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

RAYMOND GROVE,
Appellant

v.

PEACEHEALTH ST. JOSEPH'S HOSPITAL,

Respondents.

REPLY BRIEF OF APPELLANT TO RESPONDENT'S BRIEF

Kevin Keefe, WSBA #11437
Attorney for Appellant

1415 E. Jefferson Street
Seattle, WA 98122
(206) 325-9390

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1. INTRODUCTION

Respondent's Brief cites no factual, legal or logical justification for Judge Mura's ruling vacating Appellant's action following a Jury Verdict in his favor. The Respondent's Brief (hereinafter RB) also contains numerous errors and misleading conclusions and misrepresentations that need to be addressed most of which have no bearing on the issues before the Court.

2. ARGUMENT

A. Shifting Theory of Liability, Dismissal of Dr. Mostad

Respondent's Brief addresses issues that were not relevant at the time of trial, including allegations of a "shifting theory of liability" regarding sequential compression devices and the dismissal of Dr. Mostad. (RB p. 5,6)

When discovery reveals that a theory of a case is no longer viable that theory is dropped. The sequential compression device theory was dropped substantially before trial. As to the dismissal of Dr. Mostad, Respondent's counsel agreed in open court that Dr. Mostad was not negligent and that she was not a PeaceHealth employee nor part of the treatment "team." (Burnham Closing RP p. 6-7). Dr. Mostad's dismissal was appropriate and caused no prejudice to Respondent.

B. Disclosures in Discovery

At section (C) of RB p.7 the Respondent lists various alleged delays in discovery being provided. None of the listed issues regarding discovery were raised pre-trial, or at trial, by motions to strike or objections to admission (other than Dr. Adams' testimony discussed, *infra*) and have no relevance in this matter and no assignment of error was presented or preserved for this court to review. See *Fenimore v. Donald M. Drake Coast Co.*, 87 Wash.2d 85, 92 (1976).

C. Dr. Adams' Testimony On Foot Drop

The Respondent makes much regarding Dr. Adams' testimony regarding foot drop in response to a general question regarding proper monitoring. Dr. Adams testified that such finding by the physical therapist should have been brought to the attention of somebody. Respondent counsel objected. (Adams RP p.14, lls 13-15) Judge Mura ordered that this testimony be stricken on defense motion, and instructed the jury not consider it. (RB p. 8) Respondent counsel approved of the court's instruction. (Adams RP p. 34, ls 8-18). There was no motion on the part of Respondent for a mis-trial and no request for a specific jury instruction. Respondent proceeds to say "unfortunately, once the bell is rung, it is difficult to have the jury ignore the improper evidence." (RB p.9). Such concern was not so serious at trial that Respondent

subsequently elicited substantial testimony regarding foot drop from the very physical therapist note Dr. Adams referred to from their own expert, Dr. Douville. (Douville CP p. 17, ls 5-21). Respondent has presented no evidence that the jury ignored the court's instruction, or considered the stricken testimony, and no legal authority that Respondent was somehow deprived of a fair trial as a result. See *Livea v. G.A. Grays Corp.*, 17 Wn.App 214, 222 (1977).

D. Compartment Syndrome and Standard Of Care Monitoring

Respondent argues in its Brief that Appellant did not establish an expert opinion regarding standard of care in this case. This assertion is not made in good faith. There were no objections nor exceptions to the qualifications of Appellant's experts to the foundation of the expert opinions expressed by these experts, or to their admissibility nor any motion to strike said expert opinion as it applied to Respondent at trial. The Respondent's assertions have no basis in fact or law in this case and such issue is not properly before this court for consideration. See *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wash.App 572, 187 P.3d 291 (2008), *Burke v Pepsi Cola*, 64 Wn.2d 244, 245 (1964).

Respondent wants to continue to reweigh the facts the jury considered as to how a compartment syndrome presents itself. Virtually every physician in this case, including the PeaceHealth physicians and all

experts, agreed that "elevated pressure or hardness in the compartment is the one absolute manifestation of a compartment syndrome." (Appellant Brief pg. 6, ll 7 hereinafter AB). Respondent notably does not discuss this one "absolute manifestation" of compartment syndrome in its Response Brief.

Rather than address the issue the Respondent makes the statement that "virtually all the witnesses also agreed that only the late neurological signs would have lead them to a diagnosis, absent pain" (RB pg 20). The jury heard this argument at trial and rejected it.

Respondent's Brief studiously avoids any mention of the standard of care testimony as delineated by Dr. Ghidella or Dr. Adams and which was fully discussed in front of Judge Mura. At his perpetuation deposition there was the following questions and answers to Dr. Ghidella:

Q: What's the bases for your opinion?
A: There was an unrecognized compartment syndrome of the left leg that was treated late.
Q: How is that unrecognized condition below the standard of care?
A: With proper monitoring, this should have been an earlier recognized complication and, with immediate and standard of care treatment, could have led to an outcome where there was no permanent deficits or at least a better outcome than what occurred. (Dr. Ghidella RP p. 9, ls 7-16)

Dr. Adams also established his credentials, his qualifications and foundation of his standard of care opinion without any objection from

Respondent other than as discussed in section III *supra*. (Adams CP 0509, 0555; RP p.10, ls 1-7).

Dr. Adams' testified that it was a breach of the standard of care for Respondents to focus solely on cellulitis as the cause of Appellant's abnormal symptoms to the exclusion of any other possible diagnosis and that such delayed the proper diagnosis resulting in Appellant's damage. (Adams RP p.9, 11) To this day, despite the evidence in this trial, Respondent continues to assert:

> "It was the right diagnosis, at least as it appeared from all the numerous symptoms: redness in the leg, warmth, tenderness, then swelling in tissues, fever (indicative of infection), Leukocytosis (elevated white blood cells), and spreading redness to the foot." (RB p. 4)

Respondent's brief is replete with references to "lack of specific allegations" (RB p. 23), "unspecified failure to diagnose" (RB p. 17), etc. Dr. Ghidella testified that the specific standard of care compartment syndrome monitoring, by way of palpation of the compartments, should be done more than once a day. (AB p. 7-8). Dr. Ghidella also opined that it would be "logical and convenient" to monitor every time a rounding was done on a patient. Respondent objected to "logical and convenient" as being inadequate standard of care language. (Ghidella RP p.28-31; CP 0559). Judge Mura sustained the objection striking the opinion as to what

was "logical and convenient" since Dr. Ghidella didn't say it was the standard of care. (Ghidella RP 34-35). However, as to the at least twice a day monitoring, Judge Mura ruled:

> "He does say it earlier right up through line seven when your question is according to the standard of care should this exam should be done more than once a day. He says yes. That stays in. Clearly that's a standard of care response." (Ghidella p.35, lls 18-22).

E. <u>Judge Mura Reasoning</u>

The Respondent has taken the liberty of injecting itself into the thinking process of Judge Mura:

> "Despite the court's instruction, that physical therapist's testimony and note was tainted, which the trial court recognized once the jury came back with a verdict for Mr. Grove." (RB p. 9).

> "The court determined there was no evidence sufficient to support the verdict under CR 59(b) and granted Peace Health's Motion to Vacate the Jury Verdict." (RB p. 11).

> "The judge, who listened to all the evidence, recognized the error in the consideration of the jury's decision, and corrected that error." (RB 17)

Judge Mura's decision was based on his opinion that in a medical malpractice action the plaintiff needed to identify a specific negligent individual employee of defendant rather than the entire surgeon led "team." (Mura RP p.11, ls 2-4). The team of Respondent health care providers who were all employees of Respondent and none of them performed standard-of-care monitoring. Judge Mura never suggested that

the jury had considered improper or tainted evidence, that it had refused to follow his jury instructions, or that there was insufficient evidence of violation of the standard of care. The jury is presumed to have followed the court's instructions. *Livea v. G.A. Gray Corp.*, 17 Wn.App 214, 222 (1977).

In his oral rationale Judge Mura stated that if the issue regarding a standard of care violation by the Respondent team versus a named individual team member under the facts and circumstances of this case was resolved by the Court of Appeals, "then the verdict would be upheld and, like I say, the verdict will be reinstated and the case will be over." (Mura RP 16, ls 25; 17, ls 1-4).

F. Dr. Leone's Individual Negligence

Respondent in RB pages 1, 3, 6, 8, 11, 12, 19, 20, 21, and 24 repeatedly points out that the attending physician, Dr. Leone, was not in town at the time the formal compartment syndrome diagnosis was finally made. While the diagnosis was not made until December 31st, it is uncontroverted that this was a late diagnosis and that by the time Appellant was given appropriate treatment he had suffered catastrophic injury to his left leg.

Respondent correctly states that it was Dr. Ghidella's opinion that the initial onset of the compartment syndrome had occurred during the

time of Mr. Grove's intubation following surgery. (RB p.10). Based on the records Appellant was re-intubated in ICU on December 23, 2006 (Mostad RP p. 9, lls 13) and extubated on December 26, 2006. (Mostad RP p. 40, lls 23-25; 41, lls 1-3).

Dr. Leone was the team leader, primary surgeon and attending physician for Mr. Grove from the surgery date of December 21, 2006 and instituted his plan of treatment. Dr. Leone left town on December 25, 2006 and transferred care that day to Dr. Zech. Dr. Leone was in primary charge and leader of the team for Mr. Grove's care during the majority of the time that Mr. Grove was re-intubated.

Dr. Douglas testified to the procedure at PeaceHealth when a patient is transferred from the primary physician to the covering physician:

> "But typically what would happen is the person leaving on call would sign out to the person coming on call for **any issues with the patient** . . ." (Douglas RP p. 33) (emphasis added)

This is not a case where the attending physician left appropriate instructions which were not carried out. See *Adams v State of Washington*, 71 Wn.2d 414 (1967). There was no evidence that Dr. Leone did standard of care monitoring of Appellant's lower extremity compartments while he was in town nor evidence that he instructed anyone on the team covering for him to do so. Dr. Leone transferred the

care of Appellant to Dr. Zech without any evidence that he gave instructions regarding the compartment syndrome potential and without giving him any instructions as to the required standard of care monitoring for compartment syndrome. (AB p.10)

Expert testimony is not even required if a reasonable person can infer a causal connection from the facts and circumstances and the medical testimony given. *Hill v. Sacred Heart*, 143 Wash.App 438, 446, (2008) and *Douglas v. Freeman*, 117 Wn.2d 242, 252 (1991). Here the jury could reasonably make the causal connection that Dr. Leone's failure to do standard of care monitoring, and failure to instruct his replacement care giver on the need for standard of care monitoring, was Dr. Leone's negligence individually as well as a member of the Respondent's team.

Respondent did not request a separate jury instruction regarding Dr. Leone's individual negligence. Appellant did not need such instruction as Dr. Leone was an employee of Respondent. The jury had substantial evidence by which it could have found Dr. Leone individually negligent but it did not need to do so.

G. Team Concept Liability

Respondent did not legally distinguish the cases of *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937) and *Thompson v. Grays Harbor*, 36 Wash.App 300, 675 P.2d 239 (1983) regarding unidentified

negligent actors. Respondent misstates the facts in *Thompson*, supra at 306, regarding the unnamed negligent actor. The court described potential negligent parties as "unidentified nurses and other hospital staff in arguably tortious conduct." Respondent continues to assert that Appellant was required to name a specific negligent employee to make an employer liable under respondeat superior. In *Conrad v. Alderwood Manor*, 119 Wash.App 275 (2003), the jury was allowed to consider evidence and make a finding of negligence on the part of the employer when an individual responsible employee could not be specifically identified.

It is instructive to note the emphasis and value Respondent gave to the "team" concept at trial with the dismissive treatment Respondent gives to the "team" concept in its Response Brief. Appellant cited in its Appellant Brief at pages 5-6 the testimony of the actual team members as to the high standard of care and the preferred treatment this "team" method provided and how well it increased the care a patient received. The "team" concept as testified to at trial was basically all encompassing and the team oversaw a myriad of problems that a patient might face.

The Respondent wants to be given credit for the team concept in its care and treatment of its patients, such method of care being supposedly superior to any other type of care, while using the team concept to shield itself from liability by asserting that the injured party must attempt to pull

out every string of the team's operation to determine which specific team member was responsible for the failure to meet the standard of care. It is uncontroverted that Appellant was treated by a "team" of health care providers directed by a surgeon and that all "team" members were employees of Respondent. Judge Mura stated in his oral rationale for his decision that the person doing the monitoring "has to be somebody working under the supervision of the surgeon." (Mura RP p.19, ls 8-10). The standard of care applied to the surgeon led team that carried out the plan of caring for Appellant and would not change depending on who was asked by the team leader to do the standard of care monitoring. For example the standard of care monitoring would not be at least two times a day for a surgeon, once a day for a physician's assistant, etc. This would make no logical or legal sense and would make an identifiable standard of care impossible. See *Hill v. Sacred Heart Medical Center*, 143 Wash.App 438, 454, 455 (2008).

H. **Bad Result/Bad Outcome**

Respondent is in error in asserting that Appellant's claim of malpractice on the part of Respondent was a result of negligence during surgery which caused the compartment syndrome rather than the actual claim that Respondent's failure to do standard of care monitoring following surgery was negligent which prevented early diagnosis of the

syndrome after it developed. The Respondent erroneously argues that Appellant's claim was a "bad result" claim:

> "The trial court agreed with Peace Health that the law in Washington does not impose liability based on Mr. Grove's theory of "team" negligence and to do so would expand existing law in such a way that would impose negligence simply because of a ***bad result***." (RB 11)
>
> "there is no authority extending medical negligence to a hospital "team" simply because of a ***bad outcome*** – the provider must be named and his or her individual failure must be specified." (RB 12, See also RB 16)

There was absolutely no evidence or claim in this case that the compartment syndrome developed as a result of negligence from the original surgical procedure. Dr. Adams testified that Dr. Leone's surgery was "brilliant" and "masterful". (Adams CP 0511)

It was uncontroverted that compartment syndrome is a known complication of a long surgery of the type Appellant underwent. (AB p.6) The fact that compartment syndrome is a known complication was not evidence that Respondent was negligent for its onset but, rather, such known potential to develop this complication in Appellant's situation gave rise to the standard of care monitoring required in this case.

Respondent acknowledged both in open court (AB p. 10, 11) and in the opening sentence of its Response Brief, that this was a failure to timely diagnose case. (See also RB p. 11). While acknowledging the

nature of Appellant's claim Respondent chooses to erroneously assert that this was a "bad result" case.

Unfortunately Judge Mura also mis-identified the nature of the case and erroneously reasoned that this was a bad outcome case:

> "Were this court to apply the plaintiff's theory that in cases where a team approach to health care results in liability where there is proof of individual negligence by a team member, or where, as in this case, there is simply a bad outcome, then such a holding would run counter to the well-established principles that a bad outcome itself is not evidence of negligence." (Mura RP page 11, 14-21).

Washington Courts recognize the clear distinction between unsatisfactory results from a surgical procedure and the failure to properly diagnose a patient's condition. In Watson v. Hockett 42 Wash.App 549, 555, 712 P.2d 855 (1986) the court held:

> The instructions submitted in a particular case are governed by the facts which must be proven in that case. . . . It is clear from the facts of *Miller*, the negligence was a direct *result* of the doctor's course of treatment. Even though Dr. Hockett argues Mr. Watson's injuries were the *result* of unsatisfactory treatment, there was no evidence the rectal abscess was the *result* of the treatment prescribed by Dr. Hockett, it was, rather, the *result* of a failure to properly diagnose Mr. Watson's condition. Thus, there are no facts to support this instruction and the court properly refused to submit it to the jury, . . . (Instruction that "physician is 'not an insurer of results' should not be given when no issue concerning a guarantee has been raised.").

In the instant case Appellant does not even have an argument regarding instructions as the court gave the "no guarantee" and "poor

result instruction." (Jury Inst. No. 8, CP 0334). Per *Livea*, *supra* it must be presumed the jury followed the court's instruction.

The present case is no more a "bad result" case than a case of someone suffering a stroke while in the hospital because the health care provider failed to do standard of care blood pressure monitoring, or a patient having cancer become terminal because a health care provider failed to timely diagnose.

I. Captain of the Ship

The Respondent has set up a strawman with the "captain of the ship" doctrine which was neither argued nor asserted by Appellant in this case. The Respondent makes the same mistake regarding "captain of the ship" as it did in the "bad result" argument previously discussed. The contrast between the doctrine of "captain of the ship" as discussed in Van Hook v. Anderson, 64 Wash.App 353 (1992), and the instant case is particularly instructive.

The "captain of the ship" doctrine arises in a surgical context where the complained of negligence and injury occurs during the surgery and results in damage. The present case involves a failure to diagnose a condition that arose at an unspecified time, and reached a limb destroying severity due to the failure of the Respondent employees, under the

supervision of a Respondent employee/surgeon, to perform standard of care monitoring.

A basic tenant of the "captain of the ship" doctrine deals with the master's right of control of the employees of someone else. Such question of control is normally a question for the jury. *Van Hook*, supra, at 364 citing *Kemalyan v. Henderson*, 45 Wash.2d 693, 700 (1954). In the present case all of the persons on the "team" providing care to Appellant following surgery were employees of the Respondent, including the surgeons who headed the team. Respondent argues, unsupported by any evidence, that the employees on the team treating Appellant were basically operating independently. (RB p. 23). The uncontroverted evidence at trial does not support this argument. As testified to by Dr. Leone regarding the team rounding (Leone CP 0451 and Appellant Brief P.6):

> "And the plan is made between the surgeons who are there and the PAs and the nurses carry out the plan." (CP 0557)

It was uncontroverted in the present case that the term "captain of the ship" did not refer to that legal theory at trial but was a reference to the team leader surgeon on call at any particular time. (AB p.10-11). In open court Judge Mura and Respondent's counsel both acknowledged that "captain of the ship" did not refer to the legal theory but to the Appellant team leader:

Mr. Burnham: I don't care if he testifies that the captain of the ship is whoever is on call that day.

The Court: Whoever is covering for the captain of the ship. (Adams RP p.29, lls 17-20)

Respondent and the court were aware throughout trial that the negligence claimed herein was not as to specific individual employed employees but to the head of the team who directed the care:

The Court: So I'm not going to allow you to have criticism now of what Dr. Douglas did or failed to do.

Mr. Burnham: Except in the general sense that he is the captain of the ship, which was disclosed. (Adams RP p.31, ls 22-25)

Dr. Adams testified consistent with the court's and Respondent's understanding of what "captain of the ship" meant in this trial:

Q: Various times you named individually Dr. Leone and then Dr. Douglas and then apparently Dr. Zech was at the helm at some point, is that correct?
A: That's correct.
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: It's always the head of the team. And the team members report to that head. And then if the head team member is gone, then it's the person who he designates the new captain. (Adams CP 0510, 0555).

Judge Mura proceeded to erroneously combine the theories of "bad result" and "captain of the ship" in his rationale for vacating the jury verdict based on when a specific negligent individual was not identified:

> . . ."That not having been done, the defense was put into an unfair situation, as I look back on the entire process of this case, because they didn't know what they were

> defending against other than the general theory that the captain of the ship, that the surgeons were responsible because something bad happened. That is the way that I see." (Mura RP p. 16, ls 7-19).

Respondent knew they were defending against a claim of medical negligence for Respondent's employees' failure to do standard of care monitoring for compartment syndrome. Respondent has provided no facts, no law, no reasonable argument of how their defense of the overall team standard of care defense would have differed from the standard of care of each individual team member.

J. Standard of Review

Respondent misleadingly cites *Benjamin v. Cowles Pub. Co.*, 37 Wash.App 916, 923, 684 P.2d 739 (1984) and *Bunch v. King County Dep't of Youth Servs*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005) for the proposition that the standard of review in this case is for abuse of discretion. Neither case stands for that premise.

A case cited by Respondent, *Kemalayan v. Hendersen*, 45 Wn.2d 693,696, 697 (1954) states the long held law in Washington regarding directed verdicts and judgments notwithstanding the verdict:

> "We likewise follow the rule that in ruling upon a challenge to the sufficiency of the evidence, a motion for directed verdict or a motion for judgment notwithstanding the verdict, ***no element of discretion is involved***, and the trial court can grant such motions only when it can be held as a matter of law that there is no evidence nor reasonable

inference from evidence to sustain the verdict." (emphasis added)

See also *Douglas v. Freeman*, 117 Wash.2d 242, 247 (1991) and *Schmidt v. Coogan*, 162 Wn.2d 488, 491 (2007).

3. CONCLUSION

Defendant has cited no facts and no case law that supports Judge Mura's decision to vacate the jury award in this case. The Respondent has cited no adverse evidentiary ruling, no ruling in favor of Appellant that was objected to by Respondent, no Motion in Limine that was denied, no jury instruction that was issued over Respondent's objection, no logical extension of the law that would add an additional requirement to prove hospital negligence, no evidence of any juror mis-conduct by way of not following the Judge's instructions, nor any theory or defense Respondent was deprived from presenting, no evidence of any kind that the unanimous jury was "confused," nor any other basis that supports Judge Mura's decision to vacate the jury verdict.

The trial court's ruling should be vacated and the jury verdict should be reinstated.

Respectfully Submitted,

Kevin Keefe, #11437
Attorney for Appellant
Raymond Grove