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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

COA No. 312771

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBIN RASH, et al., Appellants
v.

PROVIDENCE HEALTH & SERVICES, et al., Respondents

BRIEF OF RESPONDENT SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL

RYAN M. BEAUDOIN, WSBA # 30598
MATTHEW W. DALEY, WSBA # 36711
WITHERSPOON · KELLEY, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: (509) 624-5265

Counsel for Respondent Sacred Heart Medical Center & Children's Hospital.

TABLE OF CONTENTS

I. INTRODUCTION & RELIEF REQUESTED 1

A. The Plaintiffs Contend that Ms. Zachow Died in 2010 as a Result of Missing Two Doses of Medication in 2008. 1

B. The Plaintiffs Never Actually Brought a Claim for Wrongful Death or a Claim for Loss of a Chance in this Action, But they Filed a Separate Action, Which was Consolidated Into this Action – and Which Rendered the Pleading Issue Moot. 3

C. The Substantive Issue Before the Court is Whether "But For" or "a Substantial Factor" is the Proper Standard for Proximate Cause in Medical Negligence Cases. 4

D. Sacred Heart Respectfully Asks the Court to Affirm the Trial Court in Every Respect. 5

II. RESTATEMENT OF THE ISSUES PRESENTED 6

III. STATEMENT OF FACTS 7

A. Ms. Zachow Had a Long History of Cardiac Disease. 7

B. In 2008, Ms. Zachow Underwent a Successful Knee Replacement at Sacred Heart. 7

C. While at Sacred Heart, Ms. Zachow Missed Two Doses of Metoprolol - A Cardiac Medication. 8

D. Ms. Zachow Developed and Recovered From Post-Operative Complications. 8

IV. STATEMENT OF CASE 9

A. Sacred Heart Accepted Responsibility for the Missed Dosages. 9

B. Ms. Zachow Brought Suit Against Sacred Heart 9

C. In 2010, Approximately Two Years After her Knee Surgery and Two Months After Filing this Action, Ms. Zachow Passed Away 10

D. Following Her Death, Ms. Zachow's Adult Daughter was Named PR and the Caption was Amended to Include the PR; However, No Amendment was Made to Assert Loss of Chance or Wrongful Death Claims. 10

E. The Trial Court Struck the Claims for Wrongful Death and Loss of a Chance; the Plaintiffs Filed a Separate Action Including Both Claims; and that Action was Consolidated With this Action. 11

F. The Trial Court Certified its Order as Final, and the Plaintiffs Took a Timely Appeal. 12

V. ARGUMENT: THOUGH MOOT, THE TRIAL COURT CORRECTLY STRUCK THE PLAINTIFFS' UN-PLED CLAIMS AND CORRECTLY DENIED THE PLAINTIFFS LEAVE TO AMEND 13

A. Standard of Review 13

B. The Plaintiffs' Complaint Did Not Assert Claims for Wrongful Death or Loss of a Chance. 14

C. The Trial Court Correctly Denied the Plaintiffs' Motion to Amend, Where the Motion was Made a Mere Seventeen Days Before Trial 16

D. By Filing a New Action, and by Successfully Moving for Consolidation of that Matter With this Matter, the Plaintiffs Rendered the Procedural Aspects of the Trial Court's Order Moot 17

VI. ARGUMENT: NOTHING ABOUT WASHINGTON'S RECOGNITION OF A CAUSE OF ACTION FOR LOSS OF A CHANCE CHANGED THE TRADITIONAL "BUT FOR" TEST FOR CAUSATION. 19

A. Standard of Review 19

B. Washington Recognizes a Cause of Action for Loss of a Chance – Both of Survival and of a Better Outcome. 19

C. Claims for Loss of a Chance are Subject to the Traditional "But For" Causation Standard. 20

D. Claims for Loss of a Chance Apply Only in Situations Where the Plaintiff's Pre-Negligence Chance of Survival/a Better Outcome Was Less than 50%. 23

E. The Plaintiffs Also Failed to Come Forward With the Necessary Scientific Evidence to Make Out a Claim for Loss of Chance. 25

F. Though the Plaintiffs Use "Loss of Chance" Language, They Concede that Their Claim is Not for Loss of a Chance. 26

VII. CONCLUSION 28

CERTIFICATE OF SERVICE 1

TABLE OF AUTHORITIES

Cases

Appliance Buyers Credit Corp. v. Upton,
65 Wn.2d 793 (1965) 16

Bacon v. Gardner,
38 Wn.2d 299 (1951) 13

Casper v. Esteb Enterprises, Inc.,
119 Wn. App. 759 (2004) 18

Citizens for Financially Responsible Government v. City of Spokane,
99 Wn.2d 339 (1983) 17

Dewey v. Tacoma School District Number 10,
95 Wn. App. 18 (1999) 14, 15, 16

Edmonds v. Scott Real Estate,
87 Wn. App. 834 (1997) 13

Haney v. Barringer,
2007 WL 4696827 (Ohio Ct. App. Dec. 27, 2007),........................ 24, 25

Harbor Lands LP v. City of Blaine,
146 Wn. App. 589 (2008) 17

Herskovits *v. Group Health Cooperative of Puget Sound*,
99 Wn.2d 609 (1983) 20, 21, 22, 24, 25, 26

Ives v. Ramsden,
142 Wn. App. 369 (2008) 16

Karlberg v. Otten,
167 Wn. App. 522 (2012) 16

Kelley v. Centennial Contractors Enters., Inc.,
169 Wn.2d 381 (2010) 14

Kirby v. City of Tacoma,
124 Wn. App. 454 (2004) 15, 16

Kirkham v. Smith,
106 Wn. App. 177 (2001) 16

Lewis v. Bell,
45 Wn. App. 192 (1986) 14

McLaughlin v. Cooke,
112 Wn.2d 829 (1989) 27, 28

Mohr v. Grantham,
172 Wn.2d 844 (2011) 21, 22, 24, 25, 27, 28

Molloy v. City of Bellevue,
71 Wn. App. 382 (1993) 15

Northwest Line Constructors Chapter of National Electric Contractors. Association v. Snohomish County Public Utility District Number 1,
104 Wn. App. 842 (2001) 14

Orwick v. City of Seattle,
103 Wn.2d 249 (1984) 17

Sharbono v. Universal Underwriters Insurance Co.,
139 Wn. App. 383 (2007) 22, 23

Sheikh v. Choe,
156 Wn.2d 441 (2006) 19

Shellenbarger v. Brigman,
101 Wn. App. 339 (2000) 22

Sposari v. Matt Malaspina & Co.,
63 Wn.2d 679 (1964) 26

Zueger v. Public Hospital District Number 2 of Snohomish County,
57 Wn. App. 584 .... 21, 22

I. INTRODUCTION & RELIEF REQUESTED

This appeal arises from two orders entered by the Spokane County Superior Court. The first order was entered on April 13, 2012, and it: (i) struck the Plaintiffs' claim for "loss of a chance"; (ii) struck the Plaintiffs' claim for "wrongful death" on behalf of the decedent's adult children; and (iii) denied the Plaintiffs' motion to amend their complaint to assert those claims (hereinafter "the April Order"). The April Order struck the wrongful death and loss of a chance claims both on a procedural basis (namely, that they were not pled) and on a substantive basis (namely, that the Plaintiffs failed to come forward with competent expert testimony to meet their causation burden). The second order that is at issue in this appeal was entered on October 19, 2012, and it certified the April Order as a final order (hereinafter "the Final Order").

A. THE PLAINTIFFS CONTEND THAT MS. ZACHOW DIED IN 2010 AS A RESULT OF MISSING TWO DOSES OF MEDICATION IN 2008.

This is a medical negligence case. The Plaintiffs contend that Ms. Zachow suffered compensable damages during her lifetime as a result of negligent medical treatment. The Plaintiffs also contend that Ms. Zachow's death was proximately caused by medical negligence.

In March 2008, Ms. Zachow underwent orthopedic surgery at Sacred Heart Medical Center & Children's Hospital (hereinafter "Sacred Heart"). Prior to

that surgery, Ms. Zachow suffered from a number of preexisting medical conditions, including a cardiac condition for which she was taking a medication. Following surgery, Ms. Zachow was not administered two doses (the evening of surgery and the following morning) of her cardiac medication. The Plaintiffs claim damages as a result of those missed medication dosages.

When this case began, the Plaintiffs asserted claims for damages associated with a lengthened hospital course and a reduced life expectancy. However, about two years after her surgery (and during the pendency of this action) Ms. Zachow suffered a series of strokes and died. Ms. Zachow's daughter was named Personal Representative (hereafter "PR") and the Plaintiffs (unilaterally and without Court approval) amended the caption to include the PR, who was purporting to act on her own behalf as well as on behalf of Ms. Zachow's beneficiaries.

Following Ms. Zachow's death, the Plaintiffs purported to add claims to this action. In addition to their initial claims, the Plaintiffs assert a new claim for wrongful death on behalf of Ms. Zachow's adult children. Specifically, the Plaintiffs contend that the two doses of medication that Ms. Zachow missed (in 2008) caused her to suffer a series of strokes and to ultimately die (in 2010).

B. The Plaintiffs Never Actually Brought a Claim for Wrongful Death or a Claim for Loss of a Chance in this Action, But they Filed a Separate Action, Which was Consolidated Into this Action – and Which Rendered the Pleading Issue Moot.

Due to an admitted error by Plaintiffs' counsel, no amended complaint was filed following Ms. Zachow's death. As a result, the purported claims for wrongful death and loss of a chance were never pled. However, both loss of a chance and wrongful death figured prominently in the Plaintiffs' trial brief. That trial brief was the first pleading that mentioned claims for wrongful death or loss of a chance.

As noted above, the trial court (on defense motions) struck both the loss of a chance claim and the wrongful death claim. The court also denied the Plaintiffs' motion to amend their complaint to assert those claims.

Thereafter, the Plaintiffs filed a new action asserting claims for wrongful death and loss of a chance, and that action was consolidated with this action. Therefore, regardless of the procedural aspects of the April Order, claims for wrongful death and loss of a chance are part of this action. Thus, whether the trial court was correct to strike the claims and/or to refuse the Plaintiffs' motion to amend, is a moot point – the claims are part of the consolidated case regardless.

Following the consolidation, Sacred Heart moved to certify the April Order as final, so that the substantive issue (*viz.*, whether "but for" or "substantial factor" is the appropriate standard for causation) would not be re-litigated.

While the Plaintiffs' brief takes issue with a number of procedural issues pertaining to the April Order and the Certification Order, the Plaintiffs acknowledge that those issues are moot. The Plaintiffs acknowledge that any procedural issue regarding the motions to strike and amend was rendered moot in light of the facts that: (i) the Plaintiffs filed a separate action asserting the claims; and (ii) that action and this action have been consolidated. Similarly, despite assigning error to the Final Order, the Plaintiffs actually joined in the Sacred Heart's motion to certify the April Order as final. The Plaintiffs, therefore, cannot be heard to challenge the trial court's decision to certify the April order as final. Finally, while the Plaintiffs ask the Court to ascribe error to the Final Order, the Plaintiffs specifically ask the Court to reach and rule on the merits of the appeal. Those two positions are fundamentally incompatible with one another.

C. THE SUBSTANTIVE ISSUE BEFORE THE COURT IS WHETHER "BUT FOR" OR "A SUBSTANTIAL FACTOR" IS THE PROPER STANDARD FOR PROXIMATE CAUSE IN MEDICAL NEGLIGENCE CASES.

Though the Plaintiffs use "loss of a chance" language and cite loss of chance cases, this matter does not actually implicate the loss of a chance doctrine.

In fact, the Plaintiffs admit that they are not actually asserting a claim for loss of a chance.

Instead, this appeal is about whether "but for" or "substantial factor" is the appropriate standard for causation in this medical negligence case. The recognition of a cause of action for loss of a chance had absolutely no effect on the standard for causation. Washington law is clear on this issue: a medical negligence plaintiff must demonstrate that the alleged damages "more likely than not" or "more probably than not" caused the injuries alleged. It is not sufficient to demonstrate that the alleged negligence was a "substantial factor" in bringing about the claimed harm. That is the law regardless of whether the claim is cast as one for loss of a chance or is cast as plain vanilla medical negligence.

D. SACRED HEART RESPECTFULLY ASKS THE COURT TO AFFIRM THE TRIAL COURT IN EVERY RESPECT.

Though moot, the trial court was correct to strike the claims for wrongful death and loss of a chance. Neither claim was pled, and no effort to assert either claim made until the trial was at hand. The trial court was correct to deny the Plaintiffs' motion to amend for the same reasons. The trial court was also correct to certify its April Order as final. Insofar as they remain in this appeal, the procedural aspects of trial court's orders should be affirmed.

Finally, the trial court was correct in its substantive analysis of the loss of a chance doctrine. The trial court correctly concluded that "but for" was the appropriate standard for causation, and the trial court was correct in concluding that the Plaintiffs' evidence could not meet that standard. The trial court was correct to hold the Plaintiffs to their burden. The substantive aspects of the April Order should, therefore, also be affirmed.

The trial court's orders should, therefore, be affirmed in all respects. Sacred Heart respectfully asks the Court of Appeals to do so and to remand this matter for trial.

II. RESTATEMENT OF THE ISSUES PRESENTED

A. Though moot, the Plaintiffs' brief ascribes error to the trial court's procedural exclusion of claims for loss of a chance and wrongful death. The Plaintiffs did not include such claims in their complaint, and the Plaintiffs took no steps to amend their complaint until 17 days before the scheduled trial date. Allowing the claims after that delay would have required significant additional work. In light of that prejudice, was the trial court correct to exclude the Plaintiffs' un-pled and untimely claims?

B. Washington Courts acknowledge a cause of action for loss of a chance of survival, as well as a claim for loss of a chance of a better outcome. Such claims require the plaintiff to demonstrate that "but for" the defendant's negligence the

plaintiff would have enjoyed a substantially better chance of survival/a better outcome. Was the trial court correct to strike the Plaintiffs' loss of a chance claim, where the Plaintiffs base their claim on a "substantial factor" causation analysis, and where it is undisputed that the Plaintiffs lack "but for" evidence?

III. STATEMENT OF FACTS

A. MS. ZACHOW HAD A LONG HISTORY OF CARDIAC DISEASE.

Mrs. Zachow was born in 1925. CP 63. She was 82 years old in March of 2008, when the events giving rise to this suit occurred. CP 13,63, 101. At that time, she had a number of health issues, including a long history of cardiac disease. CP 101; Supp. Des., Sub No. 36, Defendants' Trial Brief. Ms. Zachow was taking a number of medications, both before and after the March 2008 surgery. *Id.* One of her medications was Metoprolol, which was used to treat Ms. Zachow's cardiac issues. *Id.* Ms. Zachow was taking Metroprolol twice a day: one dose in the morning and one in the evening. *Id.*

B. IN 2008, MS. ZACHOW UNDERWENT A SUCCESSFUL KNEE REPLACEMENT AT SACRED HEART.

Mrs. Zachow had degenerative arthritis in her right knee prior to any of the events at issue in this case. *Id.* She reported to Sacred Heart on March 5, 2008 for a scheduled right knee replacement surgery. CP 5, 13.

Mrs. Zachow took her regular morning dose of Metoprolol on March 5, 2008. Supp. Des., Sub No. 36, Defendants' Trial Brief. Later that morning, she was admitted to Sacred Heart for surgery. Supp. Des., Sub No. 36, Defendants' Trial Brief. The surgery was successfully completed. CP 13.

C. WHILE AT SACRED HEART, MS. ZACHOW MISSED TWO DOSES OF METOPROLOL - A CARDIAC MEDICATION.

Mrs. Zachow was transferred to Sacred Heart's Post Anesthesia Care Unit, following her surgery. Supp. Des., Sub No. 36, Defendants' Trial Brief. Due to a clerical error, Ms. Zachow's medical chart did not include a notation identifying Metoprolol as a medication that Ms. Zachow was taking. *Id.*; CP 13.

Due to that clerical error, Ms. Zachow did not receive an evening dose of Metoprolol the day of her surgery, nor did she receive a dose the following morning. Supp. Des., Sub No. 36, Defendants' Trial Brief; CP 13. However, Ms. Zachow did resume her Metoprolol regimen on the evening of March 6, 2008. Supp. Des., Sub No. 36, Defendants' Trial Brief.

D. MS. ZACHOW DEVELOPED AND RECOVERED FROM POST-OPERATIVE COMPLICATIONS.

On March 6, 2008, Ms. Zachow developed sudden onset of shortness of breath, tachycardia and wheezing. Supp. Des., Sub No. 36, Defendants' Trial Brief. On March 7, 2008, Mrs. Zachow was transferred to the Intensive Care Unit

for further treatment. *Id.* She recovered and was discharged from Sacred Heart on March 15, 2008. *Id.* She lived for another two years. CP 13.

IV. STATEMENT OF CASE

A. Sacred Heart Accepted Responsibility for the Missed Dosages.

On April 18, 2008, the Director of Risk Management for Sacred Heart wrote to Ms. Zachow and acknowledged responsibility for the missed medication dosages. Supp. Des., Sub No. 36, Defendants' Trial Brief. Mrs. Zachow never responded. *Id.*

B. Ms. Zachow Brought Suit Against Sacred Heart.

On or about January 7, 2010, Ms. Zachow brought suit against Sacred Heart. CP 3-7. She alleged that the two missed medication dosages (in March 2008) caused her to develop congestive heart failure along with related cardiac failures. CP 5. Ms. Zachow went on to allege that the two missed medication dosages caused her to "suffer from serious physical injury; permanent disability; reduced life expectancy;" and a variety of other purported harms. CP 6.

Sacred Heart admitted that it was negligent in failing to administer Ms. Zachow's medication. Supp. Des., Sub No. 36, Defendants' Trial Brief. However, Sacred Heart denied that the two missed medication dosages proximately caused any loss, damage, or harm. *Id.*

C. In 2010, Approximately Two Years After her Knee Surgery and Two Months After Filing this Action, Ms. Zachow Passed Away.

Between July 2009 and March 2010, Ms. Zachow suffered three strokes.[1] *Id.*; CP 13. As a result of those strokes, Ms. Zachow was hospitalized and placed on mechanical life support. Supp. Des., Sub No. 36, Defendants' Trial Brief. Her family elected to withdraw support, and Ms. Zachow passed away on March 21, 2010. CP 13; 98.

D. Following Her Death, Ms. Zachow's Adult Daughter was Named PR and the Caption was Amended to Include the PR; However, No Amendment was Made to Assert Loss of Chance or Wrongful Death Claims.

Ms. Zachow's adult daughter, Robin Rash, was named as PR of Ms. Zachow's estate, and the Plaintiffs amended this case's caption to include the PR. *Compare* CP 1 *with* CP 94, *see also* CP 94-95, 99. Ms. Rash purports to act on behalf of: (i) Ms. Zachow's estate; (ii) Ms. Rash, herself; and (iii) Ms. Zachow's statutory beneficiaries. CP 94-95, 99.

Due to an oversight by the Plaintiffs, no motion for leave to amend the complaint was ever filed, nor was an amended complaint ever filed. 4/12/2012 RP 15, *see also* Appellant's Appeal Brief, p. 6. However, in their trial brief,

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[1] It is noteworthy, that Ms. Zachow's strokes began before this action was filed, but the initial complaint does not contend that any stroke was proximately caused by the missed medication dosages. *See* CP 3-7.

which was filed 20 days before trial was set to begin, the Plaintiffs raised both wrongful death and loss of a chance for the first time. Supp. Des., Sub No. 37, Plaintiff's Trial Brief; CP 36-37.

E. THE TRIAL COURT STRUCK THE CLAIMS FOR WRONGFUL DEATH AND LOSS OF A CHANCE; THE PLAINTIFFS FILED A SEPARATE ACTION INCLUDING BOTH CLAIMS; AND THAT ACTION WAS CONSOLIDATED WITH THIS ACTION.

Sacred Heart brought a motion to strike the two un-pled claims. CP 32-34. The trial court granted Sacred Heart's motion. CP 139-142. In addition to the fact that the claims had not been pled, Sacred Heart's motion (and the trial court's order) focused on the Plaintiffs' failure to make out a *prima facie* claim for loss of chance. CP 33; CP 141. Specifically, the trial court held that the Plaintiffs' failure to come forward with evidence satisfying the "but for" standard for causation made it impossible for the Plaintiffs to make out a loss of a chance claim. CP 141. It is undisputed that the Plaintiffs' expert based his opinions on the "substantial factor" test; it is also undisputed that the Plaintiffs could not (and cannot) come forward with evidence to satisfy the "but for" test. CP 105-116, *see also* Appellant's Appeal Brief, pp. 7, 15-20.

Following the trial court's April Order, the Plaintiffs filed a separate action asserting claims for wrongful death and loss of a chance.[2] CR 143-148. And later, on the Plaintiffs' motion, the trial court consolidated the two cases. CP 190-192.

F. THE TRIAL COURT CERTIFIED ITS ORDER AS FINAL, AND THE PLAINTIFFS TOOK A TIMELY APPEAL.

Once the actions were consolidated, it became apparent that the Plaintiffs would endeavor to re-argue their position that the "substantial factor" test applied to the consolidated cases. Sacred Heart, therefore, brought a motion asking the trial court to certify its April Order as final. CP 193-195. That is, Sacred Heart asked the trial court to confirm that its prior determination that "but for" causation was required. *See id.*; CP 139-142.

The Plaintiffs joined in the motion to certify. 10/19/2012 RP 7, 11. During oral argument, the Plaintiffs attempted to reargue their position with respect to the "substantial factor" analysis. *See generally, id.* However, the Plaintiffs' counsel also joined in the motion to certify the April Order:

> . . . if the Court doesn't wish to rescind the [April Order] based upon the context of this 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.

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[2] While it is not at all clear that the Plaintiffs' second action actually asserted a claim for loss of a chance, for purposes of this appeal it can be assumed that the second action asserts a loss of a chance claim. *See* CR 143-148.

But I agree with defense counsel that it should be certified . . .

Id. at 7.[3] Counsel went on to clarify the Plaintiffs' position: ". . . I, on the record, stated if [the court is] going to retain the [April] ruling as it stands, then I will join in the motion [to certify]." *Id.* at 11.

On September 12, 2012, the trial court entered an order certifying its April order as final. CP 220-225. Despite their joinder in the motion, the Plaintiffs took a timely notice of appeal. Supp. Des., Sub No. 87, Notice of Appeal to Court of Appeals, Division III RAP 2.26(d).

V. ARGUMENT: THOUGH MOOT, THE TRIAL COURT CORRECTLY STRUCK THE PLAINTIFFS' UN-PLED CLAIMS AND CORRECTLY DENIED THE PLAINTIFFS LEAVE TO AMEND

A. STANDARD OF REVIEW.

Whether examining Sacred Heart's motion to strike or the Plaintiffs' motion to amend, the procedural aspects of the April Order are subject to review for abuse of discretion. *See Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 851-52 (1997). Under any analysis, the central issues are: (i) whether the Plaintiffs gave Sacred Heart adequate notice of the claims; and (ii) whether Sacred Heart would have been unfairly prejudiced by allowing the claims to proceed. *Id.*; *Bacon v. Gardner*, 38 Wn.2d 299, 305 (1951).

[3] Pursuant to CR 2A, counsel's on the record statements bind the Plaintiffs.

> "A [trial] court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons," namely, when the court "relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law."

Kelley v. Centennial Contractors Enters., Inc., 169 Wn.2d 381, 386 (2010) (citation omitted).

B. THE PLAINTIFFS' COMPLAINT DID NOT ASSERT CLAIMS FOR WRONGFUL DEATH OR LOSS OF A CHANCE.

Though Washington has adopted a rule of notice pleading, a plaintiff must still provide fair notice of the claims made and the basis upon which those claims are made. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the grounds upon which it rests." *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 23 (1999) (*quoting Lewis v. Bell*, 45 Wn. App. 192, 197 (1986)). Washington allows inexpert pleadings, but it does not allow insufficient pleadings. *Northwest Line Constructors Chapter of Nat. Elec., Contractors. Ass'n v. Snohomish County Pub. Utility Dist. No. 1*, 104 Wn. App. 842, 848 (2001).

CR 8(a) requires that a complaint for relief "contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." The complaint must "apprise the defendant of the nature of the plaintiff's claims and

the legal grounds upon which the claims rest." *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385 (1993).

To be sufficient, "[a] complaint must at least identify the legal theories upon which the plaintiff is seeking recovery." *Dewey*, 95 Wn. App. at 25 (*citing Molloy*, 71 Wn. App. at 389). "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472 (2004) (*citing Dewey*, 95 Wn. App. at 26).

The Plaintiffs argue that their initial complaint adequately asserted claims for wrongful death and loss of a chance. *See* Appellant's Appeal Brief, p. 8. However, the Complaint does not even hint at, much less assert, either claim. *See* CP 3-7. First, to contend that a complaint that was written while Ms. Zachow was alive gives fair notice of a wrongful death claim is simply disingenuous, and the complaint does not even use the words "loss of a chance." *See id.* Second, the Complaint did not provide Sacred Heart of fair notice that a wrongful death or loss of a chance claim would be asserted – the complaint is quite specific in the harms that it alleges, and none of those enumerated harms even approaches "wrongful death" or "loss of a chance." *Id.* Finally, the Complaint does not identify the legal grounds for either a wrongful death or loss of a chance claim.

See Dewey, 95 Wn. App. at 25 (a complaint must "at least identify the legal theories" that the plaintiff relies upon).

The Complaint, therefore, did not assert claims for wrongful death and/or loss of a chance. Thus, the trial court did not abuse its discretion in striking those claims as un-pled and untimely. *See Kirby*, 124 Wn. App. at 472 (a party cannot interject new claims into a case by raising them in a trial brief).

C. THE TRIAL COURT CORRECTLY DENIED THE PLAINTIFFS' MOTION TO AMEND, WHERE THE MOTION WAS MADE A MERE SEVENTEEN DAYS BEFORE TRIAL.

Pursuant to CR 15, leave to amend pleadings should be "freely given when justice so requires." However, the trial court properly denies a motion to amend where the amendment would prejudice the opposing party. *Ives v. Ramsden*, 142 Wn. App. 369, 387 (2008). In determining whether prejudice would result, a trial court properly considers: potential delay, unfair surprise, and introduction of remote issues. *Karlberg v. Otten*, 167 Wn. App. 522, 529 (2012); *Kirkham v. Smith*, 106 Wn. App. 177, 181 (2001). Undue delay by the moving party is sufficient grounds to deny a motion to amend, where the "delay works undue hardship or prejudice upon the opposing party." *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 800 (1965).

The Plaintiffs' motion to amend their complaint was filed a mere 17 days before the trial date. *See* CR 120. The Plaintiffs' motion came after all the

experts had formulated their opinions and had been deposed; allowing additional claims would have, therefore, required re-formulation of expert opinion, re-deposing of experts, and potential retention of new experts. CR 130-132. Additionally, given the nearness to trial, the parties had prepared jury instructions, motions in limine, trial briefs, and engaged in significant trial preparation. Allowing additional claims would have required all that work to be redone. *Id.* Moreover, the Plaintiffs identified no justifiable reason for their failure to previously seek to amend the complaint. In short, the trial court was more than justified in denying the Plaintiffs' motion for leave to amend.

D. BY FILING A NEW ACTION, AND BY SUCCESSFULLY MOVING FOR CONSOLIDATION OF THAT MATTER WITH THIS MATTER, THE PLAINTIFFS RENDERED THE PROCEDURAL ASPECTS OF THE TRIAL COURT'S ORDER MOOT.

An issue is moot where it is no longer amenable to "effective relief" or resolution by a court. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984). Mootness is a jurisdictional issue that can be raised at any time. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350 (1983); *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 592 (2008).

Those aspects of the April Order that: (i) struck the Plaintiffs' claims for wrongful death and loss of a chance and (ii) denied the Plaintiffs' leave to amend, were rendered entirely moot by the trial court's August 31, 2012 order

consolidating this action with the Plaintiffs' subsequent action. *See* CR 190-192. In that subsequent action, the Plaintiffs asserted the same claims for wrongful death and loss of a chance that the Plaintiffs had sought to include in this action. Once that subsequent action was consolidated into this action, those claims were part of the case, and regardless of this Appeal's outcome, those claims will remain part of this case. Thus, no decision or ruling from the Court of Appeals will affect the *status quo*. The procedural aspects of the trial court's April Order are, therefore, moot, and the Court of Appeals should disregard those aspects of the Plaintiffs' Appeal.

Finally, the Plaintiffs' procedural challenge to the trial court's Final Order should also be disregarded. First, the Plaintiffs joined in the motion to certify the April Order as final. 10/19/2012 RP 7, 11. The Plaintiffs should not, therefore, be heard to complain about the trial court's decision to certify the April Order. *See Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771 (2004). (a party cannot challenge on appeal an order that he or she asked the trial court to enter). And second, the Plaintiffs specifically asked the Court of Appeals to reach the merits of this appeal. Appellant's Appeal Brief, p. 20. That request is inconsistent with the Plaintiffs' request that the Court of Appeals reverse the trial court's finding of finality. *See Id.*

All of the procedural aspects of this appeal are, therefore, moot. The Court of Appeals should disregard those procedural aspects, should reach the merits of this matter, and should affirm the trial court with respect to the merits.

VI. ARGUMENT: NOTHING ABOUT WASHINGTON'S RECOGNITION OF A CAUSE OF ACTION FOR LOSS OF A CHANCE CHANGED THE TRADITIONAL "BUT FOR" TEST FOR CAUSATION.

A. STANDARD OF REVIEW.

Though Sacred Heart's motion was cast as a motion to strike, it was treated by both the parties and the trial court as a motion for partial summary judgment – the Plaintiffs submitted substantive briefing, declarations, and documentary evidence in opposition to the motion, CP 94-116, and the trial court considered the Plaintiffs' evidence, considered the law, and focused on whether the Plaintiffs had made out a *prima facie* case. 4/12/2012 RP 25-29; CP 139-142. The Court of Appeals, therefore, exercises *de novo* review over this issue, undertaking the same analysis as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447 (2006).

B. WASHINGTON RECOGNIZES A CAUSE OF ACTION FOR LOSS OF A CHANCE – BOTH OF SURVIVAL AND OF A BETTER OUTCOME.

At the outset, it is important to understand what a "loss of chance" claim is. Loss of a chance developed, as a theory of liability, to respond to perceived inequities arising in cases involving plaintiffs who, prior to the conduct at issue in

the case, had a **less than even** chance of survival/a better outcome. In those cases, the less than even chance usually owed itself to underlying/preexisting health conditions. It was perceived that requiring the plaintiff to demonstrate that it was the defendant's conduct – rather than the underlying/preexisting condition – that caused injury or death, was too great an evidentiary burden.

C. Claims for Loss of a Chance are Subject to the Traditional "But For" Causation Standard.

Washington's State Supreme Court first recognized a cause of action for loss of a chance in *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609 (1983). While the Court was in agreement that a cause of action should exist, the Court was divided regarding how to do so.

Justice Dore penned the lead opinion, which applied a lesser standard than the traditional "but for" analysis for causation. *Id.* at 610-19. That opinion was joined by only one Justice. *Id.* at 619.

Justice Pearson wrote a concurring opinion that was joined by three justices, and, therefore, became the plurality opinion. *Id.* at 636. Rather than address the issue through causation, the plurality redefined the Court's understanding of the injury, or the compensable interest, at issue. *Id.* at 623-24. Rather than focusing on whether the defendant's conduct caused the plaintiff's death, the plurality focused on whether the defendant's conduct caused a

"substantial reduction in [the plaintiff's] chance of survival." *Id.* at 634. Under the plurality's approach, the plaintiff still must demonstrate causation by the traditional "but for" standard, but the harm that must be caused by the defendant's conduct is not death itself, but a reduction in the plaintiff's chance of beating death. *Id.* at 623-24.[4]

In the years following *Herskovits* there was some uncertainty regarding whether Justice Dore's lead opinion or Justice Pearson's plurality opinion represented Washington State law regarding loss of a chance. *See Zueger v. Public Hospital Dist. No. 2 of Snohomish County*, 57 Wn. App. 584, 589-91 (1990). However, in 1990, the Court of Appeals held that Justice Pearson's plurality opinion represented the law on loss of a chance. *Id.* at 591. In *Mohr v. Grantham*, 172 Wn.2d 844 (2011), the Supreme Court formally adopted Justice Pearson's plurality opinion in *Herkovits*, thus confirming the Court of Appeals' decision (from 11 years prior) in *Zueger v. Public Hospital Dist. No. 2 of Snohomish County*. *Mohr*, 172 Wn.2d at 857.

In *Mohr*, the State Supreme Court also extended the loss of chance analysis to "claims where the ultimate harm is something short of death." 172

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[4] The plurality also limited loss of chance claims to those instances where the reduction in the plaintiff's chances is "substantial." *Id.* at 634. Thus, while the reduction in Mr. Herskovits' chances of survival from 39 to 25 percent was deemed adequate, a reduction from 39 to 38 percent may not have been sufficient to support a loss of chance claim. *See id.*

Wn.2d at 855. Thus, after *Mohr*, a claim for loss of a chance could be maintained where: (i) the defendant was negligent; and (ii) "but for" such negligence the plaintiff would have enjoyed a substantially greater chance of survival/a better outcome.

This appeal hinges upon the Plaintiffs' contention that the recognition of loss of a chance, as a viable claim, replaced the traditional "but for" causation test with the "substantial factor" test. *See generally,* Appellant's Appeal Brief. However, that is simply untrue. Washington law regarding loss of chance retains the traditional "but for" test for causation. *See Mohr*, 172 Wn.2d at 857.

Moreover, none of the cases that the Plaintiffs cite support their contention. In fact, each court that has addressed the issue – straight from *Herskovits* to *Mohr* – has held that "but for" is the appropriate test for causation in loss of chance claims. *See Herskovits*, 99 Wn.2d at 623-24; *Zueger*, 57 Wn. App. at 590-91; *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348-49 (2000); *Mohr*, 172 Wn.2d at 851, 857.[5] The Plaintiffs' arguments to the contrary should be rejected, and the trial court's orders should, therefore, be affirmed.

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[5] The Plaintiffs also cite *Sharbono v. Universal Underwriters Insurance Co.*, 139 Wn. App. 383 (2007), in support of their contention that the "substantial factor" test should apply to this medical negligence case. First, *Sharbono* does not even address which standard of causation ought apply in a medical negligence or loss of chance claim. In fact, *Sharbono* was a bad faith case that arose in the insurance context. Second, *Sharbono* discusses the *Herskovits* lead opinion with respect to

D. CLAIMS FOR LOSS OF A CHANCE APPLY ONLY IN SITUATIONS WHERE THE PLAINTIFF'S PRE-NEGLIGENCE CHANCE OF SURVIVAL/A BETTER OUTCOME WAS LESS THAN 50%.

Regardless of any other issue, the trial court's order should be affirmed because the Plaintiffs' allegations are fundamentally incompatible with a loss of chance claim. The Plaintiffs do not contend, or concede, that Ms. Zachow had a less than 50% chance of survival/a better outcome, prior to the alleged negligence. In fact, the Plaintiffs contend exactly the opposite – that is, that Sacred Heart caused Ms. Zachow's death. *See generally,* Appellant's Appeal Brief. That contention makes a loss of chance claim impossible.

Loss of a chance does not apply to "all or nothing" cases, like this one. Loss of a chance only applies when the plaintiff recognizes his/her own inability to prove a traditional wrongful death claim. In this case, the Plaintiffs are improperly attempting to use loss of a chance as the moral equivalent of a "lesser included offense" in the criminal context. However, none of the Washington cases on loss of a chance allow the doctrine to be used to hedge a plaintiff's bets.

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the areas of law in which the "substantial factor" test has been applied. The *Sharbano* Court, however, offers no analysis of Justice Pearson's plurality opinion, nor does the *Sharbano* Court offer any analysis as to the propriety of the "substantial factor" test in medical negligence or loss of a chance cases. Finally, *Sharbano* holds that the trial court erred in giving a "substantial factor" jury instruction. In short, *Sharbano* has no bearing or applicability on this appeal.

The *Herskovits* plurality recognized that "existing principles" of tort law fully address cases in which the plaintiff's pre-negligence chance of survival was better than even (*viz.*, more than 50%):

> [C]ases where the chance of survival was greater than 50 percent . . . are unexceptional in that they focus on the death of the decedent as the injury, and they require proximate cause to be shown beyond the balance of probabilities. Such a result is consistent with existing principles in this state. . . . "

99 Wn.2d at 631. When the plaintiff's chance of survival is better than even, the claim is an "unexceptional" wrongful death action, in which the plaintiff must prove that but for the defendant's conduct, the plaintiff would still be alive.

The cause of action that the *Herskovits* plurality recognized was characterized by "**the loss of a less than even chance** [being] an actionable injury." *Id.* at 634 (emphasis added). Stated differently, *Herskovits* recognized a new cause of action for situations where, independent of any alleged negligence, the plaintiff had a less-than-even chance of avoiding whatever damage, loss or injury is being sought.

Herskovits and *Mohr* do not allow a wrongful death plaintiff to pursue a fallback "loss of chance" claim (predicated on a chance of survival that exceeded 50%). As the court held in *Haney v. Barringer*, 2007 WL 4696827 (Ohio Ct. App. Dec. 27, 2007), "the loss-of-chance doctrine is not simply a fallback position when a plaintiff cannot establish proximate cause . . .," and loss of chance does

not apply "in a case where the injured patient had a greater-than-even chance of recovery at the time of the alleged medical negligence." *Id.* at *3.

E. THE PLAINTIFFS ALSO FAILED TO COME FORWARD WITH THE NECESSARY SCIENTIFIC EVIDENCE TO MAKE OUT A CLAIM FOR LOSS OF CHANCE.

Crucial to the *Herskovits* plurality opinion was stipulated medical evidence regarding the decedent's statistical chance of survival, both with and without the defendant's negligence. As the *Mohr* Court explained:

> The lost opportunity [for which a plaintiff can recover damages] may be thought of as the adverse outcome discounted by the difference between the ex ante probability of the outcome in light of the defendant's negligence and the probability of the outcome absent the defendant's negligence.

172 Wn.2d at 858 (citations omitted). Moreover, calculation of a lost chance must be:

> based on expert testimony, which is 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 857-58 (citations, internal quotations, and ellipses omitted). Both *Herskovits* and *Mohr* emphasize and rely upon the plaintiff's ability to present medical expert testimony stating, in percentage terms, what chance had been lost. *Id.* at 849, 859-60. Without such scientific evidence, which is capable of identifying the percentage lost chance, no claim for loss of a chance can survive

even the most summary scrutiny. Without such evidence, the jury would be left to speculation and conjecture regarding the nature and extent of damages. *Sposari v. Matt Malaspina & Co.*, 63 Wn.2d 679, 688 (1964) ("testimony establishing the [plaintiff's] loss must be free of speculation and conjecture.").[6]

In this case, the Plaintiffs do not even attempt to quantify the alleged lost chance. Such evidence, however, is absolutely essential to a claim for loss of a chance. The trial court was, therefore, correct to strike the Plaintiffs' purported loss of chance claim.

F. THOUGH THE PLAINTIFFS USE "LOSS OF CHANCE" LANGUAGE, THEY CONCEDE THAT THEIR CLAIM IS NOT FOR LOSS OF A CHANCE.

While the Plaintiffs cite loss of chance cases and use loss of chance language, the claims that the Plaintiffs describe are not (and have never been) claims for loss of a chance. In fact, the Plaintiffs recognized that their claim is not one for loss of a chance:

> The issue of loss of chance of survival really is a misnomer in this case as we don't intend to bring a loss of a chance of survival claim per se because essentially that was subsumed in the death because our testimony is within the purview of the jury instruction on significant factor, significant cause.
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[6] Moreover, scientific testimony is necessary to satisfy *Herskovits'* requirement that the reduction in chance be "substantial." *See Herskovits*, 99 Wn. 2d at 634.

> [The Plaintiffs' expert] testified that the complained of event were significant factors in her death, and it is that instruction and that standard as a proximate cause standard is what we intend to submit to the jury on the cause of death so we are not making a loss of chance survival claim per se, only in that it is subsumed in the death of Mrs. Zachow and the standard at that time we have testimony on is a significant factor.

4/12/2012 RP 16, 17. Moreover, the Plaintiffs did not submit any proposed jury instruction regarding loss of a chance. Supp. Des., Sub No. 64, Plaintiff's Proposed Jury Instructions. What the Plaintiffs are actually advocating is that the courts allow a wrongful death claim to proceed under the "substantial factor" test for causation. *See generally,* Appellant's Appeal Brief. However, that is not the law in Washington; "but for" is the appropriate standard for causation in all medical negligence cases – including loss of a chance claims. *McLaughlin v. Cooke*, 112 Wn.2d 829, 837 (1989); *Mohr*, 172 Wn.2d at 857.

Similarly, the Plaintiffs are not asserting an "inter-vivos" loss of a chance of a better outcome, `a la *Mohr*. As the Plaintiffs put it:

> What we intend to do with the issue of loss of chance of survival was to show that [Ms. Zachow] was aware of that reduced life expectancy or loss of a chance of survival while she was alive, she was greatly troubled by it and she did things to protect herself and was hypervigilant . . . about everything she did after that moment because she knew her life expectancy had been reduced . . . so it really goes to issue of proof to the damages to the decedent before she died.

4/12/2012 RP 16.

The fact that the Plaintiffs submitted no proposed jury instruction regarding a loss of chance of a better outcome cannot be over-stressed. Supp. Des., Sub No. 64. This case is about whether the jury should be instructed on "but for" or "substantial factor" and whether the Plaintiffs should be permitted to reach the jury without putting on *prima facie* evidence of "but for" causation. It is undisputed that the Plaintiffs have not, and cannot, put on evidence of "but for" causation. CP 105-116, *see also* Appellant's Appeal Brief, pp. 7, 15-20.

This appeal is an effort to shoehorn the "substantial factor" test into a cause of action that undeniably requires a showing of "but for" causation. *See McLaughlin*, 112 Wn.2d at 837; *Mohr*, 172 Wn.2d at 857. The trial court was correct to hold the Plaintiffs to their "but for" burden. *See* CP 139-142. The Court of Appeals should affirm the trial court and similarly hold the Plaintiffs to their burden.

VII. CONCLUSION

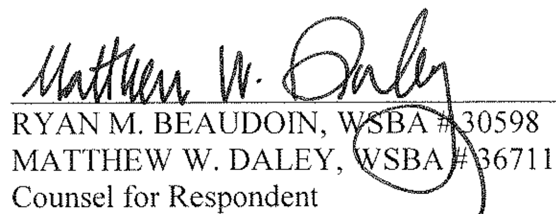
The trial court's orders were correct in every respect. The trial court was correct to strike the Plaintiffs' un-pled claims. The trial court was correct to deny the Plaintiffs leave to amend their complaint to include those un-pled claims. And the trial court was correct to hold that the Plaintiffs' failure to come forward with evidence satisfying the "but for" standard was fatal to their claim for "loss of a

chance." Finally, the trial court was correct to certify that substantive ruling as a final judgment.

As noted at the outset, the procedural aspects of this appeal are moot. The true issue before the Court is whether "a substantial factor" or "but for" is the appropriate causation test in medical negligence and/or loss of a chance cases. That issue has been conclusively resolved by prior decisions of the Court of Appeals and State Supreme Court. "But for" is the standard for causation. The trial court was correct to hold the Plaintiffs to that burden. Sacred Heart respectfully asks the Court of Appeals to affirm the trial court's orders and to hold the Plaintiffs to their proper burden.

RESPECTFULLY SUBMITTED, this 3rd day of July, 2013.

WITHERSPOON· KELLEY, P.S.



RYAN M. BEAUDOIN, WSBA #30598
MATTHEW W. DALEY, WSBA #36711
Counsel for Respondent

CERTIFICATE OF SERVICE

On the 3rd day of July, 2013, I caused to be served a true and correct copy of the within document described as BRIEF OF RESPONDENT SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL on all interested parties to this action as follows:

Michael J. Riccelli 400 South Jefferson Street, Suite 112 Spokane, Washington 99204-3144 Email: holly@mjrps.net Counsel for Appellants	Via United States Mail [ ] Via Federal Express [ ] Via Hand Delivery [x] Via Facsimile [ ] Via Electronic Mail [ ]

EVELYN M. HANSON, Legal Assistant