

FILED

JAN 30 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 308642

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In Re the Estate of RUTH M. DORMAIER, deceased, by and through
LOURENCE C. DORMAIER, Personal Representative; and LOURENCE
C. DORMAIER, individually, and as the Beneficiary of his wife's Estate,

Plaintiffs-Respondents,

vs.

COLUMBIA BASIN ANESTHESIA, P.L.L.C., a Professional Limited
Liability Company; ROBERT MISASI, C.R.N.A., and JANE DOE
MISASI, individually, and as husband and wife; GRANT COUNTY
HOSPITAL DISTRICT #1, d/b/a SAMARITAN HEALTHCARE, a/k/a
SAMARITAN HOSPITAL, a Washington non-profit organization,

Defendants-Appellants.

BRIEF OF RESPONDENTS

George M. Ahrend, WSBA #25160
AHREND ALBRECHT PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Marshall Casey, WSBA #42552
CASEY LAW OFFICES, P.S.
1318 W. College Ave.
Spokane, WA 99201-2013
(509) 252-9700

Attorney for Plaintiffs-Respondents

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Attorney for Plaintiffs-Respondents

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INTRODUCTION

Ruth Dormaier came to Samaritan Hospital in Moses Lake for surgery to repair her arm, broken in a fall five days earlier. When she arrived at the hospital for the surgery, she displayed symptoms consistent with life-threatening pulmonary embolism. She also had a number of risk factors for pulmonary embolism, including trauma from the recent fall. Her condition had deteriorated markedly from pre-operative visits between the date of the fall and the date of the surgery. The nurse anesthetist responsible for determining whether she could be safely placed under general anesthesia for surgery, Robert Misasi, did not heed the symptoms or the risk factors. Instead, he induced anesthesia under circumstances described as egregious negligence and akin to euthanasia. RP 335:11-16, 395:14-15 & 456:25-457:1. Approximately two hours into surgery, Mrs. Dormaier died from pulmonary embolism.

Her husband, Lourence, individually and as personal representative of his wife's estate (Dormaier), filed a claim for medical negligence against Mr. Misasi, his employer, Columbia Basin Anesthesia, P.L.L.C. (collectively Misasi), and the hospital, Grant County Hospital District #1, also known as Samaritan Hospital (Samaritan). CP 4-14. Following trial, a jury found that Misasi was negligent, that his negligence caused a 70% loss of a chance of survival, and that the resulting damages were in excess

of \$1.3 million. CP 357-58. The trial court entered judgment on the verdict in favor of Dormaier. CP 414-17.¹ From this judgment, Misasi and Samaritan appeal. CP 418-29 & 430-40.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Re: loss of chance

1. What is the nature of the loss of chance doctrine in Washington?
2. (a) Is the loss of chance doctrine limited to cases where the lost chance (or the upper limit of a range of chances) is equal to or less than 50%? (b) If so, is it harmless error to instruct the jury regarding loss of chance greater than 50%, because it is functionally equivalent to a more traditional wrongful death claim?
3. Is the loss of chance doctrine limited to cases where the chance in question (or the lower limit of a range) is reduced to something greater than zero but not completely eliminated?
4. (a) Is loss of chance mutually exclusive of wrongful death or other types of injury recoverable in a medical negligence action under Ch. 7.70 RCW? (b) If so, is it harmless error to submit loss of chance and wrongful death to the jury, where the jury's verdict is based solely on loss of chance?
5. Was instruction 11, regarding loss of chance, supported by substantial evidence?
6. Did the trial court abuse its discretion in instructing the jury regarding loss of chance?
7. What is the measure of damages for loss of chance over 50%?
8. Are damages for loss of consortium available when a spouse suffers injury in the form of loss of chance?

¹ The jury found that Samaritan was vicariously liable for Misasi's negligence based on apparent agency. CP 358. Samaritan does not assign error to this finding.

Re: apportionment of fault

9. Is summary judgment dismissing two defendants for lack of evidence of negligence and causation res judicata as to apportionment of fault to the dismissed defendants by the remaining defendants?
10. Did Misasi and/or Samaritan fail to preserve any error based on the trial court grant of motions in limine 1 and 14, regarding evidence of fault of the dismissed defendants, where (a) Misasi stated his agreement with both motions and (b) Samaritan cited improper grounds for admission of the evidence?
11. Did Misasi and/or Samaritan fail to preserve any error based on jury instruction 4, regarding fault of the dismissed defendants, where (a) Misasi's objection to the instruction was based on improper grounds and (b) Samaritan did not object?
12. Are Misasi's and Samaritan's assignments of error to the grant of motions in limine 1 and 14 and jury instruction 4 harmless error, where they repeatedly stated that they had no intention of apportioning fault to the dismissed defendants, and no evidence was excluded?

Re: motion to dismiss

13. Is there substantial evidence of causation to support the jury's verdict?

Re: special verdict

14. Did Misasi and Samaritan fail to preserve any error based on alleged inconsistency in the special verdict by (a) failing to object to the verdict form, and/or (b) failing to raise any claim of inconsistency before the jury was discharged?
15. Is the jury's special verdict inconsistent in finding that Misasi's negligence caused one type of injury (loss of chance of survival) but not another type of injury (death)? Or, should the findings be harmonized to uphold the verdict?

III. STATEMENT OF THE CASE

A. Background facts.

Ruth Dormaier arrived at Samaritan on September 20, 2007, with life-threatening pulmonary embolism. RP 251:19-253:2, 1160:20-24. Pulmonary embolism refers to a blood clot that sheds fragments or breaks free and travels into the blood vessels of the lungs, where it becomes lodged and starts to kill the lung. RP 222:8-11, 344:5-11. It is typically a cumulative process that causes recognizable symptoms, as it was in Mrs. Dormaier's case. RP 238:4-246:8, 393:2-394:2, 408:2-409:3, 640:8-641:4.

Among her symptoms, Mrs. Dormaier was short of breath. RP 1134:14. She was experiencing chest pain. RP 1134:13, 1143:15-23. She had an elevated respiration rate of 22-32 times per minute. RP 341:10-11, 362:4-7, 1134:12-13, 1138:20-23, 1149:21-1150:7. Normal respiration is 10-12 times per minute. RP 341:6. She had elevated blood pressure of 181 over 106. RP 360:20-24, 1138:6-11. Normal for her was 140 over 80. RP 361:22-23. Perhaps most significantly, the oxygen saturation of her blood was 82-84% on room air. RP 362:8-10, 1134:12. With the administration of extra oxygen, her oxygen saturation only improved to between 85-90%. RP 1148:2-16. Normal oxygen saturation is 96% or more on room air. RP 220:3-9, 1151:2-16. Hospital monitors are set to trigger an alarm if oxygen saturation falls below 90%. RP 220:21-221:8,

1121:15. Oxygen saturation of 84% is “very worrisome” and a “disaster.”

RP 362:20-363:15.

Before she arrived at the hospital, Mrs. Dormaier already had a number of significant risk factors for pulmonary embolism, including her age, recent trauma, immobility following the trauma, and dehydration from pre-surgery fasting, among others. RP 250:2-16, 1140:4-24, 346:2-5, 348:23-353:2. Her condition had deteriorated markedly from pre-operative visits over the preceding five days.²

On the day of the surgery, Misasi was the nurse anesthetist on duty. Samaritan uses nurse anesthetists rather than anesthesiologists to provide anesthesia for their patients. RP 332:12-25. Despite their different training and qualifications, nurse anesthetists are held to the same standard of care as anesthesiologists. RP 333:1-334:25, 1131:13-22. The nurse anesthetist has the responsibility to ensure that the patient can safely be placed under anesthesia for surgery. RP 1113:17-1116:25, 1118:1-1119:7, 1165:18-25. The nurse anesthetist is “the gatekeeper to the operating room,” RP 1114:4-5, and “the last line of defense” for the patient, RP 347:24.

Misasi violated the standard of care in his treatment of Mrs. Dormaier. RP 1131:23-1132:5. His negligence was egregious under the

² For example, when she went to the emergency room five days earlier, Ruth Dormaier’s oxygen saturation was 97%. RP 377:15-378:2.

circumstances, and placing her under general anesthesia was akin to euthanizing her. RP 335:11-16, 395:14-15 & 456:25-457:1. Among other things, Misasi should have ordered an appropriate scan, which would have revealed the existence of pulmonary embolism. RP 224:11-225:18, 1153:17-1154:10, 1157:1-9, 1159:21-25, 1160:25-1161:14. Mrs. Dormaier then could have been treated with anticoagulation medication known as Heparin. RP 246:9-247:10, 1161:15-1162:10. It should have taken only about an hour to correctly diagnose the pulmonary embolism and begin treatment. RP 232:24-233:10. Unfortunately, it was “an imminently survivable event.” RP 392:2-12.

B. If Misasi had complied with the standard of care, Ruth Dormaier would have had as much as a 90% chance of survival.

Proper diagnosis and treatment of pulmonary embolism with anticoagulation therapy (Heparin) increases the chance of survival by 50-70%:

Q. Doctor, looking at this case and taking into account all of the records that you reviewed, do you have an opinion as to whether or not had Mrs. Dormaier been properly diagnosed with pulmonary embolus and treated with anticoagulation, whether she would have survived?

A. (By Dr. Swenson): It's been my experience over the entire time of my career that if we can diagnose this, we have a good chance once beginning therapy to take a mortality rate of possibly 70 to 80 percent and bring it down into the ten to 20 percent rate.

RP 258:13-22. A mortality rate of 70-80% *without* anticoagulation treatment translates into a chance of survival of 20-30%. A mortality rate of 10-20% *with* treatment translates into a chance of survival of 80-90%. By comparing the survival rates, the failure to provide treatment results in a lost chance of survival of 50-70%.³

Mrs. Dormaier's chance of survival with proper treatment was actually higher, based on the fact that she was active and in good health for her age, and did not have any comorbid conditions such as cancer or preexisting cardiopulmonary problems. RP 258:23-259:20. Her chance of survival was as much as 90%:

Q. So based upon your earlier testimony, Doctor, if you factor out cardiopulmonary function people and the terminal illness people, my understanding is that the percentage of people that survive from this treatment is approximately 90 percent?

A. (By Dr. Swenson): Right. When you strip away the people who have very, very bad chronic medical conditions which lead them to have no reserve or people with cancers and other much more rare conditions that are life-threatening.

Q. And in your opinion, would Mrs. Dormaier, if appropriately treated, have had a 90 percent chance of survival?

A. I believe so.

Q. Doctor, your opinions today have to have been rendered to a reasonable degree of medical probability of certainty. Have they been rendered to that degree?

³ This is the formula for calculation of loss of chance cited in *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.2d 490 (2011) (citing Restatement (Third) of Torts: Phys. & Emot. Harm § 26 cmt. n (2010)). *See also* App. Br., at 37-38 & n.19. (citing formula).

A. They have.

RP 259:21-260:12.⁴

C. Apportionment of fault.

- 1. Two health care providers were dismissed on summary judgment, without opposition, based on a lack of evidence of negligence or causation against them.**

The complaint originally named as defendants, in addition to Misasi and Samaritan, two other health care providers, Dr. Daniel W. Canfield and Dr. Kenneth Craig Hart. CP 5-6. In answer to the complaint, Drs. Canfield and Hart denied that they breached the standard of care or were otherwise negligent, or that they caused injury to Ruth Dormaier. CP 23-24. They subsequently moved for summary judgment, on grounds that there was insufficient evidence to establish negligence or causation on their part. CP 479-81, 569-74. Neither Misasi nor Samaritan contested the motion. CP 576. The superior court granted the motion and dismissed claims against Drs. Canfield and Hart with prejudice. CP 37-39.⁵

⁴ *Accord* RP 233:11-24 (Dr. Swenson, confirming 90% survival rate among patients with no comorbid conditions among thousands per year diagnosed with and treated for pulmonary embolism); RP 395:22-396:6 (Dr. Hattamer, confirming high survival rate among patients diagnosed with and treated for pulmonary embolism); RP 1161:19-1162:10 (Dr. Halpern, testifying “[t]he success rate is greater than 90 percent”); RP 1164:17-22 (indicating general statistics apply to Mrs. Dormaier).

⁵ As required by then-existing law, former RCW 7.70.150, Mr. Dormaier also filed “certificates of merit” regarding breaches of the standard of care by each of the defendant health care providers, including Drs. Canfield and Hart. CP 1260 (certificate of merit by Dr. Swenson re: Dr. Hart); CP 1266 (certificate by Marty Murray, RN, re: Drs. Hart and Canfield); CP 1269 (certificate by Dr. Smith re: Dr. Canfield). In the intervening time, *Putman v. Wenatchee Vly. Med. Ctr., P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009), held that former RCW 7.70.150 was unconstitutional.

2. The trial court granted motions in limine 1 and 14 precluding evidence of nonparty fault, with the agreement of Misasi, but over the objection of Samaritan.

Before trial, Mr. Dormaier filed motion in limine 1, seeking to exclude evidence of nonparty fault. CP 627-28. Without naming Drs. Canfield and Hart, the motion specifically referenced evidence of fault on the part of “previous parties who have been dismissed pursuant to a summary judgment,” arguing that the summary judgment order had preclusive effect under the doctrine of res judicata. CP 627. Mr. Dormaier later filed a supplemental motion in limine 14, specifically referring to Drs. Hart and Canfield by name, again seeking to preclude argument that they were negligent, and prevent Appellants from attempting to apportion fault to them. CP 677-70.⁶

At the hearing on the motions in limine, counsel for Misasi initially objected to the timeliness of the supplemental, RP 81:15-25, but stated that “we are agreed with number 1 ... [and] 14,” among others, RP 82:2-7 (ellipses & brackets added).⁷

⁶ Although Appellants reference motion in limine 14 in their assignments of error and argument, they do not mention motion in limine 1. *See* App. Br., at 3 (assignment of error no. 5, referencing motion in limine 14 and CP 667-70); *id.* at 61 (citing CP 667-70).

⁷ The trial court construed the timeliness objection as relating only to those motions in limine that were contested, RP 103:10-15, and overruled the objection as to the remaining motions because there was ample time for the parties to address them, RP 143:23-144:1. Counsel for Misasi did not disagree with the trial court’s interpretation of the objection. No error has been assigned, and no argument has been made, that the trial court abused its discretion regarding the timeliness of the motion.

Counsel for Samaritan stated that the hospital's position was not any different than Misasi, RP 82:19-21, but then he asked the superior court to defer ruling on the motions in limine in case Drs. Canfield or Hart offered "some wild testimony at the time of trial," RP 82:22-83:8. He explained the basis for admitting such evidence as a type of impeachment if the health care providers inculpated Misasi:

If they're [Drs. Canfield and Hart] going to come out and affirmatively blame Mr. Misasi, now that they're dismissed, I think that opens the door a little bit to comment about their conduct.

RP 108:14-17.⁸ He acknowledged "that it's about a 99 percent chance we're not going to apportion fault" to Drs. Canfield or Hart. RP 83:5-6.⁹

The trial court judge granted motions in limine 1 and 14. RP 123:13-129:7. However, the judge indicated that his rulings on such motions were "soft rulings" in the sense that they could change, depending on the events of the trial. RP 89:6-8.

⁸ The evidence apparently consists of Dr. Swenson's testimony regarding the certificate of merit, which was limited to Dr. Hart and did not mention Dr. Canfield. RP 106:7-107:22, 120:23-121:8. No health care providers who signed a certificate of merit regarding Dr. Canfield were called as witnesses at trial by either party. *See* CP 1265-67 (certificate signed by Marty Murray, RN, BSN, LNCC, CPHQ re: Dr. Canfield et al.); CP 1268-70 (certificate signed by Carla Smith, MD, PhD re: Dr. Canfield).

⁹ *Accord* RP 105:11-12 (stating "I don't think I'm going to apportion fault to either of these gentlemen"); RP 108:3-5 (stating "I don't think I'm going to apportion fault to Dr. Hart and Dr. Canfield"); RP 121:9-11 (stating "[r]egardless of empty chair, res judicata or apportionment, *none of which I think we're probably going to have to get to ...*"; emphasis added).

3. During trial, counsel for Samaritan disclaimed any intention of apportioning fault to the health care providers dismissed on summary judgment.

In keeping with his statements during the motion in limine hearing, counsel for Samaritan continued to disclaim any intention of apportioning fault to the health care providers dismissed on summary judgment throughout trial:

I believe I stood up when we were arguing your ruling and said, I will – *defendants will not apportion fault, we're not going to try to put Dr. Hart and Dr. Canfield on the verdict form.*

RP 670:14-17 (emphasis added).¹⁰

4. Rather than apportioning fault to the health care providers dismissed on summary judgment, Misasi and Samaritan sought to have the jury base its determination of whether Misasi was negligent upon their conduct, not his own.

At trial, Misasi and Samaritan repeatedly emphasized that Misasi made a “joint” decision with Drs. Canfield and Hart to place Ruth Dormaier under general anesthesia, and that they acted together as a “team.” *See, e.g.,* RP 731:23-732:4; RP 737:2-3; 739:19-20; 743:15-16, 744:12-14, RP 1052:2-15, 1504:13-1506:3, 1510:9-10. Counsel described the joint/team nature of the decision as “the heart of our case.” RP 959:14-

¹⁰ *Accord* RP 671:6-9 (stating “[f]rankly, your Honor, as I was thinking about this, I don’t know that it makes a difference whether Dr. Hart and Dr. Canfield were negligent or not. *I’m not going to apportion fault to them*”; emphasis added); RP 962:9-12 (stating “my recollection of the ruling of the court was we could not apportion fault, we certainly aren’t going to, *we never were as to Dr. Canfield or Dr. Hart*”; emphasis added).

17. The way that they presented this evidence and argument led the trial court to be concerned that the jury would base its determination of whether Misasi was negligent upon the conduct of these nonparty health care providers. RP 992:8-993:5, 996:25-998:16, 1000:9-23.

5. The trial court drafted jury instruction 4 to minimize the danger that the jury would determine whether Misasi was negligent based upon the conduct of the health care providers dismissed on summary judgment.

To address the concern raised by the emphasis on joint/team decision-making, the trial court drafted jury instruction 4. RP 1415:10-15.

The instruction provides:

In this case, there is no issue for you to consider regarding the negligence, if any, of Daniel Canfield, MD or of Kenneth Hart, MD. You must not speculate regarding any such negligence, or the absence thereof, and must resolve the claims of the parties in this case based upon the evidence admitted, without regard to whether or not Dr. Canfield or Dr. Hart were negligent. You may consider the evidence regarding the conduct of Dr. Canfield and Dr. Hart, along with all other evidence in the case, in determining whether or not Mr. Misasi complied with the applicable standard of care.

CP 266; RP 1433-34.

6. Misasi objected to instruction 4 solely on grounds that nonparty fault was a non-issue; while Samaritan did not object to the instruction or join Misasi's objection.

Counsel for Misasi objected to instruction 4 as follows:

The defendants Misasi take exception to the conduct of physicians instruction regarding Drs. Canfield and Hart. I think that this is inserting a degree of – it's inserting something into the case that is not necessary. Similar to the fact that we are not using the insurance instruction, no insurance, we don't consider it, I think

that this is something that the jury is just going to start speculating on, wondering why Drs. Canfield and Hart are not here. We take exception in that regard.

RP 1409:4-13. Counsel for Misasi did not object to the instruction on any other grounds. Counsel for Samaritan Hospital did not object to the instruction at all. *See* RP 1411:20-1414:15.

D. The trial court denied Misasi’s and Samaritan’s motion to dismiss, finding substantial evidence of causation.

At the conclusion of Dormaier’s case-in-chief, Misasi and Samaritan moved to dismiss the case on grounds that “there’s no causation evidence.” RP 1268:22-23. They argued that anticoagulation therapy with Heparin would not dissolve the clot that led to the pulmonary embolism, among other things. RP 1268:22-1270:6. In response, Dormaier pointed to evidence that anticoagulation therapy dissolves clots,¹¹ and binds clots in place¹² so they will not be released to cause pulmonary embolism, and that other steps could have been taken to save Ruth Dormaier if Misasi had

¹¹ *See* RP 246:13-25 (explaining how anticoagulation therapy causes clots to be dissolved by stopping clotting and allowing the body’s natural mechanisms to dissolve existing clots); RP 247:4-7 (stating “Heparin ... acts immediately to stop this further clotting and allow the normal body’s clotting dissolving mechanisms to work unopposed”; ellipses added); RP 250:21-23 (stating “what this [i.e., anticoagulation or Heparin therapy] does is it stops any new clot from forming, and allows the body’s own mechanisms of dissolving [the] clot to work unopposed. So the clots out here in the veins become smaller”; brackets added); RP 294:11-14 (stating “Heparin itself is not going to dissolve it, it’s going to check any further growth of that and allow the body’s own mechanisms every dissolving that clot [sic], which are already activated”; brackets added).

¹² *See* RP 250:21-251:8 (explaining how anticoagulation therapy binds clots in place); RP 251:14-16 (stating “you’re reducing the threat that any further clots out in the rest of the body may yet migrate”); RP 295:2-5 (affirming that “[w]hat Heparin will do is work with the body to hopefully make sure that no more clots break off from the thrombus”).

followed the standard of care. RP 1270:14-1271:9. The trial court denied the motion, finding substantial evidence of causation when properly viewed in the light most favorable to Dormaier. RP 1271:13-1272:12.

E. The trial court ruled that the evidence warranted giving instruction 11, regarding loss of chance, to the jury.

Based on the evidence adduced at trial, Dormaier proposed an instruction based on the loss of chance doctrine. RP 1392:23-1393:9. The trial court agreed that loss of chance was appropriate, and drafted the instruction, eventually numbered 11. CP 233-34 & 273.¹³ Misasi and Samaritan objected to the instruction on several grounds: that loss of chance had not been pled in the complaint and they had received insufficient notice, CP 187-88 & 282-83, RP 1403:7, 1409:20¹⁴; that loss of chance is unavailable when the chance lost is greater than 50%, CP 182-84, RP 1404:5-7; that there was a lack of substantial evidence to warrant the instruction, CP 185-86 & 188-89, RP 1403:10-25; and that it would be confusing to give a loss of chance instruction, RP 1404:3-5 & 1404:20-1405:6.¹⁵

¹³ The trial court's written summary of evidence supporting the instruction, CP 233-34, is reproduced in the Appendix to this brief.

¹⁴ With respect to pleading loss of chance, counsel for Samaritan stated "it was never pled, maybe it doesn't have to be if it was never a cause of action" RP 1403:7-9. To the extent necessary, Dormaier argued that it would be appropriate to amend the complaint to conform to the evidence under CR 15(b). CP 178-79.

¹⁵ The full text of instruction 11, CP 273, is reproduced in the Appendix to this brief along with Samaritan's proposed loss of chance instruction, CP 218, and a comparison of the two.

With respect to the pleading/notice issue, in particular, Misasi and Samaritan submitted an affidavit from one of their expert witnesses containing additional testimony responsive to the testimony of Dormaier's experts. CP 219-22. Misasi and Samaritan did not explain why they did not previously present the testimony in response to Dormaier's experts, nor did they ask to reopen the evidence to present the testimony before the case was submitted to the jury.

F. Using the special verdict form drafted by the trial court without objection, the jury returned a verdict finding that Misasi was negligent and that his negligence proximately caused Ruth Dormaier to suffer a 70% lost chance of survival, and awarded damages.

The trial court drafted a special verdict form that was submitted to the jury without objection. CP 233-34.¹⁶ After instructing the jury to determine whether Misasi was negligent, the form instructed the jury first to determine whether his negligence proximately caused Ruth Dormaier's death. CP 357. If not, the form then instructed the jury to determine whether his negligence proximately caused her to suffer a loss or diminution of her chance to survive the condition that caused her death. CP 357-58. The jury returned a verdict finding that Misasi was negligent and that his negligence was a proximate cause of a 70% loss of chance of survival, and awarded damages on this basis. *Id.* Before the jury was

¹⁶ A copy of the special verdict, CP 357-58, is reproduced in this Appendix to this brief.

released, neither Misasi nor Samaritan suggested that their verdict was inconsistent.

G. The trial court entered judgment on the verdict and rejected Misasi's and Samaritan's request to enter judgment in their favor.

Following trial, Misasi and Samaritan argued that the jury's finding that Misasi's negligence caused a 70% loss of chance of survival was inconsistent with its finding that his negligence did not cause her death, and they sought entry of judgment in their favor on this basis. CP 361-67.¹⁷ The trial court determined that the jury's findings on the special verdict form were not inconsistent and entered judgment in favor of Dormaier. CP 411-17 (judgment); CP 1255-58 (memorandum opinion).

V. ARGUMENT

A. Overview of loss of chance as a distinct type of injury in medical negligence actions under Ch. 7.70 RCW.

Misasi and Samaritan assign error to instruction 11, regarding the loss of chance doctrine, and they raise a number of issues and arguments regarding the legal contours of loss of chance. *See* App. Br., at 2-4 (assignments of error 1 & 2 and issues 1-5); *id.* at *id.* at 34-50 (argument

¹⁷ *See also* RP 5:16 (Apr. 6, 2012, transcript, counsel for Samaritan stating "the verdict is internally inconsistent"); RP 9:24-25 (Apr. 6, 2012, transcript, counsel for Misasi stating "there is an inconsistent verdict"). The post-trial motion hearing transcript is numbered separately from the trial transcript.

re: loss of chance). A brief overview of the loss of chance doctrine is necessary in order to place the arguments in context and properly respond.

The Washington Supreme Court authorized recovery for loss of a chance of survival resulting from a health care provider's negligence in *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983). The plaintiff in *Herskovits* was the estate of a man who died from lung cancer. There was evidence that the decedent had a 39% chance of surviving lung cancer for five years with proper diagnosis and treatment, and that the defendant-health care provider's negligence in failing to diagnose the cancer in a timely fashion reduced the chance of surviving five years from 39% to 25%, i.e., a loss of a 14% chance. *See id.*, 99 Wn.2d at 611-12 (Doe, J., lead opinion); *id.* at 621 (Pearson, J., plurality opinion).

The Court reversed summary judgment in favor of the defendant-health care provider, and allowed the estate to seek recovery for loss of chance at trial, although a majority of the Court did not agree on the theoretical underpinnings of loss of chance. The lead opinion by Justice Dore would base recovery for loss of chance on principles of causation, concluding that "a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow *the proximate cause issue* to go to the jury." *See Herskovits*, at 619 (emphasis added). The plurality opinion

by Justice Pearson would base recovery for loss of chance on principles of injury, stating that “the best resolution of the issue before us is to recognize the loss of a less than even chance as an *actionable injury*.” See *id.* at 634 (emphasis added).

Nonetheless, both the lead and plurality opinions in *Herskovits* were motivated by similar public policy considerations. They both recognized the important function that recovery for loss of a chance serves in deterring negligent conduct. See *Herskovits*, at 614 (Dore, J., stating “[t]o 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 634 (Pearson, J., indicating that no recovery for loss of a chance “subverts the deterrence objectives of tort law”; quotation omitted). They also recognized the justice of compensating those who suffer loss of a chance. See *Herskovits*, at 618 (Dore, J., stating “no one can say that the chance of prolonging one’s life or decreasing suffering is valueless”); *id.* at 634 (Pearson, J., stating loss of a chance is “a loss worthy of redress”).

The Court recently extended *Herskovits* to allow recovery for loss of a chance of a better outcome, formally adopting the reasoning of the plurality opinion by Justice Pearson, in *Mohr v. Grantham*, 172 Wn.2d 844, 857-59, 262 P.3d 490 (2011). In *Mohr*, one of the plaintiffs had a

stroke, for which she received treatment from the defendant-health care providers. Although she suffered significant permanent disability as a result of the stroke, there was evidence that she would have had a 50-60% chance of a better outcome if she had received non-negligent treatment. *See Mohr*, 172 Wn.2d at 849. The Court reversed summary judgment in favor of the defendant-health care providers, and allowed the plaintiffs to seek a recovery for loss of that chance at trial. *See id.* at 859-60 & 862.

The Court emphasized that loss of a chance is a type of injury recoverable under Ch. 7.70 RCW, governing actions for injuries resulting from health care. *See Mohr*, at 850 (framing issue in terms of whether recovery for loss of a chance is available in “the medical malpractice context,” i.e., under RCW 7.70.040); *id.* at 856 (noting that Ch. 7.70 RCW does not preclude recovery for loss of a chance, and that the term “injury,” as used in RCW 7.70.040(2), is undefined); *id.* at 860 (indicating “lost chance of a better outcome” makes out “a prima facie case of injury” under RCW 7.70.040).

The Court also reiterated “the fundamental bases” for recovery for loss of a chance recognized in *Herskovits*, i.e., the function that tort liability serves in deterring negligence and compensating those who are injured. *See Mohr*, at 851-52; *accord id.* at 856 (referring to the

“underlying principles of deterring negligence and compensating for injury”).

B. Loss of chance is not limited to cases where the lost chance of survival (or the upper limit of a range of chances) is equal to or less than 50%.

Misasi and Samaritan argue that the loss of chance doctrine is limited to cases where the chance lost is equal to or less than 50%, and they further argue that the doctrine is inapplicable when the chance lost is greater than 50%. *See* App. Br., at 3 (issue 1); *id.* at 34-37. This is a legal question, subject to de novo review. *See Mohr*, at 850.

In support of their argument, Misasi and Samaritan point to the fact that *Herskovits* involved loss of a chance that was less than 50%. *See id.* at 34-35. However, they inexplicably fail to acknowledge that *Mohr* involved loss of a 50-60% chance. *See Mohr*, at 849 (stating plaintiff “would have had a 50 to 60 percent chance of a better outcome[.]” consisting of “no disability or, at least, significantly less disability”); *id.* at 859-60 (summarizing expert testimony regarding “50 to 60 percent chance” of a better outcome).

To the extent that *Mohr* approved recovery for loss of a chance up to 50%, it refutes the argument made by Misasi and Samaritan. This aspect of *Mohr* is a holding, and not just an incidental fact. After holding that the loss of chance doctrine encompasses lost chance of a better outcome as

well as lost chance of survival, the Court reversed summary judgment against the plaintiffs on grounds that they made a prima facie case of lost chance of a better outcome based on the evidence of a 50-60% chance lost. *See Mohr*, at 859-60; *see also Pillsbury v. Beresford*, 58 Wash. 656, 660, 109 Pac. 193 (1910) (indicating that a holding encompasses the facts that make out a prima facie case).

Recovery for loss of a chance greater than 50% necessarily follows from the conception of loss of a chance as a distinct type of injury, as recognized in the *Herskovits* plurality and approved in *Mohr*. Once loss of a chance is conceived as a type of injury, it does not matter how the injury is quantified in terms of a percentage or range of percentages. A loss of a chance does not cease to be an injury simply because the chance is greater than 50%. To the contrary, the greater the lost chance, the greater the injury, and the correspondingly greater justification for recovery.

There is nothing in the *Herskovits* plurality or *Mohr* that would limit or preclude recovery for loss of a chance greater than 50%. The *Herskovits* plurality discussed three cases from other jurisdictions involving loss of a chance greater than 50%. *See Herskovits*, at 625-31 (discussing *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966); *McBride v. United States*, 462 F.2d 72 (9th Cir. 1972); *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978)). *Hicks* involved loss of a “probability of survival.”

Herskovits, at 626-27 (citing *Hicks*, 368 F.2d at 632 & n.2). *McBride* involved a lost chance of survival that “would have been improved at least 50 percent,” 462 F.2d at 75; and *Hamil* involved loss of a 75% chance of survival, 392 A.2d at 1283. While the *Herskovits* plurality did not believe that these cases supported recovery for loss of chance *less than* 50%, the plurality stated that they were entirely consistent with existing Washington law to the extent they allowed recovery for loss of chance *greater than* 50%:

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.

Herskovits, at 631 (emphasis added). In this way, the *Herskovits* plurality approved in *Mohr* expressly supports recovery for loss of a chance greater than 50%.¹⁸

¹⁸ Misasi and Samaritan reproduce a portion of the quotation from the *Herskovits* plurality in their brief, but they reach the opposite conclusion, suggesting the fact that these cases are consistent with Washington law somehow precludes recovery for loss of a chance greater than 50%. See App. Br., at 35-37. This actually seems to relate to the separate question of whether recovery for loss of a chance is mutually exclusive of recovery for other types of injuries, an issue that is addressed below.

C. Any alleged error based on loss of chance greater than 50% is harmless, given the Supreme Court’s recognition that recovery for such chance is consistent with existing principles of law in this state.

A party assigning error to an instruction has the burden of proving that the error was prejudicial. *See Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91-92, 18 P.3d 558 (2001). A harmless error does not warrant reversal, based on considerations of judicial economy. *See State v. Tharp*, 96 Wn.2d 591, 600, 637 P.2d 961 (1981). Instructional error is harmless where the instruction in question is essentially equivalent to a correct instruction. *See Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 50-51, 593 P.2d 1308 (1979) (finding instruction harmless where it was equivalent to correct instruction that was not given). Here, given that loss of chance greater than 50% is “consistent with existing principles in this state,” as recognized in the *Herskovits* plurality and approved in *Mohr*, any error in instructing the jury regarding loss of chance greater than 50% would have to be considered harmless.

D. Loss of chance is not restricted to cases where the chance in question (or the lower limit of a range) is reduced to something greater than zero but not completely eliminated.

Misasi and Samaritan next argue that loss of a chance is restricted to cases where the chance in question (or, the lower limit of a range) is reduced to something greater than zero, and that it is unavailable when the

chance is completely lost. *See* App. Br., at 3 (issue 1); *id.* at 37-38 (argument). This is also a question of law, subject to de novo review.

In support of their argument, they rely solely on a formula quantifying the plaintiff's chance lost as the difference between the chance before the defendant's negligence and chance after the defendant's negligence. *See Mohr*, 172 Wn.2d at 858 (citing Restatement (Third) of Torts: Phys. & Emot. Harm § 26 cmt. *n* (2010)). The formula does not support the argument because the loss of chance can still be quantified when the subtrahend—the number subtracted from another (the minuend) to calculate a difference—is zero. Neither *Mohr* nor the Restatement suggest that the chance of survival after the defendant's negligence must be greater than zero, nor do they otherwise support Misasi's and Samaritan's argument. For its part, the *Mohr* opinion contains no indication that the chance in question was reduced to something greater than zero.

This argument defies logic. If loss of chance is restricted to cases where the chance in question is reduced to something greater than zero, a plaintiff whose chance is reduced from 60% to zero (the range in *Mohr*) would take nothing, whereas a plaintiff whose chance is reduced from 39% to 25% (the range in *Herskovits*) would be able to recover, even though the plaintiff who takes nothing suffers a far greater loss of chance

(60% versus 14%). This would contravene the principles of deterrence and compensation that led the Supreme Court to adopt loss of chance in Washington. To avoid such consequences, Misasi's and Samaritan's argument should be rejected.

E. Loss of chance is not exclusive of wrongful death or other forms of injury recoverable in a medical negligence action under Ch. 7.70 RCW.

Misasi and Samaritan argue that recovery for loss of chance is mutually exclusive with wrongful death or other forms of recoverable injury. *See* App. Br., at 35-37 & 44. This is also a question of law, subject to de novo review.

In support of this argument, they rely principally on an unpublished decision from Ohio. *See Haney v. Barringer*, 2007 WL 4696827 (Ohio App., Dec. 27, 2007). The Ohio approach to loss of chance is based on a relaxation of the standard of proximate cause applied in other, more traditional medical negligence claims, akin to the lead opinion in *Herskovits* rather than the plurality opinion adopted in *Mohr*. *See Haney*, 2007 WL 4696827, at *3 (discussing *Roberts v. Ohio Permanente Med. Group, Inc.*, 668 N.E.2d 480 (Ohio 1996)). Because of the different standards of causation, loss of chance is limited to cases where the chance in question is less than or equal to 50%, while more traditional negligence

claims are limited to cases where the chance is greater than 50%, and to that extent they are mutually exclusive. *See Haney*, at *3.

The approach is different in Washington, based on the conception of loss of chance as a type of injury rather than a relaxation of proximate causation. Loss of chance relies on the same “established tort theories of causation” as any other medical negligence claim. *Mohr*, at 857. It is not only compatible with a medical negligence claim, it presumes the existence of such a claim. *See Mohr*, at 856 (stating “nothing in the medical malpractice statute precludes a lost chance cause of action,” and noting that “injury” compensable under the statute is undefined). *Misasi* and *Samaritan* do not explain why, in the context of a medical negligence claim under Washington law, a claim for loss of chance would be mutually exclusive of a claim for any other type of compensable injury.¹⁹

Loss of chance is simply one of several different types of injury recoverable within the context of a medical negligence claim. *See Mohr*, at 860 (indicating loss of chance is recoverable injury under RCW 7.70.040); *see also Herskovits*, at 634-35 (Pearson, J., indicating family of the decedent is able to recover for decedent’s loss of chance under the wrongful death and survival statutes). As such, it is only one of many

¹⁹ Of course, the plaintiff would not be entitled to a double recovery, but jury instructions and verdict forms could easily be drafted to avoid such a possibility. Here, there was no double recovery because the jury’s verdict was based solely on loss of chance.

different types of potentially compensable injury. *See, e.g.*, WPI 30.04, 30.05, 30.06 (noneconomic personal injury damages); WPI 31.01.01 (survival action damages); WPI 31.02.01 (wrongful death damages). None of these types of injury is recoverable to the exclusion of the others, and the ability to recover is limited only by the evidence in the case.²⁰

F. Any alleged error premised upon the argument that loss of chance is exclusive is harmless because the jury based its verdict solely on loss of chance.

As noted above, a party assigning error to an instruction has the burden of proving that the error was prejudicial. *See supra* pt. C. Here, loss of chance and wrongful death were submitted to the jury in the alternative. Based on the phrasing of the special verdict form, the jury could not, and did not, find that Misasi's negligence caused Ruth Dormaier to suffer loss of chance unless it first found that his negligence did not cause her death. CP 357-58. As a result, the jury verdict was based solely on loss of chance. *Id.* Submitting both loss of chance and wrongful death to the jury in this way, as alternatives to each other, precluded any prejudice to Misasi and Samaritan.²¹

²⁰ Even if they were mutually exclusive, parties are entitled to have the trial court instruct the jury regarding inconsistent theories of the case. *See Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980).

²¹ *Cf. Vangemert v. McCalmon*, 68 Wn.2d 618, 622, 414 P.2d 617 (1966) (finding improper instructions regarding one type of injury (permanent disability) harmless, where damage award was based on other types of injury (pain, suffering, temporary disability, &c.) properly submitted to the jury).

G. Proportional reduction of damages for loss of chance is not warranted when the chance in question is greater than 50%.

Misasi and Samaritan argue that the damages awarded by the jury should be discounted to reflect the percentage chance lost. *See* App. Br., at 5 (assignment of error 7); *id.* at 68-69 (argument). In support of this argument, they rely on the damage formula in the *Herskovits* plurality approved in *Mohr*. *See id.* While a proportional reduction of damages under this formula may be warranted when the chance in question is *less than or equal to* 50%, it is not warranted when the chance in question is *greater than* 50%.

Proportional reduction of damages reduction is not required a matter of stare decisis for loss of chance greater than 50%. The *Herskovits* plurality obviously did not command a majority of the Court. The case did not involve a loss of chance greater than 50%, and the measure of damages was not necessary to the decision reached. *Mohr's* approval of the *Herskovits* plurality is dicta because the measure of damages was not necessary to the decision. *See State v. Pawlyk*, 115 Wn.2d 457, 487, 800 P.2d 338 (1990) (indicating statements not necessary to the decision of any issue are dicta and do not control future cases). Moreover, *Mohr* did not specifically address the measure of damages for loss of chance greater than 50%, even though the chance range in that case was 50-60%. *See*

Mohr, at 858 (discussing 40% loss of chance to illustrate formula). Thus, *Herskovits* and *Mohr* do not require proportional reduction of damages for loss of chance greater than 50%.

With due respect for the favorable reference to the proportional reduction formula in *Mohr*, the Court should not reduce damages when the chance in question is greater than 50%. The rationale for proportional reduction is the prospect of liability for loss of a chance less than or equal to 50%, which would not otherwise be compensable under the traditional but-for standard of causation and more-probable-than-not burden of proof. Thus, *Mohr*, at 858, indicates that proportional reduction of damages is responsive to the prospect of liability on the basis of “uncertain probabilities.”

This rationale does not apply when the chance in question is greater than 50%. As recognized by the plurality in *Herskovits*, at 627 & 631, recovery for loss of chance greater than 50% is “consistent with existing principles” of law in Washington. Under these existing principles of law, the but-for standard of causation and the more-probable-than burden of proof—both similar to a chance greater than 50%—support a full recovery. *See* WPI 15.01, 21.01.

Proportional reduction of damages when the chance in question is greater than 50% would undermine the public policies that led the Court to

recognize loss of chance in the first place. As noted above, the doctrine was adopted to deter negligence and compensate injured victims. *See Mohr*, at 851-52. A proportional reduction of damages when the lost chance is greater than 50% would decrease the deterrence and compensation effect of the award by a corresponding amount. To avoid undermining these public policies, there should be no proportional reduction of damages for loss of chance greater than 50%.

H. The jury's award of damages for loss of consortium was proper.

Misasi and Samaritan assign error to the award of damages for loss of consortium. *See* App. Br., at 3 (assignment of error 7); *id.* at 67-68 (argument). They do not argue that loss of consortium damages are unavailable for loss of chance. Instead, they argue that the damages instruction submitted to the jury in this case was phrased in terms of the "death" of Ruth Dormaier, thereby precluding damages resulting from her loss of chance. *See* App. Br., at 67 (quoting jury instruction 12, CP 274). In making this argument, Misasi and Samaritan overlook the fact that damages for loss of chance of survival are based on death. That is precisely why the percentage reduction is applied when the chance in question is less than or equal to 50%. As explained in *Mohr*:

the *Herskovits* plurality adopted a proportional damages approach, holding that, if the loss was a 40 percent chance of survival, the

plaintiff could recover only 40 percent of *what would be compensable under the ultimate harm of death* or disability (i.e., 40 percent of traditional tort recovery), such as lost earnings.

172 Wn.2d at 858 (emphasis added); *see also Herskovits*, at 634-35 (Pearson, J., approving recovery for loss of chance under wrongful death statute, RCW 4.20.010, as well as survival statute, RCW 4.20.046).

In addition, in making this argument, Misasi and Samaritan also fail to read the instructions as a whole. The jury was instructed to read the instructions together. CP 262. An appellate court likewise examines a particular word or phrase in an instruction by considering the instructions as a whole, and reading the relevant portion in the context of all the instructions given. *See State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010) (defining term in one instruction with reference to another instruction). In this case, instruction 11, regarding loss of chance, expressly provides that damages for loss of chance are based on damages for death:

If you find that the loss of diminution of a chance to survive was in excess of 50%, then you have found that such negligence was a proximate cause of the *death*. On the other hand, if you find that the loss or diminution of a chance to survive was less than 50%, then any damages you find to have been experienced *because of the death* of Ruth Dormaier will be reduced by multiplying the total damages by the percentage of loss or diminution in the chance of survival.

CP 273 (emphasis added). Reading this instruction together with the damages instruction, it is clear that damages for loss of chance are defined

in terms of death. This aspect of the loss of chance instruction has not been appealed, and is law of the case. There is no error and the damage award should be affirmed.

I. There is no requirement that loss of chance or any other type of injury has to be pled in the complaint, and the trial court did not abuse its discretion in instructing the jury regarding loss of chance.

Misasi and Samaritan argue that it was error for the trial court to instruct the jury on loss of chance because loss of a chance was not specifically pled. *See* App. Br., at 39. If a jury instruction correctly states the law, the trial court's decision to give the instruction is subject to review only for an abuse of discretion. *See Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.2d 286 (2009). Here, the trial court did not abuse its discretion.

Misasi and Samaritan do not cite any authority for the proposition that loss of chance or any other type of injury must be specifically pled in for the jury to be instructed on it. The pleading rules do not impose any such requirement. *See* CR 8 (general rules of pleading); CR 9 (heightened pleading requirements for special matters). The medical negligence statute does not impose any such requirement. *See* Ch. 7.70 RCW. Counsel for Samaritan even acknowledged that "maybe it doesn't have to be [pled] if it was never a cause of action" RP 1403:7-9 (brackets & ellipses added).

On appeal, Misasi and Samaritan cite *Mohr*'s references to loss of a chance as a "claim" or "cause of action" in support of their argument that it must be pled in the complaint. App. Br., at 39. In doing so, they take these references out of context, and ignore the clear teaching of *Mohr* that loss of chance is a type of injury recoverable in the context of a medical negligence claim under Ch. 7.70 RCW.²² *Mohr* clearly does not recognize loss of chance as a freestanding claim, nor does it suggest that it must be pled with particularity in connection with a medical negligence claim.

Misasi and Samaritan also cite *Dewey v. Tacoma Sch. Dist.*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999); *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 857, 22 P.3d 804 (2001); and *Berge v. Gorton*, 88 Wn.2d 756, 762-63, 567 P.2d 187 (1977). See App. Br., at 40. However, none of these cases involve instructing the jury on an item of damage. *Dewey* held that a trial court did not abuse its discretion in denying a wrongful-discharge plaintiff's mid-trial motion to amend his complaint to add a new claim for violation of the First

²² See, e.g., 172 Wn.2d at 846, 859-50 & 862 (referring to "cause of action for a lost chance" in the "medical malpractice context"); *id.* at 849 (stating "[t]he Mohrs' claim relies, at least in part, on a medical malpractice cause of action for the loss of a chance"); *id.* at 855 (stating "[t]he rationales underpinning the lost chance doctrine have generally been applied the same in wrongful death claims and medical malpractice claims where the ultimate harm is something short of death," and "[w]e find no persuasive rationale to distinguish *Herskovits* from a medical malpractice claim where the facts involve a loss of chance of avoiding or minimizing permanent disability rather than death"); *id.* at 856 (identifying loss of chance "cause of action" with "injury" under RCW 7.70.040(2)); *id.* at 862 (stating "[w]e hold that there is a cause of action in the medical malpractice context for the loss of a chance of better outcome").

Amendment. *See* 95 Wn.App. at 22-28. *Saluteen* held that a trial court did not abuse its discretion in striking three new causes of action asserted for the first time in response to a summary judgment motion. *See* 105 Wn. App. at 857. *Berge* affirmed dismissal of a lawsuit against the Attorney General on a CR 12(b)(6) motion after determining that the theory advanced by the plaintiffs was meritless, and after determining that the complaint did not “adequately allege a claim based upon some theory other than that advanced by the plaintiffs.” 88 Wn.2d at 762. To this extent all three cases are distinguishable.

Nonetheless, *Dewey*, *Saluteen* and *Berge* confirm that a pleading must merely “identify the legal theories upon which the plaintiff is seeking recovery.” *See Dewey*, at 25; *accord Saluteen*, at 857 (stating the “complaint neither cited the equitable estoppel and negligent misrepresentation claims, nor mentioned any factual basis to support them”); *Berge*, at 762-63 (stating “pleadings need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided”). Here, Mr. Dormaier provided sufficient notice of his medical negligence claim against Misasi and Samaritan. The complaint contained detailed allegations regarding the facts leading to Mrs. Dormaier’s death, CP 8-9 (¶¶ 4.1-4.14), and while it did not specifically allege loss of a chance, the complaint alleged that she

was injured and damaged as a result of Misasi's negligence, CP 9-13 (¶¶ 5.1, 5.5-5.7 & 8.1-8.5). That is all that is required, even under the authorities cited by Misasi and Samaritan.

To the extent necessary, the trial court properly deemed the pleadings amended to conform to the evidence regarding loss of chance.²³ "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." CR 15(b). The trial court has discretion to amend the pleadings to conform the evidence at any stage of the action, even after judgment. *See Green v. Hooper*, 149 Wn. App. 627, 636, 205 P.3d 134, *rev. denied*, 166 Wn. 2d 1034 (2009). Here, the trial court specifically found that "the parties addressed the issue (if under other terminology) on both sides of the case." CP 233. As a result, it would be appropriate to deem the pleadings amended to conform to the evidence.

Misasi and Samaritan suffered no prejudice from the loss of chance instruction where the loss of chance testimony was admitted without objection, the testimony conformed with the opinions disclosed during

²³ Dormaier argued that an amendment to conform the pleadings to the evidence under CR 15(b) would be warranted, if loss of chance must be pled with particularity. CP 178-79. The trial court did not rule on a motion to conform to the evidence, believing that loss of chance did not have to be specifically pled. It does not appear that CR 15(b) actually requires a formal motion and order, indicating that "failure so to amend does not affect the result of the trial of these issues," but it would constitute alternate grounds to affirm under RAP 2.5(a) in any event.

discovery, and where Misasi and Samaritan were able to cross-examine and present rebuttal testimony. Even if they did not anticipate the loss of chance instruction, they had every reason to anticipate and rebut the testimony on which it was based at trial.²⁴

J. Substantial evidence supports the loss of chance instruction.

Misasi and Samaritan argue that there was a lack of substantial evidence to support the loss of chance instruction. *See* App. Br., 45-49. Each party is entitled to have the trial court instruct the jury on its theory of the case if there is substantial evidence to support it. *See Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Substantial evidence refers to evidence sufficient to persuade a rational, fair-minded person of the truth of the matter. *See Miller v. Tacoma*, 138 Wn.2d 318, 323, 797 P.2d 429 (1999). Here, there is substantial evidence to support the instruction.

In making their substantial evidence argument, Misasi and Samaritan raise a number of objections to Dormaier's causation testimony that would more properly be made to the jury, and, in fact, were made to the jury. Initially, they quote *Mohr* regarding the requirements for expert

²⁴ In any event, Misasi and Samaritan should be deemed to have waived the alleged error based upon pleading and lack of notice because they never asked for a continuance, nor did they seek to reopen the evidence between the time that the loss of chance instruction was first raised and the time it was given to the jury. *Cf. Mose v. Mose*, 4 Wn. App. 204, 210, 480 P.2d 517 (1971) (finding waiver of objection to raising claim of alimony for the first time in closing argument, where there was no motion for continuance or to reopen the evidence).

testimony to support a loss of chance claim. *See* App. Br., at 45-46 (quoting *Mohr* 857-58). However, they did not interpose any objection to Dormaier's expert causation testimony at the time. *See* RP 258:13-260:12. To this extent, they have waived any objection to the testimony. *See* ER 103(a)(1) (providing error may not be predicated on evidentiary issue in the absence of a timely and specific objection).

In any event, Dormaier's causation testimony satisfies the requirements of *Mohr*. The quoted passage on which Misasi and Samaritan rely states:

calculation of a loss of chance for a better outcome is based on expert testimony, which in turn is based on significant practical experience and "on 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."

Mohr, at 857-58 (quotation omitted; alterations in original). Dormaier presented testimony from Erik Swenson, M.D., among others. His testimony was based on significant practical experience and data analyzed in the course of his work. He is a pulmonologist and a professor of medicine at the University of Washington, and he practices medicine at one of the university's teaching hospitals. RP 213:16-218:13. He testified that approximately 1,000 patients per year come to the hospital who are diagnosed with, and treated for, pulmonary embolism. RP 233:11-24. Of those patients, proper diagnosis and treatment increases the chance of

survival by 50-70%. RP 258:13-22. For patients without other comorbid conditions in addition to pulmonary embolism, the survival rate is as high as 90%. RP 233:11-24. Dr. Swenson then applied this data to the specific facts of Dormaier's case. Based on the fact that she was active and in good health for her age, and did not have any other comorbid conditions, he concluded that her chance of survival with proper treatment was 90%. RP 259:21-260:12. This unobjectionable evidence is more than sufficient to satisfy the requirements of *Mohr*.

Next, Misasi and Samaritan argue the foregoing expert causation testimony relates to wrongful death, not loss of chance. This is not an argument about substantial evidence, but rather an argument about how the evidence should be characterized. The characterization seems to be based upon their argument, addressed above, that loss of chance is not cognizable if the chance in question is greater than 50%.²⁵ To the extent that loss of chance greater than 50% is cognizable, the characterization is inaccurate. Regardless of how it is characterized, the evidence satisfies the requirements of *Mohr*.

²⁵ See App. Br., at 46-67 (stating "all such testimony was presented to support opinions that Mrs. Dormaier would have survived ... not to establish a reference point for a 'loss or diminution of chance' opinion"; ellipses added); *id.* at 47-48 (stating the "testimony describes a conventional wrongful death claim, not a *Herskovits* 'loss of chance of survival' claim").

Finally, Misasi and Samaritan argue that the foregoing causation testimony is insufficient because it relates to *diagnosed* rather than *undiagnosed* pulmonary embolism. *See* App. Br., at 48-49. This argument does not relate to causation, but rather negligence. The point of Dormaier's negligence claim was that, if Misasi had followed the standard of care, Ruth Dormaier's pulmonary embolism would have been diagnosed. The jury found that Misasi was negligent in this regard, and this finding has not been appealed. In sum, there was sufficient evidence to instruct the jury regarding loss of chance.

K. Substantial evidence supports the jury's verdict based on loss of chance.

In addition to arguing that the loss of chance instruction was not supported by substantial evidence, Misasi and Samaritan also argue that there was a lack of substantial evidence of causation to support the jury's verdict, and that the trial court erred in denying their motion to dismiss. *See* App. Br., at 4 (assignment of error 6); *id.* at 50-54 (argument).

This argument is without merit, as there is ample evidence in the record to support the jury's verdict. As noted above, if Misasi had complied with the standard of care and ordered an appropriate scan, the pulmonary embolism would have been discovered, and Ruth Dormaier could have been treated with anticoagulation therapy, all within the span

of an hour. With such diagnosis and treatment would have had as much as a 90% chance of survival.

In their argument, Misasi and Samaritan focus on the length of time between Mrs. Dormaier's arrival at the hospital on September 20, at 9:57 a.m., and her death at approximately 3:00 p.m. that afternoon. RP 1482:10 (9:57 a.m.); RP 293:13, 1188:18-22 (3:00 p.m.). All of the expert medical witnesses were aware of the amount of time available, yet they still testified that Mrs. Dormaier had as much as a 90% chance of survival if properly diagnosed and treated. Misasi and Samaritan were entitled to, and did, cross-examine these experts regarding the time available, as well as argue to the jury that there was not enough time. The jury was entitled not to believe these arguments, and whether or not this Court would be inclined to agree, it cannot substitute its judgment for that of the jury. *See State v. Gobin*, 73 Wn.2d 206, 208-09, 437 P.2d 389 (1968).

With respect to denial of the motion to dismiss, in particular, Misasi and Samaritan argue that the trial court denied the motion only because Dormaier's counsel misportrayed the trial testimony. They first claim that Dormaier's counsel falsely stated that "'anticoagulation therapy 'works to dissolve the smaller clots[.]'" App. Br., at 23 (unmatched

quotation marks in original; brackets added; citing RP 1270).²⁶ *This claim is misleading by omission.* In support of the claim, Appellants refer only to Dr. Swenson’s testimony “that heparin itself *does not* dissolve clots.” App. Br., at 23 n.11 (italics in original; citing RP 295). This testimony is correct, as far as it goes, in acknowledging that the drug Heparin is not the dissolving agent. However, Dr. Swenson repeatedly explained how anticoagulation therapy involving Heparin causes clots to be dissolved:

We have a number of agents, but the generally used agent is something called Heparin, which is given intravenously, and it’s a drug that stops any further clotting from happening. *And what this allows, then, is the natural body’s mechanisms of breaking up these clots to work unopposed. We have a balance. Our body is making things that will cause our blood to clot, but at the same time making things that cause those clots to dissolve. And if we shut down the ability of any new clot to be made, then we’ve balanced things in favor of the remaining clots being dissolved much faster. And by and large, this is what gives us our success rate in saving people with pulmonary embolism.*

RP 246:13-25 (emphasis added).²⁷ In light of this and other testimony, it is an entirely true statement that anticoagulation therapy dissolves clots.

²⁶ The correct quotation from the argument of Mr. Dormaier’s counsel is: “anticoagulation therapy not only works to dissolve the smaller clots[.]” RP 1270:15-16 (brackets added).

²⁷ *Accord* RP 247:4-7 (stating “Heparin ... acts immediately to stop this further clotting and allow the normal body’s clotting dissolving mechanisms to work unopposed”; ellipses added); RP 250:21-23 (stating “what this [i.e., anticoagulation or Heparin therapy] does is it stops any new clot from forming, and allows the body’s own mechanisms of dissolving [the] clot to work unopposed. So the clots out here in the veins become smaller”; brackets added); RP 294:11-14 (stating “Heparin itself is not going to dissolve it, it’s going to check any further growth of that and allow the body’s own mechanisms every dissolving that clot [sic], which are already activated”; brackets added).

Next, Misasi and Samaritan claim that Dormaier's counsel inaccurately stated that anticoagulation therapy "actually works to help bind the clot in the vein or in the area of the deep vein thrombosis ... [which] would have helped prevent the release of the larger clot," App. Br., at 23-24 (internal quotation marks, ellipses & brackets in original). *This claim is incorrect.* Dr. Swenson further explained how anticoagulation therapy prevents the release of clots:

Q. Lastly ... can you explain to the jury ... how anticoagulation or Heparin therapy would work to help alleviate the problem with the clots?

A. Well, as I said, what this does is it stops any new clot from forming, and allows the body's own mechanisms of dissolving clot to work unopposed. They also tend to become organized, and what I mean by that is that instead of being just sort of slightly contained here, they begin to stick more closely and more solidly to the vessel wall, making it harder for them to be dislodged. That's part of the way the clots are resolved. So they get smaller and they basically become less able to migrate. Of course, the same thing is happening to the clots out in the lung, as well.

RP 250:21-251:8 (ellipses added).²⁸ Again, in light of this and other testimony, it is a completely accurate statement that anticoagulation therapy binds clots in place. The trial court denied the motion based upon

²⁸ *Accord* RP 251:14-16 (stating "you're reducing the threat that any further clots out in the rest of the body may yet migrate"); RP 295:2-5 (affirming that "[w]hat Heparin will do is work with the body to hopefully make sure that no more clots break off from the thrombus"). In light of this testimony, it is entirely accurate to say that anticoagulation therapy binds clots to the vein and prevents them from being released.

its own, accurate recollection of the foregoing testimony. CP 1271:12-1272:12.²⁹

L. Misasi and Samaritan have not preserved any assignment of error based on alleged inconsistency in the jury verdict.

Failure to raise an issue at trial generally waives the issue on appeal. *See* RAP 2.5(a). The purpose of the rule is to ensure that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *See State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). “An even more important factor, however, is the consideration that the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level[.]” *In re Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006) (quoting 2A Karl B. Tegland, Wash. Prac., Rules Practice RAP 2.5 (6th ed. 2004); brackets added).

In this case, Misasi and Samaritan assign error to entry of judgment on the jury verdict, based on the claim the jury’s finding that the

²⁹ Misasi and Samaritan further claim that Dormaier’s counsel “mischaracterized testimony” and made “inaccurate” statements about other steps besides anticoagulation therapy that could have been taken to save Ruth Dormaier’s life, such as performing an embolectomy or keeping her upright. *See* App. Br., at 24 & nn. 13-15. *These claims are also incorrect.* An embolectomy is a procedure to remove a clot. RP 1162:11-20. A surgical team could have been assembled at Sacred Heart Medical Center Spokane and been ready to perform the surgery by the time that Mrs. Dormaier arrived there, had she been sent. RP 1198:7-1199:8 (stating “the OR team could be and is mobilized within 20 minutes”). In the meantime, Mrs. Dormaier could have been kept upright, using gravity to retard migration of the clot, assuming that anticoagulation therapy did not bind it in place. RP 584:11-21, 590:14-591:22.

negligence of Misasi caused Ruth Dormaier to suffer the loss of a 70% chance of survival is inconsistent with its finding that his negligence did not cause her death.³⁰ There is no inconsistency because, under Washington law and the trial court's instructions, loss of chance of survival and death are two distinct types of injury, notwithstanding the conceptual overlap. With this understanding, the jury's finding that Misasi's negligence caused one type of injury (i.e., loss of chance) is not inconsistent and can readily be harmonized with the jury's finding that his negligence did not cause another, different type of injury (i.e., death). *See infra* pts. M & N.

Nonetheless, as an initial matter, Misasi and Samaritan have not preserved their assignment of error based on alleged inconsistency in the verdict because they failed to object to the verdict form prepared by the trial court, and they failed to raise the issue before the jury was discharged. For either one of these reasons, this Court should decline to consider their arguments regarding the alleged inconsistency.

³⁰ *See* App. Br., at 3 (assignment of error 4 regarding verdict); *id.* at 4 (framing issues 7 & 8 pertaining to assignment of error 4 in terms of whether the jury's verdict is "inconsistent"); *id.* at 31 (summarizing verdict); *id.* at 59 (arguing the jury made "inconsistent findings");

1. **Misasi and Samaritan did not object to the verdict form, thereby preventing the trial court from making any changes that would eliminate the possibility of the alleged inconsistency before the form was submitted to the jury.**

A party must object to a special verdict form at trial, before the court instructs the jury, in order to preserve any error based on the form. *See Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P.3d 177 (2003) (declining to review argument that jury verdict form permitted double recovery in the absence of an objection to the form on that basis in the trial court).³¹ As explained in *Conrad*:

This requirement is more than just an idle, legal technicality. The object in this process is to avoid trying a case twice. The trial judge must then be given the opportunity, in the first instance, to properly instruct the jury. So, if a lawyer thinks the court is about to commit error, he or she must speak up and allow the court to revisit the point at a time when the trial judge can do something about it.

119 Wn.App. at 290 (citations omitted).

Here, the verdict form was prepared by the trial court judge and submitted to the jury without objection. To the extent that the verdict form permitted the jury to return an inconsistent verdict—i.e., by allowing the jury to find that Misasi’s negligence caused her to suffer loss of a chance

³¹ See also *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 187 P.3d 291 (2008) (finding order granting new trial, based in part on inconsistent verdict, lacked adequate support to the extent the inconsistency resulted from special verdict form nearly identical to those proposed by the parties); *Nania v. Pacific Nw. Bell Tele. Co.*, 60 Wn. App. 706, 806 P.2d 787 (1991) (indicating appeal based on inconsistent verdict barred by invited error doctrine where defendant insisted on modification to verdict form which resulted in the claimed inconsistency).

but not death—Misasi and Samaritan were obligated to object to the form proposed by the trial court, and they should have proposed an alternate form that would have precluded that possibility.³² Their failure to object or propose an alternate form should preclude review of any alleged inconsistency.

2. Misasi and Samaritan did not raise any claim of inconsistency before the jury was discharged, preventing the trial court from sending the jury back for further deliberations to resolve the alleged inconsistency.

A party must raise any claim of inconsistency in a jury verdict before the jury is discharged; otherwise, the alleged inconsistency is deemed waived. *See Gjerde v. Fritzsche*, 55 Wn. App. 387, 395, 777 P.2d 1072 (1989), *rev. denied*, 113 Wn.2d 1038 (1990) (involving medical negligence verdict finding no negligence but apportioning fault to defendant-health care provider).³³ As explained in *Gjerde*:

If counsel who had submitted the questions saw no inconsistency and raised no objection to the discharge of the jury, we can, under the circumstances of this case, see no reason why he should be permitted to try his luck with a second jury. Proper respect for the

³² The trial court alerted Misasi and Samaritan to the issue in an email stating “if the jury finds that negligence of the defendant proximately caused the death, they don’t need to consider loss of chance; if they do not find that negligence caused the death, they can consider whether or not it proximately caused a loss of chance. This is the formulation that gives rise to the order of questions I’ve included in the special verdict form.” CP 234.

³³ *See also Minger v. Reinhard Distrib. Co.*, 87 Wn.App. 941, 944-45, 943 P.2d 400 (1997) (involving employment verdict finding sexual harassment but no damages, relying on *Gjerde*); *Malarkey Asphalt Co. v. Wyborne*, 62 Wn. App. 495, 510, 814 P.2d 1219 (1991) (discussing *Gjerde* and emphasizing rationale).

jury verdict and the court's responsibility to manage its caseload fairly and expeditiously militate against such a course.

Id., 55 Wn.App. at 394 (quoting and stating agreement with reasoning of *Strauss v. Stratojac Corp.*, 810 F.2d 679, 683 (7th Cir. 1987)).³⁴

When the jury returned its verdict in this case, Misasi and Samaritan did not raise any allegations of inconsistency in the jury verdict until after the jury was discharged. When they did raise it, it was too late to seek clarification. Accordingly, they should not be able to complain about the alleged inconsistency on appeal.

M. The jury's finding that Misasi's negligence caused one type of injury (loss of a 70% chance of survival) is not inconsistent with its finding that his negligence did not cause another, different type of injury (death).

The goal in construing a verdict is to discern and give effect to the intent of the jury. *See Wright v. Safeway Stores*, 7 Wn.2d 341, 344, 109 P.2d 542 (1941). Toward this end, the verdict should be liberally construed. *Id.*, 7 Wn.2d at 344. In keeping with this goal and rule of construction, the court must attempt to harmonize the jury's answers to the questions that comprise a special verdict if they appear to conflict with

³⁴ CR 49(b), regarding general verdicts accompanied by answers to interrogatories, provides that "[w]hen the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." (Brackets added.) CR 49(a), regarding special verdicts, does not contain this language. Nonetheless, *Gjerde* involved a special verdict form, and the court concluded that "the absence of a general verdict makes no difference" to its reasoning. 55 Wn.App. at 394.

each other. See *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 131, 875 P.2d 621 (1994); *Stalkup*, 145 Wn. App. at 586; see also 4 Karl B. Tegland, Wash. Prac., Rules Practice CR 49 (5th ed. 2012) (stating “[t]he court will attempt to harmonize the answers given by the jury in order to support a judgment”). Only if the answers to the questions irreconcilably conflict, so that it is impossible to discern the jury’s intent, will a new trial be warranted. See *Blue Chelan, Inc. v. Department of Labor & Indus.*, 101 Wn.2d 512, 514-15, 681 P.2d 233 (1984); *Stalkup*, at 586.

The jury’s answers to the questions on the special verdict form in this case can readily be harmonized. In determining the jury’s intent, it is appropriate to consider “the issues, the evidence, the admissions of the parties, and the instructions of the court, all of which the jury presumably had in mind when making its answers to the special verdict questions.” *State Dep’t of Highways v. Evans Engine & Equip. Co.*, 22 Wn. App. 202, 206, 589 P.2d 290 (1978), *rev. denied*, 92 Wn.2d 1010 (1979).³⁵

Because the issues and instructions presented to the jury distinguished between death and loss of a chance as two distinct types of injury, the jury’s finding that Misasi’s negligence did not cause Ruth

³⁵ See also *Stalkup*, at 585 (considering evidence in rejecting claim that special verdict was inconsistent); *Parrott-Horjes v. Rice*, 168 Wn. App. 438, 447, 276 P.3d 376 (considering jury instructions in rejecting claim that special verdict was inconsistent), *rev. denied*, --- Wn. App. ---, 290 P.3d 995 (2012).

Dormaier's death can be harmonized with its finding that his negligence caused her to lose the chance of surviving the pulmonary embolism that caused her death. As noted above, under Washington law loss of a chance of survival and death are different injuries. In accordance with the law, the trial court instructed the jury that it could award damages for injury in the form of loss of a chance of survival. CP 273 (instruction 11). The verdict form then asked the jury to determine separately whether Misasi's negligence caused Ruth Dormaier's death, or her loss of a "chance to survive the condition which caused her death." CP 357-58 (questions 2 & 3). The finding that a defendant's negligence caused one type of injury, but not another type of injury, is not inconsistent. It merely confirms that the two types of injuries are distinct.

When the jury's verdict is properly construed, Misasi and Samaritan are simply incorrect in suggesting that the jury's finding that Misasi's negligence did not cause Ruth Dormaier's death precludes a finding that his negligence caused her to suffer loss of a 70% chance of survival, or that the verdict is inconsistent. *See App. Br.*, at 54.

N. Misasi and Samaritan do not properly interpret the jury’s verdict when they claim that the jury absolved Misasi of causal responsibility, despite the jury’s finding that his negligence caused Ruth Dormaier to suffer loss of a 70% chance of survival.

Misasi and Samaritan claim that the jury “absolved” them of causal responsibility for Ruth Dormaier’s death, notwithstanding the loss of chance finding, and further claim that judgment should be entered in their favor, notwithstanding the alleged inconsistency.³⁶ In making these arguments, Misasi and Samaritan do not properly interpret the verdict form in light of governing rules of construction. They do not acknowledge the obligation to discern the jury’s intent from the issues, instructions and evidence presented. They do not acknowledge the obligation to liberally construe the verdict. They do not acknowledge the obligation to harmonize the answers to questions on a special verdict form, and they wrongly suggest that “there are no Washington decisions on point.” App. Br., at 55.

Instead, Misasi and Samaritan argue that the verdict should be “construed most strongly against” Mr. Dormaier as “the party on whom rests the burden of proof.” App. Br., at 55 (citing 89 C.J.S., *Trial* § 1012,

³⁶ See App. Br., at 5 (incorporating statement that “the jury *absolved* [the defendants] of liability for Mrs. Dormaier’s death” into phrasing of issue on review; italics & brackets added); *id.* at 34 (incorporating statement that “the jury *absolved* Mr. Misasi of causal responsibility for Mrs. Dormaier’s death” in argument heading; italics added); *id.* at 69 (incorporating statement that “the jury *absolved* Mr. Misasi of liability for Mrs. Dormaier’s death” in conclusion; italics added).

at 624 (2001), in turn citing *Brittain v. Wichita Forwarding Co.*, 211 P.2d 77 (Kan. 1949)). The cited section from *Corpus Juris Secundum* appears to be from a prior version of the encyclopedia. See 89 C.J.S., *Trial* § 1012 (Dec. 2012). The current section devoted to construction of special verdicts relates to ambiguous answers to questions on a special verdict, not unambiguous but allegedly inconsistent answers. See 89 C.J.S., *Trial* § 1176 (Dec. 2012). Elsewhere, the encyclopedia recognizes the same obligations to ascertain the intent of the jury, to construe the verdict liberally, and to harmonize apparently inconsistent answers on a special verdict, all of which appear to be in accord with Washington law. See 89 C.J.S., *Trial* §§ 1158 & 1175 (Dec. 2012).

The internal citation to the Kansas court's decision in *Brittain* also involves ambiguous rather than allegedly inconsistent answers on a special verdict. Given the allegations of negligence and the evidence in *Brittain*, the plaintiff was obligated to establish that a truck involved in a motor vehicle collision was not lighted at the time of the accident. See 211 P.2d at 148. The jury was given a special verdict form that asked the precise question, "Were the lights burning on the back of the truck at the time of the collision?" *Id.* at 147. The jury answered the question by writing in the word "Doubtful." *Id.* On appeal, the court construed the term "doubtful" as a finding against the plaintiff because she had the burden of proof,

stating “[a]n expression of doubt is not tantamount to a finding of fact,” but rather “a lack of sufficient information upon which to reach a conclusion.” *Id.* at 148. Having construed the answer in this way, the court held that the jury’s answer to the specific question trumped its general finding of negligence. *See id.* There was no discussion of harmonizing the specific and general findings, and it is evident that the rule of construction against the party having the burden of proof applies to ambiguous findings, not inconsistent findings. On this level, *Brittain* is distinguishable and unhelpful in interpreting the special verdict involved in this case.

O. Misasi and Samaritan have not preserved any alleged error regarding motions in limine 1 and 14, which precluded evidence of fault on the part of health care providers dismissed on summary judgment.

Misasi and Samaritan do not assign error to motion in limine 1, regarding apportionment of fault to nonparties in general. Instead, they assign error to motion in limine 14, which involved apportionment of fault to the health care providers dismissed on summary judgment, Drs. Canfield and Hart. *See App. Br.*, 3 (assignment of error 5). Normally, the failure to assign error to motion in limine 1 would preclude review, *see* RAP 10.3(a)(3), and render the assignment of error to motion in limine 14 harmless error. However, assuming that the assignment of error to motion

in limine 14 is sufficient by itself, the alleged error still has not been preserved.

With respect to Misasi, this error has not been preserved because he affirmatively stated that he agreed with both motions in limine 1 and 4. RP 82:2-7. Review of this issue as to him is therefore precluded under the invited error doctrine. *See State v. Korum*, 157 Wn.2d 614, 649, 141 P.3d 13 (2006) (stipulation to admissibility of evidence is invited error). Samaritan's objection does not preserve the error for Misasi. *See State v. Frederick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986) (failure to join another party's objection precludes appellate review).

With respect to Samaritan, the error has not been preserved because he did not object to motion in limine 14 on proper grounds. *See* ER 103(a)(1). Counsel for Samaritan argued that apportionment of fault evidence was admissible to impeach Drs. Canfield and Hart if they changed their testimony to inculcate Misasi. RP 108:14-17. This is not a proper basis for admission because collateral evidence of a witness's misconduct that is not probative of truthfulness is not admissible to impeach the witness. *See* ER 403, 404, 608; *see also State v. O'Connor*, 155 Wn.2d 335, 350-51, 119 P.3d 806 (2005). The proper mode of impeachment would be to confront Drs. Canfield and Hart with their prior inconsistent statements, although it does not appear from the record

whether they ever changed their testimony. Because Samaritan's objection was improper, the error has not been preserved.

P. Misasi and Samaritan have not preserved any alleged error regarding jury instruction 4, which instructed the jury not to consider fault, or lack thereof, on the part of health care providers dismissed on summary judgment.

Misasi and Samaritan also assign error to jury instruction 4, instructing the jury not to consider any fault of Drs. Canfield and Hart. *See* App. Br., at 3 (assignment of error 6). With respect to Samaritan, the error has not been preserved because it did not object, and, with respect to Misasi, the objection was improper. Objections to jury instructions must state "the grounds of the objection." CR 51(f). Failure to object or state the proper grounds precludes appellate review. *See Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 281, 96 P.3d 386 (2004). As with the other preservation rules, the purpose of a specific objection is to enable the trial court to correct any mistakes in time to prevent the unnecessary expense of a second trial. *See id.* at 281. Misasi objected on grounds that instruction 4 was a non-issue. RP 1409:4-13. He did not object on the grounds urged on appeal, that the instruction precluded apportionment of fault of Drs. Canfield and Hart. As a result, the objection based on apportionment of fault has not been preserved.

Q. Misasi's and Samaritan's alleged errors regarding apportionment of fault are harmless, based on their repeated statements that they never intended to apportion fault, and the fact that no evidence of fault was excluded.

To the extent Misasi and Samaritan have not preserved their assignments of error to motions in limine 1 and 14 and/or jury instruction 4, their assignments of error the trial court's decision precluding apportionment of fault to Drs. Canfield and Hart based on principles of res judicata is harmless. *See* App. Br., at 3 (assignment of error 5). However, the error is additionally harmless because of the consistent, repeated and emphatic statements that Misasi and Samaritan never intended to apportion fault to Drs. Canfield or Hart. *See* RP 105:11-12 (stating "I don't think I'm going to apportion fault to either of these gentlemen"); RP 108:3-5 (stating "I don't think I'm going to apportion fault to Dr. Hart and Dr. Canfield"); RP 121:9-11 (stating "[r]egardless of empty chair, res judicata or apportionment, *none of which I think we're probably going to have to get to ...*"; emphasis added); RP 670:14-17 (stating "defendants will not apportion fault, we're not going to try to put Dr. Hart and Dr. Canfield on the verdict form"); RP 671:6-9 (stating "[f]rankly, your Honor, as I was thinking about this, I don't know that it makes a difference whether Dr. Hart and Dr. Canfield were negligent or not. *I'm not going to apportion fault to them*"; emphasis added); RP 962:9-12

(stating “my recollection of the ruling of the court was we could not apportion fault, we certainly aren’t going to, *we never were as to Dr. Canfield or Dr. Hart*”; emphasis added). These statements should be dispositive, and the Court should reject Misasi’s and Samaritan’s argument on appeal that they “were entitled to argue that fault should be apportioned to Drs. Hart and Canfield[.]” App. Br., at 66 (brackets added).

Furthermore, no evidence was excluded regarding apportionment of fault. In their appeal brief, Misasi and Samaritan state that the trial court’s order in limine resulted in “forbidding testimony as to the judgment exercised by Drs. Hart and Canfield” at trial. App. Br., at 61. In support of this statement, they cite four passages from the record, RP 264-69, 452, 958-64 & 991-1002. Because no evidence bearing on apportionment of fault was excluded, any assignment of error premised on apportionment of fault is harmless on yet another level.

In the first passage cited by Appellants, RP 264-69, an objection based on the motion in limine was overruled. Counsel for Misasi asked a question about the signs and symptoms that Ruth Dormaier had. RP 264:8-11. Counsel for Dormaier objected on grounds that this question “is getting into an area that this court’s ruled on in a motion in limine[.]” RP 264:12-16 (brackets added). After an extended colloquy outside the presence of the jury, the court twice stated that the objection was

overruled. RP 269:15-16, 270:23-24. When the jury returned, the court informed it that “[t]he objection is overruled.” RP 271:6 (brackets added). Counsel for Mr. Misasi and Columbia Basin Anesthesiology was then allowed to proceed with her questioning. RP 271:9-21.

In the second record passage cited by Appellants, RP 452, although an objection was sustained, the same information was obtained by questioning that immediately followed the objection. Counsel for Samaritan Hospital asked one of Mr. Dormaier’s expert witnesses whether Dr. Hart was aware of Ruth Dormaier’s symptoms (described in terms of a “process”). RP 452:7-8. Counsel for Dormaier objected to the question because “Dr. Hart and Canfield’s conduct is not at issue It’s the motion in limine[.]” RP 452:9-13 (ellipses & brackets added). The superior court sustained the objection, but counsel for Samaritan proceeded to ask almost identical follow up questions without objection, obtaining testimony that the process was “documented on the medical records of Dr. Hart and Dr. Canfield.” RP 452:17-453:2.

In the third record passage cited by Appellants, RP 958-64, an objection was again overruled, and it is not even apparent that the objection was related to the motion in limine. Counsel for Misasi asked Dr. Canfield about his training in and knowledge of deep vein thrombosis. RP 958:7-8. Counsel for Dormaier objected on grounds that Dr. Canfield

was merely a treating health care provider and not an expert witness in the case, RP 958:9-14, and that the question was irrelevant, RP 960:7-961:2. The objections do not appear to have been based on the superior court's order in limine. *See id.* In any event, the court twice stated that the objection was overruled, RP 961:3 & 14, and allowed questioning to proceed, RP 964:14.

In the fourth and final passage cited by Appellants, RP 991-1002, no testimony was excluded. The passage includes an extended colloquy between the court and counsel regarding the propriety of asking Dr. Canfield questions about the reputation of Dr. Hart and Misasi and about how often Misasi has provided anesthetic procedures without mishap. RP 988:21-989:17. Counsel for Misasi confirmed that she could question Dr. Canfield about the "team approach to medicine" used in treating Ruth Dormaier. RP 1000:24-1002:6. Counsel for Samaritan confirmed that he could question Dr. Canfield whether it was appropriate to proceed to surgery under the circumstances. RP 1002:7-1003:5. Both counsel received permission to continue describing the decision to proceed to surgery as a "joint decision" among the various health care providers. RP 998:10-12, 1000:9-23.

R. Dismissal of two health care providers on summary judgment, based on lack of fault, precludes apportionment of fault to those providers.

Assuming the issue of res judicata has been preserved and is not harmless, Misasi and Samaritan argue that the requirements of res judicata are not satisfied because there was no identity of parties or causes of action between the summary judgment ruling dismissing Dormaier's complaint against Drs. Canfield and Hart based on a lack of evidence of negligence and causation, and their attempt to apportion fault to them. *See* App. Br., at 62-63. This argument is incorrect because the only fault that Misasi and Samaritan could possibly apportion to Drs. Canfield and Hart was based upon Dormaier's complaint. *See* RCW 4.22.015 (defining fault); RCW 4.22.070(1) (re: apportionment of fault). In this way, apportionment of fault under RCW 4.22.070 involves the exact same parties and causes of action as the plaintiff's complaint. Thus, while Misasi and Samaritan claim that they have an absolute right to a determination and apportionment of fault under RCW 4.22.070, they were not deprived of that right because they had the opportunity to participate in the summary judgment proceeding that determined Drs. Canfield and Hart were not at fault. The fact that they chose not to contest those proceedings, should make no difference, and the summary judgment order should be given preclusive effect.

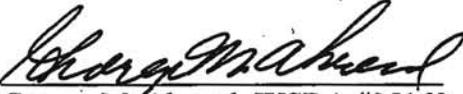
VII. CONCLUSION

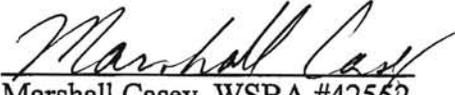
Based on the foregoing argument and authority, Lourence Dormaier, individually and as personal representative of the Estate of Ruth Dormaier, respectfully asks the Court to affirm the verdict and judgment in his favor in all respects.

Submitted this 30th day of January, 2013.

AHREND ALBRECHT PLLC

CASEY LAW OFFICES, P.S.


George M. Ahrend, WSBA #25160


Marshall Casey, WSBA #42552

Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On January 30, 2013, I served the document to which this is annexed by hand delivery, as follows:

Megan K. Murphy *By Mail*
Thorner, Kennedy & Gano P.S.
P.O. Box 1410
Yakima, WA 98907-1410

Brian Rekofke, Leslie R. Weatherhead & Geana M. Van Dessel
Witherspoon Kelly Davenport & Toole, P.S.
422 W. Riverside Ave.
Spokane, WA 99201-0369

Mark D. Kamitomo
Markam Group, Inc., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406

and by First Class Mail, postage prepaid, as follows:

Mary H. Spillane
Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union St., Ste. 4100
Seattle, WA 98101-2380

Signed at Spokane, Washington on January 30, 2013.



Marshall Croff

APPENDIX

Defendant Samaritan's Proposed Instruction No. 3

INSTRUCTION NO. _____

LOSS OF CHANCE

If you find that Defendant Robert Masasi failed to comply with the applicable standard of care and was therefore negligent, you may consider whether or not his negligence proximately caused damages to Ruth Dormaier in the nature of loss or diminution of a chance to survive the condition which caused her death.

If you find that such negligence proximately caused a loss or diminution of a chance to survive, then you may award Plaintiffs damages determined by comparing two percentages: (1) Ruth Dormaier's chance of surviving the condition which caused her death as it would have been had defendant not been negligent, and (2) the chance of surviving as affected by any negligence you find on the part of defendant.

The difference in the two percentages, if any you find, is the percentage of loss or diminution in the chance of survival. Any damages you find to have been experienced by Ruth M. Dormaier from the time of Mrs. Dormaier's admission on September 20, 2007 until she was placed under general anesthesia will be reduced by multiplying the total damages by the percentage of loss or diminution in the chance of survival.

LOSS OF CHANCE

If you find that Defendant Robert Masasi failed to comply with the applicable standard of care and was therefore negligent, you may consider whether or not his negligence proximately caused damages to Ruth Dormaier in the nature of loss or diminution of a chance to survive the condition which caused her death.

If you find that such negligence proximately caused a loss or diminution of a chance to survive, then you will determine the magnitude of the loss or diminution by comparing two percentages: (1) Ruth Dormaier's chance of surviving the condition which caused her death as it would have been had defendant not been negligent, and (2) the chance of surviving as affected by any negligence you find on the part of defendant.

The difference in the two percentages, if any you find, is the percentage of loss or diminution in the chance of survival. If you find that the loss or diminution of a chance to survive was in excess of 50%, then you have found that such negligence was a proximate cause of the death.

On the other hand, if you find that the loss or diminution of a chance to survive was less than 50%, then any damages you find to have been experienced because of the death of Ruth Dormaier will be reduced by multiplying the total damages by the percentage of loss or diminution in the chance of survival.

**Comparison of Defendant Samaritan's Proposed Instruction No. 3 (CP 218) and
the Court's Instruction to the Jury No. 11 (CP 273)**

(Underlined text added by the court; ~~strike through~~ text deleted by the court.)

LOSS OF CHANCE

If you find that Defendant Robert Misasi failed to comply with the applicable standard of care and was therefore negligent, you may consider whether or not his negligence proximately caused damages to Ruth Dormaier in the nature of loss or diminution of a chance to survive the condition which caused her death.

If you find that such negligence proximately caused a loss or diminution of a chance to survive, then you will determine the magnitude of the loss or diminution ~~may award Plaintiffs damages determined~~ by comparing two percentages: (1) Ruth Dormaier's chance of surviving the condition which caused her death as it would have been had defendant not been negligent, and (2) the chance of surviving as affected by any negligence you find on the part of the defendant.

The difference in the two percentages, if any you find, is the percentage of loss or diminution in the chance of survival. If you find that the loss or diminution of a chance to survive was in excess of 50%, then you have found that such negligence was a proximate cause of the death.

On the other hand, if you find that the loss or diminution of a chance to survive was less than 50%, then ~~Any~~ damages you find to have been experienced because of the death of ~~by~~ Ruth M. Dormaier ~~from the time of Mrs. Dormaier's admission on September 20, 2007 until she was placed under general anesthesia~~ will be reduced by multiplying the total damages by the percentage of loss or diminution in the chance of survival.

QUESTION 3: Was the defendant's negligence a proximate cause of a loss or diminution of Ruth M. Dormaier's chance to survive the condition which caused her death?

ANSWER: yes (write "yes" or "no")

INSTRUCTION: If you answered "no" to Question 3, do not answer any other questions; sign this verdict form and notify the bailiff. If you answered "yes" to Question 3, proceed to Question 4.

QUESTION 4: What do you find to be the percentage of loss or diminution in Ruth M. Dormaier's chance to survive proximately caused by the negligence of defendant?

ANSWER: 70% (write a percentage)

INSTRUCTION: Proceed to Question 5.

QUESTION 5: What do you find to be the plaintiffs' amount of damages?

ANSWER: Estate of Ruth M. Dormaier: \$ 20,481.22
Lourence C. Dormaier: \$ 1,300,000.00

INSTRUCTION: Proceed to Question 6.

QUESTION 6: Was Robert Misasi the apparent agent of Samaritan Hospital?

ANSWER: yes (write "yes" or "no")

INSTRUCTION: Sign this verdict form and notify the bailiff.

Date: March 20, 2012

James R. Branch
Presiding Juror



07-473198

THE SUPERIOR COURT OF WASHINGTON
IN AND FOR GRANT COUNTY

FILED

MAR 20 2012

KIMBERLY A. ALLEN
Grant County Clerk

In Re the Estate of RUTH M. DORMAIER, Deceased,)
by and through LOURENCE C. DORMAIER, Personal)
Representative; and LOURENCE C. DORMAIER,)
individually, and as the Beneficiary of his wife's Estate,)

Plaintiffs,)

vs.)

COLUMBIA BASIN ANESTHESIA, P.L.L.C., a)
Professional Limited Liability Company; ROBERT)
MISASI, C.R.N.A.; GRANT COUNTY HOSPITAL)
DISTRICT NO. 1, d/b/a SAMARITAN HEALTHCARE,)
a/k/a SAMARITAN HOSPITAL, a Washington non-)
profit organization,)

Defendants.)

NO. 09-2-00479-6

JUDGMENT #

12-9-00494-5

SPECIAL VERDICT FORM

ORIGINAL

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was defendant Robert Misasi negligent?

ANSWER: Yes (write "yes" or "no")

INSTRUCTION: If you answered "no" to Question 1, do not answer any other questions; sign this verdict form and notify the bailiff. If you answered "yes" to Question 1, proceed to Question 2.

QUESTION 2: Was the defendant's negligence a proximate cause of the death of Ruth M. Dormaier?

ANSWER: No (write "yes" or "no")

INSTRUCTION: If you answered "no" to Question 2, proceed to Question 3. If you answered "yes" to Question 2, do not answer Question 3 or 4; proceed to Question 5.

Evan Sperline

From: Evan Sperline
Sent: Saturday, March 17, 2012 2:37 PM
To: 'Megan Murphy'; greg@spokanelawcenter.com; Brian T. Rekofke; Samuel C. Thilo; Kim Olewiler; Tina Seifert (tina@markamgrp.com); christell@spokanelawcenter.com
Cc: Leslie Van Guse; Colette Franklin
Subject: RE: Estate of Dormaier v. Misasi
Attachments: Concluding.doc; Consortium.doc; Cover sheet.doc; Corporations.doc; Loss of chance.doc; Damages.doc; Special verdict form.doc; Other docs.doc

Counsel:

Thank you for your briefing and proposed instructions. I have concluded as follows:

1. In the context of this evidence, a loss of chance instruction is appropriate.
2. It is appropriate to give an instruction regarding Dr. Hart and Dr. Canfield.
3. It is appropriate to advise the jury regarding CBA and Samaritan having only derivative liability.
4. It is appropriate to give an error of judgment instruction.
5. It is unnecessary to give "no guarantee" and "after-acquired information" instructions.

I have drafted what I believe to be appropriate instructions. Those that are new or modified are attached.

Regarding loss of chance, I find that the following evidence (paraphrased) supports the giving of the instruction:

Swenson: 70-80% survival rate for PE; 90% if no underlying terminal disease; key to survival is prompt diagnosis and treatment; 95% diagnosed with PE receive heparin; heparin acts immediately; opinion: prompt PE diagnoses and treatment reduce mortality rate from 80-90% down to 10-15%; surgery may have tipped the balance for RD by increasing the risk factor; dissolving thrombus would take hours or days; if surgery cancelled, RD still at risk for PE but chances for survival are good; RD would remain at risk while testing was done and while surgery was delayed; treatment would significantly reduce the risk.

Hattamer: PE is eminently survivable; disagree that RD was going to die anyway; with anticoagulation therapy, RD would have had a chance; 90% survival of PE with treatment; surgery in these circumstances was euthanasia; there was clearly an on-going ominous process; RD was probably experiencing smaller PE's at the time of admission.

Reynolds: If surgery cancelled, RD could still have thrown a massive PE.

Halpern: Anticoagulation therapy success rate over 90%; CTscan 90% effective in detecting PE; anticoagulation therapy would make PE less likely.

When viewed as an element of damages, as is required by *Mohr*, it is clear to me that (1) it was not necessary to plead loss of chance as a cause of action, and (2) the parties addressed the issue (if under other terminology) on both sides of the case.

My intent regarding this instruction is to establish alternative damages. I'm

3/19/2012

not sure my tentative instructions adequately do that, and would appreciate your comments. The alternative, as I see it, is this: if the jury finds that negligence of the defendant proximately caused the death, they don't need to consider loss of chance; if they do not find that negligence caused the death, they can consider whether or not it proximately caused a loss of chance. This is the formulation that gives rise to the order of questions I've included in the special verdict form.

Important: Please add my home e-mail address, elsperl@accima.com, to any further communication this weekend.

Very truly yours,

Evan E. Sperline



07-612188

FILED *rk*

JUN 04 2012.

KIMBERLY A. ALLEN
Grant County Clerk

SUPERIOR COURT OF WASHINGTON
IN AND FOR GRANT COUNTY

In re the Estate of RUTH M. DORMAIER,)
Deceased, by and through LOURENCE C.)
DORMAIER, Personal Representative; and)
LOURENCE C. DORMAIER, individually,)
and as the Beneficiary of his wife's Estate,)

NO. 09-2-00479-6

Plaintiffs,)

vs.)

COLUMBIA BASIN ANESTHESIA,)
PLLC, a Professional Limited Liability)
Company; ROBERT MISASI, C.R.N.A.,)
individually; GRANT COUNTY)
HOSPITAL DISTRICT #1, d/b/a)
SAMARITAN HEALTHCARE, a/k/a)
SAMARITAN HOSPITAL, a Washington)
non-profit organization,)

MEMORANDUM OPINION ON
MOTIONS FOR ENTRY OF
JUDGMENT ON VERDICT OF
THE JURY

Defendants.)

THIS MATTER came before the Court the 25th day of May, 2012 for entry of an Order denying Defendants' motion for judgment upon the verdict of the jury. The court heard oral argument on April 6, 2012, and orally denied Defendants' motion for judgment; the parties dispute, however, the appropriate form and content of a written Order expressing the court's ruling.

After reviewing the parties' proposed orders, and considering the arguments relating thereto, the court concludes that no further order is necessary or appropriate herein, for the reasons expressed in this memorandum opinion.

Procedural background.

Plaintiffs brought this action for the wrongful death of Ruth M. Dormaier against an anesthetist and the hospital in which he practiced. Ms. Dormaier died during surgery to repair a broken arm. The immediate cause of her death was a saddle pulmonary embolism. Plaintiffs alleged negligence by Defendants.

Plaintiffs did not allege "loss of chance" as a separate cause of action. The court concluded that "loss of chance" was not a separate cause of action, but was, rather, an alternative element of damages allegedly caused by negligence.

Trial was conducted before a jury in March, 2012. The jury was provided a Special Verdict Form which they answered as follows:

1. Was defendant Robert Misasi negligent? *Yes*
2. Was the defendant's negligence a proximate cause of the death of Ruth M. Dormaier? *No*
3. Was the defendant's negligence a proximate cause of a loss or diminution of Ruth M. Dormaier's chance to survive the condition which caused her death? *Yes*
4. What do you find to be the percentage of loss or diminution in Ruth M. Dormaier's chance to survive proximately caused by the negligence of defendant?
70%
5. What do you find to be the plaintiffs' amount of damages?
Estate of Ruth M. Dormaier: *\$20,481.22*
Lourence C. Dormaier: *\$1,300,000.00*
6. Was Robert Misasi the apparent agent of Samaritan Hospital? *Yes*

Plaintiff noted the case for presentment of judgment on the jury's verdict on April 6, 2012. In response thereto, Defendants also noted the case for that purpose on April 6. Relying on the same verdict, Plaintiffs proposed a judgment for plaintiffs in the amount of \$1,320,481.22 plus plaintiffs' costs and attorney fees to be determined later, while Defendants proposed a judgment of dismissal of all plaintiffs' claims, with defendants' costs and attorney fees to be determined later.

In short, neither party *generally* moved for new trial or for judgment as a matter of law under CR 50(c). Rather, the parties contested the appropriate legal effect of the verdict returned by the jury. In their supporting brief, Defendants argued, in summary, as follows:

1. The jury's "no" answer to question 2 requires judgment for defendants.

2. Loss of chance was not pleaded as a cause of action or theory of recovery, and was thus precluded.
3. The evidence failed to support the jury's finding of a 70% loss of chance. The court should strike the jury's answer in this regard under CR 50.
4. No judgment may be entered for plaintiffs because the verdict is irreconcilably inconsistent.
5. If the court enters judgment for plaintiffs, it should be limited to \$20,480.22.

Following oral argument on April 6, 2012 regarding the parties' competing proposed judgments, the court (having also resolved certain objections relating to awardable costs) entered the Judgment of Jury Verdict proposed by Plaintiffs. The Judgment on Jury Verdict Proposed by Defendants was expressly denied, marked "Proposed," and filed.

Analysis.

As noted above, Defendants did not expressly move for judgment as a matter of law, or, as characterized by Plaintiffs and during oral argument, "judgment notwithstanding the verdict." To the extent the brief in support of Defendants' proposed judgment could be interpreted as such a motion, it is fully resolved by the court's entry of Judgment on Jury Verdict and by denial of Defendant's proposed judgment.

As detailed in its oral ruling, the court concluded that the evidence was sufficient to allow the jury to consider, first, whether or not the negligence of Misasi proximately caused the death of Ms. Dormaier. The jury concluded it did not. The evidence was also sufficient to allow the jury to consider whether, if it was not a proximate cause of the death, said negligence proximately caused a different type of damages--a diminution in Ms. Dormaier's chance to survive the condition which did proximately cause her death, that is, a saddle pulmonary embolism. The jury concluded that it did.

It was therefore appropriate, and not inconsistent with the jury's rejection of negligence as a proximate cause of the death itself, for the jury to consider the percentage by which negligence diminished Ms. Dormaier's chance to survive the death-causing event. The jury determined that the loss or diminution of chance was 70%.

Based upon the jury's responses, the court concluded that there were two concurrent proximate causes of the death of Ms. Dormaier: a pulmonary embolism not caused by the negligence of Misasi, and a loss of chance to survive that condition which was caused by such negligence.

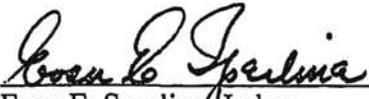
Had the jury found that the diminution of chance to survive was less than 50%, then the court would have been required to reduce the jury's finding of damages by that figure. However, where the reduction in chance to survive is itself found to be greater

than 50%, it becomes, as a matter of law, a concurrent proximate cause of the death (or, of the "failure to survive").

Defendants have appealed from the Judgment on Jury Verdict entered by the court, and from the court's denial of the judgment proposed by Defendants. Whether the judgment entered is correct is, in the court's view, purely a matter of law upon which an appellate tribunal will exercise independent *de novo* judgment. The exercise of that judgment will fully resolve the dispute, without the necessity of any separate reference to a motion for judgment as a matter of law under CR 50.

Plaintiffs' Findings of Fact, Conclusions of Law, and Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict has been marked "Proposed" and filed.

DATED this 2nd day of June, 2012.



Evan E. Sperline, Judge