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COURT OF APPEALS No. III-325121

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

AMANDA PITTS and PAUL PITTS, individually; and AMANDA PITTS as Personal Representative of the ESTATE OF TAYLOR PITTS, et al., *Appellant*,

v.

INLAND IMAGING, et al., *Respondent*.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

I. IDENTITY OF PETITIONER

Petitioners Amanda Pitts and Paul Pitts, individually, and Amanda Pitts as Personal Representative of the Estates of Taylor Pitts (hereinafter "petitioners"), asks this Court to accept review of the Court of Appeal's decisions designated in Part "II" of this petition.

II. COURT OF APPEAL'S DECISION

A copy of the Division III Court of Appeals Published Opinion filed May 4, 2017, is attached in the Appendix at pages A-1.

III. ISSUE PRESENTED FOR REVIEW

1. What is the appropriate standard of review;

2. Does Washington law on loss of chance, of either survival or of a better outcome, recognize the loss of chance itself as the injury, rather than the death or diminished outcome;

3. If issue one above is determined in the affirmative, where the chance of survival or of a better outcome exceeds 50 percent, does loss of chance remain as a viable claim, or is loss of chance discarded and replaced by traditional but for causation of death or of diminished outcome;

4. Does this court's holding in *Volk v. DeMeerler,* 184 Wn. App. 389, 429, 337 P.3d 372 (2014), state that there is no claim for loss of chance where the injury is caused by medical negligence, or does it state that there is

no loss of chance claim where it is claimed that the medical negligence was fully (100 percent) causal of the death or the unfavorable outcome;

5. Whether the Division III Court of Appeals opinion in this matter, below, is in conflict with one or more decisions of the Supreme Court; and,

6. Whether this petition involves an issue of substantial public interest that should be determined by the Supreme Court.

IV. STATEMENT OF THE CASE

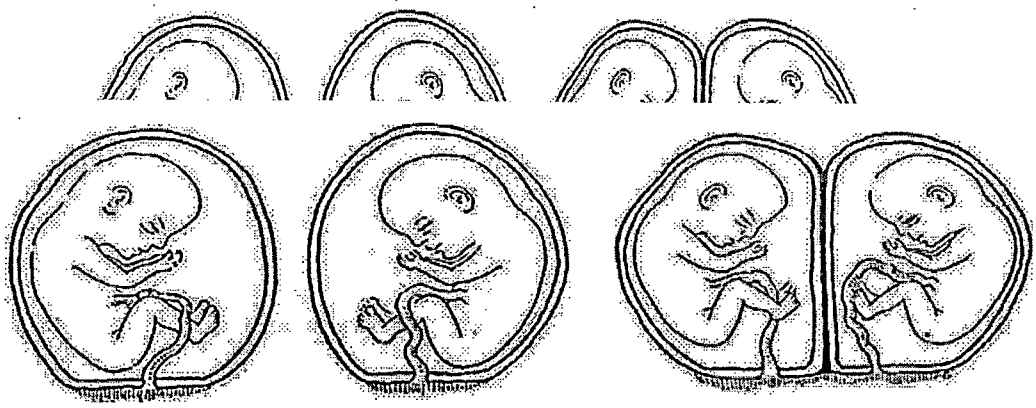
This is a medical malpractice, wrongful death, and loss of chance of survival case. Amanda and Paul Pitts (the Pitts) contend negligence by Inland in misinterpreting and misreporting on ultrasound imaging of the Pitts' twin pregnancy proximately caused the in-utero demise of Taylor Pitts, while her identical twin sister, Samantha, survived. (CP 1-3). Alternatively, the Pitts' claimed the alleged negligence of Inland caused a loss of chance of Taylor's survival. (CP 584-585)

At issue was whether Inland breached the standard of care when it misdiagnosed the chorionicity and amnionicity of the Pitts' twin pregnancy. (CP 5-8). Twins occur when two separate eggs are fertilized, or one fertilized egg splits into two. (RP filed 11/3/14, hearing 2/10/14, p.197-198). A dichorionic/diamniotic twin pregnancy usually occurs from two separately fertilized eggs (dizygotic), resulting in non-identical twins. (CP 280) A

dichorionic/diamniotic twin pregnancy can also occur from early splitting of a single fertilized egg (monozygotic), resulting in identical twins. (CP 280) In a dichorionic pregnancy, each fetus is contained within a separate sac (chorion) and is nourished by a separate placenta. (CP 280) The next higher risk type of twin pregnancy is a monochorionic/ diamniotic twin pregnancy. (CP 281). This is a monozygotic twin pregnancy where a single fertilized egg splits at a later time than one causing a dichorionic identical twin pregnancy. (CP 281) The twin fetuses are contained within one sac separated by a thin membrane dividing the sac into two compartments (amnions). The risk is higher because the twins share a single placenta, and are separated only by a thin amniotic membrane rather than a thicker, multi-layered dichorionic/diamniotic membrane. (CP 281). See trial exhibit P-20 graph on next page.

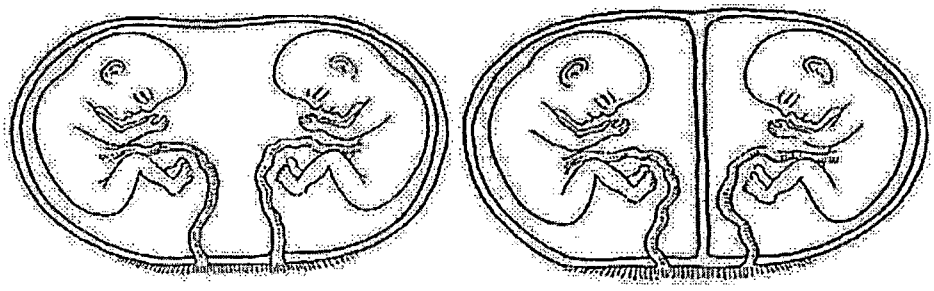
One risk is twin to twin transfusion syndrome, where twin fetuses share a single placenta, and where one twin draws more blood flow than the other. This takes needed blood flow and nutrients away from the other twin. (CP 281) Another risk is unequal physical sharing of the single placenta, and, therefore, the nourishment provided by the placenta. There is also increased risk of "intrauterine growth restriction" (IUGR) where fetal size or growth is restricted due to abnormal placental health. Finally, there is also risk of disruption or tearing of the amniotic membrane between the twins,

effectively causing the monochorionic/diamniotic twin pregnancy to become a monochorionic/monoamniotic twin pregnancy (discussed below). Such risks cause various complications which affect the development of one or both fetuses, and some of which may result in the demise (death) of one or both fetuses, if left untreated or unmanaged. A disruption or tear can result from invasive procedures, such as an amniocentesis procedure, or spontaneously, due to unknown causes. (CP 280-282)



Dichorionic Diamniotic

Dichorionic Diamniotic (Fused)



Monochorionic Diamniotic

Monochorionic Monoamniotic

Trial Exhibit P-20

The Pitts contend Inland breached the standard of care because its radiologists misdiagnosed the Pitts' twin pregnancy as dichorionic/ diamniotic when in fact it was monochorionic/diamniotic according to the post delivery pathology report. (RP filed 11/3/14, hearing 2/10/14, p. 256-261). This is supported by the Pitts' OB/GYN Dr. Hardy, who delivered the Pitts twins, Samantha live, and Taylor stillborn. Dr. Hardy reported Taylor to be covered by a membrane, and apparently succumbing to umbilical cord entanglement with Samantha's cord, indicating that the diamniotic twin pregnancy suffered from a disruption of the amnion, rendering it to functionally become a monochorionic pregnancy. (Trial Exhibit D-104).

Prior to trial, Inland Imaging moved for partial summary judgment to dismiss any loss of chance claim(s). (CP 133) There was sufficient medical testimony to establish up to a 90% chance of Taylor Pitts survival had Inland's alleged negligence not occurred, by correctly identifying the nature of the pregnancy by ultrasound, and reporting same to the attending physician. (CP 584-85)

The trial court held that, per *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 313 P.3d 431 (2013), there can be no loss of chance claim where the chance of survival exceeds 50%, and dismissed the Pitts' loss of chance claim, (CP 584-585).

"Pitts presented the testimony of Dr. Patten on this issue at paragraphs 17

and 19 of his declaration filed December 27, 2013. In paragraph 17 Dr. Patten said if negligence did not occur there was a 90% chance of survival of both twins in the general literature in this area. A reasonable reading of paragraph 19 indicates these twins would have a 90% chance of survival if Dr. Hardy, the treating physician, had been properly advised of the twins' circumstances. As this percentage exceeds 50% it does not support giving the lost chance of survival instruction to a jury. Inland's Motion for Summary Judgment is granted."

(Court's Letter Ruling January 8, 2014, CP 585)

The case was tried in Spokane County Superior Court from February 4, 2014 through February 20, 2014. On February 20, 2014, the jury returned a defense verdict and judgment was entered on March 14, 2014. Pitts' motion for a new trial was denied on April 25, 2014. (CP 1590-1592). This appeal followed.

On Appeal, the Division III Court of Appeals Held:

> **"This court considered the loss of a chance doctrine at some length in *Dormaier*,** a case where an embolism brought about a fatal heart attack during surgery to repair a fractured elbow. 177 Wn. App. at 837-838. There we recognized that loss of a chance is not a separate cause of action within the statutory framework of a medical malpractice wrongful death claim. *Id.* at 855. We also recognized that **lost chance "is fundamentally an alternative manner of proving wrongful** death **causation, available *solely* where the defendant's negligence reduced the decedent's chance of survival by less than or equal to 50 percent."** *Id.* at 854-855 (emphasis added). Put in other terms, ***Dormaier* recognized that a lost chance claim only applies when the plaintiff already has no more than a 50 percent chance of having a successful recovery or survival from the underlying problem. If there is a greater than 50 percent chance, traditional tort causation principles apply and the negligence, if proven, is the cause of injury.** If the chance of a successful outcome

from the medical condition is no better than 50 percent, then the question presented is whether the medical negligence somehow reduced that opportunity even more. In those circumstances, the alternative causation approach is used.

With these principles in mind, it is clear that the lost chance claim in this case fails for two reasons. First, appellants based their lost chance of survival claim on the alleged negligence of Inland. The Washington Supreme Court's decision in *Volk v. Demeerleer*, 187 Wn.2d 241, 279, 386 P.3d 254 (2016), authoritatively rejected that approach. There is no lost chance claim when the injury is caused by medical negligence. In *Volk*, the plaintiff (personal representative of the deceased), as here, argued that professional negligence both (1) caused the loss of plaintiff's life and (2) reduced the chance of plaintiff's survival. Plaintiff contended that the lost chance doctrine applied both to the lost opportunity to survive and as a substitute for actual "but for" causation. *Id.* at 278-279. The court disagreed:

> **This argument fails under either approach because the loss of a chance doctrine is inapplicable if the plaintiff is alleging that the defendant's negligence actually caused the unfavorable outcome—the tortfeasors would then be responsible for the actual outcome, not for the lost chance.** *Id.* at 279.

For that same reason, the Pitts' claim fails here."

Pitts v. Inland Imaging, L.L.C., No. 32512-1-III, 2017 Wash. App. LEXIS 1045, at 8 (Ct. App. May 4, 2017)

V. ARGUMENT

A. The Standard of Review of Summary Judgment is De Novo

In *Hanson Indus., Inc. v. Kutschkau.* 158 *Wn. App.* 278, 239 *P.3d367; 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).

...

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 .2d61 (1999).

B. <u>In Washington, Loss of Chance is an Actionable Claim for Injury, and Separate from a Claim for the Ultimate Physical Harm of Death or Diminished Outcome</u>.

Washington first recognized a claim for loss of a chance in *Herskovits v. Group Health Coop.,* 99 Wn.2d 609, 664 P.2d 474 (1983), where six justices concluded the plaintiff had established a prima facie case based upon a decrease in the statistical chance of survival. *Herskovits* involved a wrongful death and survival action based on a healthcare provider's failure to diagnose and treat. *Id.* at p. 611. The plaintiffs claimed the decedent incurred a loss of chance of survival. *Id.* at p. 612. The defendants moved for summary judgment, and the plaintiff responded with evidence that the alleged negligence left the decedent with a decreased five year survival probability. *Id.* at p. 610-11. There was no dispute the decedent's five year survivability never exceeded 50%. *Id.* The trial court granted summary judgment and the plaintiffs appealed. *Id.* The Supreme Court reversed and remanded the matter for trial.

The lead opinion by Justice Dore (represented two justices) and the concurring opinion by Justice Pearson (representing four justices) agreed that negligent healthcare providers could be at risk if they cause a loss of chance. **Justice Dore, in his lead opinion, clearly acknowledged and approved of loss of chance claims applied to a greater than 50% chance of survival, on a theory based in causation of the ultimate harm of death. He then extended that theory to allow for loss of chance claims in the instant Herskovits case, where the chance of survival was less than 50%:**

> "The ultimate question raised here is whether the relationship between the increased risk of harm and Herskovits' death is sufficient to hold Group Health responsible. Is a 36 percent (from 39 percent to 25 percent) reduction in the decedent's chance for survival sufficient evidence of causation to allow the jury to consider the possibility that the physician's failure to timely diagnose the illness was the proximate cause of his death? We answer in the affirmative. To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.
>
> ...
>
> We are persuaded by the reasoning of the Pennsylvania Supreme Court in *Hamil v. Bashline, supra*. **While *Hamil* involved an original survival chance of greater than 50 percent, we find the rationale used by the *Hamil* court to apply equally to cases such as the present one, where the original survival chance is less than 50 percent.** The plaintiff's decedent was suffering from severe chest pains. His wife transported him to the hospital where he was negligently treated in the emergency unit. The wife, because of the lack of help, took her husband to a private physician's office, where he died. In an action brought under the wrongful death and survivorship statutes, the main medical witness testified that if the hospital had employed proper treatment, the decedent would have had

a substantial chance of surviving the attack. **The medical expert expressed his opinion in terms of a 75 percent chance of survival. It was also the doctor's opinion that the substantial loss of a chance of recovery was the result of the defendant hospital's failure to provide prompt treatment.** The defendant's expert witness testified that the patient would have died regardless of any treatment provided by the defendant hospital.

The *Hamil* court distinguished the facts of that case from the general tort case in which a plaintiff alleges that a defendant's act or omission set in motion a force which resulted in harm. In the typical tort case, the "but for" test, requiring proof that damages or death probably would not have occurred "but for" the negligent conduct of the defendant, is appropriate. In *Hamil* and the instant case, however, the defendant's act or omission failed in a *duty* to protect against harm from *another source*. Thus, as the *Hamil* court noted, the fact finder is put in the position of having to consider not only what *did* occur, but also what *might have* occurred. *Hamil* states at page 271:

> Such cases by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable. Nevertheless, in order that an actor is not completely insulated because of uncertainties as to the consequences of his negligent conduct, Section 323(a) tacitly acknowledges this difficulty and permits the issue to go to the jury upon a less than normal threshold of proof.
>
> (Footnote omitted.)

The *Hamil* court held that once a plaintiff has demonstrated that the defendant's acts or omissions have increased the risk of harm to another, such evidence furnishes a basis for the jury to make a determination as to whether such increased risk was in turn a substantial factor in bringing about the resultant harm."

Herskovits v. Grp. Health Coop., 99 Wn.2d 609, 614-16, 664 P.2d 474, 476-77 (1983) (emphasis added)

Justice Pearson, writing for the plurality, also approved of a loss of chance claim where the chance of survival was greater than 50%, and also

applied to Herskovits' less than 50% chance of survival. Justice Pearson does this by stating and/or concurring in statements that loss of chance cases should not be "all or nothing cases." Both the case of all and the case of nothing is found to be objectionable. Where a practitioner interferes with a loss of chance of survival of 75%, he or she must pay 100% of the damages, but pay nothing where the chance of survival is 50% or less. In short, loss of chance damages should be proportional to the chance lost:

> "Having concluded this somewhat detailed survey of the cases cited by plaintiff, what conclusions can we draw? First, the critical element in each of the cases is that the defendant's negligence either deprived a decedent of a chance of surviving a potentially fatal condition or reduced that chance. To summarize, in *Hicks v. United States* the decedent was deprived of a probability of survival; in *Jeanes v. Milner* the decedent's chance of survival was reduced from 35 percent to 24 percent; in *O'Brien v. Stover*, the decedent's 30 percent chance of survival was reduced by an indeterminate amount; in *McBride v. United States* the decedent was deprived of the probability of survival; in *Kallenberg v. Beth Israel Hosp.* the decedent was deprived of a 20 percent to 40 percent chance of survival; in *Hamil v. Bashline* the decedent was deprived of a 75 percent chance of survival; and in *James v. United States* the decedent was deprived of an indeterminate chance of survival, no matter how small.
>
> The three cases where the chance of survival was greater than 50 percent (*Hicks, McBride*, and *Hamil*) 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, and with cases from other jurisdictions cited by defendant.
>
> **The remaining four cases allowed recovery despite the plaintiffs' failure to prove a probability of survival. Three of these cases (*Jeanes, O'Brien*, and *James*) differ significantly from the *Hicks, McBride*, and *Hamil* group in that they view the reduction in or**

loss of the chance of survival, rather than the death itself, as the injury. Under these cases, the defendant is liable, not for all damages arising from the death, but only for damages to the extent of the diminished or lost chance of survival. The fourth of these cases, *Kallenberg*, differs from the other three in that it focuses on the death as the compensable injury. **This is clearly a distortion of traditional principles of proximate causation. In effect, *Kallenberg* held that a 40 percent possibility of causation (rather than the 51 percent required by a probability standard) was sufficient to establish liability for the death.** Under this loosened standard of proof of causation, the defendant would be liable for all damages resulting from the death for which he was at most 40 percent responsible.

My review of these cases persuades me that the preferable approach to the problem before us is that taken (at least implicitly) in *Jeanes, O'Brien*, and *James*. I acknowledge that the principal predicate for these cases is the passage of obiter dictum in *Hicks*, a case which more directly supports the defendant's position. I am nevertheless convinced that these cases reflect a trend to the most rational, least arbitrary, rule by which to regulate cases of this kind. I am persuaded to this conclusion not so much by the reasoning of these cases themselves, but by the thoughtful discussion of a recent commentator. King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353 (1981).

King's basic thesis is explained in the following passage, which is particularly pertinent to the case before us.

Causation has for the most part been treated as an all-or-nothing proposition. Either a loss was caused by the defendant or it was not. . . . A plaintiff ordinarily should be required to prove by the applicable standard of proof that the defendant caused the loss in question. *What* caused a loss, however, should be a separate question from what the *nature and extent* of the loss are. This distinction seems to have eluded the courts, with the result that lost chances in many respects are compensated either as certainties or not at all.

Under the all or nothing approach, typified by *Cooper v. Sisters of Charity, Inc.*, 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971), a plaintiff

who establishes that but for the defendant's negligence the decedent had a 51 percent chance of survival may maintain an action for that death. **The defendant will be liable for all damages arising from the death, even though there was a 49 percent chance it would have occurred despite his negligence. On the other hand, a plaintiff who establishes that but for the defendant's negligence the decedent had a 49 percent chance of survival recovers nothing.**

This all or nothing approach to recovery is criticized by King on several grounds, 90 Yale L.J. at 1376-78. **First, the all or nothing approach is arbitrary. Second, it subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses. . . . A failure to allocate the cost of these losses to their tortious sources . . . strikes at the integrity of the torts system of loss allocation."**

90 Yale L.J. at 1377.

"Therefore, I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival."

Herskovits, 99 Wn.2d at 634 (emphasis added)

C. It Follows That the Injury of Loss of a Chance is an Actionable Claim, Regardless of Whether the Chance of Survival or of a Better Outcome Exceeds 50%.

In 2011, the Washington Supreme Court adopted Justice Pearson's plurality opinion in *Herskovits*, *supra.*, and extended loss of chance beyond survival, and applied it to ultimate harm short of death (loss of chance of a better outcome:

> "We hold that *Herskovits* applies to lost chance claims where the ultimate harm is some serious injury short of death. We also formally adopt the reasoning of a *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 a chance is the compensable injury."**
>
> *Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011). (emphasis added)

Mohr also adopted the *Herskovits* plurality proportional damages approach.

> "Treating the loss of a chance as the cognizable injury permits plaintiffs to **recover for the loss of an opportunity for a better outcome, an interest that we agree should be compensable, while providing for the proper valuation of such an interest.** *Lord v. Lovett*, 146 N.H. 232, 236, 770 A.2d 1103 (2001)..."
>
> *Mohr, Id.*, 172 Wn.2d at 858. (emphasis added)

Mohr, itself involved a claim of loss of chance that exceeded 50%:

> "Mrs. Mohr and her husband filed suit, claiming that Mrs. Mohr received negligent treatment, far below the recognized standard of care. They argue that the doctors' negligence substantially diminished her chance of recovery and that, with nonnegligent care, her disability could have been lessened or altogether avoided. The Mohrs' claim relies, at least in part, on a medical malpractice cause of action for the loss of a chance. In support of their claim, the Mohrs presented the family's testimony, including her two sons who are doctors, and the testimony of two other doctors, Kyra Becker and A. Basil Harris. The testimony included expert opinions that the treatment Mrs. Mohr received violated standards of care and **that, had Mrs. Mohr received non-negligent treatment at various points between August 31 and September 1, 2004, she would have had a 50 to 60 percent chance of a better outcome.** The better outcome would have been no disability or, at least, significantly less disability."
>
> *Mohr v. Grantham*, 172 Wn.2d 844, 849, 262 P.3d 490.

The court's reliance on *Lord v. Lovett* demonstrates that percentage or range of percentage evidence as to the degree of the lost chance is actually unnecessary. In that case, **there was no opinion evidence as to the percentage or range of percentage reduction in the loss of a chance.** The plaintiff suffered a broken neck in an automobile accident. She alleged defendant's negligently misdiagnosed her spinal cord injury, failed to immobilize her properly, failed to administer proper steroid therapy and thereby caused her to lose the opportunity of a substantially better recovery. *Lord v. Lovett,* 146 N.H. 232, 233; 770 A.2d 1103, 1104 (2001). Defendant intended to move for dismissal at the close of the plaintiff's case. The trial court permitted the plaintiff to make a pre-trial offer of proof. The plaintiff proffered that her expert would testify defendant's negligence deprived her of the opportunity for a substantially better recovery. However, the *plaintiff's expert could not quantify the degree to which she was deprived of a better recovery by defendant's negligence.* (770 A.2d at 1104) (emphasis added). The trial court dismissed the plaintiffs action and the Supreme Court of New Hampshire reversed. (Id.)

D. This Court's *Volk* Decision Does Not State " There is No Lost Chance Claim When the Injury is Caused by Medical Negligence [11]

The Division III Court misapplied *Volk* to this matter:

> "Volk claims Ashby's negligence caused Schiering and her family's entire chance for survival to be lost. This argument fails under either approach because the loss of a chance doctrine is inapplicable if the plaintiff is alleging that the defendant's negligence actually caused the unfavorable outcome—the tortfeasors would then be responsible for the actual outcome, not for the lost chance. *See* Alice Ferot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 Fla. Int'l U. L. Rev. 591, 596 (2013) ("If the patient had a 100% chance to be cured or saved and the tortious act of the physician caused all this chance to be lost, then the tortfeasor is responsible for the unfavorable outcome, not the loss of chance."). Further, this claim is indistinguishable from Volk's medical negligence claim, as Volk alleges the same duty, the same negligent actions, and the same harm."
>
> *Volk v DeMeerleer,* 187 Wn.2d 241,248-9; 386 P.3d 254 (2016)

In *Volk,* the claim for loss of chance was not thoroughly discussed, as it was determined loss of chance claims cannot be extended to injury to third parties, caused by a patient, regardless of whether the patient could bring a loss of chance claim. See, generally, *Volk v DeMeerleer,* 187 Wn.2d 241, 386 P.3d 254 (2016). The *Volk* case was not a medical malpractice case involving a claim between a patient and a physician, or other health care provider. Rather, it was a medical negligence case where a special relationship existed between a psychiatrist and his patient requiring the psychiatrist to affirmatively protect the foreseeable victims of the patient,

pursuant *Restatement (Second) of Torts § 315*. Further, this Court determined Volk claimed the psychiatrist's negligence fully caused the harm to the third parties, and did not claim a less than 100% loss of chance.

E. The Decision of the Division III Court of Appeals is in Conflict with Decisions of the Supreme Court - RAP 13.4(b)(1)

The Court of Appeals decision in this matter conflicts with several Supreme Court decisions. More critical, its position on loss of chance claims being unavailable to matters in which the chance of survival or a better outcome exceeds 50%, originating in its published *Dormaier* decision, is contra to *Herskovits* and *Mohr*. In Particular, it violates the proportionality of damages assessment expressed I these decisions, versus a potential all or nothing liability where loss of chance exceeds 50%.

> "The Dormaier court's interpretation is incorrect for two reasons. First, reading it as the Dormaier court does, the Herskovits's concurrence is no different than the lead *opinion*, in that both would employ the "substantial factor" approach to prove causation, even if the lost chance is less than even. As pointed out in Mohr, the Herskovits court was "divided by different reasoning" and "the lead and plurality opinions split over how, not whether, to recognize a cause of action." Second, interpreting the concurrence in this way makes its adoption of proportional damages moot. Employing the "substantial factor" approach, as the lead opinion does, results in full damages regardless of the percentage of chance lost, provided the jury concluded the lost chance was a substantial factor in bringing about the harm. The Herskovits concurrence adopted the "proportional" approach, and the lead opinion advocated for the "substantial factor" approach. The two are not reconcilable.
>
> This misinterpretation explains why the Dormaier court classified the loss-of-chance doctrine under three separate approaches. This

highlights the problem with the loss-of-chance doctrine perfectly: it can mean three different things depending on how it is applied to a certain set of facts."

Comment: Loss-of-Chance Doctrine in Washington: from *Herskovits* to *Mohr* and the need for clarification, 89 Wash. L. Rev. 603.

Further, as stated previously, its discussion of this matter Vis-a-Vis *Volk* is fully off point. Here, a 90% loss of chance was claimed, in the alternative to 100% loss of chance/full liability.

> **"As the jury in Dormaier demonstrated, it is possible to find that a doctor's negligence may reduce a patient's chances of a better outcome by greater than 50%, but still not be the cause in fact of the ultimate outcome. <u>It is important to distinguish the lost chance and the ultimate outcome as two separate and distinct injuries.</u>** This Comment proposes the adoption of only the proportional approach. Any time loss of chance is argued, because it is a separate and distinct injury from the ultimate outcome, it will be its own cause of action. And even if the lost chance is 51% or greater, regardless of the starting point, damages will still be applied proportionally. If the plaintiff wants to prove proximate cause for the ultimate outcome, that is fine. The plaintiff is free to argue both, but the plaintiff should not argue a loss of a 51% or greater chance to prove proximate cause for the ultimate outcome. If the jury decides there is proximate cause for the ultimate outcome, the lost chance argument is mooted. If, however, the jury finds that the defendant's negligence caused a reduction in the chance for a better outcome, no matter the percentage, the plaintiff will still have an avenue of redress, and proportional damages will apply."
>
> Comment: Loss-of-Chance Doctrine in Washington: from *Herskovits* to *Mohr* and the need for clarification, 89 Wash. L. Rev. 603 (emphasis added)

F. <u>This Petition Involves Issues of Substantial Public Interest That Should be Determined by the Supreme Court - RAP 13.4(b)(3).</u>

That the Division III Court of Appeals misconstrued the law of loss of chance in this manner 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.

> "Abstract: Loss of chance is a well-established tort doctrine that seeks to balance traditional tort causation principles with the need to provide a remedy to patients whose injuries or illnesses are seriously exacerbated by physician negligence. In Washington, the doctrine continues to create significant difficulties for judges, juries, and practitioners. Wherever it has been applied, it has often created difficulties. **The loss-of-chance doctrine needs clarification - definitive, sensible, and workable guidelines to ensure that loss of chance is consistently and fairly applied.** Part of the problem lies in the fact that courts and litigants use the term "loss of chance" as if it has a single, fixed meaning, when in fact it is an umbrella term that covers three separate - though sometimes overlapping - theories of recovery. This Comment first identifies and explains the different meanings attached to loss of chance, and briefly describe its varying implementation among states over the past three decades. Next, it tracks the evolution of loss-of-chance doctrine in Washington State from its inception to its current ambiguous status. Then this Comment analyzes the difficulties arising from ambiguities in the Washington State Supreme Court's decisions in Herskovits v. Group Health Coop. of Puget Sound and Mohr v. Grantham, as well as and the recent Washington State Court of Appeals for Division III decision in Estate of Dormaier v. Columbia Basin Anesthesia, PLLC. The critique of these three cases underscores the extent to which ambiguities in loss-of-chance doctrine currently lead to inconsistent and unpredictable standards of causation and burdens of proof. **This Comment concludes by suggesting concrete solutions to create a coherent and equitable doctrine that will allow plaintiffs to recover for loss of chance without creating incentives for unfair manipulation of common law tort standards. In order to illustrate the workability of these suggestions, this Comment applies them to the facts of**

Estate of Dormaier v. Columbia Basin Anesthesia, PLLC. While this Comment focuses primarily on Washington State law, the solutions presented are applicable in any jurisdiction that struggles with the loss-of-chance doctrine."

Comment: Loss-of-Chance Doctrine in Washington: from *Herskovits* to *Mohr* and the need for clarification, 89 Wash. L. Rev. 603. (emphasis added)

"The loss-of-chance doctrine has created no small amount of confusion, both in Washington and the rest of the country. The path to adoption or rejection of the loss-of-chance doctrine is often fraught with confusion and misinterpretation. While the doctrine's heart is in the right place, its application can be terribly confusing. Much of the difficulty surrounding loss of chance is that "loss of chance" is used as an umbrella term for no less than three distinct approaches. The three approaches - all-or-nothing, substantial factor, and proportional - have different legal requirements and apply differently to the same set of facts. To further complicate matters, some states, like Washington, wind up employing two approaches, as the proportional approach can morph into the all-or-nothing approach after the lost chance is 51% or greater. The key is identifying which approach to associate with loss of chance and sticking to it. Having the loss of chance stand for two or more approaches is untenable and unworkable. ..."

Comment: Loss-of-Chance Doctrine in Washington: from *Herskovits* to *Mohr* and the need for clarification, 89 Wash. L. Rev. 603

VI. CONCLUSION

In conclusion, the court is requested to accept review and reverse the rulings of the Trial Court and Court of appeals in this matter. Further, in doing so, this Court should better define the content and context of loss of chance claims in Washington, so as to minimize confusion and inconsistency, within the courts, and for the substantial interest of the public, and its good.

RESPECTFULLY SUBMITTED this 5th day of June, 2017.

MICHAEL J RICCELLI PS

By: _____

Michael J. Riccelli, WSBA #7492
Attorney for Petitioners

DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jennifer L. Moore	_____	Overnight Mail
Bennett, Biggelow & Leedom	_____	U.S. Mail
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date: June 5, 2017

Sally Eastwood

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APPENDIX

Appendix A-1

Pitts v. Inland Imaging, L.L.C.

Court of Appeals of Washington, Division Three

January 31, 2017, Oral Argument; May 4, 2017, Filed

No. 32512-1-III

Reporter
2017 Wash. App. LEXIS 1045 *; 2017 WL 1827025

AMANDA PITTS ET AL., *Appellants*, v. INLAND IMAGING, L.L.C. ET AL., *Respondents*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Pitts v. Inland Imaging, LLC, 2017 Wash. App. LEXIS 1145 (Wash. Ct. App., May 4, 2017)*

Prior History: **[*1]** Appeal from Spokane Superior Court. Docket No: 11-2-02449-5. Judge signing: Honorable Kathleen M O'connor. Judgment or order under review. Date filed: 04/25/2014.

Counsel: For Appellant(s): Michael Jon Riccelli, Attorney at Law, Spokane, WA.

For Respondent(s): Jennifer Lynn Moore, Bennett Bigelow & Leedom, P.S., Seattle, WA; Mary H. Spillane, Fain Anderson, Et Al, Seattle, WA.

Judges: Authored by Kevin Korsmo. Concurring: Rebecca Pennell, George Fearing.

Opinion by: Kevin Korsmo

Opinion

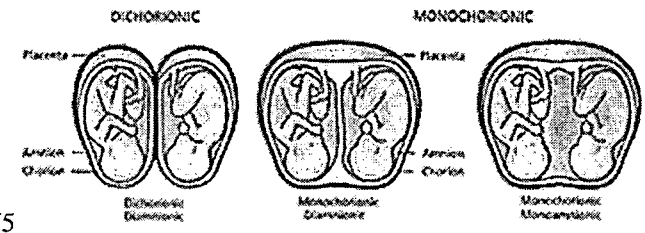
¶1 KORSMO, J. — Amanda and Paul Pitts (collectively Pitts) appeal from an adverse jury verdict and the trial court's decision to grant partial summary judgment on one of their claims. As they have identified neither error nor abuse of discretion, we affirm.

FACTS

¶2 This case arose from the death in utero of one of the twin daughters being carried by Amanda Pitts in 2007-2008. Nearly a decade later, this tragic loss is the basis for the current litigation. This appeal revolves around the actions of defendant Inland Imaging in its reading of sonograms taken during the pregnancy.

¶3 Inland sonographers performed ultrasound examinations on Ms. Pitts in 2007 on August 10, August 27, October 4, November 5, and December 7. An Inland radiologist then would read **[*2]** the sonograms and report to the obstetrician. Upon discovering that the twins were both girls, the Pitts named them Samantha and Taylor.

¶4 The radiologists reported that the findings of the first two ultrasound "are consistent with a dichorionic diamniotic pregnancy." Clerk's Papers (CP) at 197-198. On the August 27 ultrasound, the radiologist noted they read a "twin peak sign" (also called the lambda sign, based on its visual resemblance to the Greek □). CP at 225. This sign, only seen early in pregnancy, is an indication that the two fetuses are each in their own amniotic sac, with their own chorionic membrane (meaning each fetus accesses their own placenta).[1] Shown on the left of the diagram below, this is considered the safest configuration for twins in utero as the completely separate amniotic sacs and two discrete chorions act as barrier membranes that prevent umbilical cord tangling or one twin interfering with the development of the other.

¶5 

[1] This technical information is synthesized from both parties' expert testimony, primarily Drs. Filly (Report of Proceedings (RP) (February 19, 2014) at 454-497), and Patten (RP (February 10, 2014) at 195-295).

¶6 Monochorionic twins, however, share the same placenta and have intermingled circulatory systems, which can lead to additional complications such as twin-to-twin transfusion syndrome (TTTS) and intrauterine growth restriction (IUGR). TTTS is a condition in which the blood flows unequally **[*3]** between monochorionic twins that share a placenta, causing one twin to receive too much blood, and the other twin to receive too little, resulting in damage to both. IUGR occurs when there is unequal placental sharing between monochorionic twins that leads to the suboptimal growth of one twin, and is colloquially referred to as a "stuck twin" diagnosis.

¶7 An ultrasound on January 17, 2008, indicated that Taylor Pitts had died in utero. Ms. Pitts had an emergency cesarean section that same day and safely delivered Samantha. The obstetrician, Dr. Ronald Hardy, reported the following:

> Twin A [Samantha]: baby A delivered, and there was no evidence of any fluid or even an intact [amniotic] sac around baby B [Taylor]. The sacs seemed to be communicating and acting as if 1 sac, though there seemed to be [chorionic] membranes between and wrapped around baby B.
> . . . .
>
> Again, there was no clear sac. ... Baby A's cord, the healthy-appearing, normal cord, was wrapped around Baby B's neck. Baby B's cord, then was wrapped around Baby A's cord and twisted very tightly, almost with a bandlike tightness, forming a loop around Baby A's cord so that Baby A's cord could slide up and down inside this loop **[*4]** and then Baby B's cord was tightly interwoven.
> . . . .
>
> The placentas were delivered. They were connected with 2 separate cord plates. The cords seemed to traverse between the 2 membranes—it was quite unusual appearing—suggestive of a possible incomplete formation of diamniotic sacs, or potentially early on the babies could have intermixed and intertwined with each other.

CP at 232-233.[2]

¶8 The Pitts sued Inland, alleging negligence that led to Taylor's death and asserting additional causes of action. One negligence theory that later came to the fore was a lost chance of a better outcome claim. The issue arose when one of the experts for the plaintiffs testified during a deposition that the twins had a 90 percent chance of a better outcome if their condition had been appropriately diagnosed by Inland following one of the early ultrasounds. Inland moved for summary judgment on the lost chance theory, arguing that neither the evidence nor the law supported the claim. The trial court took the matter under advisement in order to review the authorities.

¶9 The trial court ultimately granted the motion by written memorandum, relying on this court's then recent decision in *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC, 177 Wn. App. 828, 313 P.3d 431 (2013)*. The case eventually proceeded to jury trial **[*5]** before the Honorable Kathleen O'Connor in February 2014. The bulk of the issues argued on appeal occurred during trial; other claims were related to discovery issues. The facts relating to those contentions will be addressed in conjunction with our discussion of the issues.

¶10 The experts agreed at trial that the umbilical cords had become tangled, leading to Taylor Pitts' death, but disagreed on how that came about. The plaintiffs' experts contended that the twins had always been within the same chorion and that Inland had failed to observe that fact, while the defense experts had other competing theories. The jury returned a verdict in favor of Inland, finding that it was not negligent. The Pitts then timely appealed to this court. The case was submitted to a panel without argument.

ARGUMENT

¶11 Appellants raise six claims, five of which are related to events occurring during trial. We first address the summary judgment ruling on the lost chance claim before turning to the remaining claims.

Lost Chance

¶12 The trial court ruled that the lost chance theory was inapplicable to the facts of this case because there was a 90 percent chance of survival if the treating physician had been properly advised. **[*6]** CP at 585. In that circumstance, the "lost chance" exceeded 50 percent, a figure this court has previously concluded was actionable instead under traditional tort causation principles. Although we maintain that position and affirm the trial court, there is an even more fundamental reason why the claim lacks merit. It was the alleged negligence of the defendants, not the underlying medical condition, which caused the injury. In those circumstances, loss of a chance does not apply. We first consider the bases for the lost chance doctrine before considering its application to this case.

¶13 An appellate court will review a summary judgment ruling de novo and consider the same evidence heard by the trial court, viewing that evidence in a light most favorable to the party responding to the summary judgment. *Lybbert v.*

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[2] Pathologist Dr. Wayne Riches analyzed the placenta after delivery and concluded that the pregnancy likely was monochorionic diamniotic.

Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.* "A defendant in a civil action is entitled to summary judgment if he can show that there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim." Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc., 169 Wn. App. 111, 118, 279 P.3d 487 (2012).

¶14 Washington's lost chance case law is developing rapidly. **[*7]** The doctrine was initially discussed in the multiple opinions, none of which garnered a majority view, found in Herskovits v. Group Health Coop. of Puget Sound, 99 Wn.2d 609, 664 P.2d 474 (1983). In Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011), the court recognized loss of chance as distinct injury. Id. at 857. The *Mohr* court observed that a loss of chance for a better outcome would be calculated based on expert testimony of "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 857-858 (internal quotation marks omitted).

¶15 The court found that it was necessary to ensure a plaintiff could bring a loss of chance claim as even "the loss of a less than even chance is a loss worthy of redress." Id. at 852 (internal quotation marks omitted). "To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence." Id. at 851 (internal quotation marks omitted) (quoting Herskovits, 99 Wn.2d at 614).

¶16 Lost chance claims can be divided into two categories: lost chance of survival and lost chance of a better outcome. Christian v. Tohmeh, 191 Wn. App. 709, 729-730, 366 P.3d 16 (2015), *review denied*, 185 Wn.2d 1035, 377 P.3d 744 (2016). In a lost chance of survival claim, such as *Herskovits*, a patient dies from a preexisting condition and would likely have died **[*8]** from the condition, even without the negligence of the health care provider. Even so, the negligence reduces the patient's chances of surviving the condition. Rash v. Providence Health & Servs., 183 Wn. App. 612, 630, 334 P.3d 1154 (2014), *review denied*, 182 Wn.2d 1028, 347 P.3d 459 (2015). In a lost chance of a better outcome case, the patient survives but has been harmed by the underlying medical condition. The question presented was whether the patient's opportunity to have a better result was reduced in some manner due to professional negligence. Id. at 631. That was the issue in *Mohr*. The plaintiff had suffered a severe stroke, but her chance of a better recovery was allegedly lessened by intervening medical negligence. 172 Wn.2d at 857. The court concluded that the loss of chance of a better outcome was not limited to wrongful death actions. *Id.*

¶17 This court considered the loss of a chance doctrine at some length in *Dormaier*, a case where an embolism brought about a fatal heart attack during surgery to repair a fractured elbow. 177 Wn. App. at 837-838. There we recognized that loss of a chance is not a separate cause of action within the statutory framework of a medical malpractice wrongful death claim. Id. at 855. We also recognized that lost chance "is fundamentally an alternative manner of proving wrongful death causation, available *solely* where **[*9]** the defendant's negligence reduced the decedent's chance of survival by less than or equal to 50 percent." Id. at 854-855 (emphasis added). Put in other terms, *Dormaier* recognized that a lost chance claim only applies when the plaintiff already has no more than a 50 percent chance of having a successful recovery or survival from the underlying problem. If there is a greater than 50 percent chance, traditional tort causation principles apply and the negligence, if proven, is the cause of injury. If the chance of a successful outcome from the medical condition is no better than 50 percent, then the question presented is whether the medical negligence somehow reduced that opportunity even more. In those circumstances, the alternative causation approach is used.

¶18 With these principles in mind, it is clear that the lost chance claim in this case fails for two reasons. First, appellants based their lost chance of survival claim on the alleged negligence of Inland. The Washington Supreme Court's decision in Volk v. Demeerleer, 187 Wn.2d 241, 279, 386 P.3d 254 (2016), authoritatively rejected that approach. There is no lost chance claim when the injury is caused by medical negligence. In *Volk*, the plaintiff (personal representative of the deceased), as here, argued **[*10]** that professional negligence both (1) caused the loss of plaintiff's life and (2) reduced the chance of plaintiff's survival. Plaintiff contended that the lost chance doctrine applied both to the lost opportunity to survive and as a substitute for actual "but for" causation. Id. at 278-279. The court disagreed:

> This argument fails under either approach because the loss of a chance doctrine is inapplicable if the plaintiff is alleging that the defendant's negligence actually caused the unfavorable outcome—the tortfeasors would then be responsible for the actual outcome, not for the lost chance.

Id. at 279.[3]

[3] An even more recent decision is to the same effect. Dunnington v. Virginia Mason Med. Ctr., 187 Wn.2d 629, 637, 389 P.3d 498 (2017) ("A key distinction of loss of chance cases is that regardless of the

For that same reason, the Pitts' claim fails here.

¶19 A second reason that this claim fails is that the lost chance substituted causation analysis that we discussed in *Dormaier* does not apply when the negligence reduces the chances of survival by greater than 50 percent. There we held that when

> the defendant's negligence reduced the decedent's chance of survival by less than or equal to 50 percent, the loss of a chance is the injury ... but 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 ... . Thus, a plaintiff **[*11]** may not argue the lost chance doctrine where the defendant's negligence reduced the decedent's chance of survival by greater than 50 percent.

177 Wn. App. at 851. Judge O'Connor correctly applied *Dormaier* to these facts.

¶20 In summary, here, as stated in *Volk*, lost chance was inapplicable because plaintiffs alleged that it was the negligence of Inland, rather than the underlying medical condition, that caused the death of Taylor Pitts. Alternatively, even if a lost chance claim otherwise had been proper, it still failed from the substituted statistical causation perspective of *Dormaier* because there was no evidence that the plaintiff's survival chance was reduced by less than 50 percent. Instead, she allegedly lost a 90 percent chance of surviving. There was no lost chance of any kind. The alleged negligence, not the lost chance of some better outcome, was the actionable theory of the case. There was no need to substitute causation theories when plaintiff's evidence showed a 90 percent chance of a favorable result (survival) but for the negligence.

¶21 The trial court correctly realized that lost chance was not the true theory of this action. The trial court did not err in granting summary judgment on this issue. **[*12]**

Rebuttal Witnesses

¶22 Appellants contend that the trial court erred in excluding testimony of two of their experts as a discovery sanction without first undertaking the analysis required by *Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997)*. There was no discovery sanction at issue in either instance and the record reveals no abuse of the court's management authority.

¶23 The trial court has "considerable discretion" in allowing a party to develop and present evidence at trial. *In re Marriage of Zigler & Sidwell, 154 Wn. App. 803, 814, 226 P.3d 202 (2010)*. The court similarly has great discretion in the way it manages its courtroom, ranging from controlling the conduct of the parties to the setting of the calendar. *Id. at 814-816* (managing courtroom); *State ex rel. Sperry v. Super. Ct. for Walla Walla County, 41 Wn.2d 670, 671, 251 P.2d 164 (1952)* (managing calendar). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)*. Discretion also is abused when the court uses an incorrect legal standard. *State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)*.

¶24 A discovery sanction that would exclude evidence that affects a party's ability to present its case amounts to a severe sanction. In such instances, courts first must consider the *Burnet* factors before imposing such sanctions. *Keck v. Collins, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015)*. Under *Burnet*, before imposing discovery sanctions such as dismissal, default, or exclusion of testimony, the court must presume that a late-disclosed witness will be allowed **[*13]** to testify absent finding (1) the opposing party's willful violation of the court's discovery orders, (2) the violation substantially prejudiced the opposing party, and (3) consider, on the record, if lesser sanctions would be insufficient. *Burnet, 131 Wn.2d at 494*.

¶25 Here, the trial court ruled that proposed witness Professor Carolyn Coffin, who was expected to testify about the standard of care for sonographers, could not testify. It also ruled that Dr. Harris Finberg, disclosed as a witness after the discovery deadline due to the depositions of defense witnesses occurring late in the process, would be limited to providing rebuttal testimony. The Pitts claim that the court excluded these two witnesses as a sanction for late disclosure of their names and erred by doing so without considering the *Burnet* standard on the record.

¶26 However, that is not what happened. Both Coffin and Finberg were identified as rebuttal witnesses in court at a hearing held January 17, 2014; each had been identified as new witnesses on December 30, 2013. CP at 497, 982; RP at 103, 105-106. Inland moved to exclude the witnesses for late disclosure, citing to *Burnet*. CP at 497-504. The trial court denied the motion, indicating that the two would be able to testify as rebuttal witnesses, **[*14]** with the subject matter of their testimony to be determined later. CP at 949. Subsequently, the sonographers were dismissed as defendants at the end of the Pitts' case-in-chief, with the court ruling that no expert testimony had been presented concerning the standard of care by a sonographer. Accordingly, Professor Coffin no longer had any testimony to rebut since no evidence was now needed concerning the sonographers' standard of

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negligence, the ultimate injury is likely to occur.").

care.

¶27 After testimony developed at trial, the court ruled that Dr. Finberg would not be able to testify concerning either IUGR or TTTS because neither topic came up during the defense case. The defense experts had testified that the membrane around Taylor had unexpectedly ruptured, an event that could not have been foreseen. The trial court authorized Dr. Finberg to address that topic.

¶28 Thus, Dr. Finberg was not excluded from testifying as a sanction for the late disclosure of his identity. Instead, his testimony was limited to its stated purpose—rebuttal. He was not permitted to testify about topics that had not been raised by the defense since there would be nothing to rebut in that instance. The trial court had very tenable reasons for limiting Dr. Finberg to proper **[*15]** rebuttal testimony.

¶29 The court did not abuse its discretion in excluding Professor Coffin's testimony and limiting the scope of Dr. Finberg's testimony. There was no error.

Dr. Finberg Video Testimony

¶30 The trial court authorized Dr. Finberg to testify by videoconferencing so that the jury could see and hear the testimony. The last witness in the trial, Dr. Finberg, was to testify at 1:30 p.m. on February 19, 2014. Judge O'Connor directed counsel to be present on the 19th no later than 10:00 a.m. to set the equipment up and confirm it was working correctly.

¶31 By noon, the equipment was not set up properly. The judicial assistant advised counsel that the room would be locked at noon for the lunch hour and that Dr. Finberg would not be testifying since the equipment was not ready. When court reconvened at 1:30 p.m., the Pitts did not object to the inability to use Dr. Finberg. The case proceeded to closing argument.

¶32 After the verdict, the plaintiffs moved for a new trial on several grounds, including the inability to call Dr. Finberg. The court denied the motion. With respect to Finberg's testimony, the court stated:

> Finally I do want to say a couple of things about this situation that occurred **[*16]** with Dr. Finberg. As counsel is both aware, we had set out a time schedule. ... I knew that there were going to be issues with the testimony because of the physical things involved. All of the experts were testifying looking at sonograms, some were fixed, some were moving, and that was a major part of all the experts' testimony. So if the jury was going to understand anything Dr. Finberg was going to say, they had to have that ability to both see him and see what he was looking at so that that testimony would be helpful for them.
>
> As a consequence, and I think the record should reflect, that we stood down. I stood down. We were done. I gave the defendant—or excuse me, the plaintiff, that morning, half a day, half a trial day, where the jury was not told to come in until the afternoon to get this set up. I also set that I wanted the call to go through and we to know by 10:00 whether it was going to work or not because Mr. Riccelli was using his own equipment. He did not have anybody assisting him. I thought this would be somewhat of a difficult technical issue. I recall that my judicial assistant came in and said they are having some problems. ... It was never going to be an easy **[*17]** thing to get him there by audio/visual but it just did not work. Comes 10:00 it hadn't even been set up, and by noon it still wasn't working. I am satisfied that we gave the plaintiff ample opportunity, we gave them a whole half a day of trial to get this in place and it did not happen.

RP at 661-663.

¶33 A party aggrieved by a trial irregularity "must request appropriate court action to obviate the prejudice before the case is submitted to the jury." *Spratt v. Davidson, 1 Wn. App. 523, 526, 463 P.2d 179 (1969)*. "Trials must be fair but they need not be perfect." *Zigler, 154 Wn. App. at 815*. Trial courts have wide discretion to "conduct trials fairly, expeditiously, and impartially." *Id.* Under *RAP 10.3(a)(6)*, a reviewing court need not consider arguments not supported by any citation of authority. *In re Marriage of Fahey, 164 Wn. App. 42, 59, 262 P.3d 128 (2011)*.

¶34 Here, the Pitts did not challenge the decision to not wait any longer for the rebuttal testimony at a time when the trial court could have done something about it. They also have not presented any argument that the trial court abused its discretion in ruling as it did. Accordingly, we could simply conclude that this issue is waived and/or abandoned.

¶35 However, the argument also is without merit.[4]

The trial court gave ample time for the plaintiffs to set up the equipment in order to permit Dr. Finberg to testify. **[*18]** Having already set aside a whole morning from the trial schedule to permit the equipment set up, we agree that the trial court had more than accommodated the plaintiffs in this

[4] In light of the fact that Dr. Fenberg did not testify, we need not decide whether the court erred in limiting the scope of his rebuttal testimony.

regard, particularly when there was no request for additional time or any hint that the technical problems could be rapidly resolved.

¶36 The court had tenable reasons for ruling as it did. There was no abuse of the trial court's management authority.

Defense Expert Testimony

¶37 Next, the Pitts argue that the trial court abused its discretion in permitting three defense witnesses to testify concerning causation. The trial court having exercised its discretion in winnowing down the number of experts each side could call prior to trial, rulings that are not challenged on appeal, we see no abuse of discretion in permitting the witnesses who did testify to do so.

¶38 Again, well settled standards govern our review of this issue. To be admissible under ER 702, expert witness testimony must be relevant and helpful to the trier of fact. Stedman v. Cooper, 172 Wn. App. 9, 16, 292 P.3d 764 (2012). Where there is no basis for the expert opinion other than theoretical speculation, the court should exercise its discretion and exclude it. Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703 (1994). Also, a party may not appeal an error based on a ruling that **[*19]** admits evidence unless a timely objection or motion to strike is made. ER 103(a)(1); Faust v. Albertson, 167 Wn.2d 531, 547, 222 P.3d 1208 (2009). A party who timely objected, however, may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Faust, 167 Wn.2d at 547.

¶39 With respect to the testimony of Dr. Callen, whom the Pitts accuse of exceeding the scope of his permitted testimony, there was no objection to that testimony. If they believed his testimony, which they elicited on cross-examination, was improper, their remedy was to seek immediate relief from the trial court. Having not objected at trial or moved to strike the testimony, they may not ask this court to grant relief for an unpreserved error claim.

¶40 Dr. Filly testified that scar tissue (synechiae) may have appeared to the Inland radiologists as a twin peak sign and confused them concerning the nature of the pregnancy. On cross-examination, Dr. Filly discussed the unusual nature and unlikelihood of his synechiae theory during his cross-examination. RP at 412. Though there had been no physical examination of Amanda Pitts to confirm the theory, the testimony was not completely unhelpful to the jury. It underscored (1) the unusual nature of this pregnancy and its outcome, supporting **[*20]** Inland's defense that it followed the standard of care, and (2) that the Pitts had no superior theory of causation to one so wholly speculative as to be impracticable. Because the testimony had some value to the jury, the trial court did not err in permitting it.

¶41 There were tenable grounds for admission of the testimony. The trial court did not abuse its considerable discretion in this area.

Proposed Voir Dire of Dr. D'Alton

¶42 The Pitts next complain that the trial court erred in refusing to allow them to voir dire Dr. D'Alton about the potential for IUGR and TTTS. Dr. D'Alton had stated during her deposition that neither condition was present during the pregnancy. The defense did not develop the topics during her trial testimony. The plaintiffs sought to voir dire the witness on the topics in order to set a foundation for Dr. Finberg to "rebut" Dr. D'Alton and suggest these conditions as possible causes for the death of Taylor.

¶43 The trial court declined to permit the voir dire because it was not a proper subject of inquiry at that point. Dr. D'Alton had not relied upon either IUGR or TTTS, nor had the Pitts developed either topic during their case-in-chief. This was, as the defense argued, **[*21]** an attempt to set a foundation for Dr. Finberg to develop a new theory of liability during rebuttal in violation of the pretrial rulings and Finberg's status as a rebuttal witness. These were very tenable reasons for rejecting the voir dire.

¶44 Once again, there was no abuse of the trial court's evidentiary and trial management authority.

Cross-Examination of Dr. Patten

¶45 Finally, the Pitts also contend the trial court erred in allowing Inland to cross-examine their expert radiologist, Dr. Patten, concerning the twin peak sign, a topic admittedly outside the scope of his expertise. Dr. Patten did not discuss the topic during his testimony describing the standard of care for radiologists interpreting sonograms. No objection was raised until the latter stages of the cross-examination, when the plaintiffs claimed the topic was beyond the scope of the doctor's expertise. The trial court overruled the objection, and Dr. Patten testified that while he was not an expert because he did not write on the topic, he knew how to use the twin peak sign in his work.

¶46 ER 611(b) limits the scope of cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness," **[*22]** but also permits the trial court discretionary authority to allow "inquiry into additional matters as if on direct examination." Accordingly, courts recognize that "the scope of cross examination is within the broad discretion of the trial court and will not be overturned

on appeal absent an abuse of discretion." *Miller v. Peterson, 42 Wn. App. 822, 827, 714 P.2d 695 (1986)*.

¶47 Here, Dr. Patten had discussed the twin peak sign at some length before the plaintiffs claimed he was addressing a topic beyond his expertise. At that point they had waived any objection to the topic. However, even if the belated objection preserved the issue, there was no error. Inquiry into an expert's knowledge base is permitted by *ER 611(b)* (and *ER 703*). Dr. Patten's earlier testimony discussed the standard of care in determining the chorionicity of a twin pregnancy by assessing the thickness of the chorion membrane, a measurement that bears relation to the visibility of the twin peak sign. All parties agreed that the twin peak sign is widely used and reliable when seen. On direct examination, Dr. Patten had read from Dr. Callen's book ("the OB-GYN Bible") and referenced sections directly before and after a section on the twin peak sign. These facts placed a discussion of the twin peak **[*23]** sign well within the scope of Dr. Patten's direct questioning. It was proper to permit inquiry on the topic during cross-examination.

¶48 The trial court did not err in overruling the objection. Discussion of the twin peak sign was proper subject matter for testimony concerning a radiologist's standard of care.

¶49 Appellants have not demonstrated any error occurred at trial, let alone any error of such significance that it calls into question the jury's verdict. This case was well tried and both sides presented evidence concerning the circumstances leading to the tragic death of Taylor Pitts. The jury concluded that negligence by Inland had not been established. That verdict was the result of a fair trial process.

¶50 Affirmed.

¶51 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

FEARING, C.J., and PENNELL, J., concur,

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