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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RAYMOND GROVE,

Petitioner,

v.

PEACEHEALTH ST. JOSEPH HOSPITAL,

Respondent.

**PETITIONER'S ANSWER TO BRIEF OF AMICI CURIAE
WASHINGTON STATE MEDICAL ASSOCIATION AND
WASHINGTON STATE HOSPITAL ASSOCIATION**

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ORIGINAL

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

ARGUMENT.....2

 I. While PeaceHealth touted its “team approach” at trial, this case does not ask whether a team may be liable as a unit. Rather, because Grove has consistently implicated three individual surgeons, the Court should simply apply settled law.2

 II. Because Grove adduced sufficient evidence that at least one of the three surgeons had committed medical negligence under RCW 7.70.040, settled law requires the jury’s verdict to be reinstated.....5

 A. Grove provided substantial expert testimony to establish the standard of care applicable to surgeons monitoring a patient for compartment syndrome after a long surgery.5

 B. Substantial, nonconclusory expert and fact testimony showed that all three surgeons—Drs. Leone, Zech, and Douglas—breached the applicable standard of care.....7

 C. The undisputed evidence at trial established that Drs. Leone, Zech, and Douglas were all employees of PeaceHealth.9

 D. Grove provided substantial expert testimony to establish proximate causation as to one or more of the three surgeons..... 10

 E. Grove bore—and carried—the burden of proof at all times..... 15

 III. *Hansch v. Hackett* remains good law because no legislation has superseded it. 15

 A. *Hansch* did not establish a substantive rule. 16

B. <i>Hansch</i> 's procedural rule is unaffected by legislation.....	18
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000)	13
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994)	17
<i>City of Fircrest v. Jensen</i> , 158 Wn.2d 384, 143 P.3d 776 (2006)	20
<i>City of Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985)	3
<i>Douglas v. Freeman</i> , 117 Wn.2d 242, 814 P.2d 1160 (1991)	3, 6, 8, 12
<i>Grove v. PeaceHealth St. Joseph Hosp.</i> , 177 Wn. App. 370, 312 P.3d 66 (2013)	5
<i>Hansch v. Hackett</i> , 190 Wash. 97, 66 P.2d 1129 (1937)	<i>passim</i>
<i>James v. Robeck</i> , 79 Wn.2d 864, 490 P.2d 878 (1971)	19
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002)	9
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829, 774 P.2d 1171 (1989)	13
<i>Putman v. Wenatchee Valley Med. Ctr., P.S.</i> , 166 Wn.2d 974, 216 P.3d 374 (2009)	20
<i>Thompson v. Grays Harbor Cmty. Hosp.</i> , 36 Wn. App. 300, 675 P.2d 239 (1983)	16

<i>In re Williams</i> , 121 Wn.2d 655, 853 P.2d 444 (1993)	20
Statutes	
<i>RCW 4.16.350</i>	18
RCW 7.70.010	18
RCW 7.70.040	2, 5, 17
RCW 7.70.040(1).....	6, 7, 10
RCW 7.70.040(2).....	10
RCW 7.70.050	4
Chapter 7.70 RCW	15, 18
Rules	
RAP 13.7(b).....	3
Other Authorities	
Const. art. I, § 21.....	19

INTRODUCTION AND SUMMARY

The brief submitted by Amici is a collection of conclusions without argument and assertions without evidence.¹ It is a good example of what can go wrong when parties wholly unfamiliar with the record attempt to pronounce on a case. Grove's response to Amici proceeds in three sections.

1. This case does not present the issue of whether a team of health care providers may be liable as a unit, because Grove has always implicated three individual surgeons employed by PeaceHealth: Drs. Leone, Zech, and Douglas. At trial, in fact, it was PeaceHealth that tried to shield itself from liability by touting its "team approach" to treatment.

2. Amici summarize several requirements to prove a medical negligence claim—and seemingly assume that Grove has not satisfied those requirements. Amici simply ignore the record. At trial, Grove presented substantial evidence on every requirement that Amici mention. Grove presented substantial evidence: (1) that a common standard of care bound all three surgeons—a standard of care that, as Grove's experts made clear, applied to surgeons in similar circumstances; (2) that all three surgeons breached that standard of care; (3) that all three surgeons were

¹ "Amici" refers to the Washington State Medical Association and the Washington State Hospital Association.

employees of PeaceHealth; and (4) that the breaches of one or more of the three surgeons proximately caused Grove's injury.

3. *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937) establishes a simple procedural rule: when a plaintiff provides substantial evidence on all elements of a tort against at least one employee of a defendant, Washington courts will uphold a jury verdict against that defendant. No legislation since *Hansch* has changed that rule.

ARGUMENT

- I. While PeaceHealth touted its “team approach” at trial, this case does not ask whether a team may be liable as a unit. Rather, because Grove has consistently implicated three individual surgeons, the Court should simply apply settled law.**

Grove has consistently contended that the verdict must be upheld because the jury had sufficient evidence to conclude that at least one of the three surgeons had violated RCW 7.70.040. When he used the term “team” in his briefing to the Court of Appeals, he referred *only* to those three surgeons.² *See* Br. of Appellant at 5 (“The ‘team’ following Grove

² For that reason, PeaceHealth is wrong to suggest that Grove raised the negligence of Drs. Zech and Douglas for the first time in “his motion for reconsideration in the Court of Appeals.” Suppl. Br. of Resp’t at 14. Rather, Grove raised the negligence of all three surgeons to the Court of Appeals. As PeaceHealth itself noted in responding to Grove’s motion for reconsideration, none of the arguments that Grove made there were new: “There is nothing new about [Grove’s] claim; it has been raised previously. There is nothing new about the law he presents, either.” Resp. to Mot. for Recons. at 3; *see also id.* (“Mr. Grove simply re-presents the fact-package a bit differently”); Suppl. Br. of Pet’r at 11 (quoting PeaceHealth’s Response to Motion for Reconsideration).

Ironically, PeaceHealth has itself failed to preserve the argument that Grove cannot bring the negligence of Drs. Zech and Douglas to this Court’s attention. In his

consisted of Dr. Leone, Dr. Zech, and Dr. Douglas, the three CT surgeons at PeaceHealth.”). He was not referring to the larger team as a unit, which included physicians’ assistants and nurses. Grove seeks to reinstate the verdict based on the negligence of the three individual surgeons, not on the conduct of the larger team as a unit.

At trial, however, PeaceHealth tried to use its team treatment as a shield. All three surgeons touted PeaceHealth’s team treatment. Dr. Zech, for example, characterized PeaceHealth’s treatment as “very much a team approach”—an approach that he said allowed “anybody on our service to be familiar with everybody that we had in the hospital.” Zech RP 4:21–23. Dr. Douglas advertised the team approach too: “We believe that the best patient care is given when all members that are taking care of the patient are aware of what’s going on with the patient. So we round entirely as a team every day.” Douglas RP 10:25–11:3. Drs. Leone testified to the same

petition for review, Grove argued that “all three surgeons had failed to timely diagnose his condition,” and hence the jury had sufficient evidence to find that “one or more” of those three surgeons violated the standard of care and proximately injured Grove. Pet. for Review at 3; *see also id.* at 4 (stating the issue presented for review). In its answer to the petition, however, PeaceHealth never once suggested that Grove had waived his right to argue that Drs. Zech and Douglas had committed medical negligence. *See* Answer to Pet. for Review at 6–10. By failing to raise its waiver argument in the answer to Grove’s petition, PeaceHealth has forfeited its right to make that argument now. *See* RAP 13.7(b) (review limited to questions raised by “the petition for review and the answer”); *Douglas v. Freeman*, 117 Wn.2d 242, 258, 814 P.2d 1160 (1991) (“We decline to consider an issue raised for the first time in a supplemental brief filed after review has been accepted.”); *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815–16 (1985) (declining to consider respondent’s argument that petitioner had forfeited its right to raise an issue, where respondent had itself failed to make that forfeiture argument in her opposition to the petition for certiorari).

effect. Leone RP 10:17–24. The subtext of all this testimony, of course, is that PeaceHealth’s team approach provided Grove with the best possible care.

After the jury rendered its verdict, however, PeaceHealth began to argue that Grove had not proved his case as to any individual health care provider, and instead had simply “relied on ambiguous references to responsibility for the ‘team.’” CP 359. There are two problems with this argument. The first is that it simply misstates the record: Grove had indeed identified three individual health care providers as having violated RCW 7.70.050. *See* Suppl. Br. of Pet’r at 5–10, 13–17. The second is that PeaceHealth was putting its own team-based defense in Grove’s mouth.

So, while Amici are right that this Court should not address the question of “team liability,” they are wrong when they accuse Grove of “promot[ing]” that theory. Br. of Amici at 13. In fact, it was PeaceHealth that touted its team treatment. Grove sought to predicate liability on the conduct of the three surgeons.

Rather than addressing a question that is not presented, the Court should simply analyze this case under settled law. And, as Grove will explain below, that law requires the jury’s verdict to be reinstated.

II. Because Grove adduced sufficient evidence that at least one of the three surgeons had committed medical negligence under RCW 7.70.040, settled law requires the jury's verdict to be reinstated.

Amici list a number of requirements for proving medical negligence under RCW 7.70.040, in the apparent belief that Grove has not satisfied them. This belief betrays Amici's ignorance of the record. Under the very principles that Amici lay out, Grove adduced more than enough evidence to sustain the verdict against PeaceHealth.

A. Grove provided substantial expert testimony to establish the standard of care applicable to surgeons monitoring a patient for compartment syndrome after a long surgery.

Grove provided expert testimony to establish the standard of care applicable to the three surgeons. Wisely, Amici do not appear to argue otherwise. Br. of Amici at 5. As Grove has explained, his two expert witnesses, Drs. Sean Ghidella and Carl W. Adams, both directed their testimony at the standard of care governing the three surgeons. Suppl. Br. of Pet'r at 8–10.³

³ Amici repeat the Court of Appeals' error by focusing on certain instances in which Grove asked "whether or not the medical treatment provided to Raymond Grove met the standard of care," without stating in the same question who was providing that care. *Grove v. PeaceHealth St. Joseph Hosp.*, 177 Wn. App. 370, 378, 312 P.3d 66 (2013); Br. of Amici at 7–8. But that question was asked of expert witnesses *who made clear they were testifying about the standard of care governing the three surgeons*. Suppl. Br. of Pet'r at 8–10, 13. Given that evidentiary context, Grove was not required to restate *in every single question* whom he was accusing of breaching the standard of care. Amici and the Court of Appeals fail to consider the evidentiary context, and thus

Amici blunder, however, when they suggest that Grove failed to establish the standard of care that applied to surgeons who are “acting in the same or similar circumstances.” RCW 7.70.040(1); *see* Br. of Amici at 5. Grove’s expert witnesses testified to the standard of care that governed Grove’s specific circumstances. In fact, the expert witnesses were remarkably specific about the circumstances to which their testimony related. Dr. Ghidella made it clear that he was opining about the treatment of Grove’s “left lower extremity while” he was recovering from surgery “in the intensive care unit . . . between December 21, 2006, and December 31, 2006.” Ghidella RP 6:22–7:1. Dr. Ghidella testified, in particular, about the “proper monitoring” that had to be done during that “perioperative period”; thus he testified at length about the specific actions that this proper monitoring required of the surgeons.⁴ *Id.* at 9:12, 9:21–10:23. Dr. Adams, similarly, testified to the standard of care that applies when a postoperative patient shows the symptoms of compartment syndrome shown by Grove. *See, e.g.*, Adams RP 38:3–45:1. The jury had substantial evidence to find that the three surgeons had breached a

violate the proper standard of review, which requires the record to be viewed in the context most favorable to Grove. *Douglas*, 117 Wn.2d at 247.

⁴ He testified, moreover, that the monitoring had to be done at least twice a day. *See* Ghidella RP 28:8–13.

standard of care that applied “in the same or similar circumstances.” RCW 7.70.040(1).

B. Substantial, nonconclusory expert and fact testimony showed that all three surgeons—Drs. Leone, Zech, and Douglas—breached the applicable standard of care.

The testimony at trial—both expert and fact—provided ample evidence that Drs. Leone, Zech, and Douglas had each breached the applicable standard of care. Rather than engaging with this testimony, however, Amici simply bury their heads in the sand and recite the legal requirements for a medical negligence claim. But those are precisely the requirements that Grove has satisfied—as a look at the record reveals.

As Grove’s Supplemental Brief showed, the evidence at trial provided the jury with substantial evidence to find that three specific physicians—Drs. Leone, Zech, and Douglas—had breached the common standard of care that applied to all of them. *See* Suppl. Br. of Pet’r at 5–10, 13–15. So it just ignores the record to claim that Grove did “not implicate any particular agent of PeaceHealth.” Br. of Amici at 16; *see also id.* at 4–5. Grove implicated *three particular surgeons* employed by PeaceHealth, and the jury had substantial evidence to find that *all three* had breached the standard of care.

Amici also say that “[i]t is not sufficient for an expert to opine on the standard of care where there is no testimony the doctor violated those

standards.” Br. of Amici at 6. The record in this case, however, contains abundant testimony that Drs. Leone, Zech, and Douglas *each* violated the applicable standard of care.⁵ The jury could rely on the deposition testimony of Drs. Leone and Zech themselves to find that neither surgeon properly monitored Grove for compartment syndrome, and hence breached the standard of care. Suppl. Br. of Pet’r at 13–14. And the jury could rely on Dr. Adams’ expert opinion to find that Dr. Douglas had breached the standard of care by overlooking “significant findings” that “should have given rise to a suspicion of compartment syndrome” on December 29. Adams RP 37:17–38:2 (quoted by Suppl. Br. of Pet’r at 14). Dr. Adams’s expert opinion, moreover, was anything but conclusory. *Cf.* Br. of Amici at 7 & n.5. Specifying the facts that supported his opinion, Dr. Adams stated that “persistent leukocytosis [i.e., an elevated white blood cell count], persistent fever, and then neurological findings and a consult from the infectious disease doctor,” plus “left lower extremity pain and swelling” and the exclusion of other causes, should have led Dr. Douglas to test for and diagnose compartment syndrome on December 29.

⁵ Here, the three surgeons’ breaches were established by *both* fact and expert witnesses. To the extent Amici suggest that fact witnesses cannot establish a breach of a standard of care, *see* Br. of Amici at 5–6, they are wrong as a matter of law. “Once the applicable standard of care is established by experts, further expert testimony is not required to prove a breach of that standard.” *Douglas*, 117 Wn.2d at 251.

Adams RP 11:23–12:8, 13:9–20, 37:24–38:2; *see also* Pet. for Review at 10 (summarizing this testimony); Suppl. Br. of Pet'r at 14 (same).

C. The undisputed evidence at trial established that Drs. Leone, Zech, and Douglas were all employees of PeaceHealth.

Amici have also penned an unnecessary disquisition on the law of agency. Br. of Amici at 12–13. The disquisition is unnecessary because Drs. Leone, Zech, and Douglas, by their own admission, were all employees of PeaceHealth. Leone RP at 2:7–8; Zech RP at 2:12–14, 4:3–4; Douglas RP at 2:18–24. No one disputes that employees are agents of their employer. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) (quoting *Restatement (Second) of Agency* § 2(2) (1958)). Because the only three health care providers that Grove implicated were all employees of PeaceHealth, the doctrine of ostensible agency is irrelevant. *See* Br. of Amici at 13. Amici's reference to Dr. Sara Mostad, a non-employee, *id.*, should be seen for what it is: a not-so-subtle implication that the jury somehow believed Dr. Mostad to be an agent of PeaceHealth. That strained implication should be rejected. Amici point to nothing in the record suggesting that Grove argued Dr. Mostad was PeaceHealth's agent, and no claims against her were tried to the jury.

D. Grove provided substantial expert testimony to establish proximate causation as to one or more of the three surgeons.

Grove provided abundant expert testimony on proximate cause. Amici imply, but do not actually come out and say, that Grove failed to provide that testimony—and yet they do not grapple with the expert testimony that Grove discussed in his Petition and Supplemental Brief. Pet. for Review at 10–11, 18–19; Suppl. Br. of Pet’r at 15–17. Contrary to Amici’s citationless assertions, Grove has proven *all* the necessary elements, including proximate cause, against one or more of the three employee surgeons.⁶ Br. of Amici at 16–17.

Grove presented substantial evidence that the breaches of one or more of the three surgeons proximately caused his injury. This is true for a simple reason: if Grove’s compartment syndrome had been timely diagnosed and treated at any time between the earliest possible date and the latest possible date of the syndrome’s development, Grove would have suffered either no injury or less injury than he actually did.

⁶ For that reason, the hypothetical that PeaceHealth discusses in a footnote—in which the required elements of medical negligence are satisfied as to no single employee of a hospital—is irrelevant here. Suppl. Br. of Resp’t at 15 n.7. Grove presented substantial evidence that *all* three surgeons breached the standard of care. RCW 7.70.040(1). He presented substantial evidence that the breaches of one or more of the three employee surgeons proximately caused his injury. RCW 7.70.040(2). Hence, he adduced substantial evidence on *all* required elements as to one or more of the three surgeons.

The jury could be certain that Grove's compartment syndrome developed sometime between December 21, the date of his surgery, and December 29, the date when clear and direct physical evidence of the compartment syndrome first comes into the medical records. *See Adams* RP 37:21–38:2. Even so, Dr. Ghidella was able to narrow the probable date range. Because he could not say with certainty “when exactly” the compartment syndrome first developed, Ghidella RP 40:4–5, he gave the jury a range of dates for when it probably developed. He testified that “the more likely time frame” for when Grove developed his compartment syndrome was while he was sedated and intubated—i.e., from December 21 to December 26. *See id.* 54:9–15; *see also id.* at 54:19–24 (reasons for this opinion).

In disregarding Dr. Ghidella's timeframe testimony, Amici apparently rely on an argument advanced by PeaceHealth. PeaceHealth has strained to construe Dr. Ghidella's reference to “the more likely time frame” in an unfavorable light. It has argued that because Dr. Ghidella mentioned three possible times in which the compartment syndrome could conceivably have developed, “more likely” did not mean “more likely than not.” Suppl. Br. of Resp't at 18. That is an ingenious argument, but it ignores the rest of Dr. Ghidella's testimony and the proper standard of

review.⁷ To begin with, Dr. Ghidella made clear that he was rendering all of his opinions “on a more probable than not basis.” Ghidella RP 41:8. It ignores that statement to read “the more likely time frame” as anything other than “more likely than not.” Moreover, even if “more likely time frame” could, with strain, be viewed as something other than “more likely than not,” viewing it that way would violate the principle that the record must be viewed in the light most favorable to Grove.⁸ *See, e.g., Douglas v. Freeman*, 117 Wn.2d 242, 247, 814 P.2d 1160 (1991).

So the jury had every right to agree with Dr. Ghidella and find that the compartment syndrome developed at some time between December 21 and December 26. And it also had substantial evidence that if the compartment syndrome had been properly monitored for, diagnosed, and treated at that early stage, Grove would have suffered either no or less injury. That is because compartment syndrome “is a completely reversible problem” when treated early. Ghidella RP 38:3–4. In treating it, however,

⁷ To be clear, even if the jury disbelieved Dr. Ghidella’s time frame, it still had substantial evidence to find proximate cause as to at least one of the three surgeons. *See* Suppl. Br. of Pet’r at 16. The point Grove is making here is simply that the jury had the right to believe Dr. Ghidella’s testimony.

⁸ PeaceHealth claims that if there are “three possible periods of time” during which the syndrome could have developed, the phrase “‘more likely’ does not mean ‘more likely than not.’” Suppl. Br. of Resp’t at 18. But PeaceHealth gets its math wrong. One of three possibilities can easily be more likely than not. For example, *X* could have a probability of 60%, *Y* a probability of 20%, and *Z* a probability of 20%. That PeaceHealth insists on reading “more likely time frame” to mean anything other than “more likely than not” simply shows that it is flouting the proper standard of review.

“time is of the essence.” *Id.* at 19:8–9. Unfortunately, by the time Grove’s compartment syndrome was treated by fasciotomy on December 31, the syndrome had already wreaked its damage—it had already “probably come and gone by that point.” *Id.* at 39:24–25. Even so, if the fasciotomy had been performed just 24 hours earlier, the result would have been better. Adams RP 40:12–17. Similarly, if the compartment syndrome had been diagnosed and treated on December 29—48 hours earlier—Grove would have had “a better chance of having a good outcome.” *Id.* at 40:11.

Thus, the jury had testimony that compartment syndrome is progressive, that time is of the essence in treating it, and that Grove would have suffered less injury if the syndrome had been treated even 24 hours earlier than it actually was. From this evidence, the jury could easily infer that if Dr. Leone or Dr. Zech had properly monitored for compartment syndrome and diagnosed and treated it sometime between December 21 and 26,⁹ Grove would have suffered no or less injury. *See McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989) (“If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient.”); *see also Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529,

⁹ Dr. Leone was Grove’s primary surgeon from December 21 to December 25. Dr. Zech took over from Dr. Leone on December 25 and was Grove’s primary surgeon until December 29, when Dr. Douglas took over. *See* Suppl. Br. of Pet’r at 6–7.

998 P.2d 856 (2000) (Grove gets benefit of all reasonable inferences). In short, the jury had ample evidence to find that the breaches of either Dr. Leone or Dr. Zech, or both, had proximately caused Grove's injury. In addition, the jury could find that by failing to diagnose and treat Grove's already-developed compartment syndrome until December 31, Dr. Douglas had also proximately caused some increment of Grove's injury.

But the evidence in Grove's favor is stronger still. Even if the jury disbelieved Dr. Ghidella's testimony, and found that the compartment syndrome first developed *after* December 26, it still had substantial evidence to find that at least one of the three surgeons had proximately caused Grove's injury. That is because the absolutely final date on which Grove could have first developed compartment syndrome was December 29. It was on that date that the first clear and direct evidence¹⁰ of compartment syndrome was recorded, in the form of a swollen, painful, and reddened left calf, a decreased ability to bend the left ankle, and an elevated white blood cell count. *See* Suppl. Br. of Pet'r at 7; *see also* Adams RP 37:17–38:2, 40:18–42:1 (expert testimony that these were signs of compartment syndrome, and should have caused the syndrome to be

¹⁰ Not, however, the first *evidence*. As Grove has noted, Dr. Ghidella, inferring from the medical record, opined that the compartment syndrome likely first developed sometime between December 21 and 26. It was lack of proper monitoring that prevented direct evidence of Grove's compartment syndrome from being recorded any earlier.

tested for and diagnosed). There was expert testimony that if Dr. Douglas—the primary surgeon at the time—had diagnosed and treated the compartment syndrome on either December 29 or 30, instead of December 31, Grove would not have suffered as much injury as he did. Adams RP 40:9–17. Thus, even if the compartment syndrome developed at the latest possible time, the jury would still have substantial evidence to find that Dr. Douglas had proximately injured Grove.

E. Grove bore—and carried—the burden of proof at all times.

Amici accuse Grove of trying to shift the burden of proof, but this accusation lacks substance. The verdict should be reinstated precisely because Grove bore his burden of proof. He provided substantial evidence on every element of a medical negligence claim. *See supra* Argument, § II.D. What is more, Amici’s burden-of-proof argument ignores the record (again): the jury was instructed that Grove bore the burden of proof on all required elements of a medical negligence claim. CP 332-33, 340.

III. *Hansch v. Hackett* remains good law because no legislation has superseded it.

Under *Hansch v. Hackett*, Washington courts uphold verdicts against an employer if the jury had substantial evidence that one or more of the employer’s employees committed the substantive violation alleged.

Suppl. Br. of Pet'r at 17–19. Amici argue that *Hansch* has been superseded. Their arguments lack merit.

A. *Hansch* did not establish a substantive rule.

Amici argue that *Hansch* somehow establishes a “substantive rule,” Br. of Amici at 18, but they do not specify what that rule might be. Nor do they explain how *Hansch* could have established a substantive rule of proof that is specific to medical negligence cases if a court could also apply *Hansch* to a tortious interference case. *See Thompson v. Grays Harbor Cmty. Hosp.*, 36 Wn. App. 300, 306–07, 675 P.2d 239 (1983).

To the extent Amici *do* suggest a substantive rule that *Hansch* supposedly establishes, that rule has no basis in *Hansch*. Amici point to nothing in *Hansch* that would allow a plaintiff not to implicate any particular health care provider, Br. of Amici at 19, not to articulate a standard of care that applies to that provider, *id.* at 18–19, or not to establish an employer-employee relationship for vicarious liability, *id.* at 20. Rather, *Hansch* requires that all elements of a claim be proven as to at least one employee of the defendant. And indeed, in this case, Grove has implicated *three specific surgeons, all of whom were bound by and breached the same expert-witness-supported standard of care, all of whom were admittedly employees of PeaceHealth, and one or more of whom proximately injured Grove.* *See supra* Argument, §§ II.A–D.

Amici's argument that *Hansch* is inconsistent with the elements of a RCW 7.70.040 claim really just masks an argument that Grove did not prove those elements against any of the three employee surgeons. And *that* argument, in turn, appears to rest on the unsupported belief that the jury simply could not have based its verdict on the conduct of any of the three employee surgeons. *See* Br. of Amici at 20 (asserting without citation that Grove implicated persons bound by different standards of care or not employed by the hospital). But Amici cite to nothing in the record to suggest that the jury was confused about whom Grove was implicating. And, as another Amicus has pointed out, the jury's actual reasoning inheres in the verdict, so the Court's review is confined to whether there is sufficient evidence to support the verdict. WSAJF Amicus Br. at 11 n.7. Amici's approach—which is to ask how the jury could conceivably have gone wrong, and not how the jury could easily have gone right—conflicts with the deference owed to a Washington jury. That deference requires looking for evidence that “would support the verdict rendered,” rather than dreaming up ways in which the jury could have ignored evidence and disobeyed instructions.¹¹ *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (citation, emphasis, and quotation omitted).

¹¹ If PeaceHealth had been genuinely concerned that the jury might base vicarious liability on persons other than the three surgeons, it should have proposed a special interrogatory asking the jury to identify the specific agent(s) on whom it based its

B. *Hansch*'s procedural rule is unaffected by legislation.

Unable to show that *Hansch* establishes a substantive rule inconsistent with chapter 7.70 RCW, Amici argue that *Hansch*'s procedural rule has been superseded. In support, they quote RCW 7.70.010, but they omit crucial words. *See* Br. of Amici at 18. In relevant part, the provision states that the Legislature “hereby modifies *as set forth in this chapter and in RCW 4.16.350*, as now or hereafter amended, *certain* substantive and procedural aspects of all civil actions and causes of action” based on health care injuries. RCW 7.70.010 (emphasis added).

This statutory language makes two things clear. First, the Legislature did not intend to modify *all* “substantive and procedural aspects” of medical malpractice actions—it only meant to modify “*certain*” aspects of those actions. *Id.* (emphasis added). Second, the Legislature intended to modify existing law only “as set forth in this chapter and in RCW 4.16.350”—i.e., only as provided through explicit enactment. *Id.* Because nothing in chapter 7.70 RCW or RCW 4.16.350 conflicts with *Hansch*, the Legislature has not abrogated *Hansch*.

verdict. Because PeaceHealth failed to do so, the Court need not address the propriety of the jury form in this case. And no party has cited any authority even hinting that the jury form here was improper.

In fact, by arguing that the Legislature has abrogated *Hansch*, Amici are inviting the Court to enter a needless constitutional thicket. Amici's position is constitutionally problematic in two different ways.

First, the rule of *Hansch* comes ultimately from our Constitution's civil jury guarantee. *See* Const. art. I, § 21 ("The right of trial by jury shall remain inviolate . . ."). *Hansch* holds that a jury verdict against a defendant must be upheld if the jury had sufficient evidence to inculcate at least one agent of the defendant—even if it lacked sufficient evidence to inculcate *other* agents or non-agents. *See Hansch*, 190 Wash. at 101–02. *Hansch* adopts this rule because any other rule would risk throwing out a verdict that flows logically from the jury's findings of fact. For if a jury has substantial evidence to find that all the elements of a tort are proven against at least one agent of a principal, then the jury's verdict against the principal follows logically from its findings of fact. Throwing out such a verdict would invade the jury's factfinding role and thereby violate the constitutional guarantee. *See, e.g., James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) ("To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts . . ."). To argue that the Legislature has abrogated *Hansch* is to argue that the Legislature has violated the Constitution's jury right.

Second, Hansch establishes a procedural rule for the review of jury verdicts. It is the judicial branch, and not the Legislature, that has inherent power over procedural matters. *See, e.g., Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). If the Legislature enacts a statute that invades the courts’ inherent “power to govern court procedures,” that statute will violate the separation of powers. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Amici, however, argue that the Legislature overturned this Court’s standard for reviewing jury verdicts—raising the difficult question of whether that standard is procedural or substantive under the Constitution. Thus, the Court’s policy of avoiding needless constitutional questions, *In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993), counsels against adopting Amici’s view of *Hansch*.

CONCLUSION

Because Grove has proven all the elements of a medical negligence claims as to one or more of three employee surgeons of PeaceHealth, the jury’s verdict against PeaceHealth should be reinstated.

Respectfully submitted this September 3, 2014.

s/ Benjamin Gould

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on September 3, 2014, I caused a true and correct copy of the foregoing to PETITIONER'S ANSWER TO BRIEF OF AMICI CURIAE WASHINGTON STATE MEDICAL ASSOCIATION AND WASHINGTON STATE HOSPITAL ASSOCIATION be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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Dear Clerk:

Attached for filing, please find *Petitioner's Answer To Brief Of Amicus Curiae Washington State Association For Justice Foundation and Petitioner's Answer To Brief Of Amici Curiae Washington State Medical Association And Washington State Hospital Association.*

Below is the case information:

Case name: Grove v. PeaceHealth St. Joseph Hospital,
Case number: 89902-9

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Thank you.

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