CASE NUMBER: 312771

ROBIN RASH, ET AL.

Appellants,

V.

PROVIDENCE HEALTH & SERVICES, ET AL.

Respondents.

APPELLANTS' SUPPLEMENTAL BRIEF

MICHAEL J RICCELLI PS

Attorney At Law
A Professional Service Corporation

February 26, 2014

Division III Court of Appeals
500 N. Cedar
Spokane, WA 99201

Attn: Renee Townsley

Re: ***Rash/Zachow v. Providence Health & Services***
Correspondence 2/3/14 from Renee Townsley to Counsel
Case No. 312771

Ms. Townsley:

This is written in response to your letter of February 3, 2014, and in particular as to whether any questions on appeal are answered by *Estate of Dormaier v. Columbia Basin Anesthesia,* PLLC, No. 308642, slip op. (Wash. Ct. App. Nov. 14, 2013). Please excuse the delay in this response, as beginning in December, through the holiday season, and to the time of your letter, my staff and I were immersed in pre-trial motions and delayed discovery on a complex medical malpractice trial. The trial started February 5, 2014, two days after your letter was dated. During that trial, there were multiple motions raised, and ongoing daily trial preparation and response to motion practice consumed every available moment of time through closing arguments and submitting the matter to the jury. This occurred this past Thursday, February 20, 2014, at approximately 4:30 p.m. Although I was generally aware of the *Dormaier* case, it took me time to sift through it in order to respond to your February 3rd letter. It is only as of this writing that I believe I can competently respond, as is detailed below.

First, as to the general matter of the appeal, I believe that the *Dormaier* case is dispositive, favorably to Appellant Rash, as Personal Representative to the Estate of Betty Zachow. As discussed in Ms. Rash's original and reply briefs, this appeal arose from a trial court's order in a consolidated matter (CP 220-225), which order simply served to determine a prior order (CP 139-142) issued in a non-consolidated matter to be a final order pursuant to CR 54(b). The original order was based upon the motion of Respondent/Providence Sacred Heart Medical Center's (hereinafter SHMC) to strike Ms. Rash's loss of chance claims, or in the alternative, to continue trial date, in which SHMC stated:

> " 2. **Grounds**. Defendants learned of Plaintiffs' new cause of action on April 2, 2012, when they received Plaintiffs' trial brief. Plaintiffs loss of chance cause of action was not pleaded in their complaint, was not mentioned in

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> discovery and is not supported by the required expert testimony. The cause of action should be stricken and not presented to the jury. In the alternative, should the Court not strike Plaintiffs' cause of action, the trial should be continued to allow Defendants to obtain discovery on Plaintiffs' new cause of action in order to properly defend their case."
>
> (CP 33)

The original complaint filed prior to Ms. Zachow's death, stated as follows:

> These breachs of applicable standard(s) of care and/or instances of negligence were the proximate causes of physical injury and resulting damages to Ms. Zachow, but for which the physical injury and resulting damages would not have occurred.
> ...
>
> As a result of the foregoing acts and/or omissions, Ms. Zachow has suffered and will continue to suffer from serious physical injury; permanent disability; ***reduced life expectancy***; loss of enjoyment of life, activity and lifestyle; serious and continuing emotional distress; healthcare and related costs and expenses; and other economic loss and damage.
>
> (CP 5-6) Emphasis added.

As is documented in Appellant's Appeal Brief, section III Statement of the Case, and with specific reference to the clerk's papers and record, this case originally arose from the admitted negligence of SHMC in caring for Betty Zachow while alive. A medical negligence case was brought on her behalf in which, among other things, damages for decreased life expectancy were claimed. Unfortunately, Ms. Zachow passed on during the litigation. SHMC's counsel was notified that the complaint would be amended, and a personal representative appointed to bring the estate's survival claim and the adult children's wrongful death claims. Due to clerical or executive error, the caption was amended, but the complaint was not. However, both parties proceeded through discovery as though the complaint had been amended. After Ms. Zachow's death, but prior to trial, Ms. Rash's medical expert, Dr. Rogers, testified that SHMC's actions were a significant (substantial) factor in contributing to Ms. Zachow's decreased life expectancy, and, ultimately, led to her death. It was in this context that at time of trial, SHMC moved to strike the Personal Representatives' claims with respect to loss of chance alleging loss of chance was a separate claim and they were not provided adequate notice of this claim. The court struck the loss of chance claim. SHMC also moved the court for dismissal, and the court dismissed the wrongful death claims of Ms. Zachow's adult children. The estate's survival claims were allowed to continue. Ms. Rash, as the Personal Representative, then filed a new, separate action for the wrongful death claims and the two matters were consolidated. Even after consolidation, and when there was ample time for Ms. Rush to develop appropriate expert testimony either for summary judgment or for trial, SHMC moved the trial court to declare the prior, pre-

consolidation order striking the loss of chance claim as final per CR 54(b). The court did so, resulting in this appeal.

Under these circumstances, it is clear that, consistent with *Dormaier*, the primary basis for this appeal has been resolved. *Dormaier* confirms that loss of chance is an injury which is included within the general nature of a wrongful death claim in the context of a medical malpractice action, such as this appeal. However, it is noted that the *Dormaier* case does not address the Rash's assignment of error due to procedural irregularity, in the trial court's failure to address any issue as to loss of chance in the context of CR 56 summary judgment.

Further, what is not resolved is whether qualitative expert testimony in the nature of "substantial factor," when provided in context of a medical malpractice action, is sufficient to maintain a loss of chance claim, where discreet statistics or percentage probabilities are not testified to. *Dormaier* dealt with expert testimony wherein percentage probability of outcomes were offered by experts, and were used to calculate potential differentials between loss of chance and traditional "but for" negligence.

Subsequent to Ms. Zachow's death, defendants took plaintiffs medical expert witnesses deposition, Dr. Rogers, in which Dr. Rogers provided testimony to substantiate the loss of chance/reduced life expectancy and wrongful death nature of plaintiff's claims:

> Q. BY MR. RICCELLI: Do you have any opinion more probably than not as to any relationship between the post 2008 surgical condition caused by the beta-blocker withdrawal and anything leading up to or causing her death?
>
> A. Yes. Yes.
>
> Q. Can you describe that.
>
> A. ***Her deterioration was accelerated over what I would have expected,*** knowing her four-year background before the — or five-year background before. If you look at her course in five years before the acute pulmonary edema episode and compare it with the two-year course afterward, you see that she has developed marked deterioration in that period, both mentally and physically, and developed new manifestations of the disease, which occurred before I would have expected them to, if she'd been on a good medical treatment program. And, namely, the fatal termination, the third cardiac embolus to the head causing a major stroke.
>
> Deposition of Wayne R. Rogers, M.D., p. 49, L. 13 — p. 50, L. 6 (emphasis added)
>
> Q. Regarding her condition subsequent to the second surgery and the beta-blocker withdrawal, ***do you have any opinion as to the significance or the amount of acceleration caused by the event of2008?***

A. Well, I'd just say its significant I mean, it's only possible to estimate things like this. And when you see that there's a change in the life pattern, which had ample opportunity to change before but hadn't, ***it becomes my opinion that this terrible weakening of her heart action that took place on March the 6th of2008 aggravated the underlying condition.***

Deposition of Wayne R. Rogers, M.D., p. 51, LL. 1-11 (emphasis added)

Q. How does the subsequent event, and I'm speaking of this postsurgical beta-blocker withdrawal and the pulmonary edema, et cetera, and hypoxia, how does that relate to what you've observed or been characterized as a lack of vigor after that event?

A. A weaker heart weakened by the acute episode and the rhythm disturbances, which went on for a while, is the proximate cause of the weakening of her activities of daily living that we've discussed, and a cause of the heart's dilating. The heart responds to injury by dilating, and her heart was dilated, particularly in the atria, because they were measured, not the ventricles, the atria were measured and that's what gave rise to her strokes. So all of that is cumulative.

Deposition of Wayne R. Rogers, M.D., p. 56, LL 13-25, p. 57, L. 1 (emphasis added)

BY MR. REKOFKE:

Q. Doctor, just a couple follow-ups. ***Your bottom-line opinion is that because of the events in Sacred Heart in March of 2008, Ms. Zachow's deterioration was accelerated? Is that what you're basically saying?***

A. Or promoted. She eventually would have died anyway, as we all do, but she had a promotion of her disease process

Q. And you can't state, as we sit here today, how much her disease was promoted or accelerated; is that correct?

A. I can't give you a mathematical figure, ***but I would say it was significant and led to her death.***

Deposition of Wayne R. Rogers, M.D., p. 58, LL. 19 — p 59, LL. 5 (emphasis added). See Declaration of Michael R. Riccelli Exhibit G.

That Dr. Rogers chose to use the term "significant" rather than "substantial" is, in and of itself, both insignificant and unsubstantial. This is because "significant" and "substantial" are used interchangeably, as synonyms. See Exhibits E and F to

> the Declaration of Michael J. Riccelli. *Judicial notice is requested as to these dictionary definitions.*
>
> (CP 88-90)

In this litigation, SHMC has admitted negligence, but denies causation. Without specific testimony as to the degree of causation, it can be presumed SHMC is merely arguing that its negligence did not contribute to greater than 50 percent causation of death (or a loss of chance of survival). Rash's expert Dr. Roger's testimony encompasses "but for" proximate cause (lead to the death of Ms. Zachow); and "loss of chance" (significant/substantial factor). Ms. Rash believes that quantitative testimony, including that of "substantial factor" causation and "but for" causation, when taken in context of all expert testimony, treating physician testimony, and lay testimony, will provide a basis for a jury to determine "but for" or "substantial factor" causation and liability, if at all. In this regard, the *Dormaier* case is not determinative. Conversely, if the *Dormaier* case is meant to require expert medical testimony as to probability of outcome, Ms. Rash believes it is inconsistent with the *Herskovits* plurality.

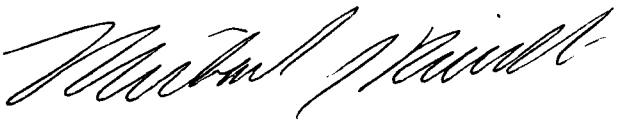
> In *Jeanes v. Milner, supra*, the plaintiff mother brought a malpractice action for the death of her child from throat cancer, claiming delayed diagnosis of 1 month caused a shortened life span and pain and suffering. The United States Court of Appeals for the Eighth Circuit, reversing a dismissal for insufficient evidence on the element of proximate cause, held at pages 604-05:
>
> We cannot agree with the District Court's holding that "there is no evidence from which the jury could find that the delay of approximately one month in the transmission of [the] slides could have been the proximate cause of [Tommy's] failure to recover from his cancer, or to increase his pain and suffering or to shorten his life." Nor can we agree that the jury could "only find a verdict for the plaintiff based on speculation and conjecture."
>
> . . .
>
> The Supreme Court of the United States has spoken to a contention similar to that argued here by the doctors and the Infirmary. In *Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946)*, the Court stated:
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."
>
> The recent case of James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980) concerned the failure to diagnose and promptly treat a lung tumor. The court

> concluded that the plaintiff sustained its burden of proof even without statistical evidence, stating at page 587:
>
> As a proximate result of defendant's negligence, James was deprived of the opportunity to receive early treatment and the chance of realizing any resulting gain in his life expectancy and physical and mental comfort. *No matter how small that chance may have been -- and its magnitude cannot be ascertained -- no one can say that the chance of prolonging one's life or decreasing suffering is valueless. (italics ours)*
>
> Where percentage probabilities and decreased probabilities are submitted into evidence, there is simply no danger of speculation on the part of the jury. More speculation is involved in requiring the medical expert to testify as to what would have happened had the defendant not been negligent. McCormick, supra.
>
> *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 634, 664 P.2d 474 (1983)

A fair reading of the foregoing excerpt from *Herskovits* is that, although use of statistical probabilities is, perhaps, preferable, it is not an absolute requirement. However, in *Herskovits*, the court concluded that with testimony of probability of outcome, there could be no argument as to sufficiency of the evidence.

Although *Dormaier* disposes of this appeal, generally, it does not address a critical issue that could give rise to another appeal in this matter, if not addressed at this time. That is, whether loss of chance injury requires, rather than is assisted by, testimony in the nature of a statistical probability, as apposed to medical testimony of a more general, qualitative nature phrased in terms of "substantial factor."

Respectfully,



Michael J. Riccelli

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COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff/Appellant, vs. PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants/Respondents.	No. 312771 DECLARATION OF SERVICE

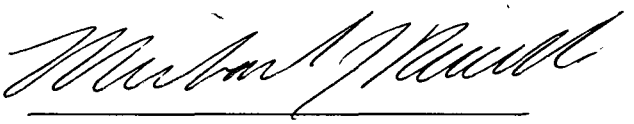
The undersigned hereby certifies that on February 26, 2014, I caused to be served a true and correct copy of Michael J. Riccelli's February 26, 2014, letter addressed to the Court of Appeals Division III, by depositing the

same in the U.S. Mail, postage prepaid, addressed as follows:

Matthew Daley and
Ryan Beaudoin
Witherspoon, Kelley, Davenport & Toole
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201

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

DATED this 26th day of February, 2014.



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