No. 95645-6

SUPREME COURT
STATE OF WASHINGTON

LYNETTE ENEBRAD, et. ano.,

Petitioner,

vs.

MULTICARE HEALTH SYSTEMS, et al.,

Respondents.

RESPONDENTS HEALOGICS, INC., AND DIVERSIFIED CLINICAL SERVICES, INC.'S ANSWER TO PETITION FOR REVIEW

Patrick C. Sheldon, WSBA #11398
Jeffrey T. Kestle, WSBA #29648
FORSBERG & UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164
(206) 689-8500
(206) 689-8501 (fax)

Attorneys for Respondents
Healogics, Inc. and Diversified
Clinical Services, Inc.

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I. INTRODUCTION

Lynette Enebrad ("Enebrad") filed a medical malpractice lawsuit alleging that Mark H. Tseng, M.D., negligently failed to timely diagnose and treat Robert Enebrad's cancer. Enebrad alleged that Dr. Tseng's conduct deprived Mr. Enebrad of a chance of a better outcome. She alleged Healogics, Inc. ("Healogics") and Diversified Clinical Services, Inc. ("Diversified") were responsible for Dr. Tseng's conduct. Under Washington law, Enebrad was required to produce evidence establishing a percentage or range of percentage reduction of a better outcome caused by Dr. Tseng's conduct. She failed to do so. As a result, the trial court properly dismissed her claims against Healogics and Diversified on summary judgment and the Court of Appeals properly affirmed the dismissal. This Court should deny Enebrad's Petition for Review.

II. STATEMENT OF THE CASE

The Court of Appeals opinion and Respondent Multicare Health System's Answer to Petition for Review set out the facts and the procedural history in a fair, detailed fashion.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) provides that a petition for review will be accepted by this Court 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.

Enebrad argues incorrectly that the Court of Appeals' decision conflicts with three Washington Supreme Court cases. In the first case, *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983), the Supreme Court first recognized the loss of chance of a better outcome theory in a case where the plaintiff's expert testimony showed the medical defendant's conduct caused a 14% loss of chance of survival.

In the second case, *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.2d 490 (2011), the Supreme Court recognized that the loss of chance theory applied in cases of serious injury short of death. The *Mohr* Court explained that the "percentage of loss of chance is a question of fact for the jury and will relate to the scientific measures available, likely as presented through experts." *Mohr*, 172 Wn.2d at 858. The Court determined that the plaintiff's experts' testimony that plaintiff would have

had a 50-60% chance of a better outcome with non-negligent treatment was sufficient to defeat summary judgment.

In the third case, *Dunnington v. Virginia Mason Medical Center*, 187 Wn.2d 629, 389 P.3d 498 (2017), the Supreme Court held that the "but for" test for causation, not the substantial factor test, applies in lost chance cases.

The Court of Appeals decision in the instant case does not conflict with any of these cases. Under Enebrad's lost chance theory, she was required to produce evidence of a specific percentage or range of percentage lost chance proximately caused by Dr. Tseng's conduct. Because she failed to do so, the Court of Appeals appropriately granted summary judgment in favor of Healogics and Diversified.

Enebrad's argument that the Court should relax the proof requirements in lost chance cases "where defendant's own conduct is a factor in creating uncertainty on what specific percentage, or range of percentages was lost" fails because (1) Enebrad did not make the argument below, (2) it does not make sense, (3) it is not supported by any evidence or authority, and (4) it is contradicted by the deposition testimony of Enebrad's expert Dr. Ko, who conceded that the ultimate outcome of Mr. Enebrad's treatment was not affected by delays in diagnosis and treatment.

IV. CONCLUSION

This is a simple case. Enebrad failed to produce competent evidence demonstrating the existence of a genuine issue of material fact supporting her claims. There are no grounds for appeal under RAP 13.4(b). Enebrad's Petition for Review should be denied.

Respectfully submitted this 20th day of April, 2018.

FORSBERG & UMLAUF, P.S.

By: _____

Patrick C. Sheldon, WSBA #11398
Jeffrey T. Kestle, WSBA #29648
Attorneys for Respondents Healogics, Inc., and Diversified Clinical Services, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

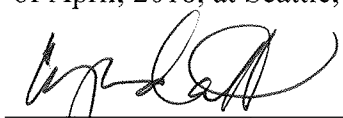
On the date given below I caused to be served the **RESPONDENT'S ANSWER TO PETITION FOR REVIEW** on the following individual in the manner indicated:

Mr. John A. Rosendahl
Ms. Mary Spillane
Fain Anderson VanDerhoef
Rosendahl O'Halloran Spillane, PLLC
1301 A Street, Suite 900
Tacoma, WA 98402-4299
(X) Via Electronic Mail

Bertha B. Fitzer
Fitzer, Leighton & Fitzer, P.S.
1102 Broadway, Suite 401
Tacoma, WA 98402
(X) Via Electronic Mail

Mr. John P. Walsh
Attorney at Law
P.O. Box 22418
Seattle, WA 98122-0418
(X) Via Electronic Mail

SIGNED this 20th day of April, 2018, at Seattle, Washington.



Lynda T. Ha

FORSBERG & UMLAUF, P.S.

April 20, 2018 - 10:54 AM

Transmittal Information

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Suite 1400
Seattle, WA, 98164
Phone: (206) 689-8500 EXT 8578

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