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NO. 89902-9

SUPREME COURT OF THE STATE OF WASHINGTON

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RAYMOND GROVE,

Petitioner,

v.

PEACEHEALTH ST. JOSEPH HOSPITAL,

Respondent.

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RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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ORIGINAL

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## I. INTRODUCTION

Washington State Association for Justice Foundation (WSAJF) addresses two principal issues in its amicus brief: (1) whether this Court needs to address Mr. Grove's "team liability" theory of recovery; and (2) whether *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937), governs the outcome of this appeal.

As to the first issue, WSAJF not only argues that "issues related to a team-based assessment of negligence are not before the Court and should not be addressed," but also invites this Court to declare that "the Court of Appeals' comments on what it characterizes as 'Grove's "team" theory' should be recognized as having no precedential value." *WSAJF Br. at* ;, *see also WSAJF Br. at 11-12, n.8*. In so arguing, WSAJF ignores the fact that Mr. Grove, both in the trial court and in the Court of Appeals, postured his case as a "team liability" or "team negligence" case in which he claimed he did not need to prove any individual health care provider's causal negligence. While it is true that Mr. Grove distanced himself from, and raised no issue concerning, his "team negligence" theory in his Petition for Review, such that this Court need not consider it, that does not mean that the Court of Appeals' consideration of the "team negligence" theory he squarely presented to that court was merely advisory or lacks precedential value.

As to the second issue, WSAJF argues that it is unnecessary for this Court to address the import, if any, of *Hansch* on Mr. Groves' team-based theory of liability, because that issue is not before this Court, but that, if the Court considers *Hansch*, it should declare *Hansch* to be valid and applicable to this case. But, as the Court of Appeals correctly concluded, *Hansch*, a common law medical negligence case, has been superseded by statute. And, to the extent that *Hansch* stands for the proposition that a medical negligence plaintiff can premise vicarious liability on proof that multiple providers were causally negligent, that concept is still viable. But, here, Mr. Grove failed to provide the evidence needed to prove causal negligence of any one or more individual health care providers for whom PeaceHealth would have vicarious liability.

## II. FACTS PERTINENT TO WSAJF'S ARGUMENTS

In support of its arguments, WSAJF presents an incomplete, if not inaccurate, procedural history of the case.

### A. Mr. Grove's Theory at Trial.

At trial, rather than focusing on the standard of care that applied to any specific team member, or whether there was a breach of that standard of care that was a proximate cause of his claimed injuries, Mr. Grove focused his expert testimony on whether the medical treatment he *received* met the standard of care. The issue he presented was whether the team

breached the standard of care, and whether Dr. Leone as “head of the team” or “surgeon of record” bore responsibility for any negligence of the team. Ghidella RP 8-9, 22-24; Adams RP 36-37. As Grove’s counsel explained it to the trial court: “The theory of the case is that they failed to, that the team, the team caring for Mr. Grove failed to diagnose a compartment syndrome that existed while he was in the hospital.” Adams RP 28.

At the close of Mr. Grove’s case, PeaceHealth moved for directed verdict, based on the facts that the “captain of the ship” theory was not applicable, and that there was no evidence of individual negligence. CP 314-322. Although the motion was denied, *see* 10/16/12 RP at 9-10, 15, the trial court, as WSAJF recognizes, *WSAJF Brief at 5 n.5*, had concerns about the sufficiency of the evidence.

Following the jury verdict, PeaceHealth moved to vacate the verdict. CP 349-362. In opposing the motion, Grove’s counsel conceded that “it is virtually impossible to pinpoint the exact onset date” for Grove’s 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 damage to [him].” CP 434.

B. Mr. Grove's Theory in the Court of Appeals.

In the Court of Appeals, Mr. Grove argued that it either was the team, or Dr. Leone as head of the team, that was negligent. Of the four issue statements he posited in his opening appellate brief, *App. Br. at 2-3*, the first and third concerned the issue of team liability, the second concerned his theory that Dr. Leone was liable as the "head of the team," and the fourth purported to address alleged individual causal negligence of Dr. Leone. Mr. Grove posited no issue, and made no argument, in his opening brief that he had presented sufficient evidence of individual causal negligence on the part of anyone else.

Even though Mr. Grove posited an issue statement and proffered an argument in his opening appellate brief concerning alleged individual liability of Dr. Leone, *App. Br. at 2-3* (Issue 4), 7-10 (citing Ghidella RP 22-24; Adams RP 37), Mr. Grove's experts, Dr. Ghidella and Dr. Adams, were only critical of Dr. Leone as the head of the team. Mr. Grove presented no expert testimony at trial that Dr. Leone individually was causally negligent in his care and treatment of Mr. Grove.

In affirming the trial court's vacation of the jury's verdict, the Court of Appeals addressed the team liability issues because those were the issues Mr. Grove raised on appeal. *Grove v. PeaceHealth St. Joseph Hosp.*, 177 Wn. App. 370, 382-88, 312 P.3d 66 (2013).

Indeed, it was not until Mr. Grove moved for reconsideration of the Court of Appeals' decision that he first raised the argument he now makes on review, *i.e.*, that he presented sufficient evidence to establish that one or more of the three surgeons (Drs. Leone, Douglas and/or Adams) individually violated the standard of care and thereby proximately caused Mr. Grove's alleged injuries.

C. Mr. Grove's Theory on Petition for Review.

In his Petition for Review, Mr. Grove continued the theme of the motion for reconsideration, effectively jettisoning his team liability theories, and instead asserting, albeit erroneously, that he presented sufficient evidence of causal negligence on the part of the three surgeons involved in his care — Drs. Leone, Douglas, and/or Adams.

III. ARGUMENT

A. That Mr. Grove, in His Petition for Review, Failed to Raise the Team Liability Issues that He Raised in the Court of Appeals, Such that This Court Should Not Consider Them, Does Not Mean that the Court of Appeals' Decision Addressing Those Claims Lacks Precedential Value.

WSAJF apparently does not want this Court to address the “team liability” issues that Mr. Grove squarely presented to the Court of Appeals and that the Court of Appeals addressed. According to WSAJF, *WSAJF Br. at 10*, this Court accepted review only on “the sufficiency of evidence under a traditional medical negligence analysis.” Without attempting to

evaluate the sufficiency (or insufficiency) of the evidence Mr. Grove presented at trial, WSAJF posits that (1) if the Court finds there was sufficient evidence under a traditional medical negligence analysis, then any inquiry ends, but (2) if the Court finds the evidence insufficient, Mr. Grove has not preserved his team liability issues for review and any comment on it then by this Court would be an unnecessary advisory opinion. *WSAJF Br. at 10-11*. WSAJF then proffers a non sequitur suggesting that because Mr. Grove did not petition for review on the team liability issues, this Court must repudiate the Court of Appeals' decision on those issues and state that the Court of Appeals' decision has no precedential value. *WSAJF Br. at 11-12 n.8; see also WSAJF Br. at 7*.

It is true that Mr. Grove did not raise in his Petition for Review the team liability issues he raised in the trial court and the Court of Appeals, such that this Court should not consider them.<sup>1</sup> *See* RAP 13.7(b); *Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975) ("Neither of the matters assigned as error in the Court of Appeals is again raised in the petition for review. Thus, we shall not consider them here").

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<sup>1</sup> In a similar vein, because the issue of whether Mr. Grove presented sufficient evidence of causal negligence by either Dr. Zech or Dr. Douglas was not raised or argued below until Mr. Grove moved for reconsideration of the Court of Appeals' decision, those issues also should not be considered by this Court. *1515-1519 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp.*, 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2002) (refusing to consider for the first time on review to the Supreme Court an issue not raised until the motion for reconsideration of the Court of Appeals' opinion); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review").

Even assuming, however, that this Court does not address the team liability issues because Mr. Grove did not raise them in his Petition for Review, WSAJF cites no authority which holds that a party's failure to include in a petition for review issues assigned as error in the Court of Appeals somehow renders the Court of Appeals' decision on those issues non-precedential. Indeed, such a conclusion makes no sense. Even if WSAJF is correct that, given Mr. Grove's failure to preserve his "team liability" issues for review by this Court, any decision of such issues by this Court would be an unnecessary advisory opinion, the Court of Appeals' opinion was not an advisory one, but directly addressed the issues that Mr. Grove squarely presented to that court.

B. *Hansch v. Hackett* Is Not Relevant to These Proceedings and Does Not Support a Finding of Liability.

WSAJF argues, *WSAJF Br. at 12*, that *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937), is not relevant to the issues before this Court because the team liability issues Mr. Grove presented in the Court of Appeals are not before this Court. WSAJF then further argues, *WSAJF Br. at 13*, that if this Court does reach the issues of team liability, then *Hansch* is good law and applies to this case. WSAJF is incorrect.

*Hansch* was a medical negligence case involving allegations related to the care of a pregnant woman. At issue was the care of four

providers, two physicians and two nurses, who were all employees of the defendant hospital. Plaintiff's theory at trial was that one of the physicians, Dr. Hackett, was negligent. *Id.* at 100-01. While the jury found him not negligent, it nevertheless found the hospital liable. On appeal, the issue was whether the verdict was proper, given the finding related to Dr. Hackett. The court noted that, despite the finding regarding Dr. Hackett, there was evidence that the other three providers were negligent. The court concluded that "[h]ere, the charge and the proof is such as to permit the jury to find any one or more of four employees to be guilty, and a verdict in favor of the employee who was made a party is not a finding that another or other employees, not parties, were not guilty." *Id.* at 102.

Contrary to WSAJF's assertion, *Hansch* is not about team liability. Nor does it suggest that a hospital can be held vicariously liable even if plaintiff fails to prove individual causal negligence of one or more of the hospital's agents or employees. *Hansch* simply stands for the proposition that if there is evidence establishing the causal negligence of one or more of a hospital's agents or employees, then the hospital can be held vicariously liable even though the jury exonerates one or more other hospital agents or employees. Here, however, Mr. Grove failed to present sufficient evidence, as required under chapter 7.70 RCW, that any agent or

employee of PeaceHealth violated the standard of care applicable to him or her and thereby proximately caused Mr. Grove's alleged injury.

As correctly pointed out by the Washington State Hospital Association (WSHA) and Washington State Medical Association (WSMA) in their amicus brief, the Court of Appeals in this case did not abrogate *Hansch*. It simply recognized that *Hansch* has been superseded by statute and that the statutory scheme in chapter 7.70 RCW has rendered *Hansch* moot to the extent it conflicts with RCW 7.70 *et seq.* See *WSMA/WSHA Br. at 17-20*.

WSAJF asserts, *WSAJF Br. at 13*, that "it is noteworthy that there is no indication in the briefing that PeaceHealth proposed a verdict form that would have required the jury to identify the employee(s) who acted negligently and for whose conduct PeaceHealth was held vicariously liable." But that is not noteworthy at all. As noted above, Mr. Grove's theory at trial was not that one of multiple, identifiable individuals was negligent; rather he argued that the team as a whole was negligent. Mr. Grove presented no evidence that any specific individual health care provider had violated the standard of care applicable to him or her and thereby caused harm to Mr. Grove. Absent such evidence, it would have been improper to include individual names on the verdict form. See *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25-26, 864

P.2d 921 (1993) (holding that the allocation procedure under RCW 4.22.070 is not self-executing and requires evidence of fault for each person or entity at issue before it can be invoked).<sup>2</sup>

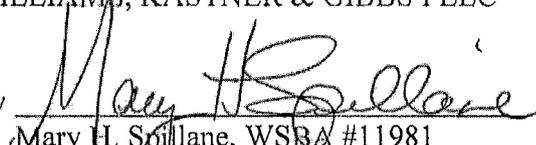
#### IV. CONCLUSION

For the foregoing reasons and those set forth in the Brief of Respondent PeaceHealth, the Brief of Respondent PeaceHealth to Appellant's Motion for Reconsideration, the Answer to Petition for Review, and Respondent's Supplemental Brief, the Court of Appeals' decision should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of September, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By

  
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<sup>2</sup> Contrary to WSAJF's suggestion, *WSAJF Br. at 14*, PeaceHealth has not challenged the use of an undifferentiated verdict form. It has challenged the sufficiency of the evidence and the viability of Mr. Grove's "team liability" theories.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 3rd day of September, 2014, I caused a true and correct copy of the foregoing "Respondent's Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation" to be delivered as indicated below to the following counsel of record:

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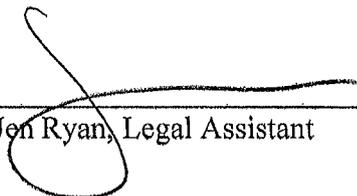
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Dear Clerk of the Court,

Attached for filing on.pdf format is Respondents Answer to Brief on Amicus Curiae Washington State Association for Justice Foundation in the *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, email [mspillane@williamskastner.com](mailto:mspillane@williamskastner.com)

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