SUPREME COURT No. 91124-0

COURT OF APPEALS No. 312771-III

IN THE SUPREME COURT

OF

THE STATE OF WASHINGTON

ROBIN RASH, et al., *Appellant*,

v.

PROVIDENCE HEALTH & SERVICES, et al., *Respondent.*

REPLY TO SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL'S RESPONSE TO APPELLANT'S PETITION FOR REVIEW

Michael J. Riccelli, WSBA #7492
Attorney for Appellant
400 South Jefferson St., #112
Spokane, WA 99204
(509) 323-1120

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

To the extent the defendant/respondent (hereinafter referred to as "Providence") seeks review of an issue not raised in the Petition for Review, plaintiff (hereinafter "Rash") respectfully submits the following reply pursuant to RAP 13.4(d).

I. PROVIDENCE'S ATTEMPT TO OBFISCATE ISSUES ON APPEAL BY RAISING NON-ISSUES.

Providence attempts to obfuscate issues on appeal by raising non-issues in their reply. First is Providence's attempt to introduce a mixed issue of pleading and fact for the first time, on appeal, which, under any circumstances, has no relationship to the true issues on appeal. In footnote one on page four of its reply, Providence states:

> "It is noteworthy that Ms. Zachow's strokes began before this action was filed, but the initial complaint does not contend that any stroke was proximately caused by the missed medication dosages. *See* CP 3-7"

However, Rash pled the following:

> "2.7 As a result of the foregoing acts and/or omissions, Ms. Zachow has suffered and will continue to suffer from serious physical injury; permanent disability; reduced life expectancy; loss of enjoyment of life, activity and lifestyle; serious and continuing emotional distress; healthcare and related costs and expenses; and other economic loss and damage."
>
> CP 5.

Whether Rash pled injury to Ms. Zachow by stroke or any other specific ailment or injury, is irrelevant, under CR 8 and the concept of notice

pleading.

> "RULE 8
> GENERAL RULES OF PLEADING
>
> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

CR 8 notice pleading has been the preferred and accepted method of pleading in Washington for decades. See, *Mose v. Mose*, 4 Wn. App. 204, 480 P.2d 517, (1971 Wash. App).

The most prominent non-issue raised by Providence its focus on applicability of the "but for" standard of causation of the independent claim of "loss of chance" of a better outcome and/or survival in, respectively, *inter vivos* and postmortem actions. In medical malpractice cases, physician testimony as to breach of the standard of care more probably than not causing either the ultimate injury or harm, or a related loss of chance, establishes proximate cause. This court stated in *Mohr v. Grantham,* 172 Wn.2d 844, 857, 262 P.3d 490 (2011):

> "We note that, significantly, nothing in the medical malpractice statute precludes a lost chance cause of action. In relevant part, chapter 7.70 RCW provides that, in order to prove "that injury resulted from the failure of the health care provider to follow the accepted standard of care," a plaintiff must establish:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.
>
> *RCW 7.70.040.* The chapter does not define "proximate cause" or "injury.""
>
> *RCW 7.70.020.*
> *MOHR v. Grantham,* 172 Wn.2d 844, 262 P.3d 490, 496 (Wash. 2011).

Proximate cause in a medical malpractice case is established by competent testimony that a breach of the standard of care more probably than not caused the complained of injury. *Davies v. Holy Family Hospital,* 144 Wn. App. 483, 496 183 P.3rd 283 (Wash. 2008).

In both instances, whether it be "loss of chance" of a better outcome and/or "loss of chance" of survival, "loss of chance" claims can be presented to the jury for consideration, concurrent with causation of the ultimate harm, and the jury can be instructed on both, so long as the jury is only allowed to find damages for one claim or the other. This was confirmed in Division III's decision in *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC,* 177 Wn. App. 828, 840-843, 313 P.3d 431 (2013), where the court determined that a "loss of chance," under notice pleading rules, does not have to be

separately pled from a general claim for injury and damages due to negligence in healthcare.

II. RASH PRESENTED RCW 7.70.040 TESTIMONY THROUGH THE DEPOSITION TESTIMONY OF WAYNE R. ROGERS, M.D.

Regardless, Dr. Rogers' testimony, when considered in a light most favorable to Rash, establishes, *more probably than not:* (1) Betty Zachow suffered an accelerated deterioration of her health as a result of Providence's admitted breach of the standard of care, causing her "loss of chance" of a better outcome while alive, and "loss of chance" of survival as to her death; and (2) Providence's breach of the standard of care was a proximate cause of her death. (See, generally, Rash's Motion (Petition) for Discretionary Review, pages 10-14). This testimony allows, for purposes of a *prima facie* case, more probably than not testimony that Providence admitted negligence caused injury, and a reasonable inference of "but for" cause in fact. *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 890 P.2d 469, (1995 Wash. App.). See also *McLaughlin v. Cooke,* 112 Wn.2d 829, 774 P.2d 1171 (Wash. 1989). Curiously, Providence referenced *McLaughlin, Id.* at 837, as support for its "but for" argument, where the term "but for" is not found within in the opinion.

Given the nature of Dr. Rogers' testimony, it satisfies any issue of

RCW 7.70.040 proximate cause, or "but for" causation testimony.

III. THE PRIMARY ISSUE PRESENTED BEFORE THE COURT IS WHETHER EVIDENCE OF STATISTICAL PROBABILITIES OF A "LOSS OF CHANCE" IS REQUIRED.

Dr. Rogers, in his discovery deposition, did not testify as to statistical probabilities. The procedural issues, discussed in Rash's initial motion, precluded supplementing this testimony, either by Dr. Rogers, or another expert prior to the consolidated trial on this matter. The trial court dismissed Rash's "loss of chance" claim based on this fact, and Division III agreed. *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 628, 636, 334 P.3d 1154 (2014).

Rash contends the trial court and Division III are mistaken, as no such requirement is found in either the *Herskovits* or *Mohr* decisions.

> "We also formally adopt the reasoning of the *Herskovits* plurality. Under this formulation, a plaintiff bears the burden to prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome."
>
> *Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011).

Further, Rash filed its misnomered "Motion for Discretionary Review" on December 8, 2014. On December 11, 2014, this court filed its opinion in *Grove v. PeaceHealth St. Joseph Hosp.*, Supreme Court No. 89902-9, Filed Dec. 11, 2014, 2014 Wash. LEXIS 1135 (Wash. Dec. 11,

2014). This court's decision in *Grove* can only represent confirmation that statistical probabilities or other quantitative testing is not required for proof of a *prima facie* "loss of chance" claim.

> "**Two experts testified for Grove: orthopedic surgeon Dr. Sean Ghidella and cardiovascular surgeon Dr. Carl Adams. Dr. Ghidella testified that the medical care** provided **to Grove fell below the standard of care because of inadequate monitoring and failure to rule out a known possible postoperation complication.** Dr. Ghidella opined that Dr. Leone was ultimately responsible as team leader at the outset of Grove's treatment. He testified that with proper monitoring Grove's compartment syndrome should have been detected earlier. **According to Dr. Ghidella, Grove's leg should have been examined on every round. He opined that Grove would not have suffered permanent injuries or would have had a better outcome if the standard of care had been met.** He thought it likely that the compartment syndrome began to develop while Grove was intubated, but he could not determine precisely when Grove developed the syndrome, stating that had the standard of care been met, with record entries regarding proper monitoring and testing, he could have determined when the syndrome developed.
>
> **Dr. Adams opined that the cardiovascular surgeon in charge of Grove's care failed to meet the standard of care of such practitioners.** He identified the three surgeons in charge of Grove's care as Drs. Leone, Zech, and Douglas. Dr. Adams also testified that Dr. Leone was responsible for the medical care team; thus, if a physician's assistant made a mistake, Leone was responsible in the same way as the captain of a ship. Dr. Adams explained that the medical care team, as directed by the surgeon in charge, should have checked for compartment syndrome, since it was a recognized complication of a long surgical procedure of the type Grove experienced. Dr. Adams further opined that the failure to promptly diagnose Grove's compartment syndrome based on his leg symptoms while being treated with antibiotics fell below the standard of care. Dr. Adams testified that the failure

to monitor for compartment syndrome began with Dr. Leone and continued thereafter. **In Dr. Adams's opinion, had hospital employees engaged in the care team not breached the standard of care, Grove would have had a better chance of avoiding injury or would have suffered less severe injury.**

The trial court instructed the jury on the standard of care applicable to a "physician, surgeon or health care provider." Clerk's Papers (CP) at 329. The court instructed the jury that a "health care provider" included "an entity" including a hospital or an employee or agent of same acting within the course and scope of his or her employment. CP at 330. And the court instructed the jury that any act or omission of a PeaceHealth employee was an act or omission of the hospital. **The jury returned a special verdict for Grove, finding that PeaceHealth was negligent and that its negligence was a proximate cause of Grove's injury, and awarding Grove $583,000 in damages."**

Grove v. PeaceHealth St. Joseph Hosp., PP 4-6, Supreme Court No. 89902-9, Filed Dec. 11, 2014, 2014 Wash. LEXIS 1135 , Paragraphs 8-10 (Wash. Dec. 11, 2014)
"CONCLUSION

Considering the inferences and the evidence presented in Grove's favor, Grove met his burden under chapter 7.70 RCW to show that identified health care providers employed by PeaceHealth failed to meet the applicable standard of care in monitoring his postoperation recovery for compartment syndrome, resulting in the untimely diagnosis of that syndrome and proximately causing injury to Grove by failure to timely treat that complication. Accordingly, we reverse the Court of Appeals and remand to the trial court with direction to reinstate the jury verdict in favor of Grove."

Grove v. PeaceHealth St. Joseph Hosp., Pages 4-6, Supreme Court No. 89902-9, Filed Dec. 11, 2014, 2014 Wash. LEXIS 1135 , Paragraph 22 (Wash. Dec. 11, 2014) (emphases added)

Statistical evidence of the injury, i.e. the "loss of chance", is simply not required.

> "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*. "
>
> *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 632, 644 P.2d 474 (1983) (plurality opinion).

In *James v. United States*, 483 Fed. Sup. 581 (N.D. Cal. 1980), cited by Justice Pearson, the plaintiff's failure to establish a statistically measurable chance of survival did not rule out the plaintiff's recovery. As Justice Pearson put it in his plurality opinion, "the decedent was deprived of an indeterminate chance of survival, no matter how small." *Herskovits*, 99 Wn.2d at 631.

As demonstrated herein, the trial court and Division III incorrectly required statistical evidence as to "loss of chance." For this reason, the court is requested to accept Rash's Petition for Review.

IV. PROVIDENCE MISCONSTRUES THE MORTALITY TABLE ISSUE.

This issue is addressed in Rash's opening motion. However, it is necessary to emphasize Rash referred to the mortality tables as one form of evidence to be considered by a jury in assessing damages, and in lieu of any statistical testimony. Rash does not proffer mortality tables as a substitute for

expert testimony on causation.

V. CONCLUSION

Rash respectfully renews her request for review of this matter based upon her initial motion (petition) and this refutation of new issues raised by Providence.

RESPECTFULLY SUBMITTED this 22nd day of January, 2015.

MICHAEL J RICCELLI PS

By: _____
Michael J. Riccelli, WSBA #7492
Attorney for Appellant/Plaintiff

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:

Steven Joseph Dixson
Matthew W. Daley
Ryan Beaudoin
Witherspoon, Kelley, Davenport & Toole
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201

____ Overnight Mail
____ U.S. Mail
____ Hand-Delivered
__X__ E-mail by agreement

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of January, 2015.

_____

\CLIENTS\23800801\DRAFT\APPEAL PLEADINGS\supreme court reply brief.doc

OFFICE RECEPTIONIST, CLERK

To: Olive Easterwood
Cc: rmb@witherspoonkelley.com; tracyw@witherspoonkelley.com; mwd@witherspoonkelley.com; evelynh@witherspoonkelley.com
Subject: RE: Rash v. Providence No. 91124-0

Received 1-22-2015

Supreme Court Clerk's Office

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

From: Olive Easterwood [mailto:Holly@mjrps.net]
Sent: Thursday, January 22, 2015 4:37 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: rmb@witherspoonkelley.com; tracyw@witherspoonkelley.com; mwd@witherspoonkelley.com; evelynh@witherspoonkelley.com
Subject: Rash v. Providence No. 91124-0

See attached reply brief for filing in Rash v. Providence, Cause No. 91124-0.

Michael J. Riccelli, Bar #7492
509-323-1120
e-mail: mjrps@mjrps.net