

NO. 66294-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARIA PEREZ GUARDADO, individually and as Personal
Representative of the Estate of DIEGO ESTEBAN CAMPOS
PEREZ, and CAIN RAFAEL CAMPOS,

Appellants,

v.

VALLEY MEDICAL CENTER, a King County Public Hospital
District; KERRI R. FITZGERALD, MD, individually and the marital
community with John Doe Fitzgerald, and DOES 1 through 50,
inclusive,

Respondents.

Appeal from the Superior Court for King County
The Honorable Cheryl Carey

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I.	ARGUMENT.....	1
A.	The Trial Court Erroneously Disregarded the Loss of Chance Doctrine In Ruling Plaintiff Could Not Prove Baby Diego Probably Would Have Survived If Resuscitated	2
B.	Plaintiff's Presented Sufficient Evidence That Baby Diego lost a 30-40% Chance of Survival, Precluding Summary Judgment	7
C.	Plaintiffs Presented Enough Evidence to Create Issues of Fact To Survive Summary Judgment About Whether Diego Was Viable	14
D.	Defendants Raised New Issues For the First Time on Appeal That Were Never Before the Trial Court, and Thus Should Be Considered Waived	16
II.	CONCLUSION	17

TABLE OF AUTHORITIES

<i>Barker v. Advanced Silicon Materials, LLC</i> , 131 Wn. App. 616, 128 P.3d 633 (2006).....	8
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985).....	6
<i>Herskovits v. Group Health</i> , 99 Wn.2d 609, 664 P.2d 474 (1983)	2, 3, 4, 5, 13, 14, 15, 17
<i>Koker v. Armstrong Cork, Inc.</i> , 60 Wn. App. 466, 804 P.2d 659 (1991).....	6, 7
<i>Shellenbarger v. Brigman</i> , 101 Wn. App. 339, 3 P.3d 211 (2000).....	3, 5, 8, 13, 17
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983)	17
<i>Zueger v. Public Hosp. Dist. No. 2 of Snohomish County</i> , 57 Wn. App. 584, 789 P.2d 326 (1990).....	3, 4, 13, 17

STATE STATUTES

RCW 4.24.020.....	16
RCW 4.20.046.....	16

RULES

RAP 2.5 (a).....	17
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I. ARGUMENT

Given the number of issues raised by defendants in their briefs, it is important to focus on the decision of the trial judge at issue. The trial court's narrow ruling dismissing plaintiffs' medical negligence claim was a legal one. It was entirely based on the mistaken belief that plaintiffs had to prove general "but for" causation to survive summary judgment – that baby Diego probably would have survived if the doctors had performed resuscitation efforts as requested. In her ruling, the trial judge stated:

I have reviewed all of the materials and, although certainly this is a very sad situation I daresay, however, I do not believe that the plaintiffs can prove more probably than not that the infant would have survived even if resuscitation efforts were made by the doctor, therefore, as a result, I am granting defendants' motion.

10/1/2010 Verbatim Report of Proceedings (RP) 15 (emphasis added). In short, the trial court did not make any rulings about the sufficiency of plaintiffs' evidence or any other issues.

The trial court erred in dismissing this case because the ruling ignores the loss of chance doctrine and imposes an impossible burden on plaintiffs of proving traditional "but for" causation. When properly considered in the context of the loss of chance doctrine – which relaxes the proximate cause burden on the plaintiff – plaintiffs' evidence is enough to create a factual dispute

that defendants' negligence caused Baby Diego's loss of a chance at life which must be resolved by a jury. Defendants improperly encourage this Court to weigh the evidence presented as an alternate way to affirm the trial court; however, to weigh the evidence is to make credibility determinations properly reserved for the trier-of-fact. Finally, defendants raise arguments for the first time on appeal that were never presented to nor considered by the trial court. This Court should decline to address them until a record is built and the trial court rules on them. As a result, plaintiffs ask that this Court reverse the trial court's summary judgment dismissal and remand back for further proceedings.

A. The Trial Court Erroneously Disregarded the Loss of Chance Doctrine In Ruling Plaintiff Could Not Prove Baby Diego Probably Would Have Survived If Resuscitated

Both defendants improperly encourage this Court to ignore *Herskovits* by arguing that plaintiffs cannot prove "but for" causation. VMC Brief of Respondent at 11; Fitzgerald Brief of Respondent at 15-16. Fitzgerald also inaccurately argues that *Herskovits* is limited to its facts and not applicable in other cases. Fitzgerald's Brief of Respondent at 17. None of these contentions is correct nor supported by case law.

In fact, the rationale of the trial court's ruling and the defendants' argument was rejected in *Herskovits v. Group Health*, 99 Wn.2d 609, 619, 664 P.2d 474 (1983), by this Court in *Zueger v. Public Hosp. Dist. No. 2 of Snohomish County*, 57 Wn. App. 584, 789 P.2d 326 (1990) and by Division II in *Shellenbarger v. Brigman*, 101 Wn. App. 339, 3 P.3d 211 (2000). In *Herskovits*, the defendant failed to timely diagnose the decedent's cancer, which led to a 14% reduction in his chance for survival (from 39% chance of survival if timely diagnosed to 25% when he finally was diagnosed). *Herskovits*, 99 Wn.2d at 612. In holding the plaintiff was entitled to recover for the 14% reduction of Herskovits' chance of survival, the court was split in its rationale. See *id.* at 619. The plurality opinion rejected the lead opinion's adoption of the substantial factor test, and instead held that the plaintiff needed to prove only that the defendant's negligence probably caused a substantial reduction in the chance of survival. *Id.* at 634. Because the harm was not the death of Herskovits, it was the reduction in his chance of survival, proving his survival was not necessary. *Id.* Similarly, the harm here is not Baby Diego's death, but the chance at life he lost due to Dr. Fitzgerald's failure to provide resuscitation.

The *Herskovits* plurality reasoned that to require a plaintiff to prove the traditional causation requirements (“but for” the negligence the decedent would have survived) would “subvert[] the deterrence objectives of tort law by denying recovery for the effects of conduct that cause[] 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.” *Id.* at 634 (internal quotations and citations omitted). In short, requiring traditional “but for” causation allows a negligent defendant to escape responsibility, something that Dr. Fitzgerald and Valley Medical Center (VMC) hope to do here.

Similarly, in *Zueger*, this Court held that loss of chance doctrine is applicable when a doctor’s negligence probably caused a substantial reduction in the chance of survival. 57 Wn. App. at 591. In other words, plaintiffs do not have to prove – as the trial court here ruled and defendants argue – that the Baby Diego more probably than not would have survived; instead, the plaintiff is required to prove only that the defendant’s negligence substantially reduced Baby Diego’s chance of survival. *See id.* at 591.

By adopting the loss of chance doctrine in *Zueger*, this Court affirmed that the doctrine survived, contrary to the claims of

defendants. Even though this Court ultimately held the loss of chance instruction was inappropriate in that case, it did so because the evidence failed to support the instruction, not because the doctrine was not good law. *See id.* at 592.

More recently, Division II of the Court of Appeals also held that the loss of a chance of survival was a “compensable interest.” *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348-49, 3 P.3d 211 (2000). In that case, the defendant doctors failed to diagnose lung disease for several years, treatment started much later, and plaintiff lost the opportunity to slow the disease. *Id.* at 342. In failing to diagnose the lung disease, the plaintiff lost a 20% chance at slowing the disease. *Id.* at 345. The court held the loss of a chance of slowing the disease was substantively the same as Herskovits’ loss of a chance of survival because both involved the loss of length of life. *Id.* at 349. If the disease had slowed, Shellenbarger would have lived longer, just as if Herskovits’ disease was cured, he would have lived longer. *Id.* If *Herskovits* had in fact been limited to its facts, as argued by defendants, then the *Shellenbarger* decision would have come out differently.

Even the cases that refuse to extend the loss of chance doctrine to other areas of law underscore the continuing validity of

the doctrine. For example, in *Daugert v. Pappas*, the Supreme Court refused to extend the loss of chance doctrine to legal malpractice cases, primarily because of the differences between legal malpractice and medical malpractice cases. 104 Wn.2d 254, 261-62, 704 P.2d 600 (1985). In a legal malpractice case, the client does not lose a chance at anything because the client's underlying case is eventually reviewed as part of the "case within a case" of the legal malpractice action and the fact-finder will make a decision about what should have happened. *Id.* at 261. By contrast, when a patient dies because of the medical malpractice, all chances at survival are lost. *Id.* In declining to extend the doctrine to legal malpractice cases, the Supreme Court nevertheless reaffirmed that the "reduction in one's opportunity to recover (loss of chance) is a very real injury which requires compensation." *Id.*

Similarly, in *Koker v. Armstrong Cork, Inc.*, this Court refused to extend the loss of a chance doctrine to an asbestos action, where the plaintiff alleged that he faced an increased risk of cancer as a result of exposure to asbestos. 60 Wn. App. 466, 482, 804 P.2d 659 (1991). Citing *Daugert*, this Court explained that the loss of chance doctrine allows a party "to recover where the plaintiff has lost an opportunity and *has no other redress.*" *Koker*, 60 Wn. App.

at 482 (emphasis in original). In other words, a plaintiff is allowed to recover for being deprived of a chance to survive or a reduction in the chance of survival, but not where there is only an increased risk harm might occur in the future. *Id.* Koker was not deprived of the opportunity to seek damages for future harm because another action could be brought when those future damages occurred. *Id.*

As all of the case law makes clear, the loss of a chance doctrine remains viable, where, as alleged here, the doctor's negligence caused a substantial reduction in the loss of a chance of survival of 30-40% (discussed in more detail in Section B below). The loss of chance doctrine ensures that negligent parties, like Dr. Fitzgerald and VMC, are held responsible for the harm they cause.

B. Plaintiff's Presented Sufficient Evidence That Baby Diego lost a 30-40% Chance of Survival, Precluding Summary Judgment

While the trial court's decision was a narrow one and did not reach whether plaintiffs presented sufficient evidence demonstrating a significant reduction in chance of survival, plaintiffs will nevertheless address defendants' contentions that they did not.

The issue of proximate cause is generally for the jury and is only appropriate for summary judgment where "the facts are undisputed and the inferences therefrom are plain and incapable of

reasonable doubt.” *Shellenbarger*, 101 Wn. App. at 348 (internal quotations and citation omitted). For a medical malpractice case, summary judgment is not appropriate if medical testimony demonstrates that the alleged negligence more likely than not caused the harmful condition. *Id.* Here, the harmful condition is the loss of chance at survival. Further, the reviewing court’s job is only “to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury’s role, once a burden of production has been met.” *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 625, 128 P.3d 633 (2006) (internal quotation and citation omitted).

Here, the facts were very disputed. Plaintiffs presented significant evidence to create a jury question that not only the parents requested resuscitation in advance, but that if the doctors had attempted to resuscitate Baby Diego, he had a 30-40% chance of survival.

Maria Perez Guardado, Baby Diego’s mother, testified that she was told by multiple people at Valley Medical Center (VMC) that they would do everything they could to save Baby Diego. CP 208-09, 212, 214-15. The medical records reflect that at least one doctor told Guardado that “we are doing all that we can.” CP 175.

The medical records also plainly document that shortly before Baby Diego's birth, Guardado told the staff at VMC, through an interpreter, that she wanted the doctors to try to resuscitate Baby Diego: "Pt states that she DOES want resuscitative measures taken when birth occurs." CP 177 (emphasis in original). The nurse testified that Guardado was "very adamant" about wanting resuscitation. CP 284. Similarly, the interpreter testified that Baby Diego's parents always requested resuscitative care. CP 272, 277.

Defendants' insistence that plaintiffs agreed to no resuscitation for Baby Diego only underscores the factual dispute here. See Fitzgerald Brief of Respondent at 5-10; VMC Brief of Respondent at 3-4. By arguing summary judgment is appropriate here, defendants necessarily ask this Court to find their evidence and witnesses more believable than plaintiffs' evidence and witnesses – an inappropriate credibility determination for a court on a summary judgment motion. Because both sides presented competing evidence about whether plaintiffs requested resuscitation for Baby Diego, summary judgment was improper.

Likewise, defendants improperly ask this Court to discount the expert testimony presented by plaintiffs that Baby Diego would have had a 30-40% chance of survival if resuscitative measure had

been taken. Defendants go to great lengths to try to discredit Dr. Hermanson's opinions, even though the summary judgment stage is about whether plaintiffs met their burden of production. All of the reasons put forth by defendants that Dr. Hermanson's opinions should be discredited are nothing more than improper attempts at impeachment, which should be reserved for cross-examination at trial.

Plaintiffs' expert neonatologist, Dr. Hermanson, testified that the standard of care required resuscitative efforts be made on 23 week premature babies, when the parents request it. CP 255, 256, 257, 260, 261, 332.¹ Dr. Hermanson also testified that if the doctors had resuscitated Diego, he would have had a 30-40 percent chance of survival longterm. CP 262-63, 264-65, 266-67, 268, 332. In other

¹ There seems to be some confusion as to the status of Dr. Hermanson's September 20, 2010 declaration, but it remains in the record. The declaration was filed one day late on September 21, 2010. Defendants filed a motion to strike the declaration on September 24. CP 334. At the hearing on October 1, 2010, the trial court entered the Revised Order Granting Defendant Fitzgerald's Motion for Summary Judgment. CP 392-95. In it, the trial judge crossed out the line indicating that she had granted Defendant Fitzgerald's Motion to Strike Untimely Hermanson Declaration. CP 394. There is no other order striking the declaration in the record. The logical conclusion is, then, that the trial judge denied the motion to strike, and Dr. Hermanson's declaration remained a part of the record. The trial judge did appear to strike it from her Order Denying Reconsideration. CP 513. But that does not change the fact that Dr. Hermanson's declaration was never stricken from the record for purposes of the original summary judgment motion.

words, of 100 babies like Diego, 30-40 of them would survive and live out full lives if resuscitation was attempted. Dr. Hermanson further testified that of those 30-40% that survive, one third of those will live without significant disability or injury. CP 266, 332. That there are other experts who have a different opinion about Diego's chances of survival with resuscitation only reinforces the need for a trial to sort it all out.

Similarly, the issue of the presence or absence of an infection is a red herring because that issue again goes to who the jury might believe more. As an initial issue, the status of plaintiffs' Sur-Reply is unclear. Dr. Fitzgerald appears to claim that the Sur-Reply filed by plaintiffs was considered by the court and not stricken. Fitzgerald Brief of Respondent at 3. However, there are contradictory court orders and oral rulings. In the trial court's Order Granting Summary Judgment Dismissal of Remaining Claims (as to VMC), Plaintiffs' Sur-Reply was crossed out, as if it had been stricken and not considered by the judge. CP 390. In contrast, in the trial court's Revised Order Granting Defendant Fitzgerald's Motion for Summary Judgment signed the same day, plaintiffs' Sur-Reply was handwritten in as a document considered by the court. CP 394. At the hearing, the trial judge orally ordered the Sur-Reply

stricken, though she said the information in it would not have affected her decision. RP 15. The court clerk also made a minute entry indicating the court struck the sur-reply. CP 388. While written orders generally trump oral rulings, the presence of two seemingly contradictory written orders plus the minute order concerning the Sur-Reply creates a confusing situation.

It was the unclear status of the Sur-Reply and defendants' belated raising of the issue of the virus that led to plaintiffs' motion for reconsideration. CP 398-400. In that motion, plaintiffs offered the expert testimony of Dr. Hussey, an obstetrician, who testified more likely than not there was no infection; he testified that there was evidence of inflammation but no infection, and the testing done by VMC that showed an infection is generally considered unreliable. CP 400-02, 443-48, 450, 453-54.

That said, any discussion about the alleged presence of an infection goes to the weight a jury might give to various doctors' opinions. Thus, it is improper discussion for purposes of a summary judgment motion. Defendants claim the virus was present and impacted Diego's chances of survival. Plaintiffs argue with the testimony of Dr. Hussey that there likely was no infection and

therefore no impact on Diego's chances of survival.² This is a classic factual dispute that only a jury can resolve. Thus, summary judgment is inappropriate.

Defendants also incredibly argue that Baby Diego's chance at life that was taken from him should not be considered "significant," as required by *Zueger*. Fitzgerald Brief of Respondent at 17-19; VMC Brief of Respondent at 15-16. The case law says otherwise. In *Herskovits*, both the lead opinion and the plurality – six justices – considered a 14% reduction in Herskovits' chance of survival significant. In *Shellenbarger*, Division II considered the loss of a 20% chance of slowing the disease significant enough to preclude summary judgment. Here, plaintiffs' expert witness testified that had Baby Diego been resuscitated, he would have had a 30 to 40 percent chance of survival long term. And if he had survived, he would have had a one-third chance at living a completely normal life. Thus, of 100 babies, 30 to 40 would have survived longterm and 10-13 would have lived normally. If as in *Herskovits* a 14% chance reduction in loss of a chance at life is significant, then Baby Diego's loss of a 30 to 40% chance of life

² Dr. Fitzgerald herself admitted that there was no evidence of infection upon examination of the baby. CP 424.

and a 10-13% chance at a completely normal life must also be considered significant.

C. Plaintiffs Presented Enough Evidence to Create Issues of Fact To Survive Summary Judgment About Whether Diego Was Viable

The trial court's ruling dismissing the case was because of an erroneous legal conclusion – what level of proof was required to establish proximate cause – and not because the fetus was not viable. See RP 15. Further, defendants' argument is nothing more than a way to get around the loss of chance doctrine's loosening of the causation requirement. Nevertheless, plaintiff's presented enough evidence to create an issue of fact for the jury on the issue of viability.

The defendants' focus on viability is their attempt to make an end-run around the loss of chance doctrine and to impute the traditional "but for" causation requirement back into the case. As the *Herskovits* plurality noted, the compensable loss is not his death; rather, it is the loss of the chance Herskovits might have survived. 99 Wn.2d at 634. Even though the harm at issue is not death, the cause of action is still pursued under the wrongful death statute. To avoid "harsh and arbitrary results," the plurality liberally construed the meaning of the word "cause" in the wrongful death

statute to include the loss of a less than even chance of survival. *Id.* at 634-635 & n.1.

It would be contradictory to interpret the wrongful death statute to allow for accountability for those doctors who harm an adult with a less than 50 percent chance of survival, as the *Herskovits* Court did, but not allow accountability for those doctors who harm babies who have a less than 50 percent chance of survival. The rationale underlying the *Herskovits*' decision was to allow culpable doctors to be held responsible for their actions when they cause compensable harms. The same should be true here where the harm is not the death of Baby Diego, but rather the lost chance he had of surviving that was taken from his family when Dr. Fitzgerald failed to attempt resuscitation.

Regardless, plaintiffs did present evidence that Diego was viable at birth. The medical records indicated he was "liveborn" with a heartbeat of 80 beats per minute and agonal breathing. CP 150, 193, 194. The state of Washington issued him a "Certificate of Live Birth." CP 189. He lived for nearly three hours before being pronounced dead. See CP 348. Further, Dr. Hermanson testified in his declaration after reviewing all of the medical records and fact witness testimony that a 23 week old fetus "is viable." CP 331-32.

In short, taken in the light most favorable to plaintiffs as the nonmoving party, plaintiffs have presented evidence and expert testimony that Diego was viable, meeting their burden of production. Summary judgment under these circumstances is improper.

D. Defendants Raised New Issues For the First Time on Appeal That Were Never Before the Trial Court, and Thus Should Be Considered Waived

The sole issue of this appeal is whether plaintiffs have met their burden of production with respect to causation when they cannot show Baby Diego would probably have survived if Dr. Fitzgerald and the staff at VMC had proceeded with resuscitative efforts. Yet that did not stop VMC from raising new arguments on appeal that were never addressed to the trial court. VMC now argues for the first time that plaintiffs have no cause of action under RCW 4.24.020 or RCW 4.20.046. VMC Brief of Respondent at 19-21. However, defendants never moved for summary judgment on these bases. See CP 23-34, 86-99. No arguments were ever made to the trial court about damages or beneficiaries. Therefore, no record was developed on these issues, and no way for a court to make a decision about them one way or the other. VMC is hoping to piggyback these issues on the plaintiffs appeal without ever

having addressed them to the trial court. These new issues should be considered waived. See *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (“[f]ailure to raise an issue before the trial court generally precludes a party from raising it on appeal”); RAP 2.5(a).

II. CONCLUSION

The loss of chance doctrine allows recovery where those who have been harmed have a less than 50% chance of living, even without a doctor’s negligence. Here, the trial court improperly granted summary judgment based on the belief that plaintiffs had to prove that Baby Diego probably would have lived “but for” Dr. Fitzgerald’s failure to take make efforts at resuscitation. Defendants ask this Court to ignore *Herskovits*, *Zueger*, and *Shellenbarger* and affirm the trial court. Alternatively, defendants ask this Court to weigh the evidence and find plaintiffs’ witnesses not credible. However, plaintiffs presented sufficient evidence to meet their burden of production with respect to whether the resuscitation was requested, viability, and that Diego lost a 30-40% chance at life. Case law supports the 30-40% loss of a chance at life as “significant.” Because both sides have competing evidence, summary judgment was inappropriate. The trial court should be

reversed. Finally, defendant's new appellate arguments about beneficiaries and damages should be considered waived.

DATED this 27th day of July, 2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **Reply Brief of Appellants** postage prepaid, via U.S. mail on the 27th day of July, 2011, to the following counsel of record at the following addresses:

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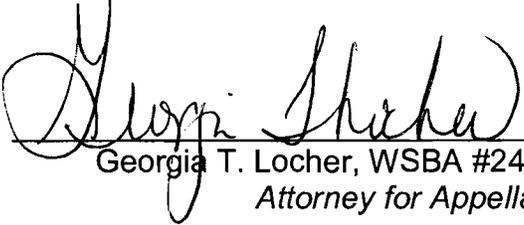
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