No. 89902-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 69556-8-I

RAYMOND GROVE,

Petitioner,

v.

PEACEHEALTH ST. JOSEPH HOSPITAL,

Respondent.

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF GROUNDS FOR REVIEW

Petitioner Raymond Grove suffered permanent injury when he developed compartment syndrome following a surgery performed by Dr. Richard Leone, an employee of Respondent PeaceHealth St. Joseph Hospital (PeaceHealth). While Grove was recovering from the surgery, Dr. Leone handed off responsibility for Grove's care to two successive surgeons with whom he practiced, also employees of PeaceHealth. Grove offered evidence at trial showing that the standard of care required his surgeons to monitor for and timely diagnose compartment syndrome. The trial court instructed the jury that PeaceHealth could act only through its employees, that it was Grove's burden to prove negligence, proximate cause, and damages, and that the jury was to determine whether the "defendant"—PeaceHealth—was at fault. PeaceHealth assigned no error to these instructions. The jury returned a verdict for Grove against PeaceHealth for $583,000.

The lower courts, however, overturned the verdict. In a published opinion, the Court of Appeals held that Grove had not proven his case because he had not "implicat[ed] a particular individual" as liable for his injury, and instead had simply implicated a "team" of providers. App. A at 12. Under our medical negligence statute, the court held, injured patients are required to implicate a particular individual as liable for their injuries.

This Court should grant review for two reasons.

1. Both the proper test to be employed in reviewing the verdict and the proper outcome are controlled by *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937). In *Hansch*, much like here, a plaintiff alleged failure to monitor and timely diagnose against four employees of a defendant clinic. The jury returned a verdict exonerating one employee who was also named as a party but finding liability by the defendant clinic. This court explained that the verdict had to be upheld if the evidence was sufficient to permit the conclusion that any one or more of the implicated employees was at fault. The court upheld the verdict in *Hansch* because "the charge and the proof is such as to permit the jury to find any one or more of four employees to be guilty." *Id.* at 102. Here too, the verdict must be upheld because Grove's evidence permits the conclusion that one or more of the successive surgeons was at fault. The Court of Appeals, however, abrogated *Hansch*, holding that "*Hansch* no longer properly states the law" because, according to the Court of Appeals, it conflicts with today's medical negligence statute, RCW 7.70.040. App. A at 17. This holding, alone, warrants review.

2. In abrogating *Hansch*, the Court of Appeals also imposed a new standard of proof on injured patients that neither RCW 7.70.040 nor any other Washington law imposes. RCW 7.70.040, Washington's medical

negligence statute, defines the standard of care according to a provider's "profession or class," requiring a plaintiff to prove that the provider "failed to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider . . . in the profession or class to which he or she belongs." RCW 7.70.040(1). As the Court of Appeals itself acknowledged, Grove's evidence came from expert witness surgeons and was always directed to the standard of care of a surgeon. This was the common standard of care that applied to all three of Grove's surgeons. Despite this, the Court of Appeals interpreted RCW 7.70.040 to demand that Grove select "a particular individual" as the liable one, even though Grove contended that *all three* surgeons had failed to timely diagnose his condition. App. A at 12. Because the evidence permitted the jury to find that one or more of the surgeons violated the standard of care of their "profession or class," the verdict must be upheld. The Court of Appeals erred by imposing the additional requirement that Grove select one specific individual to blame, when in reality he blamed all three.

IDENTITY OF PETITIONER

Raymond Grove, Plaintiff below, asks this Court to accept review of the Court of Appeals' decision terminating review.

CITATION TO COURT OF APPEALS DECISION

A copy of the published Court of Appeals decision, filed October 28, 2013, is attached as Appendix A to this Petition. Grove moved for reconsideration of that decision. The Court of Appeals denied Grove's motion on January 8, 2014.

ISSUE PRESENTED FOR REVIEW

When a plaintiff identifies a number of health care providers, supplies expert testimony as to the common standard of care that applies to all of them, and adduces evidence that one or more of them breached that standard of care and proximately caused the plaintiff's injury, may a jury find the providers' principal vicariously liable under RCW 7.70.040?

STATEMENT OF FACTS AND PROCEDURE

The jury returned a verdict for Grove. The facts are recited, as they must be, in the light most favorable to Grove, with all of his evidence taken as true and all inferences drawn in his favor. *See, e.g., Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 98–99, 882 P.2d 703 (1994).

I. Grove underwent a surgery that required his surgeons to monitor him postoperatively for compartment syndrome.

Grove underwent heart surgery at PeaceHealth on December 21, 2006. App. A at 2. Dr. Leone performed the surgery and was responsible

for Grove's postoperative care in the first few days following the surgery. *Id.*

Grove established that a surgery of his kind obligated his surgeon to monitor for and timely diagnose compartment syndrome, a known complication from a long surgery, and one that causes swelling, loss of adequate blood flow and oxygenation, and eventually muscle death. *Id.* at 3; Ghidella RP[1] 11:4–15. If caught early, compartment syndrome is completely reversible; if not, the damage is irreversible. App. A at 4.

One of Grove's expert witnesses, Dr. Sean Ghidella, testified about what a surgeon must do to monitor a patient for compartment syndrome. Monitoring involves two actions. First, a surgeon must talk to the patient "[w]hen he [is] awake, alert, cognizant, and not too heavily medicated," and ask whether the patient is experiencing any of the symptoms of compartment syndrome. Ghidella RP 9:24–10:2. Second—and especially if the patient is sedated or intubated, as Grove was here for some time—the surgeon must engage in "at least the simple act of squeezing the leg to test for how firm or tense the compartments [are], and ranging the leg for responses to passive motion." *Id.* at 10:6–8. "[A]ny clinician that is involved in work where there's [compartment syndrome] as a potential

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[1] Trial testimony will be cited using the last name of the witness.

complication" should be trained in this monitoring practice, Dr. Ghidella testified. *Id.* at 18:17–20.

II. Dr. Leone transferred responsibility for Grove to two successive surgeons.

Grove remained at the hospital following his surgery for several days due to complications. Dr. Leone would end up transferring responsibility for Grove's care to two other cardiothoracic surgeons employed by PeaceHealth, Dr. Edward Zech and Dr. James Douglas. Leone RP at 2:12–14, 4:3–4; Zech RP at 2:12–19; Douglas RP at 2:18–24.

PeaceHealth's surgeons testified to what they called their "team" approach at trial. If one of the surgeons went out of town, another of the surgeons "would take over seeing his patients." Zech RP at 5:2–3. This "designated hitter" would then have "responsibility for everybody we had in our service in the hospital." *Id.* at 5:6–8. Thus, for example, when Dr. Douglas was the primary physician, he "followed [Grove] clinically," "examined him," "look[ed] at his labs," "discuss[ed] things with his consultants," "wr[o]te orders as appropriate," and generally was "one of the primary care givers for the patient." Douglas RP at 76:15–18. Thus, at least one of the surgeons was always in charge of monitoring Grove.

PeaceHealth and the surgeons did not document in Grove's medical records their successive turns in charge of Grove's care. Dr. Zech

admitted that responsibility can shift "in the blink of an eye," but when asked whether there was "anything in the records that shows that that actually occurred," Dr. Zech answered, "[n]ot specifically that I'm aware of." Zech RP at 20:9–15. Dr. Zech testified that he was "chagrined" about the fact that "there's no progress notes from [him] during those days that [he was] supposedly at the helm for Mr. Grove." *Id.* at 22:6–10. Dr. Zech claimed that he "agonized" over not leaving proper records. *Id.* at 44:4–7. Similarly, even though Dr. Douglas eventually took over responsibility for Grove's care, "there's nothing written in the chart that he did anything." Adams RP at 48:18–19. It was supposedly a sign posted at the hospital—not anything in the medical records—that identified the surgeon on call. Douglas RP at 21:9–12.

III. Grove developed compartment syndrome and suffered permanent injury as a result.

On December 29, eight days after Grove's surgery, a physician's assistant, Shane Spears, noted in writing that Grove's left calf was swollen, painful to the touch, and red in color, and that Grove had difficulty bending both ankles, "but it was worse on the left." App. A at 3. By then, Dr. Douglas was in charge. Although Grove was already on antibiotics, Dr. Douglas suspected that Grove was suffering from cellulitis, a bacterial infection. *Id.* Meanwhile, Dr. Douglas had approved an

ultrasound, which ruled out deep vein thrombosis, the formation of a blood clot in Grove's leg. Douglas RP 44:16–45:19.

Two days later on December 31, Dr. Sara Mostad, an infectious disease specialist, noticed that Grove was unable to bend his foot and was dragging his left toe when he walked. App. A at 3. Dr. Mostad suspected compartment syndrome, and a pressure test indicated that she was right. *Id.* Grove underwent surgery to correct the syndrome, but by then it was too late. He sustained permanent damage to his left leg. *Id.* at 4.

IV. Grove presented substantial evidence that all three PeaceHealth surgeons were negligent.

The medical records did not establish when responsibility for Grove's care was transferred from one surgeon to the next, but the PeaceHealth surgeons' trial testimony did. Dr. Leone testified that he was Grove's primary physician from December 21, until he left for vacation on the 25th. *See* App. A at 2. Once Dr. Leone left for vacation, Dr. Zech took over the care of Grove. Zech RP 6:1–12. Dr. Douglas testified that he took over from Dr. Zech on the 29th. Douglas RP 27:1–2, 32:23–25, 76:8–12.

A. Each PeaceHealth surgeon failed to monitor for and timely diagnose compartment syndrome.

1. Dr. Leone

At trial, Dr. Leone testified that he was familiar enough with compartment syndrome to diagnose it, Leone RP 27:13–20, but he was

impeached by his deposition testimony. There, he had said that "[c]ompartment syndrome is something that needs to be treated, but I really don't remember the specifics of how to diagnose and treat it." *Id.* at 26:18–20. Further, even though Dr. Leone maintained that the hospital made "a big effort to try to document anything accurately" in contemporaneous notes, *id.* at 24:24–25, the notes did not indicate that Dr. Leone had ever performed the required examination of Grove's legs. Instead, the notes merely said that Grove's *feet* were warm with a pulse. *Id.* at 34:3–35:25.

2. Dr. Zech

Dr. Zech admitted that there was "nothing in the records" to show that he actually performed a physical examination of Grove. Zech RP 17:16–18. And while Dr. Zech claimed that whenever he visited patients like Grove, he would "typically examine" and would "actually touch" the patient's extremities, he, just like Dr. Leone, was impeached by his deposition testimony. *Id.* at 14:17–15:10. There, he merely said that he "would have *laid eyes* on everybody" but otherwise accepted the contemporaneous records as accurate. *Id.* at 18:5–19:9 (emphasis added).

3. Dr. Douglas

Another of Grove's expert witnesses, Dr. Carl Adams, criticized Dr. Douglas's failure to diagnose compartment syndrome given what he

knew about Grove's condition on December 29. By that date, Dr. Douglas, through his assistant, had become aware that Grove's left calf had swollen to two to five centimeters larger than the right and had become red and painful. Douglas RP 35:25–36:11, 38:10–39:3. On that date also, Dr. Mostad, Grove's infectious disease specialist, found that it had become harder for Grove to bend his left ankle than his right, and that Grove had an elevated white blood cell count and persistent fever; Dr. Mostad shared information with Dr. Douglas about Grove's condition. *Id.* at 48:6–16, 52:24–53:4. Dr. Adams testified that these were "significant findings" and agreed that they should have "given rise to a suspicion of compartment syndrome," and prompted Dr. Douglas to test the pressure in Grove's left calf—something Dr. Douglas did not do. Adams RP 37:19–38:2; *see also id.* at 41:2–13. And he agreed that it was "below the standard of care" not to have diagnosed Grove's compartment syndrome given the symptoms on December 29. *Id.* at 40:22–25.

B. Substantial evidence of proximate cause existed as to each surgeon.

Grove's expert Dr. Ghidella testified that the "more likely" time when the compartment syndrome developed was when Grove "was intubated and . . . ventilated with an altered sensorium." Ghidella RP at 54:9–12. This included the immediate postoperative period (when Dr.

Leone was in charge) through the 26th (by which time Dr. Zech was in charge). *Id.* at 54:13–15. Certainly the compartment syndrome had developed by the 29th, the day that Dr. Douglas took over, and the physician's assistant found Grove's calf swollen, painful, and red. *See* App. A at 3. Grove's expert Dr. Ghidella explained, however, that the onset of the compartment syndrome could not be determined with greater precision precisely because of the negligence of the PeaceHealth surgeons:

> Q. In your opinion, Doctor, based on your review of your review of these records, had they been operating, the PeaceHealth Hospital personnel attending to Mr. Grove while he was there been operating within the standard of care, would we know closer the approximate time of the onset of the compartment syndrome?
>
> [An objection is made and overruled.]
>
> A. Yes, sir. Had that occurred, I think I may be more able to tell you with better accuracy as to when exactly it occurred.

Ghidella RP 40:6–21.

V. The jury returned a verdict for Grove.

The trial court instructed the jury that PeaceHealth could act only through its employees. App. A at 8. The trial court further instructed that a "physician, surgeon or health care provider owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs." *Id.* The trial court instructed the jury that Grove was required to prove that "the defendant"—which was PeaceHealth—

failed to follow the "applicable standard of care." CP 332 (Jury Instruction 6). Finally, the verdict form asked whether "the defendant" was negligent. App. A at 9 n.14. PeaceHealth has not assigned error to either the instructions or the verdict form. PeaceHealth did not propose special interrogatories to distinguish the jury's findings as to individual PeaceHealth employees. The jury returned a verdict for Grove.

The trial court set aside the verdict, however, upon the view that Grove had to implicate a particular individual rather than the PeaceHealth "team." App. A at 9. The Court of Appeals affirmed on the same basis.

ARGUMENT

I. The decision below conflicts with this Court's decision in *Hansch v. Hackett.*

The analysis in this case is governed by this Court's decision in *Hansch v. Hackett*. There, the patient's widower sued a physician, Dr. Hackett, and his employer, a medical clinic. The widower claimed that Dr. Hackett and three additional clinic employees—one other physician and two nurses—failed to diagnose eclampsia and initiate proper treatment before it caused the patient's death. 190 Wash. at 100–02. The jury returned a verdict exonerating Dr. Hackett but finding the clinic liable. *Id.* at 98. Just as here, while Dr. Hackett had originally been in charge of the patient's care, "Dr. Hackett did not treat Mrs. Hansch after she came to the hospital, but turned her case over to [the other physician]." *Id.* at 101.

This court explained that because the patient had come under the care of successive providers, "[t]here was therefore a wide open opportunity" for the jury to find that the first provider was not negligent—as it did—but that one or more of the successive providers were. *Id.* The court explained that there was evidence to support findings that the other physician was negligent, and that either of the two nurses was negligent. *Id.* at 101–02. The only requirement for upholding a verdict in these circumstances is that "the charge and the proof is such as to permit the jury to find any one or more of four employees to be guilty." *Id.* at 102.

But the Court of Appeals here concluded that "*Hansch* no longer properly states the law" because today, RCW 7.70.040 requires expert testimony "to establish the standard of care applicable to 'a health care provider' as a member of a particular 'profession or class.'" App. A at 17 (quoting RCW 7.70.040(1)). The Court of Appeals was correct about the substantive requirements of RCW 7.70.040, but incorrect about its effect on the holding of *Hansch*.

RCW 7.70.040 requires that the plaintiff establish a standard of care with respect to a "profession or class," but here even the Court of Appeals acknowledged that Grove had established the surgeons' standard of care. As the Court of Appeals noted, Grove's expert Dr. Adams testified to the standard of care of "the cardiovascular surgeon who is in

charge of the patient's care." App. A at 7 (quotation omitted). RCW 7.70.040 is concerned with the *substantive* proof a plaintiff must make—and that proof was satisfied as to one or more of Grove's three surgeons. *See id.* at 14 (assuming that Grove's "articulation of the standard of care" covered the surgeons).

Hansch, on the other hand, sets out a *procedural* rule governing the review of a verdict for substantial evidence. The issue in *Hansch* was whether substantial evidence existed to establish negligence by any of the clinic employees so as to support the verdict. The substantive form that such evidence was required to take was not at issue. *Hansch* simply held that the verdict had to be upheld if a jury "might have" or "could have" found that any one of the clinic employees was negligent. *Id.* at 101–02. The same is true here. The procedural rule of *Hansch* is no different today than it was when it was first decided. Instead of following that procedure, however, the Court of Appeals undertook to overrule *Hansch* and announce a new rule that a plaintiff must select one physician to blame even when a whole group of physicians is responsible.

The Court of Appeals' underlying concern, it seems, was that Grove's standard-of-care evidence covered only the three surgeons and not other, nonphysician employees of PeaceHealth. It assumed that "Grove's articulation of the standard of care covered" the surgeons, App.

A at 14, but was concerned that it did not cover, for example, nurses or physicians' assistants. *See id.* at 13. But that concern just underscores the court's disregard of *Hansch.* Under *Hansch*, the question is not whether the jury lacked evidence to inculpate *some* employees of the defendant, but whether it possessed evidence to find *at least one* employee liable. Because the jury here had such evidence, the decision below conflicts with *Hansch* and merits review under RAP 13.4(b)(1).

II. The decision below raises issues of substantial public interest by requiring a patient treated by more than one provider to implicate one specific individual provider as liable under RCW 7.70.040.

Washington's medical negligence statute requires a plaintiff to prove that a "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." RCW 7.70.040(1). The Court of Appeals believed that "[b]y not implicating a particular individual" as liable for his injury, "Grove failed to prove the standard of care for the relevant 'health care provider,'" as required by RCW 7.70.040(1). App. A at 12. The court also thought that by failing to implicate a particular individual, Grove had failed to prove proximate causation, as required by RCW 7.70.040(2). *Id.* at 14.

Both of these conclusions are wrong—and both proceed from the same root error. According to the Court of Appeals, Grove's case asks whether "PeaceHealth can be held vicariously liable for the negligence of the 'team' *as a unit* or whether Grove needed to implicate *a specific individual*." *Id.* at 11 (emphasis added). This analysis sets up a false dichotomy between implicating a team as a unit and implicating a specific individual. Grove did not implicate a team as a unit. He did not implicate a specific individual. He implicated *more than one* individual. By equating the implication of more than one individual with the implication of a "team" as an undifferentiated whole, the decision below will erect needless barriers for the many medical negligence plaintiffs whose claims *require* them to implicate a group of medical providers as responsible.

A. The Court of Appeals wrongly concluded that by implicating more than one individual surgeon, Grove had failed to prove breach of the standard of care.

The Court of Appeals thought that Grove had failed to prove the applicable standard of care or its breach. According to the court, Grove had implicated an entire "team" as a unit, and because the team included providers that belonged to more than one "profession or class," Grove failed to prove that the there had been a breach of the standard of care "of a reasonably prudent health care provider . . . in the profession or class to which he or she belongs." RCW 7.70.040(1); *see* App. A at 13.

The Court of Appeals' own recounting of trial testimony disproves this analysis. It shows that Grove's experts were testifying as to the standard of care that bound more than one surgeon, but were not testifying as to the standard of care that bound the team as a unit. As the Court of Appeals recognized, Dr. Adams, one of Grove's two experts, testified "that it was his expert opinion that 'the cardiovascular surgeon who is in charge of the patient's care failed to meet the standard of care that one would expect.'" App. A at 7; *see also id.* at 14 (recognizing that Grove's proof of the standard of care covered his surgeons). The Court of Appeals got these facts right. *See* Adams RP 36:15–37:9; Ghidella RP 22:16–24:16.

The lower court went wrong, though, by equating the implication of a number of individual providers bound by the same standard of care with the implication of a "team" as a unit. This novel equation is illogical, since it forgets that a plaintiff can implicate more than one provider without implicating a team as a unit. Unsurprisingly, therefore, the Court of Appeals failed to support its new standard of proof with any Washington authority, and Grove can find none to support it either.

B. The Court of Appeals wrongly concluded that by implicating more than one individual surgeon, Grove had failed to prove proximate causation.

The Court of Appeals also concluded that Grove had failed to prove proximate cause, as required by RCW 7.70.040(2). According to the Court of Appeals, by failing to implicate one particular individual, Grove "did not present evidence that but for any one of those particular individuals' failure to adhere to the standard of care, he would not have been injured." App. A at 14. This analysis again confuses proof directed at more than one individual provider with proof directed at a team as a unit.

By directing his proof to three individual surgeons that took care of him one after the other, Grove proved proximate cause. Grove proved that all of the three surgeons failed to do what was necessary to diagnose compartment syndrome. Because Dr. Ghidella's opinion was that the "more likely" time when the compartment syndrome developed was during the immediate postoperative period through December 26, Ghidella RP at 54:9–15, the jury had evidence from which to conclude that at least one of Dr. Leone, Dr. Zech, or Dr. Douglas should have detected Grove's condition. Thus, if the syndrome began developing when Dr. Leone was in charge of Grove's care, then Dr. Leone, Dr. Zech, and Dr. Douglas are all responsible for failing to diagnose it. If it began when Dr. Zech was in charge, then Dr. Zech and Dr. Douglas are responsible. Indeed, even if Dr.

Ghidella's expert testimony were disbelieved and the compartment syndrome began only when Dr. Douglas was in charge, then Dr. Douglas would be responsible. In each case, Grove has proven duty, breach, and causation[2] as to at least one of the surgeons—and thus, by respondeat superior, has proven those elements as to PeaceHealth too.

C. Review is warranted because the Court of Appeals' decision imposes a new and untenable standard of proof on injured patients.

Increasingly, medical treatment in the United States is provided by teams of providers. *See* Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 413 (1994). Our state is no exception. In fact, one of Washington's most prominent healthcare organizations, Virginia Mason, has "team medicine" as its slogan.[3]

Washington courts, therefore, are certain to face more malpractice cases involving multiple providers. In many of these cases—and this case is one of them—the multiple providers have all committed negligence by omission. This fact should dispose of the Court of Appeals' worry that Grove could not lay the blame on only one particular provider. *See* App. A

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[2] The Court of Appeals nowhere intimated that Grove had failed to prove damages, the fourth element of a medical negligence claim.

[3] *See* Virginia Mason, *The Future of Health Care – Join Team Medicine at Virginia Mason*, YOUTUBE (Dec. 17, 2010), http://www.youtube.com/watch?v=xgK2v0Zqq_0.

at 12. After all, the very nature of Grove's claim—that each of the successive providers omitted to diagnose his condition—implicates all three providers. Moreover, the fact that one, two, or all of them might have been culpable should not be a barrier to PeaceHealth's vicarious liability, however, since all three surgeons were employed by PeaceHealth. By making it a barrier to liability, the Court of Appeals has created a standard of proof that has no basis in Washington law. This issue of substantial public interest warrants review under RAP 13.4(b)(4).[4]

CONCLUSION

The decision below conflicts with this Court's decision in *Hansch* and establishes a new standard of proof for victims of medical negligence. Review is therefore warranted under RAP 13.4(b)(1) and (b)(4).

Respectfully submitted this February 7, 2014.

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[4] Indeed, the Court of Appeals' faulty reasoning has already garnered nationwide attention. As one academic commentator has pointed out: "Intentionally or not, the Court's decision has created a normatively indefensible gap between malpractice by commission and malpractice by omission." Alex Stein, *Teamwork as Malpractice*, STEIN ON MEDICAL MALPRACTICE (Oct. 31, 2013), http://steinmedicalmalpractice.com/grove-v-peace-health-st-joseph-hospital-p3d-2013-wl-5786888-washapp-div-1-2013.

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on February 7, 2014, I caused a true and correct copy of the foregoing PETITION FOR REVIEW to be delivered Via ABC Legal Messenger.

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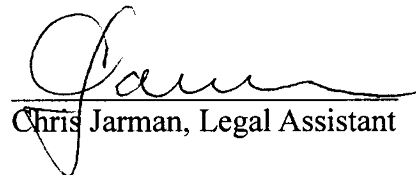

Chris Jarman, Legal Assistant

Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RAYMOND GROVE, Appellant, v. PEACEHEALTH ST. JOSEPH HOSPITAL, Respondent. ST. JOSEPH HOSPITAL FOUNDATION, DR. SARA MOSTAD and DR. DAG JENSEN, Defendants.	DIVISION ONE No. 69556-8-I PUBLISHED OPINION FILED: October 28, 2013

DWYER, J. — In the state of Washington, medical malpractice is a statutory cause of action, which requires that the plaintiff prove the standard of care to be exercised by a health care provider within the profession or class to which he or she belongs. This is no less the case when a hospital opts to provide medical care to its patients by using a "team approach." Here, Raymond Grove filed a lawsuit against PeaceHealth St. Joseph Medical Center (PeaceHealth), alleging medical malpractice for failure to timely diagnose compartment syndrome in his left leg. Grove sought damages against PeaceHealth under a theory of vicarious liability for negligence committed by its medical team or, alternatively, by Dr. Richard Leone as the leader of the team. The jury found in Grove's favor and

awarded Grove $583,000 in damages. The trial court overturned the verdict on a motion for judgment as a matter of law, finding that no legal basis existed for holding PeaceHealth vicariously liable, given that Grove had not proved that any specific employee had acted negligently. Because Grove failed to prove the applicable standard of care as required by statute, we affirm.

I

On December 21, 2006, Grove underwent aortic root and valve replacement surgery at PeaceHealth in Bellingham. After the surgery was successfully completed, Grove was placed in the intensive care unit, as is standard hospital practice following heart surgery. Dr. Leone, Grove's attending physician during the surgery, acted as primary physician until December 25. On that date, Dr. Leone traveled to New Jersey for Christmas, and Dr. Edward Zech, the surgeon on call, assumed the role of primary physician. Similarly, Dr. James Douglas assumed the role of primary physician from Dr. Zech on December 29. Dr. Leone remained the surgeon of record until Grove was released from the hospital.

Grove developed a number of complications after his surgery. Significantly, he was having trouble breathing, and was thus intubated from December 23 through December 26, during which time he was sedated.[1] Grove also developed pneumonia and bacteria in his blood, for which Dr. Sara Mostad, an infectious disease specialist, was called in. Dr. Zech was especially

[1] Intubated patients, despite being under sedation, are awakened periodically and are typically able to communicate.

concerned about the possibility of infection, because an infection in Grove's heart would have almost certainly been fatal. On December 29, Shane Spears, a physician assistant (PA), noted that Grove's left calf was exhibiting "edematous, tenderness to palpitation, warm with erythema on the anterior aspect.[2] Two to five centimeters larger than the right." PA Spears also noted that Grove had "weakness in flexion"[3] in both ankles, "but it was worse on the left." Dr. Douglas and Dr. Mostad suspected, based on these symptoms, that Grove may have had cellulitis, a bacterial infection typically treated with antibiotics. Grove was already on antibiotics at the time these symptoms developed. Grove's condition appeared to improve on December 30, but by December 31, Grove's symptoms had spread down to his foot.

On December 31, Dr. Mostad noticed that Grove was unable to fully dorsiflex[4] his foot and that he was dragging his left toe when he walked. Dr. Mostad suspected at that time that Grove had compartment syndrome. Dr. James Miller[5] conducted a compartment pressure test and found that the pressure in Grove's left leg was over three times the normal average, indicating that Grove was suffering from compartment syndrome. Compartment syndrome is a known, albeit rare, complication from a long surgery, such as the heart surgery Grove underwent.[6] Symptoms of compartment syndrome typically

[2] In laymen's terms: swelling, pain to the touch, and redness on the front of the leg.
[3] Ability to bend a joint.
[4] Bend towards the shin.
[5] Dr. Miller was not implicated in this lawsuit, as he was not alleged to have been part of the "team."
[6] Grove's surgery lasted upwards of six hours.

include hardness, swelling, numbness, tingling, pallor, loss of neurological function, lack of pulse, and excruciating pain. As far as the witnesses could recall or as Grove's medical records indicated, at no time did Grove ever complain of excruciating pain, the most notable symptom of compartment syndrome. If detected early, compartment syndrome is "completely reversible"; if not, the damage is irreversible and can be so severe as to necessitate limb loss. Grove underwent surgery to relieve his compartment syndrome but, by that time, his compartment syndrome had advanced to the point of necrosis,[7] resulting in permanent injury to his left leg.[8]

A jury trial began on June 13, 2012. Witnesses for both parties testified that Grove was treated and attended to using a "team" approach. Dr. Douglas explained how the "team" approach operated, stating that the "team," consisting of "the surgeons and the physician assistants," made rounds together twice per day. He further stated, "In our situation our patients are seen by both surgeons or all three surgeons depending on the circumstance regardless of who is primarily in charge. So at any time a patient needs assistance that physician is well-aware of what's going on. So we basically assume everybody is our patient." Dr. Douglas testified that the "team" "evaluate[s] patients in such a way that everybody gets a chance to have input."

Dr. Leone testified that the "team" made rounds more than once a day and that the "team" may also include students, nurses, and other "ancillary staff." Dr.

[7] Muscle death.
[8] During the surgery, it was also discovered that Grove did not have cellulitis.

Zech testified that the method of treatment used was "very much a team approach," designed to keep all staff informed. Dr. Zech further testified that the team consisted of surgeons, physician assistants, and intensivists. PA Spears testified that the physicians might not do a physical examination of the patient during rounds, instead relying on the physician assistant's findings, if there was not a concern with the patient. However, PA Spears also testified that he always discussed the plan of care with the surgeons before he implemented it.

Dr. Sean Ghidella, an orthopedic surgeon and expert witness for Grove, testified that the care of Grove fell below the standard of care because of a lack of proper monitoring and a failure to rule out a known possible complication after surgery.[9] When asked who he was criticizing, Dr. Ghidella testified as follows:

> A: I identified Dr. Leone.
> Q: And why did you identify Dr. Leone as opposed to someone else?
> A: I was aware that there were multiple providers involved, that there was a team approach. At the time I was asked, I was not certain entirely as to who was to blame, but I do know that one person that at least shared in the responsibility would be the surgeon of record. He is ultimately responsible for that admission and the patient's care under that admission.
> Q: So based on –
> A: So for the lack of anyone else with certainty, I knew that at least I could include him in that discussion, but I don't know that I committed anyone else for the lack of clarity in terms of what was going on in the complexity of the situation, the type of documentation that I had available to try to define who said what when and who did what when.
> Q: Your understanding is that this was a team approach that was dealing with Mr. Grove?
> A: Yes.
> Q: As far as you're concerned, who would be responsible for the

[9] Dr. Ghidella was deposed in anticipation of his unavailability for trial; the transcript of his deposition was read to the jury.

> team at any particular time?
> A: I know in my patients, I do. I feel responsible. I imagine he would, too. I understand that's probably how the law sees it.
> . . .
> Since my discovery deposition, I have clarified this was a team approach, and Dr. Leone wasn't necessarily in charge of this patient at the time that the diagnosis was made.
> Q: But in terms of your opinion, he was ultimately responsible as being the doctor in charge at the outset?
> A: That would be correct, yes, sir.

Dr. Ghidella testified that "unrecognized compartment syndrome" was below the standard of care because "[w]ith proper monitoring, this should have been an earlier recognized complication." Proper monitoring, according to Dr. Ghidella, would have consisted of interviewing Grove when he was alert and squeezing his leg to test for firmness, with increased physical monitoring while Grove was intubated. Dr. Ghidella would have recommended that Grove's leg be examined on every round. Dr. Ghidella testified that he was "not sure that any [monitoring] was done during critical parts of [Grove's] management, or at least appropriate monitoring." It was Dr. Ghidella's opinion, to a reasonable degree of medical certainty, that Grove would have had "no permanent deficits or at least a better outcome" had the standard of care been met. Dr. Ghidella was also of the belief that had the standard of care been met, he could have determined when Grove's compartment syndrome developed. Dr. Ghidella testified that the damage sustained by Grove was "clearly" a result of the late diagnosis.

Dr. Carl Adams, a cardiovascular surgeon and Grove's other expert witness, testified that he was familiar with "the standard of care for every cardiovascular surgeon practicing across the United States." Dr. Adams testified

that it was his expert opinion that "the cardiovascular surgeon who is in charge of the patient's care failed to meet the standard of care that one would expect." Dr. Adams also testified that Dr. Leone was responsible for the "team," as team members report to the team leader. When asked, "So if the PAs make a mistake, it's the head of the ship's mistake?" Dr. Adams answered, "Correct."

Dr. Adams testified that the standard of care was breached because "knowing that this patient had a very complex surgical procedure," the "team" should have checked for compartment syndrome, as it is a known complication of a long surgery. In Dr. Adams's opinion, it was "below the standard of care not to have diagnosed" compartment syndrome based on Grove's symptoms of "erythema,"[10] "edema,"[11] and "induration,"[12] while he was on antibiotics.[13] Dr. Adams also cited a lack of communication as a breach of the standard of care. Dr. Adams further testified that the failure to properly monitor for compartment syndrome began with Dr. Leone "and just continued." Had the "team" not breached of the standard of care, in Dr. Adams's opinion to a reasonable degree of medical certainty, Grove would have had a better chance of suffering no injury or a less severe injury to his leg.

When questioning both experts about the standard of care, counsel for Grove framed the inquiry as follows: Have you developed an opinion to a

[10] Redness.

[11] Swelling.

[12] Hardening.

[13] Dr. Adams testified that while these are symptoms of cellulitis, antibiotics treat cellulitis, and these symptoms should not have continued to appear while Grove was on antibiotics had cellulitis been the problem.

reasonable degree of medical certainty, "concerning whether or not the medical treatment provided to Raymond Grove met the standard of care in the state of Washington for patients under the same or similar circumstances . . . ?" PeaceHealth did not object to the form of the question on any occasion.

The trial court instructed the jury with regard to the standard of care and vicarious liability as follows:

> A physician, surgeon or health care provider owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.
>
> A physician, surgeon or health care provider has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent physician, surgeon or health care provider in the state of Washington acting in the same or similar circumstances at the time of the care or treatment in question.
>
> Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

Jury Instruction 3.

> The defendant PeaceHealth is a non-profit corporation. A corporation can act only through its officers, employees, and agents, including the employed physicians and physicians' assistants in this case. Any act or omission of an employee is the act or omission of the hospital corporation.
>
> A hospital's employees must exercise the degree of skill, care, and learning expected of reasonably prudent employees of hospitals in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care, and learning is negligence.

Jury Instruction 5.

The jury returned a special verdict in favor of Grove, finding that PeaceHealth was negligent and that such negligence was a proximate cause of

Grove's injury.[14] The jury awarded damages in the amount of $583,000. Thereafter, PeaceHealth moved for judgment as a matter of law. The trial court granted PeaceHealth's motion, ruling that "there was no evidence sufficient to support the verdict under CR 59(b)."[15] In so ruling, the trial court stated:

> This court is of the opinion that the law in this state requires proof of an independent health care provider's failure with some exceptions. . . . A hospital which operates with team treatment provided only by hospital employees, which is what we have here pretty much, and the hospital is the only defendant, so where a hospital operates with team treatment provided only by the hospital employees will always be liable under respondeat superior where an employee is negligent within the scope of their employment. *But a plaintiff is still required to prove negligence on the part of the particular employee. Were that not the case, then every bad outcome in a team setting would result in liability.*

(Emphasis added.) The trial court explained that a team is not negligent, but rather that "[t]here has to be a negligent player on the team." The trial court concluded:

> [T]herefore somebody must, for the plaintiff to prevail, be charged with the responsibility of monitoring close enough that it can be identified, i.e., through the twice-a-day pressure testing, or 24/7 monitoring, whatever your theory is. But to prevail on either of those theories that has to be the standard of care and there wasn't evidence of that.

Grove appeals from the trial court's ruling.

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[14] QUESTION 1: Was the defendant negligent?
ANSWER: Yes.
QUESTION 2: Was the negligence a proximate cause of injury to the plaintiff Mr. Grove?
ANSWER: Yes.

[15] CR 59(a) states: "On the motion of the party aggrieved, a verdict may be vacated . . . . Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties: . . . (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." CR 59(b) delineates the procedure for filing such a motion.

II

Grove asserts that he presented evidence sufficient to prove that the "team" which treated him was negligent and, therefore, that the jury's verdict should be reinstated. This is so, he asserts, because it is unnecessary to implicate a particular individual when the team as a whole did not adhere to the standard of care. We disagree. Grove did not prove the relevant standard of care.

This court reviews de novo a decision to grant or deny a motion for judgment notwithstanding the verdict. Schmidt v. Coogan, 162 Wn.2d 488, 491, 173 P.3d 273 (2007); Winkler v. Giddings, 146 Wn. App. 387, 394, 190 P.3d 117 (2008). Motions for judgment notwithstanding the verdict were renamed "'motions for judgment as a matter of law'" in 1993. Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting Litho Color, Inc. v. Pac. Emp'rs. Ins. Co., 98 Wn. App. 286, 298 n. 1, 991 P.2d 638 (1999)). Granting judgment as a matter of law is not appropriate where substantial evidence exists to sustain a verdict for the nonmoving party. Schmidt, 162 Wn.2d at 491 (citing Hizey v. Carpenter, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992)); see also Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). Indeed, "[a]n order granting judgment as a matter of law should be limited to circumstances in which there is no doubt as to the proper verdict." Schmidt, 162 Wn.2d at 493. Hence, a directed verdict should be granted only where no evidence or reasonable inferences from the evidence could support a

verdict for the nonmoving party. Winkler, 146 Wn. App. at 394 (citing Bertsch v. Brewer, 97 Wn.2d 83, 90, 640 P.2d 711 (1982)).

PeaceHealth is liable, if at all, under the doctrine of vicarious liability. Vicarious liability is liability for the negligence of an actor under the defendant's control. Van Hook v. Anderson, 64 Wn. App. 353, 363, 824 P.2d 509 (1992). An employer cannot be vicariously liable if its employees are not negligent. Doremus v. Root, 23 Wash. 710, 716, 63 P. 572 (1901); Orwick v. Fox, 65 Wn. App. 71, 88, 828 P.2d 12 (1992). The parties do not dispute that all members of the "team" were employees of PeaceHealth and that PeaceHealth is liable for the negligent acts of the members of the "team." At issue is whether, based on the evidence presented, PeaceHealth can be held vicariously liable for the negligence of the "team" as a unit or whether Grove needed to implicate a specific individual.

In Washington, medical malpractice is a statutory cause of action. Ch. 7.70 RCW. A plaintiff who alleges malpractice on the part of a health care professional must prove that

> (1) 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;
>
> (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040. The plaintiff must prove the relevant standard of care through the presentation of expert testimony, unless a limited exception applies.[16] Harris v. Robert C. Groth, M.D., Inc., P.S., 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (citing Douglas v. Bussabarger, 73 Wn.2d 476, 479, 438 P.2d 829 (1968)). None of the limited exceptions apply in this case.

RCW 7.70.040(1) can be parsed into six elements that the plaintiff must prove in order to prevail on a claim of medical malpractice: (1) "The health care provider" (2) "failed to exercise" (3) "that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time" (4) "in the profession or class to which he or she belongs," (5) "in the state of Washington," (6) "acting in the same or similar circumstances." The problem with Grove's "team" theory is that it fails to include elements (1) and (4).

By not implicating a particular individual, Grove failed to prove the standard of care for the relevant "health care provider." Grove's experts did not state as to whom the standard of care applied, as they framed their testimony in terms of the standard of care that a *patient* should *receive* and not the standard of care that a *health care professional* should *provide*. A team is not in and of

[16] One such exception is the doctrine of res ipsa loquitor.
Res ipsa loquitur applies when

> "(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff."

Ripley v. Lanzer, 152 Wn. App. 296, 307, 215 P.3d 1020 (2009) (quoting Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)). Grove does not allege that permanent damage resulting from compartment syndrome does not ordinarily happen in the absence of negligence. In fact, Grove concedes that compartment syndrome is a known complication from a long surgery. Accordingly, res ipsa loquitor is inapplicable here.

itself a health care provider. Rather, a team is a compilation of its members; in this case, a compilation of health care providers. Chapter 7.70 RCW does not contemplate liability for groups of providers. See RCW 7.70.040 ("*The* health care provider . . ." (emphasis added)).

Moreover, the "team" cannot belong to a profession or class. It is unclear in this case who exactly was on the "team." Indisputably the "team" included the three surgeons and the PAs. Some witnesses expanded the "team" much further to include medical school students, nurses, intensivists, and "ancillary staff." Clearly these positions do not all belong to the same "profession or class."[17] Grove contends that it would not make sense for the standard of care to change depending on who was treating him. To the contrary, this makes perfect sense. Surgeons, PAs, and nurses cannot all be expected to adhere to the same duty, given that they belong to different professions with different levels of required skill and training. Because the members of the "team" belonged to different professions and classes, the "team" collectively could not have belonged to a single class. Thus, because Grove did not prove elements (1) and (4) of RCW 7.70.040(1), the jury verdict was supported by neither the evidence nor the law.

Grove's "team" theory rests on the notion that causation and damages are enough to prove malpractice. In fact, Grove contends that duty is irrelevant to his

[17] For instance, Dr. Zech testified that his training consisted of medical school, two residencies, and additional training in both general and cardiothoracic surgery, whereas PA Spears testified that his training consisted of nursing school and a master's degree program in physician assistant studies.

claim.[18] Medical malpractice actions, like all tort actions, require that the plaintiff prove duty, breach, causation, and damages. Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 467-68, 656 P.2d 483 (1983). It is a basic principle of tort law that, if any of these four elements are not proved, there can be no liability. See Harbeson, 98 Wn.2d at 467-68. Grove's claim is lacking both duty and causation. Without delineating the standard of care applicable to a particular health care provider or defining the relevant profession or class, Grove failed to prove that a duty existed or to whom any such duty belonged. Duty, especially in the field of medical practice, does not just exist in the ether. Even if Grove's articulation of the standard of care covered some members of the "team," the surgeons for example, Grove did not present evidence that but for any one of those particular individuals' failure to adhere to the standard of care, he would not have been injured. Accordingly, Grove failed to prove proximate cause.[19] Without the elements of duty and proximate cause, Grove's claim fails.

The experienced trial judge detected this shortcoming when he overturned the jury's verdict. Although the evidence is this case was multitudinous and confusing such that it could and did mislead the jury, the trial judge discerned that Grove failed to prove a standard of care relevant to "a health care provider" belonging to a particular "profession or class." In his ruling, the trial judge

[18] "[I]t is irrelevant in this case which individual on the team would have had the obligation to perform standard-of-care monitoring." Appellant's Br. at 12.

[19] "Proximate cause must be established by, first, a showing that the breach of duty was a cause in fact of the injury, and, second, a showing that as a matter of law liability should attach." Harbeson, 98 Wn.2d at 475-76 (citing King v. City of Seattle, 84 Wn.2d 239, 249, 525 P.2d 228 (1974)).

explained that "a team isn't negligent," and instead there needed "to be a negligent player on the team." As he explained,

> [I]t is the plaintiff's burden to specify which *health care provider* failed to adequately monitor, identifying *that person* in pretrial discovery and producing testimony from a qualified expert that such failure was not within the standard of care expected *of such provider* within the state of Washington.

(Emphasis added.) As appealing as Grove's "team" theory may have been, the trial judge astutely observed that changes in the approach to health care do not automatically change the law.

Nevertheless, Grove contends that Thompson v. Grays Harbor Cmty. Hosp., 36 Wn. App. 300, 675 P.2d 239 (1983), and Hansch v. Hackett, 190 Wash. 97, 66 P.2d 1129 (1937), support his assertion that a hospital can be found liable when an unidentified member of a "team" acts negligently. We disagree.

In Thompson, the plaintiff, Dr. Thompson,[20] sued Grays Harbor Community Hospital under a theory of vicarious liability for tortious interference with her medical practice. Thompson, 36 Wn. App. at 301. Thompson introduced evidence that staff at Grays Harbor lied about Dr. Thompsons' availability to parents who requested her, "made disparaging remarks about her," and encouraged parents "to have their children treated by the house physician instead of by Dr. Thompson." Thompson, 36 Wn. App. at 303. Although all of the employees Dr. Thompson named in her complaint were exonerated, the court held that Grays Harbor was still vicariously liable, as Dr. Thompson proved that

[20] Dr. Thompson was a pediatrician. Thompson, 36 Wn. App. at 302.

other, unnamed hospital employees had tortiously interfered with her medical practice. Thompson, 36 Wn. App. at 305-06.

Thompson differs from this case in that Thompson's cause of action was not statutory, nor did it sound in medical malpractice. Tortious interference is a common law claim. Duty in such a claim is not related to any particular profession or class, and is instead based upon the defendant's knowledge of the plaintiff's relationships. Thompson, 36 Wn. App. at 303 (setting forth the elements of a prima facie case of tortious interference). Moreover, in a tortious interference case, no expert testimony is necessary to establish duty. Here, however, Grove was required to prove duty for the relevant "profession or class" of "health care provider" through expert testimony. RCW 7.70.040 does not contemplate a general overarching duty applicable to anyone who may have come into contact with the patient. Thus, Thompson is inapplicable to this case.

Hansch, though factually similar to this case, is also inapplicable. In Hansch, the plaintiff, Mr. Hansch, brought suit against Dr. Hackett and the Columbia Clinic for a failure to diagnose eclampsia contravis. 190 Wash. at 97-98, 101. Mrs. Hansch, the plaintiff's wife, was alternatively under the care of Dr. Hackett, Dr. Clark, and two nurses, at various times during the hours before her untimely death. Hansch, 190 Wash. at 99-100. The jury returned a verdict finding only the Columbia Clinic liable. Hansch, 190 Wash. at 97-98. The Supreme Court held that although Dr. Hackett was not found negligent, the jury could have found that Dr. Clark or either of the two nurses were negligent; thus, the Columbia Clinic could be held liable under the doctrine of respondeat

superior. Hansch, 190 Wash. at 101-02. Hansch, however, was decided in 1937, before the legislature passed RCW 7.70.040.[21] At that time, medical malpractice was a common law claim and no statutory requirement existed necessitating expert testimony in order to establish the standard of care applicable to "a health care provider" as a member of a particular "profession or class." Hansch no longer properly states the law.

Grove failed to prove the standard of care in this case, as he did not implicate a "health care provider" nor identify the relevant "profession or class" to which a particular duty was applicable. Grove thus failed to prove the standard of care as required by RCW 7.70.040. The trial court properly so ruled.

III

Grove further contends that the trial court erred by overturning the jury verdict, claiming that he sufficiently proved that a particular individual's negligence was the proximate cause of his injury. This is so, he asserts, because Dr. Leone was negligent in his role as the "leader" of the "team."[22] We disagree.

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[21] RCW 7.70.040 was enacted in 1976.

[22] An individual may be held liable as the "leader" of a "team" pursuant to the "captain of the ship" doctrine. Under the "captain of the ship" doctrine, a patient who is negligently injured during surgery may bring an action against the lead surgeon for the actions of other individuals acting at the surgeon's direction, regardless of their actual employment status. Van Hook, 64 Wn. App. at 364. However, this case does not involve the "captain of the ship" doctrine. Grove does not contend that his injury was caused by negligent conduct committed during surgery. Rather, Grove contends that the negligent conduct was committed during postsurgical monitoring. However, Dr. Leone was not exercising control and directing the actions of the staff during the entire postsurgery period. In fact, Dr. Leone was in New Jersey to celebrate Christmas during half of the relevant time period. The "captain of the ship" doctrine, therefore, does not support Grove's claim.

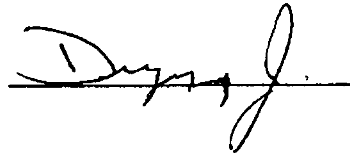
Grove does not point to Dr. Leone's direct actions as the proximate cause of his injuries, especially as neither of Grove's experts could identify when the compartment syndrome developed. Rather, Grove contends that Dr. Leone was negligent in his role as the "leader" of the "team." Thus, in order to support a finding that Dr. Leone was negligent, Grove needed to demonstrate either that Dr. Leone negligently supervised the "team" or that the standard of care was that the team leader had a duty to instruct all of the staff to monitor for compartment syndrome. Grove does not allege that Dr. Leone was negligent in his supervision, nor can he, as Dr. Leone could not have supervised from the other side of the country. Further, neither of Grove's experts testified as to whether Dr. Leone should have left instructions before he left for New Jersey. To the contrary, Dr. Adams testified that Dr. Leone's responsibility ended when he turned over care of Grove to Dr. Zech.[23] For his part, Dr. Ghidella testified that Dr. Leone remained responsible for the entire period until December 31, but his conclusion was based on the fact that Dr. Leone was the physician of record, not on a relevant standard of care. Thus, the evidence presented was insufficient to prove that Dr. Leone was negligent in his duties.

Grove's assertion that Dr. Leone was liable as the "leader" of the "team" is merely an attempt to hold Dr. Leone vicariously liable for the actions of the other doctors and staff that treated Grove. Supervisors cannot be vicariously liable for the negligence of the employees whom they supervise. Harvey v. Snohomish

[23] "Q: In terms of your statement as to the relative liability, is it the head of the team that you're critiquing or each individual member? A: . . . [T]hen if the head team member is gone, then it's the person who he designates the new captain."

County, 124 Wn. App. 806, 820, 103 P.3d 836 (2004), rev'd on other grounds, 157 Wn.2d 33, 134 P.3d 216 (2006); see also Van Hook, 64 Wn. App. at 365 (no vicarious liability of surgeon for nurses who assisted him, when surgeon did not control how nurses counted sponges). Dr. Leone was the supervisor, not the employer, of the "team." Unless Grove could show that Dr. Leone was independently liable, he cannot point to Dr. Leone as a specific individual for whom PeaceHealth may be held vicariously liable. This Grove has failed to do. Accordingly, PeaceHealth cannot be held liable for Dr. Leone's asserted liability resulting from his role as "leader" of the "team."

Affirmed.



We concur: