No. 89902-9

SUPREME COURT OF THE STATE OF WASHINGTON

RAYMOND GROVE,

Petitioner,

v.

PEACEHEALTH ST. JOSEPH HOSPITAL,

Respondent.

BRIEF OF *AMICI CURIAE* WASHINGTON STATE MEDICAL ASSOCIATION AND WASHINGTON STATE HOSPITAL ASSOCIATION

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington State Medical Association ("WSMA") and the Washington State Hospital Association ("WSHA") ("Health Care Amici"), are state-wide non-profit organizations who represent the medical and osteopathic physicians and surgeons and physicians assistants, and the state's 99 community hospitals and other health related organizations, as described in the motion for permission to file this brief. The WSMA and WSHA have appeared before this Court as *amici curiae* many times and are well known to the Court.

Health Care Amici closely follow the law that affects them, patients, and the health care system. This includes this case, *Grove v. PeaceHealth St. Joseph Hosp.*, 177 Wn. App. 370, 312 P.3d 66 (2013), *rev. granted,* 180 Wn.2d 1008 (2014) ("*Grove*"), and whether a different, more lenient standard is allowed when seeking to establish vicarious liability for injuries due to health care based on multiple providers or a "team." The Court's issues list describes it as whether a claim of negligence by a "'team' must prove breach of a duty of care by an individual health care provider under the hospital's control." With respect, Health Care Amici suggest that, after the supplemental briefs, the issue is further refined thus:

> Does RCW 7.70.040 allow vicarious liability for an injury from health care against a hospital or other employer to be established by acts or omissions of a health care "team" or other basis which allows the plaintiff to avoid proving duty, breach, and/or proximate cause of the complained-of injury from a specified health care provider's negligence?

Health Care Amici respectfully submit the long-settled answer is no. The statutory scheme adopted in 1976 and codified in Ch. 7.70 RCW does not permit such a claim. Under the statutes, here RCW 7.70.040, the plaintiff must establish the four traditionally required elements of duty, breach, causation, and damages, but within the additional strictures of the statutes. *See Grove,* 177 Wn. App. at 384 (established tort principles); 177 Wn. App. at 382-83, (six non-causation elements required by RCW 7.70.040(1)).

Health Care Amici respectfully remind the Court that under RCW 7.70.010, the courts are bound by the statutes as to ***both*** the substantive ***and*** procedural aspects of all claims for injuries from health care, as established by Ch. 7.70. RCW in 1976 and later amendments. The courts are not free to change or expand claims for injuries due to health care as they can for common law tort claims.

Health Care Amici submit this brief because the plaintiff here seeks to dramatically change and expand the nature of vicarious liability for injuries due to health care beyond that permitted by the statute and settled case law, but without obtaining such change from the legislature. If any such expansion of liability in this area is to be made, it must be done by the legislature. The trial court and the Court of Appeals recognized this in their decisions. Health Care Amici respectfully submit that this Court should affirm both lower courts because that is what is required by the statute, by this Court's own settled decisions, and the settled law of the State.

II. DISCUSSION

A. This Case Does Not Present Any Novel Issues Related to Liability. It Should be Decided by Applying the Settled Statutory Requirements -- Standard Sufficiency of the Evidence Analysis. It Should Not Create Liability Beyond That Permitted By the Controlling Statutory Scheme.

1. Medical malpractice is a statutory cause of action.

In Washington, "medical malpractice is a statutory cause of action." *Grove*, 177 Wn. App. at 382. Chapter 7.70 RCW governs legal actions for injuries arising from health care. *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001); *Branom v. State*, 94 Wn. App. 964, 971, 974 P.2d 335 (1999); RCW 7.70.010. After its adoption in 1976, Ch. 7.70 RCW allows only three different types of claims against health care providers for injury from health care listed in RCW 7.70.030:

(1) professional negligence, *i.e.*, the failure to follow the applicable standard of care;

(2) breach of a promise the injury would not occur; and

(3) lack of informed consent.

The issues on appeal in this case relate to professional negligence: whether the "injury resulted from the failure of ***a*** *health care provider* to follow the accepted standard of care." RCW 7.70.030(1) (emphasis added).

RCW 7.70.040 sets out the elements plaintiffs must prove for injuries from the alleged failure to follow the accepted standard of care for health care treatment:

(1) **<u>The</u>** 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;[1]

(2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040 (emphasis added). Those "elements are particularized expressions of the four traditional elements of negligence: duty, breach, proximate cause, and damage or injury." *Caughell v. Group Health Co-op of Puget Sound*, 124 Wn.2d 217, 233, 876 P.2d 898 (1994).

2. Expert testimony is required to establish the standard of care.

The general rule is that expert medical testimony is necessary to establish the health care provider's standard of care in a negligence action.[2] *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) ("expert testimony will

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[1] Judge Dwyer explained that the provisions in subsection (1) are comprised of six elements. *Grove,* 177 Wn. App at 382-83, ¶ 18:

> RCW 7.70.040(1) can be parsed into six elements that the plaintiff must prove in order to prevail on a claim of medical malpractice: (1) "The health care provider" (2) "failed to exercise" (3) "that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time" (4) "in the profession or class to which he or she belongs," (5) "in the state of Washington," (6) "acting in the same or similar circumstances."

Judge Dwyer noted that "The problem with Grove's "team" theory is that it fails to include elements (1) and (4)." *Id.*

[2] As the Court of Appeals correctly recognized, none of the limited exceptions to this general rule applied. *See Grove* 177 Wn. App. at 382 n. 16.

generally be necessary to establish the standard of care."). In *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 495-96, 183 P.3d 283 (2008), not cited in *Grove* or by the parties, Division III held that expert testimony was required to establish the relevant standard of care for each specific health care provider in a claim, like Mr. Grove's here, against a hospital for the actions of its staff. The court affirmed dismissal of the malpractice claim against the hospital because the expert's declarations were not sufficient to show knowledge of the relevant standards of care "for those ***specific*** health care providers—nurses, physical and respiratory therapists, registered dieticians, and other nonphysician employees [of the defendant hospital]"). *Id.* at 495 (emphasis added).[3] That rule is consistent with RCW 7.70.040 and applies here.

As in *Davies*, Mr. Grove should be held to the statutory requirement that he establish the degree of care, skill, and learning expected of the ***specific*** health care providers who he claims injured him. While Mr. Grove asserts that all three surgeons on the team were bound by the same standard of care because they were in the same profession or class, *see* Grove's Supplemental Brief at 12-13, that proposed analysis omits the requirement in RCW 7.70.040(1) that the standard of care must apply to the "same or similar circumstances" in which the health care professional was acting.

[3] Nor did the expert's evidence in *Davies* link a specified breach in the standard of care by a specific health care provider to the injury, there a death. *Id.* at 496.

When successive health care providers are acting in ***different*** circumstances, the standard of care also could be different according to RCW 7.70.040(1). The statute does not permit a rule allowing a plaintiff to implicate more than one health care professional under an undifferentiated standard of care where the specific health care providers belong to different classes or professions. *See Davies*, 144 Wn. App. at 495-96. Judge Dwyer put it plainly: "RCW 7.70.040 does not contemplate a general overarching duty applicable to anyone who may have come into contact with the patient." *Grove*, 177 Wn. App. at 386. Without expert testimony as to the standard of care owed by ***each*** specific health care provider under the relevant circumstances, a plaintiff cannot establish the duty owed. Mr. Grove seeks an expansion of statutory liability not warranted or allowed.

3. The statute requires sufficient evidence the "health care provider" violated the standard of care and that breach caused the injury.

A plaintiff must offer sufficient evidence for a jury to conclude that a specified health care provider failed to exercise the required level of skill and care. *Davies, supra.*[4] It is not sufficient for an expert to opine on the standard of care where there is no testimony the doctor violated those standards. *Id.; Winkler v.*

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[4] *Accord,* David K. DeWolf and Keller W. Allen, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 16:7 685 (2013) ("In the absence of evidence that would at least allow for an inference that the health care provider failed to exercise the required level of skill and care, the plaintiff should not prevail.").

Giddings, 146 Wn. App. 387, 394-95, 190 P.3d 117 (2008), *rev. den,*.165 Wn.2d 1034 (2009) (***directed verdict affirmed*** for doctor where expert testified as to the standard of care, but not that it was breached). Similarly, a conclusory opinion by the plaintiff's medical expert is not sufficient evidence for a jury to conclude the health care provider failed to exercise the required level of skill and care. *See, e.g.*, *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 26-27 & 26 n.6, 851 P.2d 689 (1993), *rev. denied sub nom. Guile v. Crealock*, 122 Wn.2d 1010. [5]

Thus, to establish a violation of the standard of care, Mr. Grove was required to offer sufficient evidence for the jury to conclude that a specific health care provider, or more than one specific health care provider, breached the standard of care that applied to that health care provider and that breach caused the injury.

It will not do, as the Court of Appeals noted, to focus the inquiry on the medical treatment Mr. Grove *received* when more

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[5] In *Guile*, the Court of Appeals held an expert's opinion which contained unsupported conclusions that doctor's "faulty technique" caused a poor outcome was insufficient to survive summary judgment and, in addition, that the expert's silence as to the basis for hospital liability for the alleged malpractice meant that there was no competent evidence to support claim against hospital. 70 Wn. App. at 26-27 & n. 6. *See Vant Leven v. Kretzler*, 56 Wn. App. 349, 355-56, 783 P.2d 611 (1989) (expert's declaration that the care and treatment from the doctor fell below the standard of care held not sufficient to prevent summary judgment where the expert "failed to identify facts in support of his conclusion.").

This Court relied on this part of *Guile* in *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 138, 170 P.3d 1151 (2007), citing *Guile* and holding an expert's opinion was not sufficient to raise issue of material fact as to the standard of care.

than one health care provider provided that treatment; this flips the burden from the plaintiff to the defendant. *See Grove*, 177 Wn. App. at 383-84. Where more than one health care provider helps treat a patient, establishing that the overall care "received" was deficient does not establish that every, or even any, health care provider failed to exercise the care expected of him or her under the applicable standard of care, much less causation from a specific breach. Judge Dwyer correctly pointed out this approach means two key statutory elements -- duty and causation -- need not be proven, making Mr. Grove's approach completely at odds with long-settled tort law.[6]

This Court cannot adopt a rule allowing medical malpractice plaintiffs to prevail under a theory that one or more of the team member *must have* violated the standard of care because the plaintiff

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[6] The decision explains at 177 Wn. App. at 384 (emphasis added):

> Grove's "team" theory rests on the notion that causation and damages are enough to prove malpractice. In fact, Grove contends that duty is irrelevant to his claim. Medical malpractice actions, like all tort actions, require that the plaintiff prove duty, breach, causation, and damages. *Harbeson v. Parke–Davis, Inc.*, 98 Wn.2d 460, 467–68, 656 P.2d 483 (1983). It is a basic principle of tort law that, if any of these four elements are not proved, there can be no liability. *See Harbeson*, 98 Wn.2d at 467–68, 656 P.2d 483. **Grove's claim is lacking <u>both</u> <u>duty</u> <u>and</u> <u>causation</u>**. Without delineating the standard of care applicable to a particular health care provider or defining the relevant profession or class, Grove failed to prove that a duty existed or to whom any such duty belonged. Duty, especially in the field of medical practice, does not just exist in the ether. Even if Grove's articulation of the standard of care covered some members of the "team," the surgeons for example, **Grove did not present evidence that <u>but for any one of those particular individuals' failure to adhere to the standard of care</u>, he would not have been injured**. Accordingly, Grove failed to prove proximate cause. Without the elements of duty and proximate cause, Grove's claim fails.

suffered a bad outcome since that is inconsistent with the statute, which controls. RCW 7.70.010. As the trial court and Court of Appeals recognized, and as pointed out by PeaceHealth's supplemental brief, neither is this a *res ipsa loquitor* case, nor are health care providers liable just for bad outcomes. *See Watson v. Hockett*, 107 Wn.2d 158, 161, 727 P.2d 669 (1986).[7] Rather, as the trial court correctly stated, "a plaintiff is still required to prove negligence on the part of the particular employee. ***Were that not the case, then every bad outcome in a team setting would result in liability***." *Grove*, 177 Wn. App. at 380, quoting the trial court (italics by Court of Appeals; bold and underlining added).

The trial court got it right. He and the Court of Appeals recognized that to allow liability as requested by Plaintiff would mean a fundamental change and major expansion of liability in medical malpractice actions, something the courts cannot do given the legislative pre-emption of the field in RCW 7.70.010.

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[7] This Court held unanimously, at 107 Wn.2d at 161-62:

> [A] doctor will not normally be held liable under a fault based system simply because the patient suffered a bad result. It must, rather, be shown that the doctor's conduct fell below a level that society considers acceptable. Even under the negligence doctrine of res ipsa loquitor, there must be evidence from which negligence can be inferred. In the absence of proof that the doctor failed to exercise the required level of skill and care, the patient suing the doctor should not prevail; the mere fact that an injury was . . . an unfavorable or "bad" result from the therapy, however, does not necessarily mean that there was negligence or other wrongful conduct.

Nor can it be required, under RCW 7.70.040, that members of a "team" treating a patient who suffers a bad outcome may only avoid liability if they can establish that their actions conformed with the standard of care, since that flips the burden of proof. Rather, RCW 7.70.040 places the burden on the ***patient-plaintiff*** to prove professional negligence. Yet Mr. Grove's theory—that one or more members of the team must be responsible for the failure to make a timely diagnosis—creates an impermissible presumption of liability, flipping the normal burden of proof to require the hospital employer to prove the absence of negligence for each individual team member. There is no room for this approach under the statute and its cases.

4. Expert testimony is required to establish causation.

As with standard of care, the "general rule in Washington is that expert medical testimony on the issue of proximate cause is required in medical malpractice cases." *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995), citing *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989).[8] Causation evidence is

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[8] This Court elaborated the settled principles in *Reese v. Stroh*:

> The requirement of expert testimony to prove causation is a sound and logical rule.... [J]urors and courts generally do not possess sufficient knowledge and training to determine whether a physician's or surgeon's actions actually caused plaintiff's injury. The medical field is foreign to common experience. The expert medical witness domesticates this field for the trier of fact, and counsel must be aware of this situation to best serve his client....

Reese v. Stroh, 128 Wn.2d at 308, quoting Robert J. Rudock, Comment, *Medical Malpractice-The Necessity of Expert Testimony and the Use of a General Physician as an Expert Witness in a Malpractice Action Against a Specialist*, 10 Ohio N.U. L. Rev. 37, 47-48 (1983).

insufficient to support a verdict if, "considering all the medical testimony presented at trial, the jury must resort to speculation or conjecture in determining the causal relationship." *McLaughlin*, 112 Wn.2d at 837. As PeaceHealth notes in its supplemental brief, requiring medical malpractice plaintiffs to satisfy the basic standards of causation is especially important in vicarious liability cases where the plaintiff alleges that multiple physician-employees violated the standard of care. *See* Respondent's Supplemental Brief, at 15 n. 7. That is because there could be a standard of care violation that does not cause the injury complained of, or acts that cause injury without violating the standard of care. *Id.*

5. A motion for judgment as a matter of law should be upheld where, as here, no reasonable inference from the evidence could justify the verdict.

CR 59(a)(7) provides that a motion for judgment as a matter of law may be granted where "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision[.]" A directed verdict is proper if no evidence or reasonable inferences exists to sustain a verdict for the party opposing the motion, considering the evidence in the light most favorable to the nonmoving party. *Bertsch v. Brewer*, 97 Wn.2d 83, 90, 640 P.2d 711 (1982). *Winkler, supra* (affirming directed verdict where expert did not testify that doctor violated standard of care).

This case only requires that the Court apply the well-established principles of liability outlined above. Under a straight-forward application of the basic rules of medical malpractice and the standard for judgment as a matter of law, the trial court did not err by granting PeaceHealth's motion for JMOL because no reasonable inference from the evidence could justify the verdict.

B. Vicarious Liability of a Hospital Requires Proof its Employee Was Negligent and That Employee's Negligence Was the Proximate Cause of the Injury.

As the Court of Appeals noted, if the hospital defendant was liable at all, it was under the doctrine of vicarious liability for the allegedly negligent acts of its employees. *Grove*, 177 Wn. App. at 381. "[I]n contrast to direct liability, which is liability for breach of one's own duty of care, vicarious liability, sometimes called imputed negligence, . . . is liability for breach of another's duty of care." *Van Hook v. Anderson*, 64 Wn. App. 353, 363, 824 P.2d 509 (1992). Consistent with the theory of vicarious liability, the jury here was instructed that a "'corporation can act only through its officers, employees, and agents, including the employed physicians and physicians' assistants in this case. Any act or omission of an employee is an act or omission of the hospital corporation.'" *Grove*, 177 Wn. App. at 379, quoting Jury Instruction No. 5. *See also Houser v. City of Redmond*, 91 Wn.2d 36, 40, 586 P.2d 482 (1978) (if employees were acting within the scope of their employment, their actions were the employer's). An employer cannot be

vicariously liable for the actions of its employees if its employees are not negligent. *See Grove*, 177 Wn. App. at 72, citing *Doremus v. Root*, 23 Wash. 710, 716, 63 P. 572 (1901); *Orwick v. Fox*, 65 Wn. App. 71, 88, 828 P.2d 12 (1992).

Where a health care provider is not an employee or actual agent of the hospital defendant, like Dr. Mostad in this case, the hospital may be liable for the actions of that health care provider ***only*** under the ostensible agency theory. *See Adamski v. Tacoma Gen. Hosp.*, 20 Wn. App. 98, 112, 579 P.2d 970 (1978) (where a physician is not an actual agent of the hospital, the hospital may still be liable for her malpractice under the ostensible agency theory). The ostensible agency theory provides that:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Adamski, 20 Wn.App. at 112 (quoting RESTATEMENT (SECOND) OF AGENCY § 267, at 578 (1958)).

C. There Is No Basis for Deciding this Case Under a Novel Theory of Liability Inconsistent With the Statute.

It appears Mr. Grove has abandoned advancing the "team" liability theory he promoted at trial and at the Court of Appeals since Mr. Grove now argues that theory is "beside the point[.]" Grove's Supplemental Brief, p. 2. *See* PeaceHealth's Supplemental Brief,

pp. 4-9, discussing the change in position.[9] The Court thus need not reach this abandoned concept of "team" negligence. Nevertheless, Health Care Amici will address it given the Court's issue statement that asks whether a plaintiff claiming "negligent treatment by the hospital's medical 'team' must prove breach of a duty of care by an individual health care provider under the hospital's control."

If the Court reaches the issue, it should find that such a theory of liability runs contrary to Ch. 7.70 RCW, which governs the actions of individual health care providers, not "teams." Adopting a "team" negligence theory of medical malpractice would expand liability and conflict with the statute governing medical malpractice and agency principals, which the courts may not do per the legislative pre-emption of RCW 7.70.010.

For example, RCW 7.70.040 sets forth the necessary elements of a professional negligence claim against "***the*** health care provider." A "health care provider" is defined as: "***A* person** licensed by the state to provide health care . . ." RCW 7.70.020(1) (emphasis added). As the Court of Appeals correctly noted, "A team

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[9] The so-called "team" negligence theory appears to have been presented in two different ways as this case progressed. Neither concept is a viable basis for liability. Under one concept, liability would be founded on the team as a whole violating a standard of care by failing to diagnose the compartment syndrome. *See* Brief of Appellant, at 10-11 (quoting from trial transcript in which counsel for Mr. Grove explains that the theory of the case was that "the team" failed to make the diagnosis). *See also* Brief of Appellant, at 9 (admitting that Mr. Grove's claim was "mainly based on whether or not the Peace Health *team of employees* met the standard-of-care in treating Grove[]") (emphasis added).

is not in and of itself a health care provider. Rather, a team is a compilation of its members; in this case, a compilation of health care providers." *Grove*, 177 Wn. App. at 73.

Another problem would arise when members of the team belong to different professions or classes, for then it would be impossible to say which standard of care applied to "the team" as a whole. *See id.* In *Cox v. Bd. of Hosp. Managers for the City of Flint*, 467 Mich. 1, 5, 651 N.W.2d 356 (2002), the Michigan Supreme Court addressed this issue and held that liability may not be premised on the negligence of a "unit" of a hospital. Among issues counseling against adoption of so-called "team" negligence was the concern about different people on the team with different specialties and different standards of case: "The respiratory therapist, for example, may not be held to the standard of care of the neonatologist, for example." *Id.* at 14-15.

Beyond the fundamental incompatibility between "team" negligence and the principles in RCW 7.70.040, team negligence also conflicts with agency principles when applied in a vicarious liability setting. That is because the unit, or team, is not an agent or an employee of the hospital; only the individuals are or can be. *See Cox*, 467 Mich. at 5. Without evidence that the unit itself was capable of independent actions, including negligence, "it follows that the unit itself could not be the basis for defendant's vicarious liability." *Id.* The same problem would arise in this case under the

team negligence theory. As an initial matter, the "team" could not be said to have "acted negligently" since the "team" itself is not capable of independent actions outside of the actions of the members of the team. The trial judge recognized this, stating that "'a team isn't negligent[]'" but, rather, there needed "'to be a negligent player on the team'" to impose liability. *See Grove*, 177 Wn. App. at 384 (quoting the trial court judge). Further, the unit itself is not an agent of PeaceHealth since only its employees, and not a unit of employees, are actors under PeaceHealth's control.

1. Adopting a "one-or-more, doesn't-matter-who" approach to "team liability" and vicarious liability would conflict with the statute governing medical malpractice, impermissibly expand liability beyond that permitted by the statute, and be unworkable.

The second, less sweeping, team negligence theory asserted by Mr. Grove is that he need not implicate any particular agent of PeaceHealth where he alleges that one or more member of the team is negligent.[10] But Mr. Grove's approach—that one or more health care providers must be negligent, never mind which one—to vicarious liability for medical malpractice is conceptually flawed. As discussed *supra*, RCW 7.70.040 requires that a specific health care provider be implicated and that all four elements of a negligence claim be proved against that specific provider; or, if more than one

[10] *See, e.g.*, Petitioner's Supplemental Brief, pp. 2, 12-16. The overwhelming problem with that theory as applied to this case is the absence of evidence to support a professional negligence claim against any one member of the team.

health care provider is implicated, all four elements of a negligence claim be proved against that specific provider too. This is especially important in vicarious liability cases in the modern hospital setting where it is possible that one or more of the health care providers would not be considered an agent of the hospital, or would only be considered an agent if the ostensible agency test that applies to non-employee providers is satisfied. *See Adamski*, 20 Wn.App. at 112 (ostensible agency test). *See also* examples in PeaceHealth's Supplemental Brief at p. 15 fn. 7 & p. 18, last paragraph.

2. *Hansch v. Hackett* does not apply substantively or procedurally because it no longer states the law.

Mr. Grove's contention that the pre-statute case of *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937), provides the basis for imposing vicarious liability based on undifferentiated claims that one member of the "team" must have violated the standard of care, should be addressed to affirm the statute controls. Mr. Grove mistakenly contends the Court of Appeals "abrogated" *Hansch* and "imposed a new standard of proof" not otherwise required by the statute (*see* Petition for Review, pp. 2-3),[11] and that the Court of Appeals improperly ruled Ch. 7.70 RCW superseded *Hansch*. Mr.

[11] Nowhere does the Court of Appeals' *Grove* decision state it "abrogates" *Hansch*, which it could not do. It merely recognized the change in medical negligence law with passage of the statutes in 1976 and that, to the extent that *Hansch* was inconsistent with the statutory requirements, it was superseded by the legislature -- not by the Court of Appeals. *See* 177 Wn. App. at 386.

Grove now claims that *Hansch* established a procedural rule about substantial evidence, not a substantive rule, implying the statute does not address procedural rules governing medical negligence cases. *See* Petition for Review pp. 12-14; Grove's Supplemental Brief, pp. 18-19. Mr. Grove argued that *Hansch* allows a finding of employer liability if a jury "might have" or "could have" found any of a number of employees negligent. *Id.* Mr. Grove's arguments make it plain this Court needs to confirm the Court of Appeals' holding that *Hansch* lacks continued vitality after passage of Ch. 7.70 RCW.

First, even assuming *Hansch* only established a "procedural rule" for determining whether there is substantial evidence in a tort case, Health Care Amici remind the Court that in 1976 the legislature pre-empted this field as to "certain substantive ***and procedural*** ***aspects of all civil actions and causes of action***" for injuries from health care after June 15, 1976. RCW 7.70.010. The statute thus applies to the "procedural" aspect of substantial evidence requirements for medical negligence cases, and applies here.

Second, the rule of substantial evidence includes the settled statutory requirement of requiring "expert testimony in order to establish the standard of care applicable to 'a health care provider' as a member of a particular profession or class," a requirement that did not exist when *Hansch* was decided. *See Grove,* 177 Wn. App. at 386. Nor did the provisions of RCW 7.70.030(1) and 7.70.040 exist in 1937, which now provide for establishing liability based on "**[t]he**

health care provider['s]" failure to meet the applicable standard of care.

Hansch thus cannot support the proposition that the post-1976 law of medical negligence in Washington does not require the plaintiff to prove a negligence claim against a specific employee in order for that health care provider's employer to be responsible under a respondeat superior theory. Moreover, *Hansch* does not provide a solution to the conceptual problem of adopting the rule Mr. Grove proposes because *Hansch* does not provide guidance as to situations where different standards of care or different rules of agency apply to different members of the team providing care.

In contrast, the rule Mr. Grove promotes, by which medical negligence plaintiffs would not have to implicate specific health care providers, would be unworkable for nearly all cases involving employee and non-employee health care providers where vicarious liability is alleged. That is because the failure to implicate specific health care providers would prevent a proper agency determination since there would be no basis to determine which agency test applies without knowing which team member was liable.[12]

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[12] The Michigan Supreme Court in *Cox* resolved similar issues related to team medicine and vicarious liability. It held that, "in order to find a hospital liable on a vicarious liability theory, the jury must be instructed regarding the ***specific agents*** against whom negligence is alleged and the standard of care applicable to each agent." *Cox*, 467 Mich. 1 at 15 (emphasis added).

Even the watered-down team negligence rule Mr. Grove ultimately proposes is unworkable in a vicarious liability standpoint, especially, as here, when members of the team have different agency relationships with the defendant hospital. Adding to these problems are the difficulties arising under Mr. Grove's rule where different standards of care apply to different team members. These reasons reinforce why the Court should continue to apply settled law under Ch. 7.70 RCW to decide the medical malpractice issues in this case.

III. CONCLUSION

Health Care Amici respectfully suggest the Court can best resolve this case with the settled medical malpractice law under Ch. 7.70 RCW and should affirm the lower courts for doing so.

Dated this 15th day of August, 2014.

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