No. 312771

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

ROBIN RASH, et al., ***Appellant,***

v.

PROVIDENCE HEALTH & SERVICES, et al., ***Respondent.***

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. Introduction and Relief Requested.

This is in reply to the responsive brief of Respondent Providence-Sacred Heart Medical Center (SHMC), and to summarize pertinent non-contested facts. Robin Rash is one of three adult children of Betty Zachow (RCW 4.20.046 Survival Claims) and is the Personal Representative (PR) on behalf of the Estate of Betty Zachow and her three surviving adult children, as Statutory Beneficiaries (RCW 4.20.005 – 4.20.020 Wrongful Death Claims). The Statutory Beneficiaries are Ms. Rash and her two adult brothers. The record and briefing to date in this matter confirms that Ms. Zachow was subject to the admitted negligence of SHMC in failing to provide Ms. Zachow her prescribed medication for a heart condition, subsequent to knee replacement surgery. SHMC denies the extent and nature of damages, if any, caused Ms. Zachow, and argues that any issue of causation be proven by the "but for" standard. The PR is claiming instances of "loss of opportunity for a better outcome" and for "loss of chance of survival" (collectively "loss of chance" claims) subject to the substantial (significant) factor standard of proof. In pre-trial (not CR 56 summary judgment) motion practice, much of which was on shortened notice, SHMC requested and attained a court order on April 13, 2012, ten days in advance of the scheduled trial date of April 23, 2012, dismissing the wrongful death claims of the PR on behalf of the Statutory Beneficiaries, and any "loss of

chance" claims, based on "surprise" and lack of "but for" causation evidence. Subsequently, the PR filed a separate litigation which, when consolidated with the original complaint, continued the trial date and related deadlines, and cured any claim of surprise. In response, instead of noting a CR 56 summary judgment motion, SHMC requested the court to enter judgment on the April 13, 2012 order as it related to "loss of chance" claims, and certify it for purpose of appeal. The PR objected to entry of judgment based upon the April 13, 2012 order as procedurally defective, and substantively wrong. However, as the court ruled otherwise, counsel for the PR concurred on certification for purpose of appeal.

II. The Issues On Appeal Must Be Considered In The Context Of The Consolidated Litigation.

In its reply brief, SHMC discusses, at great length, factual and procedural events and issues which it admits are moot for the purposes of this appeal. In doing so, SHMC refers to comments and briefing of counsel which took place prior to consolidation that are not applicable for the purpose of this appeal. This current litigation is a synthesis of the prior pleadings and new and/or redefined pleadings and claims. It is not appropriate for SHMC to attempt to rely on pleadings, briefing, and comments of counsel in the record which occurred in the prior, unconsolidated matter. What is pertinent is that the PR and SHMC are in agreement that the issues of substantive law

to be determined by this court relate to the interpretation and application of "loss of chance" claims within the context of the facts and circumstances of this consolidated matter.

III. The Court Order Of April 13, 2012 Is Procedurally And Substantively Defective As To Dismissal Of Loss Of Chance Claims.

It is important to note that the original, underlying Order of April 13, 2012, from which the substance of this appeal is taken, consisted of two parts. CP 139-142. The trial court first struck the claims of the Statutory beneficiaries, thereby effectively dismissing their wrongful death claims and them as real parties in interest from the original litigation. In wrongful death claims, the Personal Representative acts only as an agent for the statutory beneficiaries, who are the real parties in interest. See *Gross v. Goodson*, 61 Wn.2d 319, 378 P.2d 413 (1963); *Maciejczak v. Bantell*, 187 Wn. 113, 60 p.2d 31 (1936). The second part denied all "loss of chance" claims which, for the purposes of this appeal, was based on inadequate evidence to support a "but for" standard of proof, and lack of precise, mathematical qualification of the relative (percentage) value to be assigned any "loss of chance" claim versus the original (pre-negligence) chance of a better outcome and/or survival. It is important, however, to recall that this order was made as a result of pretrial motions (not a CR 56 pretrial motion) in which there was no

opportunity to provide responsive testimony by affidavit of the PR's then expert medical witness, to supplement his discovery deposition previously taken by SHMC, or to obtain testimony of another expert.

Curiously, the trial court allowed the Estate's survival claims to continue without an amendment of the complaint, based upon the amended caption reflecting that the PR was representing the Zachow Estate, but struck the claims of the Statutory Beneficiaries, reference to whom was also made in the amended caption.

IV. The Concurrence Of Counsel For The PR With Counsel For SHMC For Entry Of Partial Judgment Under CR 54(B) And Certification for Purposes of Appeal Doest Not Constitute Concurrence in the Procedural and Substantive Aspects and Validity of the Order.

Though the undersigned admits that the PR's original opening brief in this matter is a bit inarticulate as to its objections to the trial court's order of April 13, 2012, it is clear from SHMC's own references to the hearing of October 19, 2012, from which the court entered judgment on the original April 13, 2012 order pursuant to CR 54(b), that concurrence in "certification" was for purposes of right to appeal. Clearly, the undersigned, as counsel for the PR, requested that the court disregard the April 13, 2012, order as it was procedurally and substantively defective, and incongruent with the

consolidated litigation.

> In this instance, it was within the authority of the court to certify the order at issue in this motion, at the time of its ruling, April 13, 2012, as to its actions effectively dismissing the statutory beneficiaries as real parties in interest from the litigation by dismissing their claims by and through the Personal Representative. The court did decline to certify the order at that time. ***However, when the matter was consolidated and a new Case Schedule Order issued, new deadlines were applied, and it is uncertain at this time whether plaintiff will utilize Dr. Rogers as her expert medical witness, or supplement his testimony with that of another expert. Procedurally, the consolidated matter is a new action, and the prior order of April 13, 2012, should be disregarded, as the basis for defendants claim then was surprise, immediately before the trial date. Therefore, the order should be withdrawn by the court, on its own authority. However, should the court disagree with plaintiff in this regard, then plaintiff joins in with defendant on requesting the order to be certified under CR 54(b).***
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> CP 213-14, *Response to Defendant's Motion to Certify Order as Final Judgment Pursuant to CR 54(b).*

Curiously, the Court ruled to retain the estate as a plaintiff but ruled to dismiss the statutory beneficiaries. That was the reason that the separate claim was brought on behalf of the statutory beneficiaries within the statute of limitations. But the context was that it was right before trial. ***We didn't have a chance, then, to develop any additional testimony. CR 54 is well—written and received in the context of a normal case that doesn't have the vagaries of this case in which there's a consolidation, the stay of case immediately before trial, and a consolidation with a new case schedule order, which will allow additional discovery, which will allow additional testimony to be developed, which I think will support the claim of lost chance of survival, and there's no surprise in this instance because we have plenty of time to do this. On the other hand, if the Court doesn't wish to rescind the order based upon the context of the case and the fact that***

> ***the case was consolidated, then I want to make it a final order or the law of the case then.*** But I agree with defense counsel that it should be certified, because I don't think anybody wants to go through a trial and go through the extent of testimony we're going to put on and take the time and the cost to our clients to do so to have it appealed and perhaps changed on appeal. So I would agree that if we don't want to revisit this issue, allow time to revisit the issue under a new motion based upon the testimony as it develops from expert witnesses within the case schedule order, then I would agree to —— I would support the certification of this order.
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> RP 6-7.

The consolidated litigation had new dates for trial, discovery cut-off, cut-off for summary judgment motions, and disclosure of lay and expert witnesses, etc., none of which had occurred as of the time of the October 19, 2012 hearing. Therefore, the April 13, 2012 pre-trial order could not and should not have been substituted for an order the type of which should have resulted from a CR 56 motion, with attendant rights of notice, and opportunity to present responsive evidence. It was only in the context of the court adopting the substance of the April 13, 2012 order that counsel for the PR concurred in CR 54(b) certification, as all counsel and the court understood that the interpretation and application of "loss of chance" claims were a significant issue to be dealt with, and that the unsuccessful party at trial was likely to appeal any adverse result from the trial court's ruling on the "loss of chance" claims.

V. Loss of Chance Claims in Washington are Independent, Compensable, Inter-Vivos and Post-Mortem Claims.

The Washington Supreme Court has succinctly ruled that "loss of chance of a better outcome" and "loss of chance of survival" are independent tort claims which can be brought in a medical malpractice action by an individual, while alive (inter-vivos) or after their death (post mortem). See, generally, *Herskovits v. Group Health Cooperative of Puget Sound,* 99 Wn.2d 609, 664 P.2d 474 (1983); *Mohr v. Grantham,* 172 Wn.2d 844, 262 P.3d 490 (2011). *Herskovits* involved a survival action by his estate, where it was claimed a negligent failure to timely diagnose lung cancer caused him a diminished chance of long term survival (decreased life expectancy). The *Herskovits* court ruled, by a split decision, that a loss of chance of survival claim existed in Washington as a separate chance which could be brought while the claimant was alive, or by his estate upon his death, without having to prove death was caused by the same negligence ("but for") which was causal of the "loss of chance."

> *Herskovits* involved a survival action following an allegedly negligent failure to diagnose lung cancer. Over the course of a year, Leslie Herskovits repeatedly sought treatment for persistent chest pains and a cough, for which he was prescribed only cough medicine. *Id. at 611* (Dore, J., lead opinion). When he finally sought another medical opinion, Herskovits was diagnosed with lung cancer within three weeks. *Id.* ***His diagnosing physician testified that the delay***

> ***in diagnosis likely diminished Herskovits's chance of long-term survival*** from 39 percent to 25 percent. *Id. at 612*. Less than two years after his diagnosis, then 60 years old, Herskovits died. *Id. at 611*. The trial court dismissed the case on summary judgment on the basis that Herskovits's estate, which brought suit, failed to establish a prima facie case of proximate cause: it could not show that *but for* his doctor's negligence he would have survived because he "*probably* would have died from lung cancer even if the diagnosis had been made earlier." *Id.* Though divided by different reasoning, this court reversed the trial court, finding that Herskovits's lost chance was actionable.
>
> Mohr, 172 Wn 2d at 851 (emphasis added, citations omitted)

In *Mohr*, the Washington Supreme Court concluded a loss of chance of a better outcome claim where the outcome was something less than death (i.e. difference in nature of recovery, disability, etc.) also existed as an independent, compensable claim.

> ***The principal arguments against recognizing a cause of action for loss of a chance of a better outcome are broad arguments, similar to those raised when Herskovits was decided:*** concerns of an overwhelming number of lawsuits and their impact on the health care system; distaste for contravening traditional tort law, especially regarding causation; and discomfort with the reliance on scientific probabilities and uncertainties to value lost opportunities. *See* Joseph H. King, Jr., *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L. Rev. 491, 506 (1998)*; *Matsuyama, 452 Mass. at 15* (noting criticisms of the doctrine, namely that it "upends the long-standing preponderance of the evidence standard; alters the burden of proof in favor of the plaintiff; undermines the uniformity and predictability central to tort litigation; results in an expansion of liability; and is too complex to administer"). ***However, none of these arguments effectively***

> ***distinguish the Mohrs' claim from Herskovits and seem instead to agitate for its overruling. Now nearly 30 years since Herskovits was decided, history assures us that Herskovits did not upend the world of torts in Washington, as demonstrated by the few cases relying on Herskovits that have been heard by Washington appellate courts.***
>
> ***We hold that Herskovits applies to lost chance claims where the ultimate harm is some serious injury short of death.***
>
> Mohr , 172 Wn. 2d at 856-57 (emphasis added, citations omitted)

In loss of chance claims, the standard of proof is not proximate cause based as in "but for," but due to the actionable negligence being a substantial factor in causing the loss of chance.

> The lead and plurality opinions split over *how*, not whether, to recognize a cause of action. Drawing from other jurisdictions, especially the Pennsylvania Supreme Court's holding in *Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978)*, the lead opinion held that the appropriate framework for considering a lost chance claim was with a "substantial factor" theory of causation. The court summarized that once a plaintiff has demonstrated that the defendant's acts or omissions have increased the risk of harm to another, such evidence furnishes a basis for the jury to make a determination as to whether such increased risk was in turn a substantial factor in bringing about the resultant harm.
>
> *Herskovits, 99 Wn.2d at 616* (additionally noting the *Hamil* court's reliance on the *Restatement (Second) of Torts § 323* (1965), which provides that one who renders services to another, necessary for the protection of that person, is liable if "his failure to exercise [reasonable] care increases the risk of [physical] harm"). ***The "substantial factor test" is an exception to the general rule of proving but for causation and requires that a plaintiff prove that the defendant's alleged act or omission was a substantial factor in causing the plaintiff's injury, even if the injury could have occurred***

> ***anyway.*** *Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 684, 183 P.3d 1118 (2008).*
>
> Mohr , 172 Wn. 2d at 852-53 (emphasis added, citations omitted)

This is further confirmed by Justice Madsen in her dissent in *Mohr.*

Madsen, C.J. (dissenting):

> ...
>
> It is a fundamental principle that in a medical malpractice action the plaintiff must prove causation of the plaintiff's actual physical (or mental) injury before tort liability will be imposed. To avoid the difficulty posed by this requirement, ***the majority recognizes a cause of action for which the plaintiff does not have to prove that "but for" the physician's negligence, the injury would not have occurre***d. Majority at 850-51 (citing *Herskovits v. Grp. Health Coop. of Puget Sound, 99 Wn.2d 609, 619, 664 P.2d 474 (1983)* (Dore, J., lead opinion); *id. at 634-35* (Pearson, J., plurality)). That is, because the majority finds the traditional causation-of-injury requirement to be an insurmountable obstacle, it employs a different concept to anchor a lost chance claim. Majority at 850. The majority simply redefines the injury as the lost chance. With this semantic leap--essentially a fiction--the causation problem is fixed.
>
> Mohr, 172 Wn. 2d at 864 (emphasis added, citations omitted)

A careful reading of the *Mohr* opinion further reveals that mathematical probability as to loss of chance may be provided by experts, but is not necessary so long as enough testimony exists that a jury can reasonably assign a value and does not have to resort to mere speculation or conjecture. *Haner v. Quincy Farm Chemicals*, 29 Wn. App. 93, 97, 627, P.2d 571 (1981).

> ***The significant remaining concern about considering the loss of chance as the compensable injury, applying established tort causation, is whether the harm is too speculative.*** We do not find this concern to be dissuasive because ***the nature of tort law involves complex considerations of many experiences that are difficult to calculate or reduce to specific sums***;
>
> > yet juries and courts manage to do so. We agree that [s]uch difficulties are not confined to loss of chance claims. A wide range of medical malpractice cases, as well as numerous other tort actions, are complex and involve actuarial or other probabilistic estimates. *Matsuyama, 452 Mass. at 18*
>
> ***Moreover, calculation of a loss of chance for a better outcome is based on expert testimony, which in turn is based on significant practical experience and "on data obtained and analyzed scientifically ... as part of the repertoire of diagnosis and treatment, as applied to the specific facts of the plaintiff's case."*** *Id. at 17.* Finally, discounting damages responds, to some degree, to this concern.
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> Mohr, 172 Wn. 2d at 857-58 (emphasis added, citations omitted)

Note that the expert testimony may be based on experience and scientific inquiry and reports, and is not restricted to probability and statistics.

VI. Under Any Appellate Court Ruling Adverse To The PR, Dismissal of a Claim of the PR is Inappropriate Without A CR 56 Summary Judgment Procedure.

Based on Washington law, and for the reasons stated above, should the appellate court rule adversely to the PR, the matter should be returned to the trial court for appropriate proceedings, including, if relevant, a CR 56

summary judgment procedure. Dismissal of the PR's "loss of chance" claims was based upon the April 13, 2012 order, and its October 19, 2013 CR 54(b) entry of judgment, and the certificate of appealability did nothing to correct procedural insufficiency, when considered in the context of the consolidated litigation. The April 13, 2012 order emanated from pre-trial motions where SHMC requested a continuance of the trial date or striking "loss of chance" claims and dismissal of the Statutory Beneficiary's wrongful death claims, where the court ruled to keep the trial date. SHMC admits the basis for dismissing the wrongful death claims of the Statutory Beneficiaries in the order was obviated or cured by the PR's filing of a new complaint, consolidation of the litigation, and continuance of the trial date and related deadlines. This should have also obviated the dismissal of "loss of chance" claims in the absence of a CR 56 procedure, a procedure which did not occur in the original litigation, and is yet to occur in this consolidated litigation.

VII. Conclusion

Wherefore, Robin Rash, as Personal Representative of the Estate of Ms. Zachow, and on behalf of herself and her brothers as Statutory Beneficiaries, request this court to remand this matter to the trial court, reversing the trial court's judgment denying "loss of chance claims"; find "loss of chance of survival" and "loss of chance of a better outcome" exist as independent claims subject to a "substantial factor" standard of proof or

theory of causation; and requiring a CR 56 procedure to be had as prerequisite for entry of any future partial judgment.

RESPECTFULLY SUBMITTED this 3rd day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2013, I caused a true and correct copy of the Appellant's Reply Brief to be served on the following in the manner indicated below:

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