71497-0

FILED
March 31, 2015
Court of Appeals
Division I
State of Washington

No. 71497-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

LABORATORY CORPORATION OF AMERICA, a foreign corporation; DYNACARE LABORATORIES, INC., a foreign corporation; DYNACARE NORTHWEST, INC., a domestic corporation, d/b/a DYNACARE LABORATORIES, INC., a domestic corporation; KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a VALLEY MEDICAL CENTER,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE CATHERINE SHAFFER

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE HOSPITAL ASSOCIATION

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

SWANSON GARDNER, PLLC

By: Todd W. Gardner
WSBA No. 11034
Peter E. Meyers
WSBA No. 23438

4512 Talbot Road South
Renton, WA 98055-6216
(425) 226-7920

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Respondents Brock and Rhea Wuth submit this answer to the Brief of Amicus Curiae Washington State Hospital Association.

II. ARGUMENT

A. The Court should not consider the entirely new issues raised only by amicus.

This Court will not decide an issue raised only by amicus. *Ruff v. King County*, 125 Wn.2d 697, 704 n. 2, 887 P.2d 886 (1995); *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 217, 304 P.3d 914, *rev. denied*, 178 Wn.2d 1022 (2013) ("this court does not consider new issues raised for the first time in an amicus brief."). Here, the Washington State Hospital Association asks this Court to rule as a matter of law that the Wuths could have no "corporate negligence" claim because Valley was vicariously liable for its employees' negligence. (Amicus Br. 4: "Claims against a hospital for corporate liability and vicarious liability should be treated as mutually exclusive claims.") Valley has never made this argument, below or on appeal. This Court should decline to address the argument that corporate negligence and vicarious liability are "mutually exclusive" theories at the invitation of amicus Hospital Association.

B. Hospitals have an independent, nondelegable duty to patients. Valley's breach of its duty of care caused the Wuths' injuries.

As the Wuths pointed out in responding to Valley's argument that the "corporate negligence" doctrine merely "fills a gap" "by imposing an independent duty on hospitals to select and supervise medical staff" (Valley Br. 17), a hospital's duties in tort are not limited to improper credentialing. (Wuth. Resp. Br. 58) This Court must reject the Hospital Association's equally misguided limitation of its members' responsibilities as corporate health care providers under RCW ch. 7.70 to vicarious liability for the negligence of its employees and agents – a reading of the Act rejected by our state Supreme Court just months ago in a case neither Valley nor the Hospital Association even acknowledges, much less distinguishes - *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 341 P.3d 261 (2014).

As the Supreme Court recently held once again in *Grove*, under RCW 7.70.020(3) and RCW 7.70.030(1) a hospital, and not just the hospital's employees or agents, is a "health care provider" liable in tort for breach of its independent, nondelegable "accepted standard of care." *Grove*, 341 P.3d at 266-67, ¶¶ 19-21; *see also*, *Douglas v. Freeman*, 117 Wn.2d 242, 248-50, 814 P.2d 1160 (1991).

Here, Valley's duty of care to its patients, and its breach of that duty, was established by its own guidelines, by expert testimony, and by the standards of the Joint Commission on Accreditation of Health Organizations, and included the duty to provide "an adequate number and mix of staff to meet the care, treatment, and service needs of the patients" and to train its employees on "hospital wide policies and procedures . . . and relevant unit, setting, or program-specific policies and procedures." (*See* Wuth Resp. Br. 59-60, citing *Pedroza v. Bryant*, 101 Wn.2d 226, 233, 677 P.2d 166 (1984).) There was nothing "vague" about Valley's duties (Amicus Br. 9), or about the lay and expert testimony establishing Valley's negligent breach of its duties.

The Hospital Association's argument that Valley should be absolved from its failure to adequately staff, schedule, and train its own employees because "Dr. Harding stepped into the role of a genetic counselor" (Amicus Br. 2) is particularly misguided. As the jury was instructed, as a health care provider Valley had the duty to "exercise that degree of care, skill and learning expected of a reasonably prudent hospital in the State of Washington acting in the same or similar circumstances . . .". (CP 11615) Valley could not evade liability on the grounds that Dr. Harding – a "nonspecialist"

– was forced to undertake tasks "typically performed by specialists" (Amicus Br. 8) – in this case, the genetic counseling that Valley did not provide when Rhea Wuth's genetic testing was ordered and reviewed, because of Valley's negligent scheduling, staffing and training decisions.

The Hospital Association ignores the overwhelming evidence of institutional malfeasance presented to the jury. (Wuth Resp. Br. 10-17, 22-24) Even though patient volume doubled at Valley's Maternal-Fetal Medicine Clinic in 2007, Valley reduced the number of staff to provide patient care. (RP 1084, 2302-03) Its Clinic Manager quit in April 2007, yet Valley hired no one to replace her until February 2008 – two months after Rhea Wuth was seen as a patient on December 31, 2007. (RP 1086-87, 4422-26) In November 2007, having given months of notice, the Clinic's three-day-a-week genetic counselor left on maternity leave. (RP 4425-26) Valley replaced her with a genetic counselor who only worked in the Clinic one day a week. (RP 4469-70, 4681-82) All of the maternal-fetal medicine clinics in King County, except Valley, had a full-time Manager and full-time genetic counselor coverage in 2007. (RP 670) The jury was properly instructed, in accordance with WPI 105.02.02, that "the degree of care actually practiced by hospitals is

evidence of what is reasonably prudent." *See* RCW 7.70.040. (CP 11615)

In addition, because it was operating its Maternal-Fetal Medicine Clinic without a manager, Valley had failed to train the "patient service representative" responsible for patient scheduling at the Clinic regarding Valley's patient scheduling policies. (RP 2310-12, 2693, 5003, 5196) The Valley employee who scheduled Rhea for the critical CVS procedure on a day when there was no genetic counselor available was unaware that Valley's own policy directed that patients be sent to Swedish if no genetic counselor was available when a patient was scheduled for a procedure that required genetic counseling. (RP 2307, 4470-71) And the test results were reviewed and reported to the Wuths by Valley's overworked, one-day-a-week replacement genetic counselor, who because of Valley's scheduling and staffing decisions had never met or spoken with the Wuths, was not familiar with their history, had not filled out the test requisition, and was not familiar with Valley's filing system or forms. (RP 4733-36, 4754-55)

Far from being unsupported by expert testimony, experts for both the Wuths and Dr. Harding (who the Hospital Association, along with Valley, gratuitously claims "stepped into the role of a

genetic counselor in ordering the test") (Amicus Br. 2), established that Valley's "systemic" scheduling, staffing and training failures (RP 2315) were "directly related to the care that . . . gave rise to the injury . . ." (Amicus Br. 8-9) and the "root cause" of its negligent treatment. (RP 659, 669; 1081-84; *see* Wuth Resp. Br. 63) In short, there was overwhelming evidence that Valley's scheduling, staffing and training was negligent, and that this negligence was a proximate cause of the Wuths' injuries.

The Hospital Association's efforts to tie Valley's liability for "health care" solely to a "physician's" examination, diagnosis, treatment, or care of a patient is based on a gross misreading of an internal quotation from *Estate of Sly v. Linville*, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994), in *Branom v. State*, 94 Wn. App. 964, 969-70, 974 P.2d 335, *rev. denied*, 138 Wn.2d 1023 (1999) (Amicus Br. 6). *Branom* added the bracketed reference to a "physician" in its definition of "health care" as 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" (Amicus Br. 6) to replace the name of the physician in the quoted case, and *only* because the named defendants in *Branom* and in the quoted cases were physicians. But neither *Branom, Sly,* nor any

other case limits "health care," or a tort claim based on "health care," to a physician's conduct.

To the contrary, *Grove* confirms once again that hospitals have an independent duty, as health care providers, to meet the "accepted standard of care." An entity such as a hospital providing health care must, of course, act through individuals. But that does not mean that the entity itself cannot be negligent and liable for malpractice under RCW ch. 7.70 when expert testimony establishes the applicable standard of care. *Grove*, 182 Wn.2d at 217, ¶ 21. Contrary to the Hospital Association's argument, hospitals have an independent, nondelegable duty to patients. Valley's failure to meet its standard of care here caused the Wuths' injuries.

C. Corporate negligence and vicarious liability are not "mutually exclusive" under RCW ch. 7.70.

In support of its new argument that corporate negligence and vicarious liability are "mutually exclusive," the Hospital Association claims that the WPI warns against use of its corporate negligence instructions when a hospital employee is directly negligent. (Amicus Br. 6) To the contrary, the Note on Use to WPI 105.02.02 anticipates that a plaintiff may bring claims *both* for corporate negligence and for vicarious liability:

> It is important to distinguish between the three theories on which liability against a hospital may be based: corporate negligence, vicarious liability for a non-employee physician ("ostensible" or "apparent" agency), and vicarious liability for the negligence of a hospital's officers, employees, or agents. *One or all of these theories may be advanced against a hospital in any one case.*

6 *Wash. Prac.: Wash. Pattern Jury Instr. Civ.* 595, WPI 105.02.02 (6th ed. 2012) (emphasis added); *see also* 6 *Wash. Prac.: Wash. Pattern Jury Instr. Civ.,* Note on Use, WPI 105.02.01 at 591 ("If an issue of corporate negligence exists, *also* use WPI 105.02.02.") (emphasis added).

That is precisely what happened here. The Wuths identified and provided expert testimony of six separate ways in which Valley's negligence caused their injuries (Wuth Resp. Br. 8-17, 22-24), and the jury was properly instructed on each of them. (Wuth Resp. Br. 57-61) Given the facts of this case, the Hospital Association's claimed concerns that making Valley liable for its staffing and training decisions will lead to "unfettered hospital liability" (Amicus Br. 9) ring hollow, as does its hyperbole that providing for tort liability when "different" scheduling, staffing or training decisions could have been made will "prejudice" "profitable or successful" hospitals. (Amicus Br. 10)

To the contrary, a hospital may only be held liable where, as here, its *negligent* (as defined by RCW 7.70.040) scheduling, staffing or training decisions cause a patient injury. Recognizing that a hospital's failure to adequately schedule, staff or train employees in accordance with the accepted standard of care will expose it to liability under RCW ch. 7.70 has the precise effect intended by tort law – to deter corporate health care providers from profiting from negligent conduct that may irretrievably harm patients such as the Wuths. (*See* Wuth Resp. Br. 51-54)

III. CONCLUSION

This Court should reject the Hospital Association's attempts to eviscerate the corporate negligence doctrine on grounds not raised by Valley and that are inconsistent with established statutory and case law.

Dated this 1st day of April, 2015.

SMITH GOODFRIEND, P.S.

By:_____
Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

SWANSON GARDNER, PLLC

By:_____
Todd W. Gardner
WSBA No. 11034
Peter E. Meyers
WSBA No. 23438

Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 31, 2015, I arranged for service of the foregoing Respondents' Answer to Brief of Amicus Curiae Washington State Hospital Association, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail X E-File
Todd W. Gardner Peter Meyers Swanson Gardner 4512 Talbot Road South Renton, WA 98055-6216 todd@swansongardner.com peter@swansongardner.com (denise@swansongardner.com)	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Anthony Todaro Corr Cronin Michelson Baumgardner & Preece LLP 1001 4th Avenue, Suite 3900 Seattle, WA 98154-1051 atodaro@corrcronin.com	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Melissa White Megan K. Kirk Kevin A. Michael Cozen O'Connor 999 Third Avenue, Suite 1900 Seattle, WA 98104 MWhite@cozen.com mkirk@cozen.com kmichael@cozen.com (dbowzer@cozen.com)	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail

Sherry H. Rogers Craig McIvor Mindy Drogseth Lee Smart, P.S., Inc. 701 Pike Street, Suite 1800 Seattle, WA 98101 shr@leesmart.com mrd@leesmart.com clmc@leesmart.com (jlm@leesmart.com)	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Steven P. Caplow Davis Wright Tremaine, LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101 stevencaplow@dwt.com (lisabass@dwt.com)	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Barbara A. Shickich Brett S. Durbin Riddell Williams, P.S. 1001 Fourth Avenue, Suite 4500 Seattle, WA 98154 bshickich@riddellwilliams.com bdurbin@riddellwilliams.com (vmagda@Riddellwilliams.com)	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail

DATED at Seattle, Washington this 31st day of March, 2015.

V. Vigoren

Victoria K. Vigoren