No. 91387-1

SUPREME COURT

OF THE STATE OF WASHINGTON

BEVERLY VOLK, et al., *Appellants*,

v.

JAMES B. DEMEERLEER, et al., *Respondents*.

REPLY TO RESPONDENT ASHBY'S RESPONSE TO APPELLANTS' PETITION FOR REVIEW

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I. INTRODUCTION

To the extent the Defendant/Respondent Ashby (hereinafter referred to as "Dr. Ashby") seeks review of an issue not raised in the Plaintiffs/Appellants Volk's ("hereinafter referred to as "Volk") Petition for Review, Volk respectfully submits the following reply pursuant to RAP 13.4(d).

II. ARGUMENT

A. Division III's opinion below conflicts with this Court's opinions on loss of chance.

In the present case, the Court of Appeals wrote: "We further dismiss the lost chance claim in its entirety because the Schierings presented no expert testimony of percentage of lost chance." *Volk v. DeMeerleer,* 184 Wn. App. 389, 429, 337 P.3d 372 (2014). Conversely, *Herskovits v. Group Health Cooperative*, 99 Wn.2d 609, 664 P.2d 474 (1983) and *Mohr v. Grantham,* 172 Wn.2d 844, 850, 262 P.34d 490 (2011), do not require expert opinion testimony as to the percentage or range of percentage reduction in a lost chance claim.

RAP 13.4(b)(1) provides a petition for review will be accepted by the Supreme Court: " if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court ...". Since Division III held percentage or range of percentage evidence of a lost chance is required and the Supreme

Court has not held such evidence is required, there is a conflict between Division III and the Supreme Court which makes review entirely appropriate and beneficial to these litigants, the bench and bar.

B. Dr. Knoll's declaration presents the only admissible expert testimony on appeal, and creates issues of fact as to causation.

1. Dr. Knoll provides competent testimony which must be considered fact for the purposes of appeal

Dr. Ashby devotes a substantial portion of his brief (p.7-10) arguing, without any contrary expert testimony, that Dr. Knoll's declaration is conclusory, speculative and leads to conjecture. To the contrary, Dr. Knoll's declaration presents admissible questions of fact with respect to Ashby's breach of duty and proximate cause which preclude summary judgment.

James L. Knoll, IV, M.D. is a board-certified psychiatrist and neurologist. He earned a subspecialty certification in forensic psychiatry. (CP 55 at para. 2). The factual basis upon which he formed his opinions in this case is: (1) his review of the clinical records of Jan DeMeerleer from the Spokane Psychiatric Clinic; (2) his review of the Spokane Valley Police/Spokane County Sheriff Department's investigative files pertaining to the July 18, 2010 incident in question; and (3) his review of the Spokane County Medical Examiner's autopsy report and related toxicology report with respect to DeMeerleer. (CP 55 at para. 4). Dr. Knoll is knowledgeable of the applicable standard of care in the State of Washington. (CP 55 at para. 5).

His opinions and conclusions are made on a more probable than not basis, and when made with respect to clinical psychiatric practice, made with reasonable medical certainty, on a more probable than not basis. (CP 55 at para. 6). Dr. Knoll's testimony is provided with ample foundation and meets all criteria to establish issues of fact in a medical negligence action. When viewed in the light most favorable to Volk, as the non-moving party at summary judgment, Dr. Knoll's uncontested testimony creates issues of fact on all causes of action pled by or available to Volk.

2. Dr. Knoll establishes breach of the standard of care and causation.

Dr. Knoll's declaration sets forth testimony creating a question of fact with respect to Dr. Ashby's breach of the applicable standard of care. Specifically, at CP 55, para. 11, Dr. Knoll testifies in pertinent part:

> "SPC breached the applicable standard of care by failing to exercise the decree of care, skill and learning expected of a reasonably prudent healthcare provider of psychiatric medical services, in the State of Washington, acting in the same or similar circumstances ... These breaches include, but are not limited to: failing to perform adequate assessments of DeMeerleer's risk of harming himself, and others when clinically indicated to do so; and failing to adequately monitor DeMeerleer's psychiatric condition, and provide appropriate treatment."
>
> CP 55, para. 11.

"SPC" refers to Dr. Ashby and his colleagues at the Spokane Psychiatric Clinic. (CP 55, para. 5). Dr. Knoll's testimony, set forth in

paragraph 11, creates genuine questions of fact as to whether Dr. Ashby breached the applicable standard of care.

a) Dr. Knoll testifies as to cause in fact of the incident.

Dr. Knoll's declaration properly addresses traditional proximate cause in tort. In paragraph 12, he testifies:

> "But for the referenced Breaches by SPC, it is unlikely the Incident would have occurred."

In paragraph 13, he testifies:

> "The referenced Breaches were, collectively and individually, most likely a causal and substantial factor contributing to and in bringing about the Incident and the resulting harm ..."

CP 55, at para. 12 and 13.

"Unlikely" and "most likely" are simply alternative expressions of "more probably than not." Moreover, any opinions or conclusions made by Dr. Knoll in his declaration are made on a more probable than not basis with reasonable medical certainty. (CP 55, para. 6). As demonstrated above, Dr. Knoll's declaration addresses Ashby's breach of the standard of care and proximate cause on a more probable than not basis with reasonable medical certainty.

b) Dr. Knoll testifies as to cause in fact of loss of chance.

In paragraph 14, Dr. Knoll testifies:

> "The referenced breaches were, collectively and individually, a causal and substantial factor in contributing to and in bringing

about loss of chance of a better outcome of the psychiatric care and treatment of DeMeerleer, and thus a loss of chance that the incident and the resulting harm wouldn't have occurred."

(CP 55 at paragraph 14)

Dr. Ashby argues on page 9 of his brief:

"... the absence of expert witness testimony on any percentage or range of percentage reduction in plaintiffs' chances of survival invites speculation."

(CP 55 at paragraph 9)

Dr. Knoll's statement is not equivocal as to causation. Dr. Knoll states the breaches were "causal" of loss of chance. In paragraph 6 of his declaration, Dr. Knoll states:

"Any opinions or conclusions made by me in this declaration are based upon my education, training, background and experience and are made on a more probable than not basis, and when made with respect to clinical psychiatric practice, are made with reasonable medical certainty, on a more probable than not basis."

(CP 55 paragraph 6)

This argument begs the question of whether percentage or range of percentage testimony is required. (Please see above and Volk's Petition for Review). Also, recall this court in *Mohr* cited with approval the New Hampshire case of *Lord v. Lovett*, 146 N.H. 232, 770 A.2d 1103, 1108 (2001) wherein the plaintiff's expert's testimony was held to be admissible even though the expert could not quantify the degree to which the plaintiff had been deprived of a better recovery.

"First, we fail to see the logic in denying an injured plaintiff recovery against a physician for the lost opportunity of a better

> outcome on the basis that the alleged injury is too difficult to calculate, when the physician's own conduct has caused the difficulty. Second, we have long held that difficulty in calculating damages is not a sufficient reason to deny recovery to an injured party. Third, loss of opportunity is not inherently unquantifiable. A loss of opportunity plaintiff must provide the jury with a basis upon which to distinguish that portion of her injury caused by the defendant's negligence from the portion resulting from the underlying injury. This can be done through expert testimony just as it is in aggravation of pre-existing injury cases."
>
> *Lord v. Lovett*, 146 N.H. 232, 239; 770 A.2d 1103, 1108 (2001) (internal citations omitted).

Recently, this court confirmed that loss of chance in Washington does not require expert testimony specifically quantifying the degree of loss of chance. In *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn. 2d 136, 341 P.3d 261 (2014), two experts testified for the plaintiff during a medical malpractice trial. Neither expert testified as to a percentage or range of percentage reduction in the chance of survival. Dr. Ghidella opined that Grove would not have suffered permanent injuries or would have had a better outcome if the standard of care had been met. *Id.* at 140-141. Dr. Adams's testified if the hospital employees had not breached the standard of care, Grove would have had a better chance of avoiding injury or would have suffered less severe injury. *Id.* at 142. In *Grove*, this court reversed the appellate court's confirmation of the trial court's dismissal of the plaintiff's case on summary judgment.

c) Appellants are not claiming that the psychiatric duty to warn is actively at issue.

Dr. Ashby argument on page nine of his brief appears to be aimed at paragraph 10 of Dr. Knoll's declaration. Paragraph 10 reads in relevant part:

> "... proper inquiry and assessment may have substantiated that Ms. Schiering and her children were foreseeably at risk of harm from DeMeerleer. Had this occurred, given proper caution or warning by SPC directly, through an appropriate intermediary or an (sic) subsequent psychiatric services provider to DeMeerleer, Ms. Schiering and her family most likely would have had the opportunity to have: taken reasonable effort to avoid contact with DeMeerleer; seek protection from him; and/or make themselves unavailable to access by DeMeerleer. Failure by SPC to follow up and treat DeMeerleer appropriately precluded any such opportunity."
>
> CP 55, para. 10.

Dr. Ashby's specific criticism is:

> "Dr. Knoll's opinion that plaintiffs might have survived Mr. DeMeerleer's attacks, albeit under a hypothetical scenario unsupported by facts and contrary to the evidence that Mr. DeMeerleer never mentioned any ideation to cause harm to the plaintiffs, is a conclusion without science or data."

Any criticism of Dr. Knoll's opinions as being hypothetical, conclusory and unsupported by fact is misplaced, and not supported by law. Where the facts upon which a hypothetical question is based are subject to conflicting evidence, the answer to such a question is not rendered speculative or otherwise inadmissible if the question fairly incorporates the facts supported by evidence under the examiner's theory. *Potter v. Van Waters,* 19 Wn. App. 746, 754, 578 P. 2d 859 (1978).

The facts contained in these records, files and reports support the Volk's theory that Ashby's negligence was a proximate cause of both the incident, and a loss of chance of a better outcome of survival for Volk. Under the authority of *Potter,* Dr. Knoll's opinion is not speculative or otherwise inadmissible.

Moreover, Dr. Knoll's testimony that had Mr. DeMeerleer been properly treated and assessed for risk of harm to himself or others, it may have led to establishing actual risk to Ms. Schiering and her family. It is then that the duty to warn may have, hypothetically, come into play. If this had occurred, options available to Ms. Schiering and her children, had they known they were at risk, to: (1) make reasonable efforts to avoid contact with DeMeerleer; (2) seek protection from him; and/or (3) make themselves unavailable to access by DeMeerleer, are not speculative or hypothetical. (CP 55, paragraph 10). These options simply represent logical alternatives which could have been employed, are supported by the evidence, and are presented under the Volk's loss of chance theory of the case. Again, under the authority of *Potter,* Dr. Knoll's opinion is not speculative or otherwise inadmissible.

Finally, Dr. Ashby takes issue with that part of the underlying opinion wherein Division III wrote:

> "But the law likely recognizes two levels of speculation, one for purposes of summary judgment, and one for purposes of finding facts after an evidentiary hearing or trial. We do not consider

> Dr. Knoll's testimony speculative for purposes of defending a summary judgment motion. Dr. Knoll relied on facts found in the chart notes of Dr. Ashby. He gives a reasoned explanation for his conclusions. He bases his opinions on a reasonable probability."

Volk v. DeMeerleer, 184 Wn. App. at 432.

Volk respectfully contends the court was observing that Dr. Ashby's argument goes to the weight, not the admissibility, of Dr. Knoll's testimony:

> "Dr. Howard Ashby contends that the Schierings offered a declaration from an expert witness containing generalities, factually unsupported conclusions, and speculation, advocating for a boundless and expansive duty to warn. If we were the trier of fact, we might agree with Dr. Ashby, but our role is not to weigh the credibility of the witness or the validity of expert opinions. Courts do not weigh the evidence or access witness credibility on a motion for summary judgment."

Volk v. DeMeerleer, 184 Wn. App. at 430.

Clearly, Dr. Knoll's competent testimony is that breaches of the standard of care, individually and cumulatively, were causal of the incident, and also causal of a loss of chance of a better outcome, including survival, with respect to Rebecca Schiering, and Philip Schiering (both deceased). In testifying about loss of chance, Dr. Knoll is, indeed, testifying about the hypothetical future which was precluded by the incident. Contrary to respondents' allegations, however, Dr. Knoll carefully testifies as to supporting facts, with the foundation of his knowledge and experience. Respondents' arguments about lack of science or data are hollow, as they are

merely improper factual allegations of attorneys for respondents, not factual testimony of an expert, in opposition to Dr. Knoll's testimony.

C. <u>RCW 71.05.120 is fully inapplicable to this action</u>.

The immunity afforded by RCW 71.05.120 is not applicable to this case. *Volk v. DeMeerleer*, 184 Wn. App. 389, 426, 337 P.3d 372 (2014). In 1987 the Washington Legislature narrowed the duty created by *Peterson v. State*. It enacted new legislation providing limited immunity to mental health care professionals with respect to the involuntary commitment process. *Volk*, 184 Wn. App. at 422. RCW 71.05.120 reads in pertinent part:

> "(1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any county designated mental health professional, nor the State, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable ***for performing duties pursuant to this chapter*** with regard to the decision of whether to admit, discharge, release, administer anti-psychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.
>
> (2) This section does not relieve any person from giving their required notices under RCW 71.05.330(2) or 71.05.340(1)(b), or the duty to warn or to take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims. The duty to warn or to take reasonable precautions to provide protection from violent behavior is discharged if reasonable

> efforts are made to communicate the threat to the victim or victims or to law enforcement personnel."
>
> RCW 71.05.120(emphasis added).

The statute applies only to involuntary mental health care treatment and voluntary in-patient mental health care treatment. *Poletti v. Overlake Hospital Medical Ctr.*, 175 Wn. App. 828, 832, 303 P.3d 1079 (2013). Dr. Ashby's treatment of DeMeerleer was not involuntary nor was DeMeerleer an in-patient voluntarily seeking treatment. Therefore, the act is not applicable and Ashby is not entitled to the immunity set forth in RCW 71.05.120. The court of appeals correctly concluded that RCW 71.05.120 does not apply in this case.

To the extent Dr. Ashby contends the victims were not foreseeable, the Court of Appeals rightly observed:

> "Imposing a duty on Dr. Ashby, in the setting of our case, entails addressing whether the Schiering family was a foreseeable victim. The family was more foreseeable as a victim than Cynthia Peterson in *Peterson v. State*, since Larry Knox, the criminal actor in *Peterson*, had no prior connection to Cynthia Peterson. Jan DeMeerleer had a prior connection to Rebecca Schiering and her three sons. DeMeerleer had already slugged one son. According to the evidence before the court on summary judgment, Dr. Ashby knew that Jan DeMeerleer had already threatened to use violence against his former wife and her boyfriend. Dr. Ashby knew DeMeerleer suffered from distress and depression resulting from the breakup with Rebecca Schiering.
>
> *Peterson v. State* also answers the dissent's position that no liability should attach to Dr. Ashby because there were no threats

> uttered about the Schierings. Cynthia Peterson was not the subject of prior threats."
>
> *Volk v.* DeMeerleer, 184 Wn. App. 389, 432, 337 P.3d 372 (2014).

For the reasons demonstrated above, Dr. Knoll's declaration presents triable issues of fact precluding summary judgment. The court of appeals correctly reversed the trial court's summary judgment with respect to the traditional malpractice case. However, the court of appeals did err as to dismissal of Volk's loss of chance action. Accordingly, this Court is requested to grant Volk's petition for review.

D. Volk is not advocating for substantial factor causation.

> "We hold that *Herskovits* applies to lost chance claims ... We also formally adopt the reasoning of the *Herskovits* plurality. Under this formulation, a plaintiff bears the burden to prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome. This reasoning of the *Herskovits* plurality has largely withstood many of the concerns about the doctrine, particularly because it does not prescribe the specific manner of proving causation in lost chance cases. Rather, it relies on established tort theories of causation, without applying a particular causation test to all lost chance cases. Instead, the loss of chance is the compensable injury."
>
> *Mohr v. Grantham,* 172 Wn.2d 844, 857, 262 P.34d 490 (2011).

In the present case, as discussed in Section "B(2)(b) above, Dr. Knoll's declaration is *prima facie* evidence of Dr. Ashby's breach of duty proximately causing Volk's loss of chance of a better outcome. The Court of Appeals incorrectly read *Herskovits* and *Mohr* to require Dr. Knoll opine with

respect to a percentage or range of percentage of the loss of chance. *Herskovits* and *Mohr* do not require such evidence. Therefore, this court is requested to accept Volk's Petition for Review.

III. CONCLUSION

Dr. Knoll's testimony is competent and admissible expert testimony that, without undue speculation, establishes both proximate cause of the incident and a loss of chance for a better outcome/survival. The Court of Appeals incorrectly read *Herskovits* and *Mohr* to require Dr. Knoll opine with respect to a percentage or range of percentage of the loss of chance. *Herskovits* and *Mohr* do not require such evidence. Dr. Knoll's declaration presents admissible evidence of Dr. Ashby's breach of the standard of care proximately causing Volk a loss of chance for a better outcome. Therefore, Volk respectfully requests the court grant the Petition for Discretionary Review.

RESPECTFULLY SUBMITTED this 27th day of April, 2015.

MICHAEL J RICCELLI PS

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2015, I caused a true and correct copy of the Reply to Respondent Ashby's Response to Appellants' Petition for Review to be served on the following in the manner indicated below:

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