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COURT OF APPEALS
DIVISION ONE
APR - 5 2013



NO. 69556-8-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RAYMOND GROVE,
Appellant

v.

PEACEHEALTH ST. JOSEPH'S HOSPITAL,
Respondents.

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Raymond Grove (hereinafter Grove) had cardiac surgery at Peace Health Hospital (hereinafter Peace Health) on December 21, 2006. Following surgery he was in the Peace Health Intensive Care Unit, hereinafter (ICU) at Peace Health from December 21, 2006 through December 31, 2006 during which time he developed compartment syndrome in his left leg resulting in disabling injury to that leg.

Grove brought a medical malpractice action against Peace Health for its negligent failure to adequately monitor Grove for development of compartment syndrome so as to be able to prevent the subsequent damage.

The case was tried to a jury before Hon. Judge Steven J. Mura in Whatcom County Superior Court. The jury returned a special verdict in which it answered “yes” to the first question which asked whether defendant was negligent and “yes” to the second question which asked whether the negligence was a proximate cause of injury to plaintiff Raymond Grove. (CP 347-348)

After the jury was discharged plaintiff moved for Entry of Judgment upon the Jury Verdict. (CP 565-566)

After discharge of the jury defendant brought a Motion to Vacate verdict and/or for Judgment as a Matter of Law on various theories. (CP 349-362)

Plaintiff responded to defendant's Motion and the matter was heard before Hon. Judge Mura on September 26, 2012.

After argument the court granted defendant's post trial Motion (CP 740-741) granting Judgment in favor of Peace Health as a matter of law.

II. ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred in entering the order Vacating the Jury Verdict in favor of plaintiff previously entered June 28, 2012.

Issues Pertaining to Assignment of Error

- 1) When a hospital treats a patient under a team management scheme made up of its employees, is a Plaintiff who is injured due to the team's failure to meet the standard-of-care in his treatment required in all factual situations to identify the specific individual member of the team whose negligence was ultimately the proximate cause of plaintiff's injury?
- 2) Is the surgeon head of a hospital treating team a negligent actor responsible for his failure to provide standard-of-care treatment to a patient or for failing to instruct members of the team to provide standard-of-care treatment to a patient when such failure results in injury to that patient?
- 3) Was the evidence presented at trial sufficient to allow the jury to find that defendant Peace Health was responsible for the negligence of its employees and that such negligence was a proximate of plaintiff's injuries without specifically identifying which specific employee's negligence proximately caused plaintiff's injury?
- 4) Was there evidence sufficient for the jury to find that Dr. Leone was individually negligent in his care and treatment of

Mr. Grove following surgery and that such negligence was a proximate cause of Mr. Grove's injury?

III. STATEMENT OF THE CASE

a) Course of Care

Raymond Grove had heart surgery at defendant Peace Health Hospital on December 21, 2006 performed by Dr. Richard Leone and assisted by Dr. James Douglas. (Douglas RP 3, IIs 14-19). Dr. Leone was primary care giver for Grove at Peace Health from December 21, 2006 to December 25, 2006. (Leone RP 9, IIs 1-3; 19, IIs 4-10). Grove had a series of post-surgical complications which required an extended stay at Peace Health ICU. He was sedated and intubated for several days following surgery. (Mostad RP 9, IIs 7-16).

Dr. Sara Mostad, an infectious disease specialist, was originally called in by Dr. Edward Zech, a Peace Health Cardio Thoracic (hereinafter CT) surgeon, to consult on Grove's condition due to a positive blood culture on December 26, 2006. (Mostad RP 39, IIs 11-16; 3, IIs 1-7). Dr. Mostad consulted on infectious disease issues with Grove from December 26, 2006 through December 31, 2006. (Mostad RP 9, IIs 1-5).

Grove developed symptoms in his left lower extremity including swelling and redness for which an ultrasound test was ordered and performed which ruled out DVT on December 29, 2006. (Douglas RP 44,

lls 3-15; 45, lls 1-18). On December 29, 2006 Grove had developed decreased dorso-flexion in both lower extremities, left greater than right. (Douglas RP 69, lls 12-20). Dr. Mostad initially made a “probable cause” diagnosis of cellulitis. (Mostad RP 25, lls 2-4, 19-21). Grove’s symptomology was also consistent with compartment syndrome. (Mostad RP 27, lls 14-21).

On December 31, 2006, Grove’s first day out of ICU, Dr. Mostad noted worsened neurologic findings in his left foot termed foot drop. (Mostad RP 16, lls 9-25). Foot drop indicated that damage in the compartment has already occurred. (Zech RP 24, lls 22-25; 25, lls 1-8). Dr. Douglas testified that compartment syndrome will typically develop shortly after surgery and not 9 or 10 days later. (Douglas RP 30, lls 5-9).

Grove’s increased symptoms caused Dr. Mostad a concern that Grove was suffering from compartment syndrome, though diagnosing this condition was far outside of her area of expertise in infectious disease. (Mostad RP 21, lls 3-11). Dr. Sara Mostad consulted with Dr. James Douglas, the CT team surgeon then in immediate charge of Grove’s care. Dr. Douglas then called in non-employee surgeons, Dr. James P. Miller and Dr. Steven Bruce. Dr. Bruce did a palpation of Grove’s lower anterior compartments and found the anterior compartment firmer on the left than right indicating increased pressure inside that compartment. (Bruce CP

0534, 0535) Dr. Miller did a compartment pressure test with a resulting reading of 35, an elevated pressure. (Douglas RP 71, lls 2-25; 88, lls 18-25)(Ghidella RP 11, lls 20-25; 12, lls 1-8). Drs. Bruce and Miller performed decompression surgery on Grove on December 31, 2006. Grove had, in fact, developed compartment syndrome which had by the time of surgery progressed to the point that there was substantial muscle loss and Grove suffered extensive damage to his leg as a result. (Ghidella RP 12, lls 1-8).

(b) Health Care Provider Team

At all times relevant Peace Health employed a team concept for taking care of patients, including Grove. (Douglas RP 3, lls 8-9; 10, lls 18-25; 11, lls 1-18).

The “team” following Grove consisted of Dr. Leone, Dr. Zech, and Dr. Douglas, the three CT surgeons at Peace Health. (Zech RP 4, lls 9-24). A minimum two of the surgeons would be involved in the team rounds. (Leone RP 28, lls 13-25; 29, lls 1). The team always rounded on a patient at least twice a day. (Leone 10, lls 21-25; 11, lls 1-4) (Douglas RP 12, lls 25; 13, lls, 1-20). Dr. Leone described the CT patient coverage as “It’s all one big team.” (Leone RP 29 lls 18). Dr. Douglas testified that this team concept provided the best patient care. (Douglas RP 10, 23-25; 11, 1-18).

Dr. Leone, testified in describing the typical rounding which would have applied to Grove, that after collecting the pertinent data the surgeons present on the rounding team would formulate a plan “and the plan is made between the surgeons who are there and the PA’s and the nurses carry out the plan.” (Leone RP 30, lls 18-25; 31, lls 1).

Dr. Leone testified that he would follow a patient like Grove “very closely” post-surgery because a lot of complications can happen with this sort of operation. (Leone RP 7, lls 16-20).

Despite the team patient management model employed by Peace Health in treating and monitoring Grove, Dr. Leone was still considered Grove’s attending physician and Grove was always his patient. (Leone RP 27, lls 24-25; 28, lls 1-4; Leone RP 33, lls 1-9; 42, lls 12-14)

(c) Compartment Syndrome

Raymond Grove suffered a compartment syndrome in the left anterior compartment whose late diagnosis resulted in muscle necrosis. (Ghidella RP 11, lls 25; 12, lls 1-8) Compartment syndrome is a known complication from a long surgery of the type Grove underwent. (Leone RP (38) 24-25; (39) 1-5) (Quinton RP (6) 13-14) (Zech RP (34) 3-5) (Bruce CP 0537, 0538) (Ghidella RP (16) 18-25)(Douglas RP (31) 8-19). Elevated pressure or hardness in the compartment is the one absolute manifestation of a compartment syndrome. (Zech RP (26) 4-8) (Douville

RP (31) 15-20) (Bruce CP 0546) (Quinton RP (19) 2-7)(Ghidella RP (16) 14-15; (19) 13-18) (Leone RP (48) 2-3)(Douglas RP (72) 1-4). Time is of the essence in diagnosing and treating compartment syndrome to limit or prevent damage. (Bruce CP 0541) (Quinton RP (20) 13-19)(Douville RP (32) 5-8)(Zech RP (41) 17-23)(Ghidella RP (33) 23-25; (34) 1-2).

Palpation of the compartment is a simple, reliable non-invasive method to monitor for hardness or excessive pressure in the compartment indicating compartment syndrome and/or give suspicion enough to do a needle pressure test. (Bruce CP 0534, 0535)(Quinton RP (23) 13-25; (24) 1-18) (Douville RP (26) 18-25; (27) 1-3)(Ghidella RP (18) 9-13; (19) 9-25; (20) 1-6; (30) 7-21). Undiagnosed and untreated compartment syndrome can result in devastating damage to a patient. (Douglas RP 83, lls 25; 84, lls 1-3). If timely diagnosed and operated on the patient can suffer no permanent impairment. (Zech RP 41, lls 17-23).

(d) Standard-of-Care

Dr. Sean Ghidella, plaintiff's expert, testified that the Peace Health medical care team treating Grove between December 21, 2006 and December 31, 2006 failed to meet the standard-of-care in monitoring Grove's condition, with late diagnosis of compartment syndrome resulting in permanent injury to his left leg. (Ghidella RP 8, lls 21-25; 9, lls 1-17). The standard-of-care monitoring for compartment syndrome should have

included “the simple act of squeezing the leg to test for how firm or tense the compartments were . . .” (Ghidella 10, lls5-17; 18, lls 7-20). The standard-of-care was that such be done at least twice a day. (Ghidella RP 35, lls 19-22).

Ghidella further opined that when Grove was sedated or intubated increased monitoring or vigilance beyond the routine required monitoring should have been done. (Ghidella RP 10, lls 11-17).

Defendant did not object to the foundation of Dr. Ghidella’s standard-of-care opinions.

(e) Defendant’s Standard-of-Care

Defendants did not define a contrary specific standard-of-care monitoring requirement for compartment syndrome in this case other than by asserting that they did not need to suspect compartment syndrome until Grove demonstrated “severe pain” or “exquisite, excruciating pain.” (Douglas RP 79, lls 3)(Zech RP 42, lls 19).

IV SUMMARY OF ARGUMENT

Judge Mura’s decision does not question whether or not the Jury’s Verdict was correct, but whether under respondeat superior Peace Health should be held responsible for negligent but unnamed employees.

V ARGUMENT

Judge Mura's decision to vacate the jury verdict was based on his opinion that since plaintiff's claim was based on the negligence of the team of Peace Health employees caring for Mr. Grove, rather than on an identified specific individual employee, Peace Health was not responsible under respondeat superior for Grove's damages. While plaintiff's claim, and Peace Health's defense, were mainly based on whether or not the Peace Health team of employees met the standard-of-care in treating Grove, the plaintiff's case also dealt with specific individual negligence on the part of Dr. Leone.

1. Individual Negligence of Dr. Leone

Dr. Leone was at all times in this case Grove's attending physician and directly cared for him from the day of surgery, December 21, 2006 through December 25, 2006. Dr. Carl Adams, plaintiff's expert, was of the opinion that Dr. Leone, the primary surgeon, was individually negligent for failing to have directed and instituted appropriate monitoring from the start of Grove's stay in ICU. Dr. Adams' opinion was that Dr. Leone's failure to monitor Grove's condition to the standard-of-care set into motion deficient standard-of-care monitoring and such deficient monitoring continued until December 31, 2006 by those filling in for Dr.

Leone from December 25, 2006 to December 31, 2006. (Adams RP 37, lls 5-9).

Dr. Ghidella was also of the opinion that the surgeon of record, Dr. Leone, was individually negligent. (Ghidella RP 22, lls 1-25; 23, lls 1-4; 24, lls 1-7).

That Dr. Leone did not pass on instructions as to standard-of-care monitoring came from Dr. Zech:

Mr. Keefe: Did you instruct anybody on the team under you that this was a known complication to keep your eyes out for it?

Dr. Zech: Not specifically, no.

Mr. Keefe: Do you recall whether anybody else on the team did that?

Dr. Zech: I do not.
(Zech RP 34, lls 12-18).

There was no evidence contradicting Dr. Adams' or Dr. Ghidellas' expert opinions that Dr. Leone was individually negligent for his failure to adequately monitor, or to assure those covering for him, would appropriately monitor Mr. Grove in his absence.

2. Team Negligence

Judge Mura stated that he asked plaintiff's counsel a couple times what was his theory of the case. (Mura RP 21, lls 1-7). Judge Mura did ask plaintiff's counsel this question during the testimony of Dr. Adams.

The Court: What is it that you're theory of your case is?

Mr. Keefe: The theory of the case is that they failed to, that the team, the team caring for Mr. Grove failed to diagnose a compartment syndrome that existed while he was in the hospital. And Dr. Adams is showing what things were there that the team should have picked up that would have indicated to them that it was a compartment syndrome and that they would have diagnosed it soon enough to prevent damage.

The Court: So it's a failure to diagnose.

Mr. Keefe: It's a failure to timely diagnose I would say probably since it was eventually diagnosed but too late.

The Court: Is that the defense's understanding of the theory of their case?

Mr. Burnham: Generally, yes.
(Adams RP 28, lls 5-21)

Defendant could hardly disagree that the team concept was the basis of plaintiff's claim or their defense. Defendant was consistent throughout this case that Grove's care was provided by a team run by Drs. Douglas, Zech, and Leone and that such treatment structure was superior to the individual care model.

There was no disagreement in this case that a team made up of various Peace Health employees was responsible for the overall care of Grove over a period of 10 days. Grove's health depended on the non-negligent care of the team. The specific issue in this case was not whether this was a team versus individual care case, the issue was: Did defendant, through its employees, meet the standard-of-care for monitoring Grove following surgery?

Based on the testimony and evidence defendant asserted that monitoring for compartment syndrome was not called for until the possibility of its presence was manifested by exquisite pain in a compartment. In his opening statement Mr. Burnham prepared the jury for Peace Health's theory of standard-of-care in this case:

And if you didn't have that severe pain at all during those nine days of post-operative follow-up, then why are you going to look at compartment syndrome as a potential problem? You're not.

There's another reason why you don't look at compartment syndrome as a potentiality problem and that is it's extremely rare. (Burnham RP 19, lls 21-25; 20, lls 1-2)

Based on the evidence in this case the specific time of onset of compartment syndrome is unknown because standard-of-care monitoring was not done. Without knowing the time of onset there was no way to determine which individual's failure to monitor was the proximate cause of Plaintiff's injury unless there was a standard-of-care monitoring plan in place. However, it is irrelevant in this case which individual on the team would have had the obligation to perform standard-of-care monitoring on whatever day the compartment syndrome first developed because it was uncontroverted that no one on the team, no Peace Health employee, did standard-of-care monitoring or gave orders to do such standard-of-care monitoring.

(3) Jury Verdict on Peace Health Liability

Judge Mura speculated on various matter in his oral explication for his decision but based his decision on his belief that Peace Health could not be found liable because “respondeat superior requires negligence on the part of an individual” and that there’s “an obligation for plaintiff to identify which employee was negligent.” (Mura RP 16). Judge Mura did not cite any specific cause under CR 59 for his decision.

In this case the unanimous jury found Peace Health negligent and that such negligence was a proximate cause of plaintiff’s injuries. For defendant Peace Health to be found responsible under the theory of respondeat superior the plaintiff did not need to name the specific employee negligent as long as there was substantial evidence that a negligent employee or employees were the negligent actors, particularly in this case where the complained of negligence is the reason a specific responsible actor could not be identified. Washington has a long history of cases which do not require the naming of a specific negligent employee in order to make an employer responsible under respondeat superior for unnamed negligent employees.

In Thompson v. Grays Harbor 36 Wash.App 300 (1983) the Court reversed the trial Judge and reinstated a jury verdict in plaintiff’s favor against a hospital despite the exoneration of the named defendant

hospital's employee. The Court held that the jury could find, and did, that acts of unnamed employees did not preclude a finding of vicarious liability on the part of defendant hospital. The Court conceded that the theory of liability was thin but that there was sufficient evidence and reasonable inferences therefrom to put before a jury and to sustain a verdict.

In Hansch v. Hachett 190 Wash. 97, 183 (1937), a medical malpractice case, a medical clinic was found liable by a jury under respondeat superior after a verdict was rendered in favor of the physician in charge when there was evidence that other employee non-parties may have contributed to the neglect. The Supreme Court upheld the verdict stating:

Here, the charge and the proof is such as to permit the jury to find any one or more of four employees to be guilty, and a verdict in favor of the employee who was made a party is not finding that another or other employees, not parties, were not guilty.

The evidence presented in the present case was that standard-of-care monitoring was not done by anyone on the team. It was never ordered nor carried out. The "team", consisting of nothing but Peace Health employees, was negligent for not doing routine standard-of-care monitoring. It was this negligent failure on the part of the "team" of employees that resulted in damage to Grove. Based on the evidence the

jury found that defendant was negligent. Defendant never refuted plaintiff's evidence that the team was made up of their employees or that they were required to do standard-of-care monitoring and failed to do so.

VI CONCLUSION

Judge Mura felt his decision to allow this matter to go to the jury would not necessitate a retrial whichever way the Court of Appeals ruled. (Mura RP 9, lls 19-25; 10, lls 1-4). Judge Mura recognized that the facts of this case justified reinstatement of the verdict if the Court of Appeals could either "massage or modify" the law in team of the team approach. (Mura RP 16, lls 20-25; 17, lls 1-4). No such modification or massage is necessary. The evidence in this case was substantial that the team members were employees of defendant and were negligent in the care of Grove and such was properly determined by the jury. The facts require reinstatement of the jury verdict reached in this case. In Douglas v. Freeman 117 Wash.2d 242, 814 P.2d 1160 the Supreme Court restated the long held standard of review:

In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion. The court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. The evidence must be viewed in the light most favorable to the nonmoving party; the court may grant the motion only where there is no competent evidence or reasonable inference that would sustain a verdict for the nonmoving party. "If there is any justifiable evidence upon

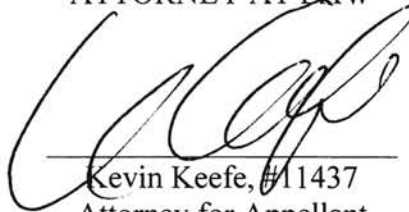
which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.”

Grove cannot improve on the court’s reasoning for reinstating the Jury’s Verdict from Thompson v. Grays Harbor Hospital 36 Wash.App 300, 312 (1983):

In the final analysis, while we might harbor some of the same feelings of unease about the evidence and this verdict, the parties had their day in court, the judge permitted the evidence to be presented to the jury for its consideration and the jury was given the law of the case. The jury responded in good conscience; the system has worked as it was designed to work, although perhaps not in the way we or the trial judge would have it. That same system, except for certain well defined exceptions which we have found are not present here, now precludes our disturbing the jury’s work-product.

RESPECTFULLY SUBMITTED this 5th day of April, 2013

KEVIN KEEFE
ATTORNEY AT LAW

A handwritten signature in black ink, appearing to read 'Kevin Keefe', written over a horizontal line.

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