No. 91387-1

THE SUPREME COURT OF THE

STATE OF WASHINGTON

SPOKANE PSYCHIATRIC CLINIC, P.S., a Washington business entity,

Appellant,

v.

BEVERLY R. VOLK as Guardian for Jack Alan Schiering, a minor; and as Personal Representative of the Estates of Philip Lee Schiering and Rebecca Leigh Schiering, and on behalf of the statutory beneficiaries of Philip Lee Schiering; and BRIAN WINKLER, individually,

Respondents.

RESPONDENT SPOKANE PSYCHIATRIC CLINIC, P.S.'s RESPONSE TO VOLK'S PETITION FOR REVIEW

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I. ASSIGNMENTS OF ERROR

No. 1: Volk and Winkler assert that the trial court erred in entering summary judgment in favor of SPC and Ashby on the claim of "loss of a chance" and in requiring Volk and Winkler to present expert testimony regarding the percentage or range of percentage reduction in Volk and Winkler's loss of a chance claim.

II. STATEMENT OF THE CASE

For purposes of this Respondent's Brief, Volk and Winkler and all other appellants shall be referred to hereinafter as ("Volk"). On October 25, 2010, Volk filed an action against the Estate of Jan DeMeerleer, hereinafter ("DeMeerleer"). CP 1-13. On January, 19, 2011, Brian P. Winkler, hereinafter ("Winkler") filed an action against DeMeerleer. CP 14-26. On May 22, 2012, after consolidating the above cases, Volk and Winkler amended the complaint to sue Howard and Jane Doe Ashby, hereinafter ("Ashby") and Spokane Psychiatric Clinic, P.S., hereinafter ("SPC").[1] CP 27-43. This amended complaint states several causes of action against Ashby and SPC, including a claim for loss of a chance. *Id.* After conducting discovery, Ashby and SPC filed motions for summary judgment. CP 44-69.

[1] SPC concedes that if Dr. Ashby is liable in regards to the loss of a chance claim, SPC is vicariously liable for Dr. Ashby's conduct. However, SPC asserts that Dr. Ashby is not, and cannot, be liable under the loss of a chance doctrine to non-patients.

In response to SPC's motion for summary judgment, Volk offered a single declaration from Dr. Knoll, a psychiatrist. CP 82-92. Dr. Knoll's declaration fails to address any percentage or range of percentages as required by the loss of a chance doctrine asserted by Volk. CP 82-92.

Dr. Ashby began treating Jan DeMeerleer in September 2001. CP 281. Jan DeMeerleer was diagnosed previously with bipolar disorder. CP 84, 153-154. Dr. Ashby treated Jan DeMeerleer for over nine years. CP 281. In the early years of treatment, Dr. Ashby saw Jan DeMeerleer monthly or more often if required. CP154. During those nine years plus, Jan DeMeerleer stated on a few occasions that he had suicidal ideation and he expressed homicidal ideation rarely and only much earlier in Dr. Ashby's treatment cycle. Jan DeMeerleer never acted upon any of these thoughts or ideations until the tragic circumstances identified in Volk's complaint. CP 234-241.

On April 16, 2010, Dr. Ashby visit did not find Jan DeMeerleer in "obvious distress" as asserted by Volk and Jan DeMeerleer had not "presented with suicidal thoughts." CP 234. Jan DeMeerleer expressed that when his suicidal ideation happened in the past, this bothered him but he would not and did not act on it. *Id.* The actual treatment note reads:

> April 16, 2010 Dr. Ashby Jan DeMeerleer TT-25
> Jan indicates that his life is stable, he is reconstituting gradually with his fiancé. They are taking marriage classes, he can still cycle

> many weeks at a time. Right now he is in an expansive, hypomanic mood, but sleep is preserved. He has a bit more energy and on mental status, this shows through as he is a bit loquacious but logical, goal oriented and insight and judgment are intact. He states when depressed he can get intrusive suicidal ideation, not that he would act on it but it bothers him. At this point, it's not a real clinical problem but we will keep an eye on it.
>
> Plan: We will continue Risperdal, Depakote and Bupropion.

CP 234.

III. SUMMARY OF THE ARGUMENT

SPC believes that the Court of Appeals properly granted summary judgment on the loss of a chance doctrine for a number of reasons: (1) Neither Volk, Winkler or Schiering were patients of Dr. Ashby or SPC and every Washington reported decision discussing a claim for loss of a chance requires such a relationship; and, (2) Dr. Knoll failed to express the necessary medical opinion stating a percentage or range of percentages as required by the loss of chance doctrine and Washington case law.

IV. ARGUMENT

A. The standard of review is de novo for summary judgment.

In *Hanson Indus., Inc. v. Kutschkau,* 158 Wn. App. 278, 239 P.3d 367; *rev. den.* 171 Wn.2d 1011, 249 P.3d 1028 (2011), the Court stated:

> An order of summary judgment is reviewed de novo. This court engages in the same inquiry as the trial court and views the facts in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is proper if there is no genuine issue of material fact and

> the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). Questions of law and questions of statutory interpretation are reviewed de novo. *Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't*, 139 Wn.2d 546, 551-52, 988 P.2d 961 (1999).

B. Standards and Requirements for Summary Judgment.

The purpose of a motion for summary judgment is to examine the sufficiency of the evidence underlying a plaintiff's formal allegations to avoid unnecessary trials when no genuine issue of material fact exists. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Civil Rule 56(c) provides that a judgment "shall be rendered forthwith" if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

It is well settled under Washington law that defendants may test the plaintiff's potential proof by moving for summary judgment "on the ground the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice." *Id.* Once a party seeking summary judgment has made an initial showing of the absence of any genuine issues of material facts and the propriety of summary judgment under applicable law applied to those facts, the non-moving party has the burden to demonstrate the existence of unresolved factual issues. *Ruffer v. St. Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990), *rev. den.*,

114 Wn.2d 1023 (1990). Established case law clearly places the burden on the non-moving party to submit affidavits affirmatively presenting the factual evidence relied upon. *Ruffer*, 56 Wn. App. at 634.

C. The Prima Facie case against SPC for "Loss of a Chance" includes the following elements.

An independent professional negligence claim against a psychiatric clinic resulting from health care is controlled by RCW 7.70, *et seq.* and RCW 4.24.290. Specifically, RCW 7.70.030(1) provides that, in a claim of healthcare negligence, a plaintiff must prove, by a preponderance of evidence "[t]hat injury resulted from the failure of a health care provider to follow the accepted standard of care."

RCW 7.70.040 sets forth the necessary elements of proof for such a claim:

> (1) The health care provider failed to exercise that degree of care, skill and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

In addition to those elements identified by statute, the loss of a chance doctrine, adopted by Washington case law, requires the existence of a patient-health care provider relationship. The reported Washington cases all dealt with situations where a health care provider's error in

treatment or diagnosis or his or her failure to treat or diagnose a patient's condition resulted in a substantiated, defined loss of a chance of a patient (or the patient's estate) opportunity for a better outcome or a chance at an extension of life. *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983); *Zueger v. Public Hospital District No. 2 of Snohomish County*, 57 Wn.App. 484, 789 P.2d 326 (1990); *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011); *Schellenbarger v. Brigman*, 101 Wn.App. 339, 3 P.3d 211 (2000); *Estate of Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn.App. 828, 313 P.3d 431 (2013); *Rash v. Providence Health Services*, 183 Wn.App. 612, 334 P.3d 1134 (2014).[2]

In *Rash*, supra at p. 630-31, the Court explained the loss chance doctrine as follows:

> Lost chance claims can be divided into two categories: lost chance of survival and lost chance of a better outcome. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash.2d 609, 664 P.2d 474 (1983); *Mohr*, 172 Wash.2d 844, 262 P.3d 490 (2011). In a lost chance of survival claim, the patient died from a preexisting condition and would likely have died from the condition, even without the negligence of the health care provider. Nevertheless, the negligence reduced the patient's chances of surviving the condition. *Herskovits*, 99 Wash.2d 609, 664 P.2d 474. The quintessential example of a lost chance of survival claim is a preexisting cancer that a physician untimely diagnosed. We distinguish between a lost chance of survival theory and a

[2] In fact, my research has failed to find a single case in any jurisdiction where a court extended the loss of a chance theory to a plaintiff who was not the patient of the health care provider being sued.

> traditional medical malpractice theory. In the latter, but for the negligence of the health care provider, the patient would likely have survived the preexisting condition. In other words, the patient had a more than 50 percent chance of survival if the condition had been timely detected and properly treated. In a lost chance claim, the patient would likely have died anyway even upon prompt detection and treatment of the disease, but the chance of survival was reduced by a percentage of 50 percent or below.
>
> In a lost chance of a better outcome claim, the mortality of the patient is not at issue, but the chance of a better outcome or recovery was reduced by professional negligence. *Mohr,* 172 Wash.2d at 857, 262 P.3d 490. In a traditional medical malpractice case, the negligence likely led to a worse than expected outcome. Under a lost chance of a better outcome theory, the bad result was likely even without the health care provider's negligence. But the malpractice reduced the chances of a better outcome by a percentage of 50 percent or below.

1. Appellants were not patients of SPC or Dr. Ashby.

Volk asserts that Dr. Ashby's alleged negligence resulted in a "loss of a chance" for a better outcome, either for Ms. Schiering or her sons. Volk attempts to extend the loss of chance doctrine well beyond the policy considerations that the Supreme Court initially considered and adopted in the *Herskovits* plurality opinion. Neither Dr. Ashby nor SPC treated Ms. Schiering or her children. Since the appellants were not patients, the loss of a chance doctrine has no application here. In *Herskovits*, this Court relied upon *Restatement 2nd of Torts § 323* (1965), which reads:

> **One who undertakes . . . to render services to another** which he should recognize as necessary for the protection of the other's

person or things, **is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking,** if

(a) His failure to exercise such care increases the risk of such harm, or

(b) The harm is suffered because of the other's reliance upon the undertaking.

(Emphasis added.)

This Restatement section establishes the loss of a chance doctrine based upon the Restatement's clear understanding that the doctrine arises within the relationship of one who renders service (a health care provider) and the person to whom the services are rendered (a patient). Volk's attempt to extend the duty to third parties ignores the clear and stated necessity of a direct relationship between the health care provider and his or her patient.

The rationale for this Court's adoption of the loss of chance doctrine was to allow a patient a "relaxed standard" for proving causation in a medical malpractice case. The application of a "relaxed standard" has no application in the type of claim presented here by Volk. There is no Washington case authority that allows a non-patient to take advantage of this lesser degree of proof. The loss of chance doctrine was not intended to replace required causation proof in a case such as the one asserted by Volk here.

This Court relied upon and cited a Pennsylvania case, *Hamil v. Bashline,* 481 Pa. 256, 392 A.2d 1280 (1978). The Supreme Court stated at p. 615:

> The [Hamil] court then cited *Restatement 2nd of Torts § 323* (1965) as authority to relax the degree of certitude normally required of plaintiff's evidence in order to make a case for the jury. The court held that once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, "it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm". *Hamil, at 269. See also* C. McCormick, *Damages* § 31 (1935); Wolfstone & Wolfstone, *supra* at 744.

The Supreme Court's decision established that a jury could utilize a lesser degree of certainty based upon expert testimony as to the percentage of loss chance in order to establish proximate causation as it related to any injury or death of a patient from a health care provider's negligence. The Court's holding did not extend to third party claims where no patient/health care provider relationship exists.[3] *See also*: *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011).

Volk's attempt to invoke the "loss of a chance doctrine" is misplaced and completely misconstrues the rational for the doctrine as

[3] SPC does not suggest that Mr. DeMeerleer's estate, his testator, executor or the like could not bring such a claim on behalf of Mr. DeMeerleer's estate but that is not the situation presented here.

first set forth by the Washington Supreme Court in its plurality decision in *Herskovits* and, subsequently, in *Herskovits'* progeny.

2. Dr. Knoll's declaration fails to provide an opinion regarding the percentage loss of chance or a range of loss of a chance as required in the plurality opinion in *Herskovits*.

The court in *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983), stated the law with regard to this requirement:

> In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a lay person. Medical facts in particular must be proven by expert testimony unless they are 'observable by [a layperson's] senses and describable without medical training'. Thus, expert testimony will generally be necessary to establish the standard of care, and most aspects of causation. (Internal citations omitted).

In *Hertog v. The City of Seattle*, 138 Wn.2d 265, 283-84, 979 P.2d 400 (1999), the Court analyzed legal causation and stated:

> Legal causation "rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." *Taggart* [*v. State*], 118 Wn.2d [195, 822 P.2d 243 (1992)] at 226; *Hartley* [*v. State*], 103 Wn.2d [768, 698 P.2d 77 (1985)] at 779. Legal causation is intertwined with the question of duty. *Taggart*, 118 Wn.2d at 226; PROSSER, HANDBOOK OF THE LAW OF TORTS 244-45 (4th ed. 1971)). While the same policy considerations may be relevant to both elements, existence of a duty does not automatically satisfy the requirement of legal causation, however. *Schooley* [*v. Pinch's Deli Market, Inc.*], 134 Wn.2d [468, 951 Wn.2d 749 (1998)] at 479.

The undersigned determined that every Washington decision that permits recovery under the loss of a chance doctrine requires testimony

from an expert health care provider that includes an opinion as to the percentage or range of percentage reduction in the chance of survival. *Herskovits, supra* at p. 611 (14 percent reduction in chance of survival); *Mohr, supra* at 849 (50 to 60 percent chance of loss of better outcome); *Shellenbarger, supra* at p. 348 (20 percent chance that the disease's progress would have been slowed). The percentage allows the court to determine the amount of damages to award a plaintiff, since the award is based on the percentage of loss. *See Smith v. Dep't of Health & Hospitals,* 95–0038 (La.6/25/96); 676 So.2d 543, 548. The percentage is also necessary so that the court or jury can discount the damages by the stated percentage in order to avoid a windfall to the plaintiff. *Mohr, supra* at p. 858; *Matsuyama v. Birnbaum,* 452 Mass. 1,17, 890 N.E.2d 819 (2008). Otherwise, the defendant is held responsible for harm beyond that which it caused. One of the leading authors on the subject of the loss of a chance doctrine states:

> Despite the sound conceptual underpinnings of the doctrine, its successful application depends on the quality of the appraisal of the decreased likelihood of a more favorable outcome by the defendant's tortious conduct.

Joseph H. King, Jr., "*Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine,* 28 U. Mem. L.Rev. 491, 546–47 (1998). Here, Dr. Knoll's "opinion" as stated in his declaration

and relied upon Volk for their loss of chance claim is as follows:

> 13. 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 of loss of life, and other physical and psychological injuries.
>
> 14. 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 at 89–91.

Dr. Knoll's declaration fails to state the percentages or range of percentages necessary to inform the judge or jury as specifically mandated by this Court. This Court stated in *Herskovits, supra* at p. 618:

> 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* [C. McCormick, *Damages* § 31 (1935)].

Volk's expert failed to provide admissible opinion testimony sufficient to establish the necessary certainty to avoid summary judgment in this matter. The Court of Appeals correctly rejected Dr. Knoll's testimony as inadequate and this Court should affirm the Court of Appeals decision on loss of a chance.

V. CONCLUSION

Volk has failed to establish a rational basis for overturning the trial court's decision to grant summary judgment in favor of Respondent SPC. Volk's attempt to extend the "loss of chance" doctrine to include non-patients runs afoul of *Herskovits, Mohr* and additional Washington authorities and it is not supported by the *Restatement* position upon which the doctrine was established.

Volk failed to present admissible expert testimony establishing a percentage or range of percentages associated with the alleged loss of a chance as required by Washington case law.

DATED this 28th day of April, 2015.

RANDALL | DANSKIN, P.S.

By: 

David Kulisch, WSBA # 18313
Attorneys for Respondent
Spokane Psychiatric Clinic, P.S.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the **RESPONDENT SPOKANE PSYCHIATRIC CLINIC, P.S.'s RESPONSE TO VOLK'S PETITION FOR REVIEW** on the 28th day of April, 2015, addressed to the following:

Attorneys for Plaintiffs: Michael J. Riccelli, P.S. Attorney at Law 400 S. Jefferson St., Suite 112 Spokane, WA 99204-3144	_____Hand Delivered __X_ U.S. Mail _____Overnight Mail _____Fax Transmission
Ian Ledlin Phillabaum, Ledlin, Matthews, Sheldon & Kime 1235 N. Post Street Spokane, WA 99201-0413	_____Hand Delivered __X_ U.S. Mail _____Overnight Mail _____Fax Transmission
James McPhee Workland & Witherspoon 601 W. Main Street Suite 714 Spokane, WA 99201	_____Hand Delivered __X_U.S. Mail _____Overnight Mail _____Fax Transmission
Robert Sestero Michael McFarland Patrick Risken Evans, Craven & Lackie, P.S. 818 W. Riverside Avenue Suite 250 Spokane, WA 99201-0910	_____Hand Delivered __X_U.S. Mail _____Overnight Mail _____Fax Transmission

David A. Kulisch

User\31676\4-28-15

OFFICE RECEPTIONIST, CLERK

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Cc: David Kulisch
Subject: RE: E-filing for: Supreme Court Case No. 91387-1

Received 4-28-2015

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Janet Pryor [mailto:jlp@randalldanskin.com]
Sent: Tuesday, April 28, 2015 2:18 PM
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4-28-15
Case Name: Spokane Psychiatric Clinic, P.S., vs. Beverly R. Volk, et al.;

Case Number: Supreme Court Case No. 91387-1;

Party Filing: Respondent Spokane Psychiatric Clinic, P.S.;

Party's counsel: David A. Kulisch (WSBA #18313);

Attached is one pleading to be filed:

1) Respondent Spokane Psychiatric Clinic, P.S.'s Response To Volk's Petition For Review.

Please confirm receipt. Thank you.
Sincerely,
Janet Pryor
Legal Assistant to David A. Kulisch

R|D
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