No. 101083-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No: 83415-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON, SEATTLE

ROBERT WILLIAMS,

Plaintiff/Appellant

vs.

FRANCISCAN HEALTH SYSTEM d/b/a ST. JOSEPH HOSPITAL,

Defendant/Respondent

PETITION FOR REVIEW

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

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I. IDENTITY OF PETITIONER.

Petitioner is Robert Williams. He was Plaintiff in the Pierce County Superior Court and Appellant in the Division One of the Court of Appeals.[1]

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision for which review is sought is found in Appendix B. It was filed April 11, 2022. A motion for reconsideration was timely filed by Petitioner April 28, 2022. May 11, 2022 the Court of Appeals ordered Respondent Franciscan Health System to file an answer to the Motion for Reconsideration. An order denying reconsideration was entered in the Court of Appeals June 17, 2022. It is found in Appendix C.

III. ISSUE PRESENTED FOR REVIEW

Should the absence of percentage testimony be an absolute legal barrier to recovery for lost chance of a better outcome even where competent non percentage evidence esttablishes that harm?

IV. CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW

A. Article 1, Section 21, of Washington's Constitution provides the right of trial by jury shall remain inviolate. The Supreme

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[1] The case was transferred from Division II of the Court of Appeals to Division I.

Court has interpreted this to include the calculation of general damages in civil cases. Does requiring percentage testimony before a jury can award general damages for lost chance of a better outcome create an unconstitutional limitation on the power of the jury to award damages?

B. The courts of appeals have stated the purpose of the requirement of percentage testimony as an absolute requirement to recover damages for lost chance of a better outcome is to give the jury a multiplier for it to apply to the damages award. The Supreme Court in Sophie v. Fibreboard held it was an unconstitutional invasion of the province of the jury for the legislature to impose a damages formula on the jury. Can the courts constitutionally do what it says the legislature cannot do – impose a formula on juries for the purpose of calculating general damages?

C. The courts of appeals have held the absence of percentage testimony is an absolute barrier preventing recovery for lost chance of a better outcome, despite any other competent testimony supporting that harm. The Supreme Court in Volk v. DeMeerleer at p. 278 specifically declined to decide whether percentage testimony should be required to recover for lost

chance of a better outcome. Should the Supreme Court now address this issue to eliminate potential uncertainty in future cases?

V. STATEMENT OF CASE

Robert Williams at around 4:30 in the afternoon of September 15, 2015 experienced a strange and painful sensation related to his right ear. He called his wife and told her he was going to urgent care in Bonney Lake. CP 82-3.

Urgent Care felt the issue needed a more complex evaluation, and said he needed to go to the emergency department at Good Samaritan Hospital to be evaluated. Urgent Care additionally told Mr. Williams that he could not drive himself there. CP 83.

At Good Samaritan Hospital, imaging was ordered for Mr. Williams. While waiting to be imaged, he threw up. Id.

At Good Samaritan an MRI was ordered to rule out stroke. Once stroke is diagnosed there are treatments, including aspirin, statins, and IV fluids given to minimize the effects of stroke and risk of recurrence. CP 102-104.

Over the course of the evening Good Samaritan became aware that Mr. Williams was insured through Group Health. Good Samaritan accordingly did not perform the ordered MRI. Instead they contacted St.

Joseph Medical Center (operated by Franciscan Health System) which handled Group Health insureds, to see if Mr. Williams could be transferred. The content of the conversation between the physicians who discussed transfer is not documented beyond the fact that St. Joseph would accept the transfer, however, it is believed that Mr. Williams' presenting symptoms were conveyed. Id.

Mr. Williams arrived at St. Joseph at 12:46 a.m. September 16, 2015. He was not seen by a physician until 3:14 a.m. The physician he saw ordered an MRI to rule out stroke. The MRI did not take place until 8:35 a.m. Unfortunately, shortly after 7:00 a.m. Mr. Williams' stroke became much more serious with medical records documenting right facial numbness and droop. Id.

Appropriate stroke therapies were not begun until 10:03 a.m. Mr. Williams is now totally disabled. Prompt attention at St. Joseph's in accordance with the standard of care by immediately performing an MRI, as was originally ordered at Good Samaritan, would have created a chance for a better outcome for Mr. Williams, including the possibility of complete recovery, since his symptoms upon arrival at St. Joseph's were relatively minor. Id.

An expert in stroke neurology, Dr. Aaron Heide, testified that with stroke time is brain. He stated the longer treatment is delayed the more

brain is damaged. Dr. Heide testified that, since stroke was on the differential, there was need to act expeditiously to assess Mr. Williams. He stated this was not done and that this failure violated the required standard of care and led to the loss of chance of a better outcome. CP 101-103.

With respect to the harm suffered as a result of the standard of care violation, Dr. Heide testified prompt MRI imaging would have revealed Mr. Williams' ischemic stroke, presumably leading to an appropriate medical response to minimize and possibly eliminate any sequelae of stroke. CP 103.

Dr. Heide testified that it was not possible to determine with precision the extent of brain damage caused by the delay in treatment. However, he testified that it is clear Mr. Williams' symptoms considerably worsened and that this likely represented worsening damage to Mr. Williams' brain as time passed. Dr. Heide testified that the interventions that would have and should have been implemented included prompt MRI and administration of aspirin, statin and IV fluids. He stated failure to deliver those therapies caused harm to the brain. CP 103-4.

Dr. Heide testified Mr. Williams is now totally disabled. Mr. Williams cannot walk without assistance. He cannot drive. He has lost hearing in one of his ears. He has lost peripheral vision. Dr. Heide states

with timely implementation of the described interventions and therapies that Mr. Williams' described stroke morbidities could have been minimized or avoided altogether. CP 104.

Franciscan argued testimony establishing the percentage of loss of chance was necessary to recover damages for loss of chance of a better outcome. The court agreed and a non-final order dismissing all claims against Franciscan was entered December 18, 2020. CP 144-146.

The case against the remaining defendant continued. By agreement a final order dismissing all claims against the remaining party was entered February 22, 2021. CP 147-149.

Appeal of the Franciscan dismissal was filed March 19, 2021, 25 days after the final order. CP 150. The court of appeals affirmed the summary judgment, holding percentage testimony was an absolute requirement to recover for lost chance of a better outcome. *Appendix B.* Reconsideration was denied June 17, 2022. *Appendix C.*

VI. ARGUMENT

A. Summary judgment can only be affirmed if the court, reviewing the record de novo, finds there is no evidence, and no inference that can be drawn from the evidence, that Robert Williams was injured by Franciscan's violation of the required standard of care.

A trial court's order granting summary judgment is reviewed *de novo*. Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489,

497, 210 P.3d 308 (2009). Summary judgment is only appropriate if the pleadings, answers to interrogatories, depositions, declarations and admissions reveal there is no genuine issue as to any material fact and the nonmoving party is entitled to judgment as a matter of law. CR 56(c). In determining whether a genuine issue of material fact exists, all evidence and all inferences that can be drawn from the evidence are drawn in favor of the nonmoving party. Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). All questions of law are subject to de novo review. Durland v. San Juan County, 182 Wn.2d 55, 340 P.3d 191 (2014).

B. Loss of chance of a better outcome is an element of general damage, not a cause of action, which puts it in the province of the jury.

The case law is somewhat confusing with respect to the nature of loss of chance. Loss of chance of a better outcome is referred to both as a cause of action and as an element of damage – sometimes on the same page in the same opinion. For example, the Washington Supreme Court in a recent analysis of loss of chance said:

> Mohr contains a detailed and comprehensive discussion of the cause of action, the principles underlying the cause of action, and how the cause of action fits in our traditional and general tort principles of medical malpractice, including duty, breach, injury, and proximate cause.

Dunnington v. Virginia Mason Medical Center, 187 Wn.2d 629, 634, 389 P.3d 498 (2017). In the next paragraph the Supreme Court described loss

of chance as an element of damage, stating:

> A plaintiff making such a claim must prove duty, breach, and that there was injury in the form of a loss of chance caused by the breach of duty.

Id. Thus, although initially characterized as a cause of action, the court defined loss of chance as the injury suffered, not the wrongful conduct.

Despite the seemingly contradictory descriptions, an analysis of prior Supreme Court decisions make it clear loss of chance is an element of damage, not a cause of action. The cause of action is the tort, the wrongful conduct, not the damages flowing from the wrong. Sprague v. Adams, 139 Wash. 510, 247 P. 960 (1926). The term "cause of action" actually reveals this. The "cause" of the action is the wrongful conduct. The "result" of the wrongful conduct is the damage.

Sprague involved a motor vehicle accident. Mrs. Sprague was injured when defendant's taxicab ran into her Ford sedan. She initiated an action in justice court to recover for damage to her vehicle which resulted in a judgment in her favor. She then instituted another action in Superior Court to recover for the injuries to her person. The defendant argued *res judicata* prevented the second action.

The Washington Supreme Court in Sprague analyzed whether or not *res judicata* operated to prevent Mrs. Sprague from splitting her claim. In the course of its analysis the Supreme Court had to determine what

constituted the cause of action. It pointed out that the English rule would have permitted Mrs. Sprague to bring separate actions for property damage and personal injuries, stating:

> The English rule . . . is based on the proposition that the cause of action rests not on the negligent act, but on the consequence of the wrong, from which it is argued that separate proceedings may be instituted for the different injuries as they accrue.

Id. at 519.

Sprague noted that the English rule went against the weight of United States authority. It found that the cause of action is the wrongful act, not the consequences of the wrongful act. The Washington Supreme Court stated: "If the cause of action is the wrongful act, and we so hold, then all the damages sustained thereby, whether to person or property, are properly sought in one suit." Id.

Sprague is still good law and is frequently cited. The evolved case law has continued to define causes of action in terms of the wrongful act, not the consequential damages.

In Volk v. DeMeerleer, 187 Wn.2d. 241 386 P.3d 254 (2016) the Supreme Court made it clear that loss of chance is an element of damage, not a cause of action, stating: "In Washington, the loss of chance can be a compensable injury in a medical malpractice action." Id. at 278.

Thus, although sometimes loosely characterized as a cause of action, loss of chance is actually an element of general damage. The cause of action is medical negligence; the resultant damage caused by the wrongful conduct is loss of chance of a better outcome. The question actually considered by the Supreme Court in Mohr v. Grantham, et al., 172 Wn.2d 844, 262 P.3d 490 (2011) was whether loss of chance of a better outcome was a recoverable element of damage in a stroke case. It found that it was.

To prove the damage related to loss of chance the Supreme Court says established tort causation doctrines apply. Dunnington at 634.

C. The Washington Supreme Court has not made percentage testimony a prerequisite to recover for loss of chance of a better outcome.

There is a constitutional right to have a jury determine general damages. In Sophie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989) the Washington Supreme Court made it clear the right to have a jury determine damages, especially general damages, is a constitutional right. Sophie struck down an attempt by the legislature to place a limit on general damages in medical negligence cases.

There have been recent court of appeals opinions holding that, to recover for loss of chance of a better outcome, there must be testimony establishing the percentage chance of success. Although the Washington Supreme Court discussed percentage testimony in Mohr, the Supreme

Court has never made percentage testimony a requirement to recover for loss of chance. The Supreme Court has so far declined to address the issue when it has been presented.

Volk v. DeMeerleer, 187 Wn.2d 241, 386 P.3d 254 (2016) involved analysis of loss of chance in the context of a medical negligence case against a mental health professional. The Supreme Court stated:

> However, the Court of Appeals affirmed summary judgment as to the loss of chance portion of the medical malpractice claim. The Court of Appeals reasoned that loss of chance requires expert testimony stating actual percentage of lost chance, which Knoll failed to provide.

Id. at 253. The Supreme Court subsequently stated:

> Ashby contends that in order to establish a loss of chance claim, an expert opinion must state the conclusion in terms of percentage of lost chance. We need not reach Ashby's argument about the requirement for an actual percentage.

Id. at 278. The Washington Supreme Court has yet to make percentage testimony a requirement to recover loss chance damages.

D. Washington's Constitution does not permit imposition of a formula on jurors for the determination of noneconomic damages.

In Sophie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989) the Washington Supreme Court examined whether a legislatively imposed damages limit was constitutional. The court was considering whether the damages limit based on a formula created by the legislature

violated the constitution of the State of Washington. Sophie held that it did, stating:

> We find that the statute's damages limit interferes with the jury's traditional function to determine damages. Therefore, RCW 4.56.250 violates article 1, section 21 of the Washington Constitution, which protects involate the right to a jury.

Id. at 638.

The Washington Supreme Court described the issue before it as follows:

> At issue in the present case is whether the measure of damages is a question of fact within the jury's province. Our past decisions show that it is indeed.

Id. at 645. The Supreme Court was particularly protective of the jury's constitutional right to determine non-economic damages:

> As our past decisions have shown, Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. This jury function receives constitutional protection from article 1, section 21.

Id. at 648.

To the argument that this constitutional requirement ought not apply to loss of chance of a better outcome because it is a remedy that did not exist when Washington's Constitution was passed, Sophie provides a ready answer:

> Subsequent cases and statutes have recognized newer theories of recovery within the framework of those basic tort actions, but the

> basic cause of action remains the same. Therefore, the right to trial by jury with its scope as defined by historical analysis – remains attached here.

Id. at 649. Applying this principle to the case at bar, it is clear that the medical malpractice cause of action has long existed; the fact that loss of chance is a relatively new remedy applied to that cause of action does not eliminate the constitutional right to have a jury make the determination.

The fundamental point emphasized by Sophie is "the legislature cannot intrude into the jury's fact-finding function in civil actions, including the determination of the amount of damages." Id. at 651. The unequivocal holding was "the limit on noneconomic damages in RCW 4.56.250 is unconstitutional." Id. at 669.

It is clear from Sophie that, if the legislature had passed a statutory requirement that juries had to apply a percentage-based formula to determine noneconomic damages for loss of chance of a better outcome, this would be found unconstitutional. The question to be asked here is, can the courts in this circumstance do what Sophie court has made clear that the legislature cannot do without violating article 1, section 21 of the Washington Constitution?

If in fact the right to have a jury determine noneconomic damages is inviolate and if in fact the legislature is prohibited from imposing formulas on the determination of noneconomic damages on the jury, then

it seems that the same constitutional prohibition should apply to court imposed formulas.

The question thus becomes: should a percentage requirement be imposed on this element of general damage? An argument can be made that absence of such testimony leaves the jury rudderless. However, the jury is trusted to determine general damages in other circumstances, like loss of enjoyment of life and loss of consortium, without percentage guidance.

In the case at bar a board certified stroke neurologist testified: "with stroke time is brain. In other words the longer treatment is delayed the more brain is damaged." CP 103. He further stated: "Since stroke was on the differential, St. Joseph needed to act expeditiously in assessing Mr. Williams. It failed to do so, and that failure violated the required standard of care." Id. He noted:

> It is not possible to determine with precision the extent of brain damage caused by the delay in treatment at St. Joseph. However, it is clear that Mr. Williams' stroke related symptoms considerably worsened while at St. Joseph prior to MRI and diagnosis. This likely represented worsening damage to Mr. Williams' brain as time passed.

CP 103-4. Finally, the doctor stated the following:

> Mr. Williams is now totally disabled. He cannot walk without assistance. He cannot drive. He has lost hearing in one of his ears. He has lost peripheral vision. With appropriate intervention at Good Samaritan and St. Joseph

> it is possible those problems could have been minimized or avoided altogether.

CP 104.

The question is who should bear the burden of the uncertainty – the wrongdoer or the victim. The Supreme Court has stated traditional tort doctrine applies to loss of chance. Under traditional tort principles it is the wrongdoer, not the victim, who bears the risk of uncertainty related to the wrongdoing. Requiring percentage testimony from the victim where there is proof of harm caused by the defendant would reverse this. This seems particularly inappropriate in circumstances such as the one at bar, where damage is known to have occurred which cannot be numerically described.

The argument that a jury must have numeric percentage guidance to recover for loss of chance of a better outcome places too little faith in juries and too much faith in percentages that are speculative at best and arbitrary at worst.

Loss of chance of a better outcome is an element of general damage. As such, it is for the jury to decide. Further, the jury cannot be constitutionally limited to multiplying a percentage times total damage without violating the principles laid out in Sophie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989).

It is not clear what the jury is supposed to do with the percentage testimony mandated by the Court of Appeals. If it is required to multiply the percentage times their damages finding, it would seem to violate Sophie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989) by creating a formula the jury must follow. If it is not required to multiply the percentage times their award, then why would percentage testimony be any better than an expert testifying that a chance of a better outcome was probably lost. If the jury is free to disregard the percentage, how would requiring it prevent unsupported jury speculation?

Probably the most troubling aspect of requiring percentage testimony in order to recover for lost chance of a better outcome is its false imprimatur of accuracy. In fact any opinion expressing a percentage of lost chance is at best applying population statistics to an individual case and at worst rank speculation. It is a known and undeniable fact that population statistics cannot be applied to an individual case. There is even a term for this mistake in statistics – it is called ecological fallacy. Portnov, et al, Journal of Exposure Science and Environmental Epidemiology (2007) 17, 106-121. "Ecological fallacy is incorrect assumption about an individual based on aggregate data for a group." Id.

In this case the amount of additional brain damage cannot be known. All that is known is that additional brain damage was caused by

the delay. The fact that statistics do not exist that parse out that damage should not prevent the victim of the negligence from recovering.

The Supreme Court should reject the requirement of percentage testimony to recover for lost chance of a better outcome that has been created by the Court of Appeals.

VII. CONCLUSION

The order granting summary judgment should be reversed. This case should be remanded for trial on the merits.

Dated this 14th day of July 2022.

LOPEZ & FANTEL, INC., P.S.

/s/ Carl A. Taylor Lopez

Carl A. Taylor Lopez, WSBA#6215
Of Attorneys for Appellant

APPENDIX A

CONSTITUTION OF THE STATE OF WASHINGTON

This Constitution was framed by a convention of seventy-five delegates, chosen by the people of the Territory of Washington at an election held May 14, 1889, under section 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The Constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with section 8 of the Enabling Act, the president of the United States proclaimed the admission of the State of Washington into the Union.

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In part (A), for convenience of the reader, the latest constitutional amendments have been integrated with the currently effective original sections of the Constitution with the result that the Constitution is herein presented in its currently amended form.

All current sections, whether original sections or constitutional amendments, are carried in Article and section order and are printed in regular type.

Following each section which has been amended, the original section and intervening amendments (if any) are printed in italics.

Appended to each amendatory section is a history note stating the amendment number and date of its approval as well as the citation to the session law wherein may be found the legislative measure proposing the amendment; e.g. "**[AMENDMENT 27,** 1951 House Joint Resolution No. 8, p 961. Approved November 4, 1952.]"

In part (B), the constitutional amendments are also printed separately, in order of their adoption.

(A) Constitution of the State of Washington

PREAMBLE

Article I — DECLARATION OF RIGHTS

Article II — LEGISLATIVE DEPARTMENT

SECTION 15 CONVICTIONS, EFFECT OF. No conviction shall work corruption of blood, nor forfeiture of estate.

SECTION 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [**AMENDMENT 9,** 1919 p 385 Section 1. Approved November, 1920.]

Original text — Art. 1 Section 16 EMINENT DOMAIN — *Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.*

SECTION 17 IMPRISONMENT FOR DEBT. There shall be no imprisonment for debt, except in cases of absconding debtors.

SECTION 18 MILITARY POWER, LIMITATION OF. The military shall be in strict subordination to the civil power.

SECTION 19 FREEDOM OF ELECTIONS. All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

SECTION 20 BAIL, WHEN AUTHORIZED. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature. [**AMENDMENT 104,** 2010 Engrossed Substitute House Joint Resolution No. 4220, p 3129. Approved November 2, 2010.]

Original text — Art. 1 Section 20 BAIL, WHEN AUTHORIZED — *All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.*

SECTION 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [**AMENDMENT 10,** 1921 p 79 Section 1. Approved November, 1922.]

Original text — Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS — *In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

SECTION 23 BILL OF ATTAINDER, EX POST FACTO LAW, ETC. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

SECTION 24 RIGHT TO BEAR ARMS. The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section

APPENDIX B

FILED
4/11/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT WILLIAMS,

Appellant,

v.

FRANCISCAN HEALTH SYSTEM d/b/a ST. JOSEPH HOSPITAL, MULTICARE HEALTH SYSTEM d/b/a GOOD SAMARITAN HOSPITAL, and JOHN DOES 1-10,

Respondents.

DIVISION ONE

No. 83415-1-I

UNPUBLISHED OPINION

DWYER, J. — Robert Williams appeals from the trial court's summary judgment order dismissing his medical negligence claim against Franciscan Health System, d/b/a St. Joseph Hospital. Williams asserts that the record contains sufficient evidence to raise a genuine issue of material fact as to whether Franciscan Health caused Williams the loss of chance of a better outcome. However, Williams did not proffer expert testimony that included an opinion as to the percentage or range of percentage reduction of a better outcome that resulted from the defendant's wrongful actions. Because a plaintiff must produce such evidence in order to succeed on a lost chance of a better outcome claim, we affirm.

I

On September 15, 2015, at approximately 4:30 p.m., Robert Williams, according to his declaration, "experienced an unusual sensation in [his] right ear."

Immediately thereafter, Williams informed his wife that he was going to an urgent care facility. At 5:15 p.m., Williams arrived at an urgent care facility located in the city of Bonney Lake.

Upon his arrival at the urgent care facility, Williams "had symptoms of ear pain and dizziness." Thereafter, Williams was informed that he should go to Good Samaritan Hospital. Subsequently, Williams's wife drove him to that hospital.

Williams arrived at Good Samaritan Hospital around 6:24 p.m. Upon his arrival, Williams "was examined and imagining was ordered." As a result, Williams was scheduled to receive an MRI[1] scan. While Williams awaited this procedure, he vomited.

Employees at Good Samaritan Hospital discovered that Williams's insurance provider did not cover the medical services performed at Good Samaritan Hospital. As a result, an MRI was not performed at Good Samaritan Hospital.

Employees at Good Samaritan Hospital attempted to discharge Williams with a diagnosis of vertigo. However, Williams did not agree to be discharged, insisting that he was not suffering from vertigo. An employee at Good Samaritan Hospital subsequently contacted an employee at St. Joseph Hospital because Williams's insurance provider covered treatment at St. Joseph. Williams was subsequently transferred, via ambulance, to St. Joseph Hospital.

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[1] Magnetic Resonance Imaging.

On September 16, 2015, at 12:46 a.m., Williams arrived at St. Joseph Hospital. At 3:14 a.m., Williams was examined by a medical doctor. The doctor ordered an MRI scan to determine whether Williams was suffering from a stroke. Around 7:00 a.m., Williams experienced "numbness of the right side of the face and right facial droop." The MRI scan did not occur until 8:35 a.m.

Williams did not recall his time at St. Joseph Hospital. Instead, the first thing he remembered after agreeing to be transferred from Good Samaritan was "waking up at St. Joseph after having suffered a stroke." Thereafter, Williams became "permanently disabled." In particular, Williams lost his peripheral vision, lost the ability to hear from one of his ears, is unable to walk without assistance, is unable operate a motor vehicle, and "can no longer work."

On September 5, 2019, Williams filed a complaint against Franciscan Health System, d/b/a St. Joseph Hospital, MultiCare Health System, d/b/a Good Samaritan Hospital, and various unnamed defendants who were referred to as "John Does 1-10." In his complaint, Williams alleged that the "[d]efendants committed negligent acts and omissions with regard to the medical care, or lack thereof, provided to Plaintiff on or about September 15, 2015 and thereafter." The complaint further alleged that, as a result of this negligent conduct, Williams suffered his injuries.

In response to an interrogatory from Franciscan Health, Williams stated that Dr. Aaron Heide was the only expert witness that he intended to produce at trial. Subsequently, during a deposition, Dr. Heide testified as follows with regard to Williams's chance of a better outcome:

> Q. Well, the question that you just asked sort of in your answer there was whether any treatment -- any of the treatments that he did eventually receive, whether any of those should have been given earlier based on what we later saw on the MRI.
>
> A. I think the key word in your question is "eventually." And I'm going to stick with my answer that the quicker the better in acute stroke and that eventually you get to a treatment. The question is would the treatment have been given earlier, would there be a better outcome? And we can't revise history. All I can say is that quicker and more information is better. Determining the mechanism of the injury allows you to treat quicker and better. And so eventually getting the treatment based on assessment and mechanistic injury determination at a later date, I don't think we can go back in history and say if he had received aspirin or statin or IV fluid earlier, would he have a better outcome, because we don't have that luxury. We just have what is presented to us.
>
> All we know is from the standard of care is quicker, earlier the better.
>
> Q. So are you able to say more likely than not, if he had received, for example, aspirin earlier, his outcome would be different?
>
> A. I'm not that powerful of a being to know that. But we do know in acute stroke, quicker and sooner is better.

On October 30, 2020, Franciscan Health filed a motion for summary judgment. In this motion, Franciscan Health asserted, in part, that Williams failed to establish a genuine issue of material fact with regard to whether Franciscan Health caused any injury to Williams.

On December 8, 2020, Williams filed a signed declaration of Dr. Heide which contained the following statements regarding Williams's loss of chance for a better outcome:

> 8. With stroke time is brain. In other words the longer treatment is delated the more brain is damaged.
>
> 9. Since stroke was on the differential, St. Joseph needed to act expeditiously in assessing Mr. Williams. It failed to do so, and that failure violated the required standard of care.
>
> 10. The delay of diagnosis led to delay of treatment. Delay of treatment led to the loss of chance for a better outcome.

> 11. It is likely MRI imaging performed at St. Joseph at any time after Mr. Williams arrive[d] would have revealed the stroke, presumably leading to an appropriate response, which likely would have included Plavix, among other therapies. Because ischemic stroke was not diagnosed until 8:35 a.m. and Plavix was not given until 10:03 a.m., Mr. Williams' [sic] lost a chance for a better outcome. It is possible that Plavix administration before the onset of the more serious symptoms at 7:00 a.m. would have prevented the later more serious brain injury suffered by Mr. Williams.
>
> 12. Although content of the telephone call between physicians related to the transfer is not documented, it is inconceivable that the call would not have included discussion of Mr. Williams' symptoms and the fact that an MRI had been ordered, but not performed, at Good Samaritan. If this did not occur, then failure to share the information was a violation of the required standard of care by Good Samaritan and failure to inquire was a violation of the required standard of care by St. Joseph.
>
> 13. It is not possible to determine with precision the extent of brain damage caused by the delay in treatment at St. Joseph. However, it is clear that Mr. Williams' stroke related symptoms considerably worsened while at St. Joseph prior to the MRI and diagnosis. This likely represented worsening damage to Mr. Williams' brain as time passed.
>
> . . . .
>
> 15. The reason aspirin, statin and IV fluids are given in the sub acute phase of stroke is to improve outcome. Failure to MRI sooner delayed delivery of therapies. Harm caused [to] the brain as a result cannot be quantified, but it is known that time is brain in stroke and quicker is better. Delay in this case resulted in a loss of chance for a better outcome.
>
> 16. Mr. Williams is now totally disabled. He cannot walk without assistance. He cannot drive. He has lost hearing in one of his ears. He has lost peripheral vision. With appropriate intervention at Good Samaritan and St. Joseph it is possible these problems could have been minimized or avoided altogether.

On December 18, 2020, the trial court heard Franciscan Health's motion for summary judgment. During the hearing, the trial court ruled that Williams failed to establish a genuine issue of material fact on his loss of chance claim because the evidence he proffered did not include expert testimony as to the percentage of the loss of chance of a better outcome he sustained. That same

day, the trial court entered a written order granting the motion for summary judgment and dismissing with prejudice Williams's claims against Franciscan Health.[2]

Williams appeals.

II

Williams contends that the trial court erred by granting Franciscan Health's motion for summary judgment. This is so, he avers, because he was not required to produce expert testimony regarding the percentage or range of percentage reduction in the chance of a better outcome he sustained in order to advance his lost chance claim. To the contrary, authority holds that Williams was required to produce such testimony in order to advance a lost chance of a better outcome claim. Accordingly, the trial court did not err.

A

We review an order granting summary judgment de novo, performing the same inquiry as the trial court. Nichols v. Peterson Nw., Inc., 197 Wn. App. 491, 498, 389 P.3d 617 (2016). In so doing, we draw "all inferences in favor of the nonmoving party." U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc., 104 Wn. App. 823, 830, 16 P.3d 1278 (2001). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

[2] On February 22, 2021, the trial court entered a stipulated order dismissing Williams's claims against MultiCare Health System.

"A plaintiff seeking damages for medical malpractice must prove his or her 'injury resulted from the failure of a health care provider to follow the accepted standard of care.'" Keck v. Collins, 184 Wn.2d 358, 371, 357 P.3d 1080 (2015) (quoting RCW 7.70.030(1)). To prove such a claim the plaintiff must establish the following statutory elements:

> The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:
>
> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

Former RCW 7.70.040 (2020).

"Washington recognizes loss of chance as a compensable interest." Shellenbarger v. Brigman, 101 Wn. App. 339, 348, 3 P.3d 211 (2000). "A lost chance claim is not a distinct cause of action but an analysis within, a theory contained by, or a form of a medical malpractice cause of action." Rash v. Providence Health & Servs., 183 Wn. App. 612, 629-30, 334 P.3d 1154 (2014).

Medical negligence claims alleging a loss of chance are divided into two categories: (1) loss of chance of survival, and (2) loss of chance of a better outcome. See Herskovits v. Grp. Health Coop. of Puget Sound, 99 Wn.2d 609, 619, 634, 664 P.2d 474 (1983) (lead opinion) (Pearson, J., concurring) (recognizing a medical negligence claim for loss of chance of survival); Mohr v. Grantham, 172 Wn.2d 844, 857, 262 P.3d 490 (2011) (recognizing a medical negligence claim for loss of chance of a better outcome).

"In a lost chance of survival claim, the patient died from a preexisting condition and would likely have died from the condition, even without the negligence of the health care provider. Nevertheless, the negligence reduced the patient's chances of surviving the condition." Rash, 183 Wn. App. at 630 (citing Herskovits, 99 Wn.2d 609). Accordingly, a lost chance of survival claim must be distinguished from a traditional medical malpractice claim wherein the negligent act proximately caused the patient's death:

> We distinguish between a lost chance of survival theory and a traditional medical malpractice theory. In the latter, but for the negligence of the health care provider, the patient would likely have survived the preexisting condition. In other words, the patient had a more than 50 percent chance of survival if the condition had been timely detected and properly treated. In a lost chance claim, the patient would likely have died anyway even upon prompt detection and treatment of the disease, but the chance of survival was reduced by a percentage of 50 percent or below.

Rash, 183 Wn. App. at 630-31.

Next, "[i]n a lost chance of a better outcome claim, the mortality of the patient is not at issue, but the chance of a better outcome or recovery was reduced by professional negligence." Rash, 183 Wn. App. at 631 (citing Mohr, 172 Wn.2d at 857). Therefore, a lost chance of a better outcome claim must also be distinguished from a traditional medical malpractice claim:

> In a traditional medical malpractice case, the negligence likely led to a worse than expected outcome. Under a lost chance of a better outcome theory, the bad result was likely even without the health care provider's negligence. But the malpractice reduced the chances of a better outcome by a percentage of 50 percent or below.

Rash, 183 Wn. App. at 631.

Notably, "expert testimony is required to establish the standard of care and most aspects of causation in a medical negligence action." Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). In a lost chance case, "a plaintiff need not forward medical testimony that negligence of the health care provider was the likely cause of [the underlying] injury." Christian v. Tohmeh, 191 Wn. App. 709, 730, 366 P.3d 16 (2015) (citing Rash, 183 Wn. App. at 636). However, such a "plaintiff must provide a physician's opinion that the health care provider 'likely' caused a lost chance." Christian, 191 Wn. App. at 730 (citing Rash, 183 Wn. App. at 631).

As a result, "[i]n a lost chance suit, a plaintiff carries the burden of producing expert testimony that includes an opinion as to the percentage or range of percentage reduction of the better outcome." Christian, 191 Wn. App. at 731. "Without that percentage, the court would not be able to determine the amount of damages to award the plaintiff, since the award is based on the percentage of loss." Rash, 183 Wn. App. at 636. After all, "[d]iscounting damages by that percentage responds to a concern of awarding damages when the negligence was not the proximate cause or likely cause of the" underlying injury. Rash, 183 Wn. App. at 636. "Otherwise, the defendant would be held responsible for harm beyond that which it caused." Rash, 183 Wn. App. at 636.

B

Turning to the challenge raised on appeal, the trial court did not err by granting Franciscan Health's motion for summary judgment. Neither the deposition of Dr. Heide nor the declaration of Dr. Heide provided an opinion on a

percentage or a range of percentage reduction of the chance of a better outcome. To the contrary, during his deposition, Dr. Heide stated:

> I don't think we can go back in history and say if he had received aspirin or statin or IV fluid earlier, would he have a better outcome, because we don't have that luxury. . . . All we know is from the standard of care is quicker, earlier the better.

Likewise, in his declaration, Dr. Heide stated:

> It is not possible to determine with precision the extent of brain damage caused by the delay in treatment at St. Joseph. However, it is clear that Mr. Williams' stroke related symptoms considerably worsened while at St. Joseph prior to the MRI and diagnosis. This likely represented worsening damage to Mr. Williams' brain as time passed.

This declaration also included several speculative and conclusory statements with regard to causation. In particular, Dr. Heide stated both that, "[i]t is *possible* that Plavix administration before the onset of the more serious symptoms at 7:00 a.m. would have prevented the later more serious brain injury" and that, "[w]ith appropriate intervention at Good Samaritan and St. Joseph[,] it is *possible* [Williams's] problems could have been minimized or avoided altogether." (Emphasis added.) Additionally, Dr. Heide conclusively declared that "[d]elay in this case resulted in a loss of chance for a better outcome."

Because Williams did not proffer evidence that included expert testimony setting forth an opinion, on a more likely than not basis, as to the percentage or range of percentage reduction of a chance of a better outcome suffered by Williams, the trial court did not err by granting Franciscan Health's motion for summary judgment. See Christian, 191 Wn. App. at 731; Rash, 183 Wn. App. at 636.

The speculative and conclusory statements made by Dr. Heide were insufficient to survive summary judgment. Under CR 56(e), "[a]ffidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment." Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993). In particular, in a medical negligence case,

> the evidence must "rise above speculation, conjecture, or mere possibility." "[M]edical testimony must demonstrate that the alleged negligence 'more likely than not' caused the later harmful condition leading to injury; that the defendant's actions 'might have,' 'could have,' or 'possibly did' cause the subsequent condition is insufficient."

Shellenbarger, 101 Wn. App. at 348 (alteration in original) (citation omitted) (quoting Attwood v. Albertson's Food Ctrs., Inc., 92 Wn. App. 326, 331, 966 P.2d 351 (1998)).

Williams avers that "the Supreme Court has never made percentage testimony a requirement to recover for loss of chance" and that "[t]he Supreme Court has so far declined to address the issue when it has been presented."[3] Williams is correct that our Supreme Court has not expressly held that a plaintiff advancing a lost chance claim must produce expert testimony providing a percentage or range of percentage reduction in the chance of either survival or a better outcome. However, in every case in which our Supreme Court has addressed a lost chance claim, such evidence was submitted. See Dunnington v. Virginia Mason Med. Ctr., 187 Wn.2d 629, 636, 389 P.3d 498 (2017) (expert testimony providing that the negligent act caused a 40 percent reduction in

[3] Br. of Appellant at 9-10.

chance of a better outcome); Mohr, 172 Wn.2d at 849 (expert testimony providing that the negligent act caused a 50 to 60 percent reduction in chance of a better outcome);[4] Herskovits, 99 Wn.2d at 611 (expert testimony providing that the negligent act caused a 14 percent reduction in chance of survival).[5]

Furthermore, Justice Pearson's plurality opinion in Herskovits, which was later adopted by the court in Mohr, demonstrates the necessity of the plaintiff providing percentage testimony in order to be entitled to advance a loss of chance claim:

> Under the all or nothing approach, . . . a plaintiff who establishes that but for the defendant's negligence the decedent had a 51 percent chance of survival may maintain an action for that death. The defendant will be liable for all damages arising from the death, even though there was a 49 percent chance it would have occurred despite his negligence. On the other hand, a plaintiff who establishes that but for the defendant's negligence the decedent had a 49 percent chance of survival recovers nothing.

---

[4] In Rash, the court noted:

> One wonders if Mohr should be treated as a lost chance case, since under traditional proximate cause principles, Mohr needed to only establish by a 51 percent chance that the alleged negligence caused her increased disability. Perhaps the case was considered one involving a lost chance because the range of percentages dipped below 51 percent by one percent. The trial court granted Grantham summary judgment dismissing the suit because Mohr could not show "but for" causation.

183 Wn. App. at 634 n.1.

In other words, because the expert testimony provided a range of percentage of loss that included 50 percent, Mohr was entitled to advance a loss of chance claim. It is worth noting that, when a plaintiff presents expert testimony that includes a range of percentage reduction from either below or at 50 percent to greater than 50 perfect, the plaintiff may advance, in the alternative, both a loss of chance claim and a traditional negligence claim. See, e.g., Estate of Dormaier v. Columbia Basin Anesthesia, PLLC, 177 Wn. App. 828, 853, 313 P.3d 431 (2013).

[5] Additionally, in Volk v. DeMeerleer, 187 Wn.2d 241, 279, 386 P.3d 254 (2016), our Supreme Court explained that "the loss of a chance doctrine is inapplicable if the plaintiff is alleging that the defendant's negligence actually caused the unfavorable outcome—the tortfeasors would then be responsible for the actual outcome, not for the lost chance." This holding reinforces the need for expert testimony providing a percentage or range of percentage reduction in the chance of either survival or a better outcome.

> This all or nothing approach to recovery is criticized by King[6] on several grounds, 90 Yale L.J. at 1376-78. First, the all or nothing approach is arbitrary. Second, it
>
> > subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes *statistically demonstrable losses*. . . . A failure to allocate the cost of these losses to their tortious sources . . . strikes at the integrity of the torts system of loss allocation.
>
> 90 Yale L.J. at 1377. Third, the all or nothing approach creates pressure to manipulate and distort other rules affecting causation and damages in an attempt to mitigate perceived injustices. . . . Fourth, the all or nothing approach gives certain defendants the benefit of an uncertainty which, were it not for their tortious conduct, would not exist. . . . Finally, King argues that the loss of a less than even chance is a loss worthy of redress.
>
> . . . *[T]he best resolution of the issue before us is to recognize the loss of a less than even chance as an actionable injury*. Therefore, I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival.

Herskovits, 99 Wn.2d at 633-34 (Pearson, J., concurring) (emphasis added) (some alterations in original); accord Mohr 172 Wn.2d at 857 ("We . . . formally adopt the reasoning of the Herskovits plurality.").

Thus, in order for a plaintiff to demonstrate that the plaintiff was *injured* so as to be entitled to advance a loss of chance claim, the plaintiff must demonstrate that the defendant caused a loss of chance by a percentage of 50 percent or less. Without such evidence, there is nothing preventing the defendant from being improperly held liable for causing the *underlying* injury, which is *not* the actionable injury in a loss of chance claim. Instead, as our

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[6] Joseph H. King, Jr. was a legal commentator who promoted the theory of loss of chance of survival. His work was relied on in the Herskovitz plurality. See *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353 (1981).

Supreme Court has made clear, the actionable injury in a loss of chance claim is *the loss of chance*. Whether it is the lost chance to survive or the lost chance of a better outcome short of death, it is this loss, not the loss caused by the underlying injurious event, that is the focus of the claim. In this way, when the defendant's wrongful conduct falls short of being, more likely than not, the cause of the death or injury short of death, the plaintiff can seek redress for the share of damages incurred as a result of the defendant's tortious conduct (as opposed to the totality of the loss suffered by the plaintiff). Mohr, 172 Wn.2d at 857; Herskovits, 99 Wn.2d at 633-34 (Pearson, J., concurring). Therefore, a plaintiff in a loss of chance case bears the burden of establishing, by expert testimony, that the percentage or range of percentage of the lost chance of a better outcome amounted to either 50 percent or less.[7]

Williams next asserts that requiring an expert witness to provide a percentage or range of percentage reduction of the chance of a better outcome invades the province of the jury. In support of this argument, Williams cites to Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989). That case concerned a constitutional challenge to a statute that "place[d] a limit

---

[7] During oral argument, Williams asserted that, pursuant to James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980), which was cited by our Supreme Court in Herskovits, a plaintiff advancing a loss of chance claim does not bear the burden of producing such percentage testimony. In that case, a federal trial court ruled that the "Plaintiffs' failure to establish the premise for the loss of a statistically measurable chance of survival does not . . . rule out recovery." James, 483 F. Supp. at 586. After reviewing this authority, we disagree.

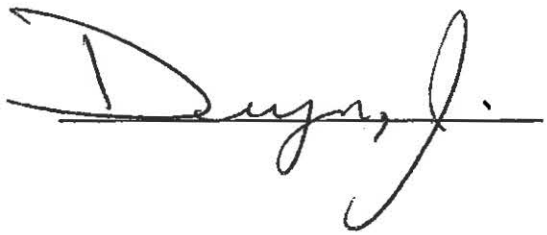
There are at least two reasons why James is of no aid to Williams. First, the decision therein was rendered by a federal district court applying California, not Washington, law. James, 483 F. Supp. at 583. Second, in Herskovits, a plurality of our Supreme Court cited the James decision with approval only insofar as that decision "view[ed] the reduction in or loss of the chance of survival, rather than the death itself, as the injury" in a loss of chance of survival case. 99 Wn.2d at 632 (Pearson, J., concurring). Thus, the Herskovits plurality did not cite James for the proposition that a plaintiff need not produce expert testimony regarding the percentage or range of percentage reduction of the chance of survival suffered by the plaintiff.

on the noneconomic damages recoverable by a personal injury or wrongful death plaintiff." Sofie, 112 Wn.2d at 638. Our Supreme Court held that the statute at issue violated article I, section 21 of the Washington Constitution by interfering with the jury's traditional function to determine damages. Sofie, 112 Wn.2d at 638.

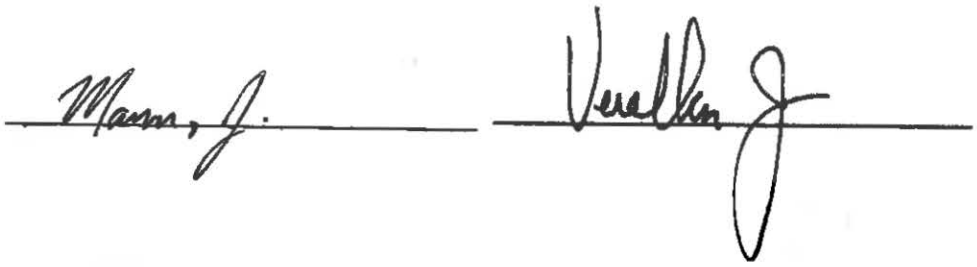
However, requiring a plaintiff to produce expert testimony establishing the percentage or range of percentage reduction of a chance of a better outcome does not interfere with the jury's traditional function to determine damages. Rather, as already explained, such testimony is necessary for a plaintiff to establish that the plaintiff was, in fact, *injured* in a manner that allows the advancement of a loss of chance claim. Indeed, the requirement of such testimony in no way improperly limits the amount of damages that the jury may award. To the contrary, the existence of such evidence ensures that the jury, in awarding damages, does not hold the defendant responsible for damages caused by the underlying injury as opposed to damages caused by the negligence that resulted in the lost chance. Rash, 183 Wn. App. at 636.

The trial court properly granted Franciscan Health's motion for summary judgment.

Affirmed.



WE CONCUR:



APPENDIX C

FILED
6/17/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT WILLIAMS,

Appellant,

v.

FRANCISCAN HEALTH SYSTEM d/b/a ST. JOSEPH HOSPITAL, MULTICARE HEALTH SYSTEM d/b/a GOOD SAMARITAN HOSPITAL, and JOHN DOES 1-10,

Respondents.

DIVISION ONE

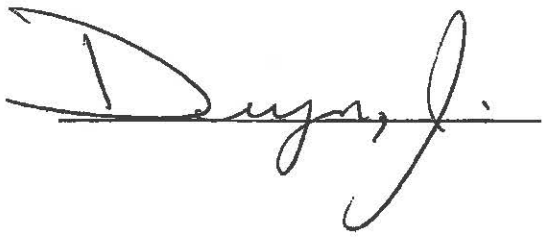
No. 83415-1-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

For the Court:



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No.

SUPREME COURT
OF THE STATE OF WASHINGTON

No: 83415-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON, SEATTLE

ROBERT WILLIAMS,

Plaintiff/Appellant

vs.

FRANCISCAN HEALTH SYSTEM d/b/a ST. JOSEPH HOSPITAL,

Defendant/Respondent

CERTIFICATE OF SERVICE - PETITION FOR REVIEW

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

I, Cynthia Ringo, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County, Washington, and am over the age of 18 years.

2. On the 14 day July, 2022, I caused to be served the following documents on counsel:

- Petition for Review; and
- Certificate of Service.

Michelle M. Garzon
Amanda Thorsvig
Elizabeth Unterbrink
Fain Anderson VanDerhoef Rosendahl O'Halloran Spillane, PLLC
1301 A Street, Suite 900
1302 Tacoma, WA 98402

[X] via email via Court of Appeals filing portal

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated at Seattle, Washington, this 14 day of July, 2022.

Cynthia Ringo

LOPEZ & FANTEL

July 14, 2022 - 10:50 AM

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