608264-4

608264-4

NO. 68264-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DAVID A. FALSBERG,

Appellant,

v.

GSK, PLLC, or GLAXO SMITH KLINE, INC., a foreign corporation, also d/b/a GSK, L.L.C., GSK CONSUMER HEALTHCARE, L.P., GSK BIOLOGICALS, NORTH AMERICA, GSK CONSUMER HEALTHCARE, L.L.C., and GSK SERVICES, INC., and JACK S. CONWAY, M.D.

Respondents.

DAVID FALSBERG'S REPLY TO CONWAY & GSK

LEVENTHAL BROWN & PUGA, P.C.
James Leventhal, *pro hac vice*
Benjamin Sachs, *pro hac vice*
950 South Cherry St., Suite 600
Denver, CO 80246
(303) 759-9945

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES

RULES

RESTATEMENTS

OTHER AUTHORITIES

INTRODUCTION

Under RCW 4.16.350(3), the three-year statute of limitations (SOL) began to run on April 4, 2007, the date of Dr. Conway's last act or omission (telling David to reduce, rather than stop, the Lamictal®). But § .350 is not triggered by when a cause of action accrues. By contrast, under RCW 4.16.190(1), the disability tolling statute, David's cause of action did not accrue until April 6, 2007, the earliest time that he reasonably could have known the cause of his symptoms, and a time at which he was fully incapacitated for purposes of disability tolling. As a result, the SOL was tolled for four months, from April 6, through August 2007. The three-year SOL thus did not expire until August 2010, and David's July 2010 complaint against Dr. Conway was timely. At the very least, there are genuine issues of material fact that preclude summary judgment based on the statute of limitations.

Dr. Conway missed the diagnosis of SJS/TEN. So did many other doctors. David's experts opined to a reasonable medical probability that so many experienced physicians are missing this diagnosis because GSK's warning label is inadequate and misleading. The trial court thus erred in dismissing this case on summary judgment. The Court should reverse and remand for trial.

REPLY TO DR. CONWAY

A. While David was incapacitated for four months, RCW 4.16.190(1) tolled the statute of limitations, so his suit against Dr. Conway was timely.

Dr. Conway perhaps misunderstands David's main point, which is not that RCW 4.16.350(3)'s statute of limitations (SOL) began to run sometime after April 4, 2007. Under § .350(3)'s plain language, Dr. Conway's last act or omission (reducing, rather than stopping, the Lamictal® dosage, which in itself caused David's injuries to be much worse) triggered the SOL. Thus, the three-year SOL commenced running on April 4, 2007.

David's actual point is that for purposes of RCW 4.16.190(1) – the disability tolling statute – David's cause of action against Dr. Conway did not "accrue" until April 6, 2007, where David could not reasonably have known all of the elements of his cause of action until then, at the earliest. And by that point, David was incapacitated for purposes of the disability tolling statute.

As a result, taking the facts in the light most favorable to David, the three-year SOL that commenced on April 4 was tolled (*i.e.*, the clock stopped running) for roughly four months, from April 6, through some time in August 2007. This tolling meant that if the three-year SOL "normally" would have expired in April 2010, here it

would not expire until four months later, in August 2010. David timely sued Dr. Conway on July 12, 2010.

At a minimum, there are genuine issues of material fact on when David was incapacitated and when his claim accrued. The trial court's ruling dismissing this action on summary judgment was thus in error. This Court should reverse and remand for trial.

Dr. Conway asserts that it is "implausible" to conclude that "accrued" in the disability tolling statute (§ 190(1)) still means what it says, even after the Legislature used very different words in RCW 4.16.350(3). Conway Brief of Respondent (CBR) 14. It is true that accrual is not relevant under § .350(3), as recognized in ***Gunnier v. Yakima Heart Ctr., Inc.***, 134 Wn.2d 854, 953 P.2d 1162 (1998). *Id.* David has never argued otherwise. But if the Legislature had also intended to take "accrual" out of § .190(1), it would have done so.

The issue here is thus whether § .350(3) somehow tacitly amends § .190(1). This Court will not presume that the Legislature amended a statute by implication. *See, e.g.*, ***Nguyen v. R.S. (In re R.S.)***, 124 Wn.2d 766, 774, 881 P.2d 972 (1994) ("amendment of a statute by implication is not favored in the law"; *citing* ***Misterek v. Wash. Mineral Products, Inc.***, 85 Wn.2d 166, 168, 531 P.2d 805

(1975) (*citing* ***Washington State Welfare Rights Organization v. State***, 82 Wn.2d 437, 511 P.2d 990 (1973); *see also* ***Tollycraft Yachts Corp. v. McCoy***, 122 Wn.2d 426, 858 P.2d 503 (1993))). Dr. Conway cites no authority for taking the disability-tolling statute out of RCW Ch. 4.16, or for taking "accrued" out of § .190(1). ***Gunnier*** does not address either issue. Accrual is still the standard under § .190(1). Summary judgment was improper.

B. The discovery rule is not at issue here.

Dr. Conway falls back on the alternative argument that even if "accrued" still means accrued, David suffered injury earlier than April 6, so – under the discovery rule – his cause of action "accrued" even earlier than April 4, 2007. CBR 15-19. But the discovery rule is not at issue here. Under § .190(1),

> if a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued . . . incompetent or disabled such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW . . . the time of such disability shall not be a part of the time limited for the commencement of action. [Emphasis added.]

"Accrued" in this context cannot mean simply that the person is injured to any degree, but rather expressly contemplates a significant disability as determined under RCW Ch. 11.88.

This plain language makes clear that persons like David who were too disabled to "understand the proceedings" must have the benefit of tolling, even where the statute of limitations has already commenced running under § .350(3). At a minimum, there are questions of fact on whether David was disabled at the relevant time: indeed, even his doctors did not understand the etiology of his symptoms until April 6, at the earliest, so David could not possibly know before that. This Court should reverse and remand.

C. Genuine issues of fact preclude summary judgment.

Dr. Conway also argues that there are no genuine issues of material fact. CBR 20-22. Interestingly, in a footnote (CBR 21 n.9) he lists several of them. While it is true that exactly when David became incapacitated may be a complex and difficult fact question, but it is nonetheless a genuine issue of material fact.

In this context, Dr. Conway attempts (several times) to dismiss ***Rivas v. Overlake Hosp. Med. Ctr.***, 164 Wn.2d 261, 189 P.3d 753 (2008). The relevant holding in ***Rivas*** is at pp. 264-65:

> . . . a person is incapacitated for the purpose of tolling the statute of limitations if he or she "cannot understand the nature of the proceedings" claimed to be tolled because of an incapacity or disability that creates "a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety." Former RCW 4.16.190; RCW 11.88.010(1)(a). Given

> the disputed evidence before us, we agree with the trial court that Rivas's incapacity cannot be resolved on summary judgment. Thus, we reverse the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

Under this holding, whenever David became incapacitated, the SOL was tolled. It is for a jury to determine when that was.

D. Dr. Conway's last act or omission was plainly his decision to decrease – rather than stop – the Lamictal®.

Dr. Conway appears to argue that his last act or omission was earlier than April 4, when he failed to properly instruct David to stop taking Lamictal®. CBR 22-24. Dr. Conway relies on a case that says the right to informed consent ends once the relevant procedure "is complete." CBR 23 (quoting ***Young v. Savidge***, 155 Wn. App. 806, 815-16, 230 P.3d 222 (2010)). But Dr. Conway's treatment – his Lamictal® prescription – was not "complete" until the emergency room doctors stopped the Lamictal®, going even beyond Conway's failure to stop the dosage on April 4. That is, David reasonably relied on Dr. Conway to correctly inform him about the serious danger from merely reducing the Lamictal® dosage (rather than stopping it) on April 4. At the very least, there is a question of fact on this issue.

Dr. Conway further argues that even if April 4 was his last act or omission, the suit was untimely. CBR 24. This simply ignores the disability-tolling arguments addressed above. The trial court erred in dismissing David's informed consent claim.[1]

REPLY TO GSK

A. GSK's Statement of the Case is misleading and simply raises genuine issues of material fact in any event.

GSK's Statement of the Case contains something on the order of two dozen factual assertions lacking any citation to the record. The Court should disregard the unsupported assertions.[2] In any event, GSK simply confirms David's factual points and otherwise raises genuine issues of material fact. For instance, GSK quotes the following language from its 2007 label:

> OTHER THAN AGE, THERE ARE AS YET NO FACTORS IDENTIFIED THAT ARE KNOWN TO PREDICT THE RISK OF OCCURRENCE OR THE SEVERITY OF RASH ASSOCIATED WITH LAMICTAL.

GSK BR at 6 (quoting CP 676). This is a good example of a misleading statement on its label: Like the statement at the end of this "black box warning" that it is not possible to predict which

---

[1] Dr. Conway also argues about the misrepresentation claim. CBR 24-26. David did not raise this issue on appeal, so no reply is necessary.

[2] Moreover, GSK's Statement falls well short of the Court's requirement of a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5).

rashes are serious or life threatening (also on CP 676), this sentence misleadingly suggests to doctors that they cannot distinguish benign from life-threatening rashes. *See, e.g.*, CP 902-03, 951, 954-56, 966-67, 969. David's experts each opined that this sort of statement is false and misleading. *Id.*

GSK also quotes a paragraph from the "Patient Information" section of the Product Information label that it supplies to doctors, a single paragraph on the tenth and last page of its single-spaced, and very difficult to read label. GSK BR 10 (quoting CP 685).[3] Burying a warning like this (which at most heads in the general direction of an accurate warning about symptoms) deep in the fine print is also misleading. And in any event, this paragraph plainly does not inform physicians that rash plus mucosal involvement indicates SJS/TEN.

As it did below, GSK relies on other medical literature that does call-out the fact that rash plus mucosal involvement indicates SJS/TEN. GSK BR 11-12. This section of GSK's briefing is misleading because it implies that Dr. Conway actually looked at this additional literature when treating David. *Id.* On the contrary,

---

[3] GSK's counsel noted (in his declaration attaching this Exhibit) that "the Lamictal label is not very legible." CP 614. A copy of this page is attached to this brief; yes, this goes on for 10 pages. *See* CP 676-85.

when asked whether he read "anything specific with regards to" David, Conway replied (CP 629):

> A. There was no need to do anything specifically in regards to Mr. Falsberg.
>
> Q. Why not?
>
> A. His condition was familiar to me in the scope of my medical training and practice, I was familiar with the treatment of his diagnosis and so there was no need to refer to additional literature.

Thus, this additional literature is largely irrelevant here.

But it does suggest one relevant point: the existence of these readily accessible sources explaining that rash plus mucosal involvement indicates SJS/TEN shows that GSK's failure to so state in its warnings – and its repeated unconscionable misrepresentations that no such information exists – were plainly in violation of its duties to warn physicians under the WPLA.

The ultimate example of how badly GSK misses the point comes on its page 13: GSK relies on a letter that it sent to Dr. Conway seven years before David's injuries, which called out SJS/TEN as "two related serious blistering mucocutaneous disorders that form a continuous spectrum in terms of severity." GSK BR at 13 (citing CP 629, 654-69). This is a single sentence in another difficult-to-read document that goes on for about 20 single-

spaced pages. CP 650-69. The letter does not say that rash plus mucosal involvement indicates SJS/TEN. But it does show that long before David's injuries, GSK was aware of the connection.

B. GSK had a duty to warn the medical profession that rash plus mucosal involvement is SJS/TEN (BA 24-25).

David's first argument as to GSK was that it had a duty to warn the medical profession that rash plus mucosal involvement indicates SJS/TEN, particularly where it knew or should have known about the extreme danger of frequently missed diagnoses. BA 24-25. This duty arises under the WPLA, specifically RCW 7.72.030(1) & (1)(c). *Id.* GSK nowhere challenges this analysis.

GSK's only responses are (1) an assertion that David "concedes on appeal that his only claim is under the WPLA for alleged failure to warn" (GSK BR at 18, citing BA 24) – a "concession" that appears nowhere in the opening brief, much less on page 24; and (2) an assertion that David's statutory analysis is a mere "semantic game" (GSK BR at 21 n.3). GSK thus tacitly concedes that David's claims properly arise under these statutory provisions. While accurate statutory analysis is not a mere semantic game, hyperbole is.

C. The learned intermediary doctrine does not help GSK.

As in the trial court, GSK relies almost exclusively on the learned intermediary doctrine to avoid its responsibility to accurately warn doctors that rash plus mucosal involvement indicates SJS/TEN. *Compare* BA 26-39 *with* GSK BR 18-38. For the reasons stated in the opening brief and further discussed below, these arguments are unavailing on summary judgment. The Court should reverse and remand for trial.

1. GSK's warnings are not "adequate as a matter of law." (BA 26-34; GSK BR 18-29)

As it did below, GSK continues to assert that even though its labeling was misleading, cases involving labels that clearly identified the specific risk suffered by the plaintiff are controlling here. GSK BR 18-21.[4] As explained in the opening brief, these cases are materially inapposite where, as here, the manufacturer's label is misleading. BA 26-34. GSK simply fails to address this crucial point, so the Court should reverse and remand.

David's leading authorities were obviously ***McEwen v. Ortho Pharm. Corp.***, 270 Or. 375, 528 P.2d 522 (1974) and

---

[4] Citing, *e.g.*, ***Estate of LaMontagne v. Bristol-Meyers Squibb***, 127 Wn. App. 335, 111 P.3d 857 (2005); ***Adams v. Synthes Spine Co.***, 298 F.3d 1114, 1116-18 (9th Cir. 2002); ***Wash. State Phys. Ins. Exch. V. Fisons Corp.***, 122 Wn.2d 299, 315, 858 P.2d 1054 (1993); ***Terhune v. A.H. Robins Co.***, 90 Wn.2d 9, 577 P.3d 975 (1978).

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 6, and the many cases cited by them, including another leading case, ***Holley v. Burroughs Wellcome Co.***, 330 S.E.2d 228 (N.C. Ct. App. 1985), *aff'd*, 348 S.E.2d 772 (1986). BA 28-34. GSK attempts to distinguish ***McEwen*** on causation grounds, and oddly claims that § 6 is "irrelevant" simply because our courts have not yet adopted it. GSK BR 32-34 & n.11. But GSK completely fails to address David's key point: where, as here, experts opine that alleged warnings are not only inadequate, but actually misleading, it is for the jury to determine whether the manufacturer violated the WPLA. BA 28-34.

David also argued that here, as under ***McEwen*** and § 6, this Court should hold that GSK's duty extends to all medical professionals – including the various emergency room doctors who (like so many other doctors) missed the diagnosis here – not simply to the prescribing physician. BA 31-33. Two more recent cases have also followed this "modern trend," ***Stevens v. Novartis Pharm. Corp.***, 247 P.3d 244, 257-60 (Mont. 2010), and ***Mahaney v. Novartis Pharm. Corp.***, 835 F.Supp.2d 299, 306-08 (W.D. Ky. 2011). ***Stevens*** in particular provides a scholarly analysis of the current law and policy bases for extending the duty to warn to all

medical professional who come in contact with the patient in a decision-making capacity. ***Stevens***, 247 P.3d at 258-60 & nn. 6 & 7 (citing ***McEwan*** and ***Holley***, *supra*, together with seven additional cases,[5] plus a dozen or so secondary sources supporting the modern trend[6]).

---

[5] "***Whitley v. Cubberly***, 24 N.C. App. 204, 210 S.E.2d 289, 292 (N.C. 1974) (requiring warnings to all members of the "medical profession" using the drug); ***Singleton v. Airco***, 169 Ga. App. 662, 314 S.E.2d 680 (Ga. 1984) (considering the adequacy of warnings directed at trained nurse anesthesiologists); ***Mazur v. Merck & Co.***, 964 F.2d 1348, 1356 (3d Cir. 1992) (declining to extend the doctrine to a school nurse, but indicating that the doctrine would extend to nonprescribing physicians, physicians' assistants, and nurses acting in an area of special expertise); ***Walker v. Merck & Co.***, 648 F. Supp. 931, 934-35 (M.D. Ga. 1986), *aff'd*, 831 F.2d 1069 (11th Cir. 1987) (finding that Georgia law considered nurse practitioners to be learned intermediaries); ***Rohrbough v. Wyeth Labs.***, 719 F. Supp. 470, 478 (N.D. W. Va. 1989) (designating registered nurses who administered vaccines as learned intermediaries); ***Wyeth-Ayerst Lab Co. v. Medrano***, 28 S.W.3d 87, 92-94 (Tex. Ct. App. 2000) (concluding that the doctrine applies to advanced practice nurses who prescribe medication and treat patients without the supervision of a physician); ***Hoffman v. Sterling Drug, Inc.***, 485 F.2d 132, 142 (3d Cir. 1973) (extending the duty to warn to treating as well as prescribing physicians)."

[6] "Susan A. Casey, Comment, *Laying an Old Doctrine to Rest: Challenging the Wisdom of the Learned Intermediary Doctrine*, 19 Wm. Mitchell L. Rev. 931, 934-37 (1993); Teresa Moran Schwartz, *Consumer-Directed Prescription Drug Advertising and the Learned Intermediary Rule*, 46 Food Drug Cosmetic L. J. 829, 829-31 (1991);" "Robert J. Friedman, *Take Two of These and Sue Me in the Morning: Efficacy of the Learned Intermediary Doctrine in Prescription Drug Failure to Warn Cases*, 22 St. Thomas L. Rev. 278 (2010); Ozlem A. Bordes, *The Learned Intermediary Doctrine and Direct-to-Consumer Advertising: Should the Pharmaceutical Manufacturer Be Shielded from Liability?*, 81 U. Det. Mercy L. Rev. 267, 267-68 (2004); Timothy S. Hall, *Reimagining the Learned Intermediary Rule for the New Pharmaceutical Marketplace*, 35 Seton Hall L. Rev. 193, 198 (2004); Sheryl Calabro, [*footnote cont'd*]

In light of (a) the strength of this modern trend (driven by the realities of health care in the 21st Century, where patient care is handled by a clinical "team," and many doctors may be called upon to confront the consequences of any given medical negligence); (b) the importance of the issue in this case (where numerous doctors repeatedly missed the diagnosis); and (c) the strong evidence presented here that many, many doctors who confront SJS/TENS miss the diagnosis, this Court should hold that GSK's duty to warn

---

[*cont'd footnote*] Note, *Breaking the Shield of the Learned Intermediary Doctrine: Placing the Blame Where It Belongs*, 25 Cardozo L. Rev. 2241, 2254-56 (2004); Daniel Richardson, Note, *The Lost Child of Products Liability: New Thoughts about Advertising and the Learned Intermediary Doctrine*, 27 Vt. L. Rev. 1017, 1018 (2003); Paul F. Strain & Christina Gaarder, *Direct-to-Consumer Advertising and the Learned Intermediary Doctrine: Unsettling a Settled Question*, 30 U. Balt. L. Rev. 377, 382-83 (2001); Mitchell S. Berger, *A Tale of Six Implants: The Perez v. Wyeth Laboratories Norplant Case and the Applicability of the Learned Intermediary Doctrine to Direct-to-Consumer Drug Promotion*, 55 Food & Drug L.J. 525, 551 (2000); Timothy A. Pratt & John F. Kuckelman, *The Learned Intermediary Doctrine & Direct-To-Consumer Advertising of Prescription Drugs*, 51 Fed'n. Ins. & Corp. Counsel Q. 17 (2000), available at http://www.thefederation.org/documents/pratt.htm (April 5, 2004); Catherine A. Paytash, Note, *The Learned Intermediary Doctrine and Patient Package Inserts: A Balanced Approach to Preventing Drug-Related Injury*, 51 Stan. L. Rev. 1343, 1349 n. 24 (1999); Edward W. Gerecke & Harvey L. Kaplan, *The Restatement (Third) of Torts and its Projected Impact Upon Manufacturers of Prescription Drugs and Medical Devices, Drug and Medical Device Litigation: Defense Perspectives*, 2 Def. Research Inst. 70, 71 (1998); 63A AM. JUR. 2D *Products Liability* §§ 1206-07 (1997); Jerry J. Phillips, PRODUCTS LIABILITY IN A NUTSHELL 225-29 (4th ed., West 1993) (hornbook discussion of the doctrine)."

extended to all medical professionals who came in contact with David in a decision-making capacity.

In a footnote, GSK argues that the trial court struck Dr. Khandelwal's declaration because he was allegedly "late disclosed" under KCLR 56(e) and that David has failed to appeal from that order. GSK BR 22 n.4. GSK fails to present any record from which this Court could decide this issue (*e.g.*, witness disclosures, etc.) so its claim is waived. Moreover, GSK's only "motion" to strike Dr. Khandelwal's declaration was in a footnote in its reply on summary judgment, which (somewhat ironically) was obviously too late. CP 993 n.1. GSK never mentioned its so-called "motion" during the summary judgment argument, never obtained a ruling from the trial court on its untimely "motion," and never obtained an order striking Dr. Kahndelwal's Declaration. Since there was no order striking this declaration, there was nothing to appeal from. It is true that GSK left Dr. Kahndelwal's declaration off of its proposed summary judgment order, but in the absence of any ruling from the trial court, GSK's argument is moot. This Court should not encourage this sort of gamesmanship.

In any event, even if the trial court had stricken this declaration, this Court's review would be *de novo*. *See, e.g.*, ***Davis***

v. Baugh Indus. Contractors, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) ("Trial court rulings in conjunction with a motion for summary judgment are reviewed de novo"; citing ***Folsom v. Burger King***, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). And such an order would have been obvious reversible error under numerous recent cases, including ***Teter v. Deck***, 174 Wn.2d 207, 274 P.3d 336 (2012); ***Blair v. TA-Seattle E. No. 176***, 171 Wn.2d 342, 254 P.3d 797 (2011); and ***Burnet v. Spokane Ambulance,*** 131 Wn.2d 484, 933 P.2d 1036 (1997). In those cases, and many others, our courts have made it abundantly clear that a trial court striking an expert declaration must find on the record that the late disclosure was willful and deliberate, that it prejudiced the moving party, and that no lesser sanctions would suffice. Since GSK never properly raised its motion to strike in the trial court, the trial judge obviously never addressed the necessary findings when allegedly striking (but not actually striking) a declaration from David's treating physician – of whom GSK was obviously well aware. Again, GSK's unpreserved argument is meritless.

GSK next relies on its own expert's assertions to contradict David's experts. GSK BR 26-27. This is simply a battle of the experts, properly resolved by a jury. *See also* BA 34-35. Setting

aside its fear-mongering, GSK does nothing more than assert again that its expert is right. *Id.* That is for the jury.

2. GSK's disagreements with David's experts simply raise genuine issues of material fact, and causation is also for the jury.

David also pointed about that his experts raise genuine issues of material fact and that causation is for the jury. BA 34-39. In response to the first point, GSK continues its effort to mischaracterize David's argument as suggesting that GSK "should have taught physicians how to diagnose and recognize the symptoms of SJS/TEN." GSK BR 21 (citing BA 8). But on page 8 of the opening brief, David's point is simply that the label should tell physicians that rash plus mucosal involvement indicates SJS/TEN, not "how to diagnose" SJS/TEN. BA 8.

In light of the expert testimony in this case – which GSK's own research confirms – that virtually every doctor initially confronted with these symptoms misses the diagnosis, GSK plainly has a duty to warn physicians of this danger under the WPLA. No case GSK cites holds to the contrary. Its various arguments about why its expert disagrees with David's experts simply raise genuine issues of material fact. BA 34-35.

As it did below, GSK repeatedly asserts throughout its response that David cannot prove that its misleading labeling caused so many doctors to miss the diagnosis. GSK has never cited a single case that would require a plaintiff in a WPLA failure to warn case to prove that a misleading label deceived a specific physician, and it cites no such case here. Beyond the lack of authority, David's experts specifically opined that GSK's label is misleading and that many physicians – indeed, virtually all physicians – miss the SJS/TEN diagnosis. CP 907, 953, 966, 968.

Dr. Kahndelwal specifically opines to a medical probability that the delay in diagnosing David increased his harm and was directly caused by GSK's inadequate and false labeling. CP 969. Dr. Lindberg similarly opines to a medical probability that the failure to immediately diagnose David both increased his harm and was caused by GSK's inadequate and false labeling. CP 906-08. This expert testimony is more than enough to establish causation before the jury: it establishes that but for GSK's gross failures to warn, David's injuries would not have occurred.

David also argued in the alternative that GSK's false and inadequate labeling deprived him of a substantial chance at a better outcome under ***Herskovits v. Group Health Coop. of Puget***

Sound, 99 Wn.2d 609, 664 P.2d 474 (1983) and ***Mohr v. Grantham***, 172 Wn.2d 844, 262 P.3d 490 (2011). BA 37-39. GSK badly misstates ***Mohr***, arguing that it does not address causation. GSK BR 32. That is a remarkable assertion:

> The expert testimony also included information regarding causation, including Dr. Becker's opinion that had Mrs. Mohr "received anti-thrombotic therapy there's at least a 50 to 60 percent chance that things could have had a better outcome. ... Less disability, less neglect, less ... of the symptoms of right hemispheric stroke." CP at 225-26. Dr. Harris testified that had Mrs. Mohr received nonnegligent treatment at various points between August 31 and September 1, 2004, she would have had a 50 to 60 percent chance of a better outcome. This included the possibility, according to Dr. Harris, that Mrs. Mohr may have had no disability if she had been properly treated. We find, on this evidence, a prima facie showing of . . . injury in the form of a lost chance, and causation.

Mohr, 172 Wn.2d at 859-60.

As noted above, the experts here also opined that to a medical probability, David lost a substantial chance at a better outcome. That is sufficient to establish a *prima facie* case of causation. This case should go to a jury.

GSK makes much ado about David's experts' testimony that they do not blame the doctors for missing the diagnosis. GSK BR 34-38. But again, GSK misses the point: they don't blame the doctors because GSK's label was false and misleading. The

testimony GSK mischaracterizes does not contradict this fundamental opinion.

CONCLUSION

For the reasons stated above, the Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 7th day of November, 2012.

MASTERS LAW GROUP, P.L.L.C.

Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing postage prepaid, via U.S. mail on the 7th day of November 2012, to the following counsel of record at the following addresses:

Attorneys for Appellant

Lish Whitson
Kristy Stell
Lish Whitson, PLLC
2121 Fifth Avenue
Seattle, WA 98121-2510

Andrea B. Dalton
Law Office of Andrea Dalton, LLC
600 17th Street, Suite 2800S
Denver, CO 80202

James Leventhal
Benjamin Sachs
Leventhal, Brown & Puga P.C.
950 S. Cherry Street, Ste 600
Denver, CO 80246

Attorneys for Defendant GSK

John W. Philips
Philips Law Group PLLC
315 Fifth Avenue South,
Suite 1000
Seattle, WA 98104-2682

Brian P. Johnson
Johnson, Trent, West &
Taylor, LLP
919 Millam, Suite 1700
Houston, TX 77002

Attorney for Jack Conway, M.D.

John C. Graffe
Alison H. Grennan
Johnson, Graffe, Keay, Moniz &
Wick, LLP
925 Fourth Avenue, Suite 2300
Seattle, WA 98104

Mary Spillane
Two Union Square
Williams Kastner & Gibbs
601 Union Street, Suite 4100
Seattle, WA 98101-2380

Kenneth W. Masters, WSBA 22278