NO. 89902-9

SUPREME COURT OF THE STATE OF WASHINGTON

---

RAYMOND GROVE,

Petitioner,

v.

PEACEHEALTH ST. JOSEPH HOSPITAL,

Respondent.

---

# ANSWER TO PETITION FOR REVIEW

---

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent PeaceHealth St. Joseph Hospital

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

TABLE OF CONTENTS

I. IDENTITY OF RESPONDING PARTIES ..... 1

II. COUNTERSTATEMENT OF THE CASE ..... 1

A. Introduction ..... 1

B. Health Care at Issue ..... 1

C. Lawsuit and Trial ..... 3

D. Granting of PeaceHealth's Motion to Vacate the Verdict for Failure of Proof ..... 4

E. Court of Appeals Decision ..... 6

III. ARGUMENT WHY REVIEW SHOULD BE DENIED ..... 6

A. The Court of Appeals' Decision, Which Is Premised on a Failure of Proof, Does Not Involve an Issue of Substantial Public Interest that Should Be Determined by the Supreme Court ..... 6

B. The Court of Appeals' Decision Applying RCW 7.70.040 Does Not Conflict with *Hansch v. Hackett* ..... 8

IV. CONCLUSION ..... 10

## TABLE OF AUTHORITIES

**Page(s)**

**STATE CASES**

*Beggs v. Dep't of Soc. & Health Servs.*,
171 Wn.2d 69, 247 P.3d 421 (2011) ..... 8

*Branom v. State*,
94 Wn. App. 964, 974 P.2d 355, *rev. denied*,
138 Wn.2d 1023 (1999) ..... 8

*Douglas v. Freeman*,
117 Wn.2d 242, 814 P.2d 1160 (1991) ..... 9

*Grove v. PeaceHealth St. Joseph Hosp.*,
177 Wn. App. 370, 312 P.3d 66 (2013) ..... 1, 2, 6

*Hansch v. Hackett*,
190 Wash. 97, 66 P.2d 1129 (1937) ..... 8-10

*Miller v. Jacoby*,
145 Wn.2d 65, 33 P.3d 68 (2001) ..... 9

**STATE STATUTES**

*Laws of 1975-76, 2d Ex. Sess., ch. 56, §§8-9* ..... 8

RCW 7.70.030 ..... 8

RCW 7.70.030(1) ..... 9

RCW 7.70.040 ..... 6, 8, 9, 10

Chapter 7.70 RCW ..... 8

**RULES**

RAP 13.4(b)(1) ..... 9, 10

RAP 13.4(b)(4) ..... 7, 10

**OTHER AUTHORITIES**

WPI (Civ.) 105.01 ..... 3

WPI (Civ.) 105.02 ..... 3

WPI (Civ.) 105.03 ..... 3

## I. IDENTITY OF RESPONDING PARTIES

Respondent PeaceHealth St. Joseph Hospital[1] asks the Court to deny Raymond Grove's petition for review.

## II. COUNTERSTATEMENT OF THE CASE

### A. Introduction.

Raymond Grove sued PeaceHealth St. Joseph Hospital, St. Joseph Hospital Foundation, and two physicians for malpractice, but only a vicarious liability claim against PeaceHealth went to trial. The jury was given pattern standard-of-care and malpractice burden-of-proof instructions. It was not instructed on any theory of corporate negligence. The jury found causal negligence and awarded Mr. Grove damages. The trial court granted PeaceHealth's motion to vacate the verdict and dismiss the complaint. The Court of Appeals affirmed. *Grove v. PeaceHealth St. Joseph Hosp.*, 177 Wn. App. 370, 312 P.3d 66 (Oct. 28, 2013). Mr. Grove's motion for reconsideration was denied on January 8, 2014.

### B. Health Care at Issue.

PeaceHealth operates St. Joseph Medical Center in Bellingham, where on December 21, 2006, Dr. Richard Leone, a PeaceHealth-employed cardiothoracic surgeon, successfully performed an aortic root

[1] The hospital's correct name is PeaceHealth St. Joseph Medical Center.

and valve replacement on Mr. Grove's heart.[2] CP 270. Dr. Leone was Mr. Grove's attending physician during his postoperative course until December 25, when Dr Leone left for vacation, CP 435, 445, and two surgeon colleagues, Dr. Edward Zech and Dr. James Douglas, took over as attending physicians. *Id.*; 6/18/12 RP 5-6; 6/20/12 RP 23. A physician assistant, a physical therapist, and nurses also provided care to Mr. Grove in the hospital. CP 437, 449; 6/25/12 RP 1, 4; 6/26/12 RP 5-6.

On December 31, Mr. Grove was noted to have "foot drop," indicating nerve damage. CP 271, 438. An MRI was performed and Mr. Grove underwent fasciotomy surgery to relieve compartment syndrome, a buildup of pressure in a muscle compartment that can kill tissue.[3] CP 271; 6/30/12 RP 11. Mr. Grove claimed he was left with some permanent impairment of function in his lower left leg. 6/30/12 RP 51-52; CP 271.

Dr. Sean Ghidella, an expert called by Mr. Grove, opined that Mr. Grove's compartment syndrome probably developed between December 21 (the day of surgery) and December 31 (the day it was diagnosed), but he could not say more probably than not when, 6/30/12 RP 39-40; that signs of compartment syndrome must not have been looked for diligently

[2] The survival rate for such a repair is no higher than twelve percent. *See* CP 270, 484.

[3] The signal symptom of developing compartment syndrome is severe pain, of which Mr. Grove admittedly never complained. 6/30/12 RP 44-45, 54. Indeed, he was ambulating on December 28. *See* CP 481.

enough before December 31, 6/30/12 RP 46-48; and that, if compartment syndrome had been diagnosed earlier, a fasciotomy would have been performed to reduce pressure in the calf, 6/30/12 RP 37-38, and Mr. Grove probably would have had a better outcome, 6/30/12 RP 41. The other expert Mr. Grove called, Dr. Carl Adams, opined that the compartment syndrome probably developed on December 29 or thereafter. CP 511.

C. Lawsuit and Trial.

On December 21, 2009, Mr. Grove filed suit, naming PeaceHealth St. Joseph "Hospital," St. Joseph Hospital Foundation, and two physicians as defendants.[4] CP 2-11. By the time of trial in June 2012, no individual defendants remained; the sole defendant was St. Joseph "Hospital"/St. Joseph Hospital Foundation/PeaceHealth. CP 323.

The jury was instructed that Mr. Grove claimed PeaceHealth "failed to diagnose a postoperative complication," proximately causing him injury. CP 327. The court gave what were essentially pattern instructions on physician and health care provider malpractice, WPI (Civ.) 105.01, 105.02, and 105.03, CP 329, 332, and gave a pattern instruction that PeaceHealth is liable for its employees' acts or omissions, CP 331. The court did not give a "corporate negligence" instruction. Mr. Grove

[4] One originally named defendant was Dr. Sara Mostad, an infectious disease expert not employed by PeaceHealth. CP 711.

has not assigned error to jury instructions, nor does he complain about jury instructions in his Petition. The jury found PeaceHealth ("the defendant") causally negligent and awarded Mr. Grove $583,000. CP 347.

D. Granting of PeaceHealth's Motion to Vacate the Verdict for Failure of Proof.

PeaceHealth moved to vacate the verdict, CP 349-62, renewing a motion for "directed verdict," *see* CP 314-22. PeaceHealth argued that Mr. Grove's expert witnesses had not identified a specific PeaceHealth-employed provider who had failed to perform according to the standard of care applicable to him or her at a particular time when Mr. Grove's compartment syndrome existed and was diagnosable, and had not testified that any specific PeaceHealth-employed provider's failure to comply with the standard of care applicable to him or her proximately caused compartment syndrome to go undiagnosed. CP 352-55, 357-62. PeaceHealth argued that the jury must have been confused into finding negligence by the questioning and expert testimony about "team" care and about Dr. Leone being "the captain of the ship." CP 355-56.

Opposing PeaceHealth's post-verdict motion, Mr. Groves conceded that "it is virtually impossible to pinpoint the exact onset date" for his compartment syndrome, CP 433, and that "[w]ithout knowing the exact date and time of onset, due to inadequate monitoring, there is no way to

determine which individual's or individuals' failure to meet the standard of care in monitoring Mr. Grove for compartment syndrome resulted in the damage to [him]." CP 434. He argued that he had presented expert medical testimony by Dr. Ghidella that, although he could not tell from the chart documentation what was done postoperatively to look for signs of compartment syndrome, CP 430-31, "it was the team's failure to diagnose due to inadequate monitoring that violated the standard of care," CP 432, and that "the standard of care testified to by plaintiff's experts applied independently to the team as a whole as well as to any identifiable individual PeaceHealth employee," CP 433. Mr. Grove did not argue that *res ipsa loquitur* applied. He argued that the evidence permitted the jury to find that Dr. Leone, as attending physician, had been responsible for all of Mr. Grove's postoperative care but had not ensured that the "team" carried out and documented the monitoring for compartment syndrome that he contended the standard of care required. CP 435-36.

The trial court granted PeaceHealth's motion, CP 740-41, ruling orally that "[t]here has to be a negligent player on the team" for a team to be negligent, unless it is "a res ipsa loquitur situation where the outcome could not have occurred but for someone's negligence," CP 772, and that "[t]here is no evidence ... that compartment syndrome does not occur following thoracic surgery but for someone's negligence," CP 764. The

Court entered judgment in favor of PeaceHealth. CP 740-41.

E. Court of Appeals Decision.

The Court of Appeals affirmed, *Grove v. PeaceHealth St. Joseph Hosp.*, 177 Wn. App. 370, 312 P.3d 66 (2013), holding that:

-- RCW 7.70.040 governs health care provider malpractice claims and does not allow "team liability" claims;

-- PeaceHealth cannot be liable vicariously unless an individual provider was causally negligent in failing to meet the standard of care applicable to him or her;

-- the post-operative calf tissue injury for which Mr. Grove sued is not typically the result of some health care provider's malpractice, making *res ipsa loquitur* inapplicable; and

-- Mr. Grove did not present testimony sufficient to prove either a violation by any individual health care provider of the standard of care applicable to that provider or a "but for" causal link between such a violation and the calf tissue injury.

## III. ARGUMENT WHY REVIEW SHOULD BE DENIED

### A. The Court of Appeals' Decision, Which Is Premised on a Failure of Proof, Does Not Involve an Issue of Substantial Public Interest that Should Be Determined by the Supreme Court.

Mr. Grove sued under the health care provider malpractice statute, RCW 7.70.040, and accepted liability instructions patterned on it. This

was not a corporate negligence case. The Court of Appeals correctly affirmed the dismissal of Mr. Grove's case because his malpractice claim against PeaceHealth was based on a "team malpractice" theory advanced without expert medical testimony identifying any team member's violation of a standard of care applicable to him or her, or establishing that any such team member's violation of standard of care applicable to him or her was a "but for" cause of Mr. Grove's injury.

Even if Mr. Grove had shown that some provider's omission was a breach of the standard of care applicable to that provider, the omission still could not be a "but for" cause of injury attributable to delayed intervention unless there also was expert medical testimony that compartment syndrome was diagnosable at the time of the omission and that a better outcome was still then possible. The Court of Appeals correctly concluded that Mr. Grove failed to offer expert testimony connecting all of those dots. A Court of Appeals' decision that a specific plaintiff's proof failed does not present and issue of substantial public interest so as to warrant review under RAP 13.4(b)(4).

Mr. Grove argued repeatedly that his various providers had been members of a "team," but he proceeded to trial solely against a hospital and did not present evidence of a standard of care applicable specifically to hospitals. Nor has he argued on appeal that the trial court should have

instructed on a "corporate negligence" theory of liability. The viability of a "team malpractice" theory is not an issue of substantial public interest because, as the Court of Appeals explained, RCW 7.70.040, the health care provider malpractice statute under which Mr. Grove sued, will not accommodate a theory imposing liability for medical malpractice without proof that (among other propositions) at least one particular health care provider failed to meet the standard of care applicable to him or her.

B. The Court of Appeals' Decision Applying RCW 7.70.040 Does Not Conflict with *Hansch v. Hackett*.

Mr. Grove argues, *Pet. at 12-15*, that the Court of Appeals' decision conflicts with this Court's decision in *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937). It does not. *Hansch* has not been good law since 1976, when the legislature enacted RCW 7.70.030 and 7.70.040. *Laws of 1975-76, 2d Ex. Sess., ch. 56, §§8-9.* "Chapter 7.70 RCW provides the exclusive remedy for damages for injuries resulting from health care." *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011) (citing *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 355[, *rev. denied*, 138 Wn.2d 1023] (1999)). "In Washington, actions for injuries resulting from health care are governed by chapter 7.70 RCW," and a plaintiff alleging malpractice "must establish that the 'injury resulted from the failure of a health care provider to follow the accepted

standard of care.'"[5] *Miller v. Jacoby*, 145 Wn.2d 65, 72, 33 P.3d 68 (2001). The common law applied in *Hansch* has been superseded by RCW 7.70.030(1)[6] and RCW 7.70.040.[7] Conflict with a superseded decision that is no longer binding authority is not the sort of conflict to which RAP 13.4(b)(1) refers.

Even if a conflict with *Hansch* would qualify the Court of Appeals' decision for review under RAP 13.4(b)(1), the decisions do not conflict. *Hansch* did not address the issue of whether a "team malpractice" theory was viable in 1937. The evidence in *Hansch* was sufficient to enable the jury to find either of two particular nurses – "the nurse who received Mrs. Hansch at the hospital,"[8] or "the nurse in the maternity ward"[9] – causally negligent. Thus, the Supreme Court's statement that the

---

[5] Although a hospital may be sued directly, under a *corporate* negligence theory, *see, e.g., Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991), Mr. Grove did not argue below and does not argue in his petition that the jury should have been given some form of corporate negligence instruction to express a "team malpractice" theory.

[6] RCW 7.70.030(1) sets forth the first of three propositions, one or more of which a plaintiff must establish to recover in an action for damages for injury occurring as a result of health case: "(1) That injury resulted from the failure of a health care provider to followed the accepted standard of care...."

[7] RCW 7.70.040 provides:

> The following shall be necessary elements of proof that injury resulted from the failure to follow the accepted standard of care:
>
> (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.

[8] *Hansch*, 190 Wash. at 101.

[9] *Id.* at 102.

hospital's liability in *Hansch* "would apply to negligence by any one of its officers, employees, or servants," *Hansch*, 190 Wash. at 102, signifies that the evidence permitted the jury to find that either or both of those two nurses were causally negligent, not that the hospital was properly held liable because a bad outcome occurred sometime during a period of time when hospital-employed nurses happened to have provided care to the patient.[10]

## IV. CONCLUSION

It was plaintiff's responsibility to prove all elements of a claim under RCW 7.70.040. The trial court and Court of Appeals each had the responsibility to apply the law, not to save a claim that fell short legally and as a matter of proof. Both courts applied the law correctly. Review is not warranted under RAP 13.4(b)(1) or (4).

RESPECTFULLY SUBMITTED this 10th day of March, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
Attorneys for Respondent

[10] Mr. Grove asserts, *Pet. at 13*, that there is a conflict with *Hansch* because his evidence "established *the surgeons*' standard of care [italics added]," but the physician defendant in *Hansch* was absolved of malpractice, and the verdict against the hospital was upheld solely because of evidence of causal nursing malpractice by individual nurses. Mr. Grove's medical experts disclaimed criticism of his nursing care.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 10th day of March, 2014, I caused a true and correct copy of the foregoing document, "Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Petitioner:
Kevin Keefe, WSBA #11437
ATTORNEY AT LAW
1415 E Jefferson St
Seattle, WA 98122-5538
Ph: (206) 325-9390
Email: kkeeph@comcast.net

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Petitioner:
Ian S. Birk, WSBA #31431
Benjamin B. Gould, WSBA #44093
KELLER ROHRBACK, LLP
1201 3rd Ave Ste 3200
Seattle, WA 98101-3052
Ph: (206) 623-1900
Email: ibirk@kellerrohrback.com
bgould@kellerrohrback.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Co-Counsel for Respondent:
D. Jeffrey Burnham, WSBA #22679
JOHNSON GRAFFE KEAY MONIZ & WICK LLP
925 4th Ave Ste 2300
Seattle, WA 98104-1145
Ph: (206) 223-4770
Email: DJBurnham@jgkmw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

DATED this 10th day of March, 2014, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

## OFFICE RECEPTIONIST, CLERK

**To:** Custer, Carrie
**Subject:** RE: Grove v. PeaceHealth St. Joseph Hospital / SC Cause No. 89902-9

Received 3-10-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Custer, Carrie [mailto:CCuster@williamskastner.com]
**Sent:** Monday, March 10, 2014 12:36 PM
**To:** OFFICE RECEPTIONIST, CLERK
**Cc:** Spillane, Mary; Ferm, Dan; kkeeph@comcast.net; Ian Birk; bgould@kellerrohrback.com; DJBurnham@jgkmw.com
**Subject:** Grove v. PeaceHealth St. Joseph Hospital / SC Cause No. 89902-9

891320
Dear Clerk of Court,

Attached for filing in .pdf format is the Answer to Petition for Review in *Grove v. PeaceHealth St. Joseph Hospital*, Supreme Court Cause No. 89902-9. The attorney filing this answer is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

Respectfully submitted,

**Carrie A. Custer**
Legal Assistant to Mary H. Spillane, Daniel W. Ferm, and Jake Winfrey
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600
Direct 206.628.2766
Fax: 206.628.6611
ccuster@williamskastner.com
www.williamskastner.com

WILLIAMS KASTNER