NO. 94647-7

SUPREME COURT OF THE STATE OF WASHINGTON

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AMANDA PITTS (nee/aka AMANDA COMPTON, nee/aka AMANDA CRUTCHFIELD) and PAUL PITTS, individually; and AMANDA PITTS as Personal Representative of the ESTATE OF TAYLOR PITTS, and on behalf of all statutory claimants and beneficiaries,

v.

Petitioners,

INLAND IMAGING, L.L.C., a Washington business entity and healthcare provider, INLAND IMAGING ASSOCIATES, P.S., a Washington business entity,

Respondents.

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# ANSWER TO PETITION FOR REVIEW

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## I. IDENTITY OF RESPONDING PARTY

Respondents Inland Imaging, L.L.C., and Inland Imaging Associates, P.S. (collectively "Inland Imaging") submit this Answer to Amanda and Paul Pitts' Petition for Review.

## II. COURT OF APPEALS DECISION

On May 4, 2017, Division III filed its unpublished opinion, affirming the trial court's summary judgment dismissal of the Pitts' loss of chance claim and judgment on the jury's verdict in favor of Inland Imaging on the Pitts' medical negligence claim. In affirming the summary judgment dismissal of the loss of chance claim, Division III concluded that the claim failed for two reasons: (1) consistent with this Court's decision in *Volk v. DeMeerleer*, 187 Wn.2d 241, 279, 386 P.3d 254 (2016), the loss of chance doctrine is inapplicable in cases like this one where the plaintiff alleges that the defendant's negligence actually caused the unfavorable outcome – loss of the entire chance of survival; and (2) consistent with cases such as *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 313 P.3d 431 (2013), a lost chance claim only applies when, absent any negligence, the decedent had no more than a 50 percent chance of survival, not in cases like this one where plaintiff's evidence showed a 90 percent chance of survival absent any negligence.

## III. ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude that the summary judgment dismissal of the Pitts' loss of chance claim should be affirmed because (1) the loss of chance doctrine is inapplicable in cases like this one where the plaintiff alleges that the defendant's negligence actually caused the unfavorable outcome – loss of the entire chance of survival and/or (2) a loss of chance claim only applies when, absent any negligence, the plaintiff had no more than a 50 percent chance of survival, not in cases like this one where plaintiff's evidence showed a 90 percent chance of survival absent negligence?

## IV. STATEMENT OF THE CASE

In this medical malpractice/wrongful death action, the Pitts sued Inland Imaging, claiming that Inland Imaging radiologists interpreting Mrs. Pitts' ultrasound scans failed to properly diagnose and inform her obstetrician that Mrs. Pitts' twin pregnancy was a monochorionic diamniotic one and thereby proximately caused the death of one of the twin fetuses, Taylor Pitts. *See* CP 6-8, 584-85; RP, Filed 10/28/14, Hearing 2/6/14, 87-88, 90-95, 101-02; RP, Filed 10/22/14, Hearing 2/10/14, 257-58, 274; RP, Filed 10/22/14, Hearing 2/11/14, 476-77. Inland Imaging contended that its radiologists reasonably interpreted the ultrasound scans as showing a dichorionic diamniotic twin pregnancy, and that no one could have pre-

dicted based on the scans that the babies' umbilical cords would become entangled and cause Taylor's death. *See* RP, Filed 10/28/14, Hearing 2/18/14, 314-18, 328, 333, 340-42, 374-75, 389-91; RP Filed 10/28/14, Hearing 2/19/14, 480-81, 483-91. The jury found no negligence, CP 1593-94, and judgment was entered on that verdict, CP 1595-97.

Before trial, Inland Imaging moved for partial summary judgment to dismiss any claim for recovery based on loss of chance. CP 133. The trial court considered the expert testimony the Pitts proffered in opposition to the motion that the "twins would have a 90% chance of survival if Dr. Hardy [Mrs. Pitts' obstetrician] … had been properly advised of the twins' circumstances." CP 285-87, 584-85. In her letter ruling granting the partial summary judgment, the trial court stated: "As this percentage exceeds 50%, it does not support giving the lost chance of survival instruction to a jury." CP 584-85.

The Pitts now seek review of that portion of the Court of Appeals' decision affirming the trial court's dismissal of their loss of chance claim.

## V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Under RAP 13.4(b), this Court will accept a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In their Petition, the Pitts seek review only under RAP 13.4(b)(1) and (4). Because the Court of Appeals' decision is not in conflict with any decision of this Court and does not involve an issue of substantial public interest that should be determined by this Court, the Pitts' Petition should be denied.

A. The Court of Appeals' Decision Is Not in Conflict With Any Decision of This Court, but Rather is Consistent with This Court's and the Court of Appeals' "Loss of Chance" Decisions.

The Pitts contend, *Pet. at 13-15, 17*, that the Court of Appeals' decision in this case conflicts with this Court's decisions in *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983) and *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011), which they claim allow for a loss of chance claim where the chance of survival or a better outcome exceeds 50 percent. But neither *Herskovits* nor *Mohr* so holds. Contrary to the Pitts' contentions, both this Court and the Court of Appeals have consistently recognized that the loss of chance doctrine only applies in cases where, even if the defendant had provided non-negligent care, the patient's chance of survival or better outcome was no better than 50 percent. *E.g.*, *Herskovits*, 99 Wn.2d at 633-35 (Pearson, J., concurring);

*accord Mohr*, 172 Wn.2d at 857 (adopting Justice Pearson's plurality opinion in *Herskovits*); *Dormaier*, 177 Wn. App. at 849-51; *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 630-31, 334 P.3d 1154 (2014), *rev. denied*, 182 Wn.2d 1028 (2015).

Indeed, it was only because the patient had less than a 50 percent chance of surviving his lung cancer prior to the allegedly negligent failure to diagnose the cancer that the plurality in *Herskovits* found it necessary to "recognize the ***loss of a less than even chance*** as an actionable injury." *Herskovits*, 99 Wn.2d at 634 (emphasis supplied). As the *Herskovits* plurality noted in reviewing cases from other jurisdictions, the "cases 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" under traditional tort principles. *Herskovits*, 99 Wn.2d at 631. The problem confronting the *Herskovits* court was what to do in cases where the defendant's negligence allegedly decreased a patient's chance of survival, but that chance of survival was no better than 50 percent to begin with.

Because the only expert testimony the Pitts presented concerning Taylor's chance of survival was that she had at least a 90 percent chance of survival with non-negligent diagnosis and treatment, and therefore would more likely than not have survived but for the Inland Imaging radiologists'

alleged negligence, the Pitts presented a traditional theory of medical malpractice and the Court of Appeals correctly affirmed the summary judgment dismissal of their loss of chance claim.

In a lost chance of survival or lost chance of better outcome claim, where the plaintiff proves that the defendant's negligence proximately caused a reduction or loss of a less-than-even (or not-better-than-even) chance of survival or of a better outcome, that reduction or loss is the injury, and "the defendant is liable, not for all damages arising from the death" or the worse-than-expected outcome, "but only for damages to the extent of the diminished or lost chance." *Herskovits*, 99 Wn.2d at 632 (Pearson, J., concurring in plurality opinion); *Mohr*, 172 Wn.2d at 857; *Rash*, 183 Wn. App. at 630-31. "[B]ut where the defendant's negligence reduced the decedent's chance of survival by greater than 50 percent, as a matter of law, the death remains the injury and the plaintiff receives all-or-nothing recovery under traditional tort principles." *Dormaier*, 177 Wn. App. at 851, 869 ("the lost chance doctrine is alternative to and provides different relief from traditional tort principles").

As the court in *Rash*, 183 Wn. App. at 630-31, explained:

> 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 Wn. 2d

> 609. … We distinguish between a lost chance of survival theory and a 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.

Similarly, in a loss of chance of a better outcome claim, "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." *Id*. at 631.

And, as the Court of Appeals explained in *Dormaier*, 177 Wn. App. at 851: "[A] plaintiff may not argue the lost chance doctrine where the defendant's negligence reduced the decedent's chance of survival by greater than 50 percent." If, however, a plaintiff presents expert testimony establishing that a defendant's negligence reduced the chance of survival or a better outcome by a range of percentages that includes 50 percent or less and greater than 50 percent, the plaintiff may present in the alternative both a lost chance of survival and a traditional wrongful death claim to the jury. *Id*. at 853.

The Pitts argue, *Pet. at 17*, that the Court of Appeals' opinion in *Dormaier*, like the Court of Appeals' decision in this case, conflicts with

*Herskovits* and *Mohr* by holding that loss of chance theory does not apply to cases where the expert testimony establishes that the chance of survival or a better outcome exceeded 50 percent. Contrary to the Pitts' assertion, *Dormaier* accurately described the *Herskovits* plurality's choice to limit "the lost chance doctrine to cases where the defendant's negligence reduced the decedent's chance of survival by less than or equal to 50 percent." *Dormaier*, 177 Wn. App. at 848 (citing *Herskovits*, 99 Wn.2d at 622-24, 633-34). The *Dormaier* court also specifically recognized that this Court in *Mohr* reversed a summary judgment dismissal of a lost chance claim where expert testimony showed that the patient would have had a 50 to 60 percent chance of a better outcome with non-negligent care. 177 Wn. App. at 845 (citing *Mohr*, 172 Wn.2d at 849, 859-60). The *Dormaier* court observed that "[c]ontext indicates that the court did not expand the lost chance doctrine to losses greater than 50 percent." *Id*. at 849. Instead, because the range included 50 percent, the testimony constituted *prima facie* evidence under the lost chance doctrine. *Id*. at 849-50.

Finally, the Pitts contend that the Court of Appeals misapplied this Court's holding in *Volk*, *Pet. at 16-17*, and that *Volk* "is fully off point" because the Pitts claimed a loss of a 90 percent chance of survival "in the alternative to 100% loss of chance/full liability," *Pet. at 18*, The Pitts' contentions are incorrect.

This Court, citing *Mohr*, the plurality in *Herskovits*, and *Rash*, acknowledged in *Volk*, 187 Wn.2d at 278-79, that "the loss of chance can be a compensable injury in a medical malpractice action." But, if a plaintiff alleges that an "entire chance for survival" was lost, "the tortfeasors would then be responsible for the actual outcome, not for the lost chance," and "the loss of a chance doctrine is inapplicable." *Id*. at 279. In other words, because the plaintiff in *Volk* alleged that the death would not have occurred but for the negligence of the health care provider, her claim was indistinguishable from a traditional medical negligence claim and could not properly rely on the lost chance theory. *Id.*; *Rash*, 183 Wn. App. at 630-31.

The Court of Appeals properly followed *Volk* in this case because, like the plaintiff in *Volk*, the Pitts did not allege that negligence caused a loss or reduction of a less-than-even (or no-better-than-even) chance of survival. Instead, the Pitts presented expert testimony that, but for Inland Imaging's alleged negligence, Taylor had a 90 percent chance of survival. Thus, they claimed that Inland Imaging's alleged negligence caused the loss of the entire 90 percent chance – that more likely that not Taylor would have survived the existing condition but for Inland Imaging's alleged negligence. As explained in *Rash*, that is a traditional medical malpractice claim in which "the patient had a more than 50 percent chance

of survival if the condition had been timely detected and properly treated." *Rash*, 183 Wn. App. at 630.

Like the claim at issue in *Volk*, the Pitts' claim was indistinguishable from a traditional medical malpractice claim because they alleged that Inland Imaging's alleged negligence proximately caused Taylor's loss of her entire 90 percent chance of survival, meaning she more likely than not would have survived in the absence of the alleged negligence. Thus, the loss of chance doctrine did not apply and the Pitts were properly required to prove their case according to traditional medical malpractice principles. *Volk*, 187 Wn.2d at 279; *Rash*, 183 Wn. App. at 630.

Contrary to the Pitts' assertions, the Court of Appeals' decision is not in conflict with this Court's decisions in *Herskovits*, *Mohr*, or *Volk*. Review is therefore not warranted under RAP 13.4(b)(1).

B. The Court of Appeals' Decision Does Not Involve an Issue of Substantial Public Interest that Should Be Determined by This Court.

The Pitts argue, *Pet. at 19*, that the Court of Appeals' construction of the law of loss of chance in this case "underscores the substantial public interest to be served by precise clarification of the law, generally, and with potential plaintiff, defendants, and their attorneys in mind," as to whether the loss of chance theory is available when a plaintiff asserts that a health care provider's negligence caused the patient to lose a greater than 50

percent chance of survival or a better outcome. But, the decisions of this Court and the Court of Appeals have already clarified that the loss of chance doctrine does not apply, rather traditional tort principles apply, to cases where the plaintiff claims that the patient lost a greater than 50 percent chance of surviving or obtaining a better outcome from a preexisting condition as a result of the defendant health care provider's alleged negligence.

The loss of chance doctrine only comes into play in cases where there is expert testimony that the alleged negligence proximately caused the loss or reduction of a less-than-even (or not-better-than-even) chance of surviving or obtaining a better outcome from a preexisting condition that would likely have caused the death or unfavorable outcome regardless of the care provided. *Herskovits*, 99 Wn.2d at 634; *Mohr*, 172 Wn.2d at 857 (adopting reasoning of *Herskovits* plurality); *Rash*, 183 Wn. App. at 630-31; *Dormaier*, 177 Wn. App. at 851; *Volk*, 187 Wn.2d at 278-79. The fact that the Pitts disagree with those decisions does not raise an issue of substantial public interest that should be determined by this Court so as to warrant review under RAP 13.4(b)(4).

## VI. CONCLUSION

Contrary to the Pitts' assertions, the Court of Appeals' decision is not in conflict with any decision of this Court, nor does it involve an issue

of substantial public interest that should be determined by this Court. Because none of the RAP 13.4(b) criteria for discretionary review are present, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 3rd day of July, 2017.

FAIN ANDERSON VANDERHOEF ROSENDAHL
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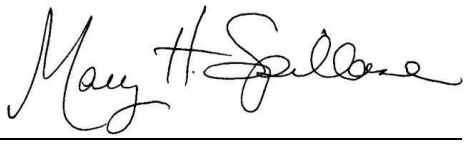
By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 3rd day of July, 2017, I caused a true and correct copy of the foregoing document, "Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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Carrie A. Custer

Carrie A. Custer, Legal Assistant

# FAVROS LAW

## July 03, 2017 - 10:43 AM

## Transmittal Information

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