the ordering of a medical test and the subsequent actions taken in relation to the ordering of the test. The damages suffered by the Wuths were caused because the genetic testing did not reveal the presence of a chromosomal translocation. If the testing had identified the translocation, then the damages would not have occurred.

The chain of events that resulted in the translocation not being identified is contested. The Wuths' corporate negligence claim seeks to apply the doctrine in a way not previously recognized in Washington, because it fails to address the questions, as required under Chapter 7.70

RCW, of whether Valley breached the standard of care in conducting genetic testing, and whether any such breach caused plaintiffs' claimed injuries.

The Wuths' assertion that hospitals have a generalized duty to "staff and train" is not a sound method for evaluating corporate negligence in this case. Focusing on these vague duties places form over substance and avoids an evaluation of the actual causes of the patient's injuries. If a hospital normally staffs its Emergency Room with a physician and a physician's assistant, along with nursing and other staff, and there is no physician assistant on a shift, the hospital may have failed to appropriately staff its ER. However, if the physician, whose scope of practice encompasses that of a physician assistant, and other staff on duty meet the standard of care in providing emergency care to patients who present to the ER during that shift, there is no basis to impose corporate liability on the hospital for a patient's complications based on the absence of a physician assistant. The fact that the care was provided by a physician, rather than a physician assistant, is irrelevant in determining whether the hospital met its duty of care in providing health care to the patient.

In this case, Dr. Harding stepped into the role of a genetic counselor in ordering the test. Therefore, the questions are whether he met the standard of care in proceeding with and ordering the genetic test,

whether the administrative assistant met the standard of care in completing the paperwork, and whether those actions were the proximate cause of the Wuths' injuries. Under these circumstances there is no basis to find Valley corporately negligent for the Wuths' injuries.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Hospital Association ("WSHA") is a nonprofit membership organization representing Washington's 99 community hospitals. WSHA works to improve the health of the people of the State by advocating on matters affecting the delivery, quality, accessibility, affordability, and continuity of health care.

WSHA's members will be directly affected if the lower court's apparent application the corporate negligence doctrine in this case is upheld. Such a ruling on corporate negligence will effectively impose strict liability on hospitals for their staffing, training or scheduling decisions. Plaintiffs will no longer be required to prove a nexus between a hospital's duties and an injury, and hospitals will become the sole target of all negligence claims for any injury that occurs within a hospital. Hospital patients will bear the burden of the increased costs resulting from such expanded corporate liability.

III. STATEMENT OF THE CASE

WSHA relies on the statement of the case in the Appellant Valley Medical Center's Brief.

IV. ARGUMENT

A. The Corporate Negligence Claims in this Case are Duplicative of the Vicarious Liability Claims.

It is well settled, under the doctrine of corporate negligence, that a hospital owes a separate, nondelegable duty directly to its patients. *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991). This duty was first recognized in Washington in *Pedroza*, in which the court explained that "corporate negligence differs from respondeat superior." *Pedroza*, 101 Wn.2d at 229.

Claims against a hospital for corporate liability and vicarious liability should be treated as mutually exclusive claims. See WPI 105.02.02 comment (corporate negligence instructions "should not be used for issues involving direct negligence of a hospital employee in the performance of medical care.") Decisions imposing liability on hospitals under the corporate negligence doctrine have done so only where there was no vicarious liability. *Schoening v. Grays Harbor Comm'y Hosp.*, 40 Wn. App. 331, 334 n.2, 698 P.2d 593 (1985) (independent contractor). Such an approach is consistent with the approach of courts in non-hospital contexts in dealing with claims of both respondeat superior and negligent

supervision, finding the inclusion of both claims duplicative, unnecessary or redundant. See, e.g., *Gilliam v. Department of Social & Health Services*, 89 Wn.App. 569, 585, 950 P.2d 20 (1998); *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 866, 991 P.2d 1182 (2000); *Rodriquez v. Perez*, 99 Wn.App. 439, 450, 994 P.2d 874 (2000).

Here the Wuths identified and presented to the jury specific theories of the hospital's vicarious liability. Accordingly, the trial court should never have reached the issue of corporate negligence in this case.

B. The Corporate Negligence Claims are Governed by RCW 7.70 Because the Injury Occurred as a Result of Health Care.

An action for injuries resulting from health care is a statutory cause of action. RCW 7.70.010. The court in *Branom v. State*, 94 Wn.App. 964, 969, 974 P.2d 335, *review denied*, 138 Wash.2d 1023, 989 P.2d 1136 (1999), determined that RCW 7.70.010 modified the "procedural and substantive aspects of **all** civil actions for damages for injury occurring as a result of health care, regardless of how the action is characterized." *Hall v. Sacred Heart Medical Center*, 100 Wn.App. 53, 61 (1999) quoting *Branom* (emphasis added). Thus, chapter 7.70 RCW governs all aspects of civil actions and causes of action against health care providers for all damages occurring as a result of health care. RCW 7.70.010. A hospital is a health care provider. RCW 7.70.020(3); *Miller v. Jacoby*, 145 Wn.2d

65, 72, 33 P.3d 68 (2001). As a result, claims against a hospital for corporate negligence for damages occurring as a result of health care are subject to the provisions of Chapter 7.70.RCW.

For purposes of RCW 7.70, "health care" is "the process in which [a physician is] utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient." *Branom,* 94 Wn.App. at 969-70 (quoting *Estate of Sly v. Linville,* 75 Wn.App. 431, 439, 878 P.2d 1241 (1994)). In this case, the Wuths' injuries resulted from the performance of genetic testing done to diagnose a chromosomal translocation. This testing was clearly part of the process of examining, diagnosing, treating or caring for the Wuths and therefore falls within the definition of "health care." Respondents' Brief 46 ("The Wuths sued under RCW ch. 7.70 for 'injury arising from health care'").

C. The Relevant Standard of Care Under RCW 7.70 is the Standard of Care Related to the Injury Alleged.

To prove a claim of corporate negligence, a plaintiff must prove that the injury resulted from the failure of a hospital to follow the accepted standard of care. RCW 7.70.040. The applicable standard of care must be determined in terms of the injury alleged. The independent duty of care hospitals owe their patients is not an abstract concept to be considered separate and apart from the care that is provided. Rather, there must be a

direct link between the duty, the alleged breach, and the injury. A plaintiff must prove that the hospital "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider...acting in the same or similar circumstances." *Id.*

Here, the injury occurred as a result of genetic testing. Thus, the Wuths must prove that Valley did not exercise the reasonable prudence in arranging for and ordering a genetic test to determine the presence of a chromosomal translocation. This requires evaluating the services that were actually performed and the standard of care applicable to those services.

The actual services performed here were ordering genetic testing. Under RCW 7.70.040, the identity and professional background of the health care provider ordering the testing is not relevant. The only relevant consideration is whether that health care provider exercised the same degree of care as that of a reasonably prudent health care provider in ordering the test. RCW 7.70.040. This is a reasonable prudence standard. *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 445, 451, 663 P.2d 113 (1983). The standard of care actually practiced by members of the profession is evidence of what is reasonably prudent, but it is not dispositive. *Adair v. Weinberg*, 79 Wn. App. 197, 203-04, 901 P.2d 340 (1995). Given that the standard of care is not controlled by the practices

of a specialist, there is no basis to conclude that the standard was violated merely because a non-specialist undertook a task, within the non-specialist's scope of practice, typically performed by specialists. Accordingly, the fact that genetic testing was not ordered by a genetic counselor is insufficient to demonstrate a breach of the standard of care.

D. Imposing Corporate Liability Based Solely on Generalized Duties Will Have the Practical Effect of Making Hospitals Strictly Liable for All Injuries in Hospitals

Respondents seek to establish new duties, the alleged breach of which has not been shown to be the proximate cause of the injury in question. Appellant Valley's Reply pp. 5-8, 10, 11.

Rejecting generalized assertions that additional staff, additional training, or different scheduling would have avoided an injury, does not "eviscerate [Valley's] duty to make institutional decisions with due regard for patient care" (Respondent's Brief at 57), rather it is the required recognition that a bad outcome does not mean a hospital has breached the applicable standard of care. Negligence cannot be inferred from the mere fact of a bad result. *See, Guile v. Ballard Community Hospital*, 70 Wn.App. 18, 26 (1993); *Watson v. Hockett*, 107 Wn.2d. 158, 161, 727 P.2d 669 (1986).

Finding corporate negligence for inadequate scheduling, staffing or training where those duties are not directly related to the care that

allegedly gave rise to the injury has the very real possibility of leading to the "unfettered hospital liability" that has been identified as a concern if corporate liability is subject to unclear standards. *See, The Emerging Trend of Corporate Liability: Courts' Uneven Treatment of Hospital Standards Leaves Hospitals Uncertain and Exposed*, 47 Vand. L. Rev. 535, 571 (1994). The cost of this liability will be passed on to patients through increased costs and fees. *Id.*

Respondents suggest a hospital should be held corporately liable when staff hours are cut or a position is left vacant ("...Valley cut its genetic counselor coverage from three days to one day a week" and "Valley allowed its Clinic to operate without a manager..." Respondents' Brief at 61-62.). Yet, as Appellant Valley explains, the Wuths failed to establish proximate cause between these alleged breaches of the hospital's standard of care and the lab overlooking the Wuths' genetic history. (Appellant Valley's Reply at 5-8, 10-11) There is no case law to support holding hospitals corporately liable in the absence of a causal connection between an alleged breach of a duty and an injury. The risk of such an approach is amply demonstrated here—it opens the door to prejudicial testimony regarding hospital resources and speculation about how those resources might have been used to avoid the injury. Respondent's Brief is replete with prejudicial language that demonstrates the expanded liability

risk such an application of the corporate liability doctrine will pose for hospitals that are profitable or successful. ("[i]ncreasingly profitable" Respondents' Brief 9; "Valley had seen ... its patient revenue grow..." Respondents' Brief 10; "...Valley was not even spending the $980,000 it had budgeted for patient care in the Clinic...." Respondents' Brief 11).

In essence, Respondents' suggest that the hypothetical allocation of resources determines the standard of care; the possibility of different scheduling, different staffing or different training means a hospital is corporately negligent. This view of liability is based on speculation and conjecture, not an analysis of the facts that caused the injury. It is contrary not only to the requirements of RCW 7.70, but also to established case law. *See Alexander v. Gonser*, 42 Wn.App. 234, 241, 711 P.2d 347, 352 (1985) ("Proximate cause must be established by evidence which rises above speculation, conjecture, or more possibility".) The focus must be whether the health care received fell below the standard of care, not whether the health care could have been provided in a different manner. To do otherwise is to effectively impose strict liability on hospitals.

V. CONCLUSION

For these reasons, the Washington State Hospital Association urges the court to find that the trial court misapplied the corporate

negligence doctrine and that the Respondents' corporate negligence claim fails as a matter of law.

RESPECTFULLY SUBMITTED this 24th day of February, 2015.

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