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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.*

APPELLANT'S REPLY TO ANSWER TO PETITION FOR REVIEW

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CASES

REGULATIONS

I. IDENTITY OF REPLYING PARTY

Petitioners consist of Amanda Pitts and Paul Pitts, individually, and Amanda Pitts as Personal Representative of the Estates of Taylor Pitts (hereinafter "petitioners").

II. COURT OF APPEAL'S DECISION

This is an appeal of the May 4, 2017 Division III Court of Appeals published Opinion in this matter, copy previously provided.

III. ISSUES RAISED BY REPONDENTS FOR REVIEW

In their Answer, respondents explicitly and implicitly raise, by construal (argued as misconstrual by petitioners) the following:

A. Division III's conclusion in published and unpublished opinions regarding loss of chance, that loss of chance greater than 50 percent may only be considered where a percentage range of loss of chance includes an upper numerical value of greater than 50 percent, but a lower numerical value of 50 percent (or presumably less than 50 percent);

B. Whether this court's holding in *Volk v. DeMeerleer,* 187 Wn.2d 241,248-9; 386 P.3d 254 (2016), states that any loss of chance claimed to be greater than 50 percent and less than 100 percent is equivalent to "but for" causation of the ultimate harm or outcome; and

C. Whether expert testimony of a percentage loss of chance is equivalent to testimony of causation of the ultimate harm.

IV. ARGUMENT

A. Division III's purported exception to the loss of chance greater than 50 percent where the bottom of a range is at or below 50 percent is in error.

On page eight of respondents' Answer, and with regard to Division III's discussion in *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 313 P.3d 431 (2013), of the 50-60 percent likelihood of a better outcome as stated in *Mohr v. Grantham* , 172 Wn.2d 844, 857, 262 P.3d 490 (2011), respondents' state:

> "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."
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> Respondent's Answer to Petition for Review, P. 8.

Respondents' reliance on this is misguided, as Division III's holding in this regard is arbitrary, and violates equal protection under the law. It is arbitrary in that: where there is any testimony of a range which includes 50 percent or less loss of chance, but includes greater than 50 percent loss of chance at the top end, a claim for loss of chance is permissible; but, testimony of a greater than 50 percent loss of chance without a range reaching 50 percent or below, is impermissible. This means that a jury could hear a loss of chance case where it is claimed that the range is between 50 and 90 percent, but could not hear a loss of chance case where the claim is simply a 55 percent loss of chance. It is internally

inconsistent, illogical and arbitrary. Further, this construction violates both the Washington and U.S. constitutions regarding equal protection:

> "Washington Constitution article I, section 12, and the Fourteenth Amendment to the United States Constitution guarantee that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment."
>
> *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473, 482 (1996)

B. Division III and respondents may not rely on *Volk* as authority prohibiting loss of chance claims greater than 50 percent and less than 100 percent.

At pages eight through ten of their answer, respondents' state:

> "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."

Respondent's Answer to Petition for Review, P.P. 8-9

However, in *Volk v. DeMeerleer,* 187 Wn.2d 241,248-9; 386 P.3d 254 (2016), this court did not significantly address the loss of chance issue, as it was determined that loss of chance could not be extended to third parties, but is only reserved as a claim between a healthcare provider and the patient. Any other statement by this court in *Volk* is essentially dicta. Regardless, respondents apparently fail to consider this court's statement in *Volk*, as follows:

> "Volk contends that the loss of chance may also be a substitute for the requirement of actual, but for causation, citing to Justice Dore's lead opinion in *Herskovits*, 99 Wn.2d at 616. Under either formulation, the plaintiff still bears the burden of proving duty, breach, causation, and harm—**the approaches differ only in the determination of causation and in the ultimate harm.** *Mohr*, 172 Wn.2d at 857.
>
> *Volk v. DeMeerleer*, 187 Wn.2d 241, 279, 386 P.3d 254, 274 (2016) (emphasis added)

This Court's reference above is found in *Mohr* is as follows:

> "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 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. 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, 496 (2011) (emphasis added)

Clearly, *Mohr*, and subsequently *Volk*, hold the loss of chance as a separate, different, and distinguishable harm and injury, apart from the ultimate harm of death, in loss of chance of survival cases, and greater injury, in loss of chance of a better outcome cases. It follows that conversion to the all or nothing tort of causation of the ultimate harm where greater than 50 percent loss of chance is claimed is incongruous with Mohr and its progeny.

C: Expert testimony as to loss of chance is not the equivalent of "but for" causation of the ultimate harm.

Division III's holdings in *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 313 P.3d 431 (2013), *Rash v. Providence Health & Servs., 183 Wn. App. 612,334 P.3d 1154 (2014), rev. denied, 182 Wn.2d 1028 (2015)*, this case at hand, and respondents' arguments thereon construe expert testimony as to a percentage loss of chance as equivalent to "but for" causation of the ultimate harm under the presumption that greater than 50 percent loss of chance revert a medical malpractice claim to traditional tort theory. Loss of chance in Washington applies only to medical malpractice claims.

> "In Washington, the loss of chance can be a compensable injury in a medical malpractice action. *Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011)
>
> *Volk v. DeMeerleer*, 187 Wn.2d 241, 278, 386 P.3d 254, 274 (2016)

However, regarding a traditional ultimate outcome medical malpractice case, Washington law requires the following testimony:

RCW 7.70.030

"Propositions required to be established—Burden of proof.

No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

(1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;

...

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence."

RCW 7.70.040

"Necessary elements of proof that injury resulted from failure to follow accepted standard of care.

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(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 or she belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of."

In this instance, as is noted by respondents on page three of their Answer:

> "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.

In this instance, the trial court was relying on the following from plaintiffs' medical expert's declaration:

> "17. The medical literature, as confirmed in defense witness Dr. Callen's edited "Ultrasonography in Gynecology and Radiology," Fifth edition, published in 2007, concludes that it is highly likely both twins would have been born live, had Inland Imaging initially and correctly diagnosed the Pins twin pregnancy, and Dr. Hardy followed it as a monochorionic diamniotic pregnancy. This is also true had Inland Imaging followed-up on lack of observation of a competent dividing membrane. Evidence of a monochorionic, and probable functionalmonoamniotic, twin pregnancy dictates that delivery would have probably occurred at 32 weeks, at a time the PiUs twins were reported as healthy. Otherwise, Ms. Pitts would have been admitted to a hospital for constant fetal monitoring, and delivery at any time significant fetal stress was noted. Dr. Hardy testified to this in his deposition. The Callen text, an excerpt of which is attached as Exhibit E, also confirms that a live twin birth would have been likely. **Refer to Exhibit E, at p. 277, where, in one study, Rodis, et al, reported a survival rate for live birth of both twins at 90 percent, where a monochorionic monoamniotic twin pregnancy is monitored closely.** This is true if the twins are alive at 30 weeks, according to Carr, et al. Further, according to the Callen text, Exhibit E at page 278-79, a study by Rogue, et al, recommends delivery at 32 weeks for such cases, also confirming Dr. Hardy's testimony."
>
> CP 285-286 (emphasis added)

Although it may be reasonable inference to conclude that this testimony substantiates that if respondents' negligence is proved, respondent was responsible for a 90 percent loss of chance of survival of Taylor Pitts. It cannot, however, be construed to mean that more probably than not and with reasonable medical certainty, Inland Imaging caused the death of Taylor Pitts. The statement of a probability of an outcome is not equivalent to stating which side of the probability an actual event fell within. In other words, the Pitts' expert did not state or provide an opinion as to whether Taylor Pitts' fate fell within the 90 percent probability or the 10 percent lack of probability of the outcome.

Medical malpractice statutes in Washington require medical testimony, more probably than not, that the medical negligence at hand caused the outcome, rather than caused a loss of chance. It is intuitive, and should be a matter of judicial notice, that obtaining medical testimony for plaintiffs is much more difficult than that for defense for medical defendants, and that it may be more palatable to a medical expert to testify as to loss of chance, rather than to actual causation of an adverse outcome. It is simply incongruous that testimony as to loss of chance, which this court has held to be a separate harm or tort, apart from the ultimate outcome, is necessarily testimony that substantiates the ultimate outcome.

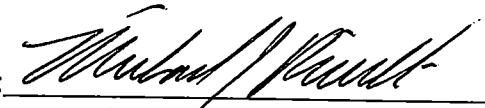
V. CONCLUSION

In conclusion, petitioners Pitts again request this court to accept

review of this matter for thorough consideration and deliberation, and ruling thereon.

RESPECTFULLY SUBMITTED this 18th day of July, 2017.

MICHAEL J RICCELLI PS

By: 

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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 Bennett, Biggelow & Leedom Two Union Square 601 Union Street, Suite 1500 Seattle, WA 98101-1387 e-mail address: jmoore@bbllaw.com; kcalkins@bbllaw.com	_____ _____ _____ __x__ _____	Overnight Mail U.S. Mail Hand-Delivered E-Mail Facsimile
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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: July 18, 2017

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