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STATE OF WASHINGTON

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NO. 84712-6

SUPREME COURT OF THE STATE OF WASHINGTON

LINDA J. MOHR and CHARLES L. MOHR, her husband,

Appellants,

v.

DALE C. GRANTHAM, M.D. and JANE DOE GRANTHAM, and their marital community; BRIAN J. DAWSON, M.D. and JANE DOE DAWSON, and their marital community; BROOKS WATSON II, M.D. and JANE DOE WATSON, and their marital community; KADLEC MEDICAL CENTER, a Washington corporation; and NORTHWEST EMERGENCY PHYSICIANS, INC., a Washington corporation,

Respondents.

ANSWER OF RESPONDENTS GRANTHAM, DAWSON, WATSON AND NORTHWEST EMERGENCY PHYSICIANS TO BRIEF OF AMICUS CURIAE OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## I. IDENTITY OF ANSWERING PARTIES

Respondents Drs. Grantham, Dawson, and Watson and Northwest Emergency Physicians submit this answer to the Brief of Amicus Curiae Washington State Association for Justice Foundation (“WSAJF”).

## II. ARGUMENT

A. Contrary to WSAJF’s Assertions, this Court Has Not Already Recognized Recovery for Loss of Chance as a Distinct Type of Claim or Injury in Tort Cases Generally or Medical Malpractice Cases Specifically.

Citing *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983), and *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985), the WSAJF, *Amicus Br. at 5-6*, asserts that “[t]his Court has recognized recovery in tort for loss of a chance, as a distinct type of claim” or as “a distinct type of injury.” WSAJF’s reliance on either *Herskovits* or *Daugert* for such a proposition is misplaced.

To the extent that *Herskovits*, where the rationales of neither the lead, nor the concurring, nor the dissenting opinions received a clear majority, has any binding precedential value at all, see *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) (“[a] plurality opinion has limited precedential value and is not binding on the courts”), its holding is the position taken by those concurring on the narrowest grounds, *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 113 Wn.2d 413, 427-28, 780 P.2d 1282 (1989). Thus, and as the

court in *Zueger v. Public Hosp. Dist. No. 2*, 57 Wn. App. 584, 591, 789

P.2d 326 (1990), aptly recognized:

[I]f *Herskovits* stands for anything beyond its result, we believe the plurality represents the law on a loss of the chance of survival. The plurality would allow instructions on a loss of a chance of survival in this case only if the evidence shows (1) a substantial reduction in the chance of survival, and (2) the negligence of the defendant caused the reduction.

With only a four-justice plurality in *Herskovits* recognizing the loss of a less than even chance of survival as an actionable injury under Washington's wrongful death and survival statutes, *see Herskovits*, 99 Wn.2d at 634 (Pearson, J., concurring) ("Therefore, I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival"), it cannot be said that *Herskovits* stands for a broader proposition that plaintiffs in medical malpractice actions under RCW ch. 7.70 (or in other general negligence personal injury actions) can now recover for loss of a less than even chance of any potentially better outcome, much less an unspecified one.

Nor does *Daugert*, a legal malpractice case, so hold. Contrary to WSAJF's assertions, *Amicus Br. at 10-11*, this Court in *Daugert* did not hold, much less create "binding precedent" elevating Justice Pearson's plurality opinion in *Herskovits* to anything other than a recognition that a

plaintiff in a wrongful death or survival action may recover if the plaintiff can prove that defendants' negligence probably caused a substantial percentage-chance reduction in the decedent's chance of survival. Indeed, the *Daugert* court did not expand Justice Pearson's formulation of a loss of chance of survival claim or extend its rationale to actions other than wrongful death and survival actions, but instead held that "the loss of chance analysis articulated in *Herskovits* is inapplicable in a legal malpractice case." *Daugert*, 104 Wn.2d at 262.

B. This Is Not a Case Where the Court Should Consider Recognizing "Loss of Chance of a Better Outcome" as a Compensable "Injury" Actionable under RCW Ch. 7.70.

This Court should decline to consider whether *Herskovits* should be extended to cases not involving loss of a chance of survival under the wrongful death and survival statutes until it is presented with a case in which the plaintiff has presented competent medical expert testimony that defendant's alleged negligence proximately caused a substantial reduction (in terms of data-based statistically demonstrable percentages) in the plaintiff's chance of achieving a specific and ascertainable outcome. That was the kind of evidence presented in *Herskovits* – competent expert medical testimony that defendant's alleged failure to earlier diagnose Mr. Herskovits' lung cancer proximately caused a reduction of his chance of survival from 39% to 25%. That is not the kind of evidence that the

Mohrs have presented in this case.

Even as to Dr. Grantham, who evaluated and treated Ms. Mohr on August 31, 2004, the proffered testimony of the Mohrs' experts boils down to testimony, not grounded in any scientific data, concerning a loss of a chance of a potentially different, but unspecified and unascertainable, outcome. While the Mohrs' experts opined that, had Dr. Grantham done certain things differently on August 31, 2004, Mrs. Mohr had a 50-60% chance of obtaining a better outcome, they were unable to say to any reasonable degree of medical probability what that better outcome would look like or be. *See Br. of Resp. Grantham, et al, at 24-28.* And, as to Drs. Dawson and Watson, who saw Ms. Mohr on September 1, 2004, the Mohrs' experts did not even claim that the postulated chance of a better outcome applied to their care and treatment of Ms. Mohr. *See id.* at 22-24. Without competent expert medical testimony establishing a measurable and identifiable "better outcome," the percentage chance of which was substantially reduced by defendant's alleged negligence, a jury could do no more than resort to speculation and conjecture to assess what the loss, and the value of the loss, was.

Expert medical testimony establishing proximate cause in medical malpractice cases must rise above speculation, conjecture, or mere possibility. *E.g., McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d

1171 (1989). Nothing in *Herskovits* changed that basic principle. This Court should defer addressing the issue of whether, and under what set of rules, *Herskovits* should be extended until it is presented with a case in which the plaintiff has been able, at a minimum, to present competent expert medical testimony specifically identifying the “better outcome” and quantifying, using accepted statistical data, the percentage by which the defendant’s alleged negligence reduced the chance of achieving that specific better outcome. Because the Mohrs’ evidence falls far short of such minimum requirements, the trial court’s grant of summary judgment to defendants in this case should be affirmed.

C. WSAJF Glosses Over the Importance, to *Herskovits*, of Expert Testimony Establishing a Statistically Demonstrable, Substantial Reduction in the Patient’s Chance of Five-Year Survival.

WSAJF argues, that juries “should be allowed to determine damages for the loss of a chance based on the totality of the evidence, including, but not limited to, the *available* statistical estimates of the chance lost.” *Amicus Br. at 17* (italics added). WSAJF seems to be suggesting that, when a “statistical estimate of the chance lost” is *unavailable*, a plaintiff ought nonetheless to be able to get by summary judgment and have a jury “determine damages” based on the “totality” of *other* kinds of evidence. In aid of such a suggestion, WSAJF, *Amicus Br. at 7-8 and n.3*, portrays *Herskovits* as a case in which six justices quibbled

over whether to dispense with or relax traditional causation-proof requirements but joined in recognizing “loss of chance” as a basis for medical malpractice liability based on a policy determination that a negligent health care provider simply ought not enjoy “the benefit of an uncertainty.” But percentage-chance testimony was pivotal in *Herskovits* and it would make little sense to recognize some “loss of chance” as an injury when the chance itself and its loss have not been expressed in percentage terms based on accepted statistical data.

WSAJF’s portrayal of *Herskovits* glosses over the fact that both Justice Dore’s two-justice lead opinion and Justice Pearson’s four-justice plurality opinion noted that the plaintiff in *Herskovits* had presented testimony of an expert (Dr. Jonathan Ostrow) that “[i]f [Mr. Herskovits’] tumor had been a stage 1 tumor in December 1974, [his] statistical chance of surviving 5 years was 39 percent,” and that “[w]hen the tumor was discovered in June 1975, it was a stage 2 tumor [and t]he statistical chance of surviving 5 years when the tumor has reached stage 2 is 25 percent.” *Herskovits*, 99 Wn.2d at 621. Justice Pearson, writing for himself and three other justices, stated that “[t]he issue before the court, quite simply, is whether Dr. Ostrow’s testimony satisfies the standard [for proof of causation] enunciated in *O’Donoghue* [*v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968)].” *Id.* at 623. Justice Dore, in whose “lead” opinion only

one other justice joined, defining the injury in terms of death (unlike Justice Pearson), emphasized Dr. Ostrow's statistically-based causation opinion in framing the issue:

The ultimate question raised here is whether the relationship between the increased risk of harm and Herskovits' death is sufficient to hold Group Health responsible. Is a 36 percent (from 39 percent to 25 percent) reduction in the decedent's chance for survival sufficient evidence of causation to allow the jury to consider the possibility that the physician's failure to timely diagnose the illness was the proximate cause of his death? We answer in the affirmative.

Although WSAJF quotes from Justice Dore's statement that a plaintiff needs to establish "simply that the [defendant's] negligence increased the risk of injury or death," *Amicus Br. at 13*, WSAJF neglects to acknowledge that Justice Dore summarized the section of the opinion that includes that statement by stating:

*Where percentage probabilities and decreased probabilities are submitted into evidence, there is simply no danger of speculation on the part of the jury.*

*Herskovits*, 99 Wn.2d at 618 (emphasis added). *Herskovits* cannot and should not be unmoored from its record, the centerpiece of which was expert testimony establishing a statistically demonstrable percentage loss of chance of a particular specified and ascertainable outcome (survival), that removed the danger of speculation on the part of the jury.

WSAJF, in its treatment of *Daugert*, similarly glosses over the necessity of supporting a claimed loss of chance with expert causation testimony expressed in terms of statistically demonstrable percentages. WSAJF asserts, *Amicus Br. at 11*, that the jury in *Daugert* “was instructed on loss of a chance based on *Herskovits . . .*,” but fails to acknowledge that the instruction given in *Daugert* told the jury:

The Plaintiffs have the burden of proving the following:

1. That Defendants’ malpractice proximately caused the loss of chance for Plaintiffs to avoid damage;
2. ***The percentage chance***, if any, that the Supreme Court would have accepted review and reversed the decision of the Court of Appeals;
3. ***Whether the percentage chance***, if any, for Plaintiffs to avoid damage that was lost by Defendants’ malpractice was a substantial factor in bringing about damage to Plaintiffs.

*Daugert*, 104 Wn.2d at 256 (emphases added).<sup>1</sup>

In the Comment to WPI 105.09 – Loss of a Chance of Survival (for which no instruction was adopted) – the Washington Pattern Jury Instruction Committee notes that “whether statistical evidence is necessary in order for *Herskovits* to apply” is among several questions left unanswered by Washington decisions. The WPI comment then goes on to say:

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<sup>1</sup> Because the Supreme Court held in *Daugert* that a loss-of-chance theory did not apply to a legal malpractice case, it did not need to, and did not, reach the question of what basis an expert witness in a legal malpractice case would need for a percentage estimate of the chance of prevailing in litigation of a given lawsuit or appeal but for the defendant’s legal malpractice.

Citing *Herskovits*, another jurisdiction has noted that “a substantial and growing majority of the States that have considered the question have indorsed the loss of chance doctrine, in one form or another, in medical malpractice actions.” *Matsuyama v. Birnbaum*, 452 Mass. 1, 10, 890 N.E.2d 819 (2008). The *Matsuyama* opinion contains an extended discussion of jury instructions addressing issues of causation and the measure of damages in such a case.

While the Mohrs cited *Matsuyama* in their opening brief, App. Br. at 23, they did not discuss it. WSAJF does not even cite it. Because *Matsuyama* is recent and surveys other decisions, it warrants closer attention; as does a 1988 article by Professor Joseph H. King on the “loss of chance doctrine” that neither WSAJF nor the Mohrs cites, but that is more recent than the 1981 article by Professor King that WSAJF cites, *Amicus Br. at 8 n.3*.<sup>2</sup>

Although space does not allow for a lengthy discussion, in both *Matsuyama* and Professor King’s 1998 article, there is a clear assumption that proof of causation in a “loss of chance” case will include competent expert testimony that negligence on the defendant’s part reduced the probability, *stated in terms of percentage based on accepted scientific data*, that the patient would have survived or had a better outcome. *See, e.g., Matsuyama*, 890 N.E.2d at 832-34 (“progress in medical science now makes it possible, at least with regard to certain medical conditions, to

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<sup>2</sup> WSAJF cites Joseph H. King, “Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences,” *90 Yale L. J.* 1353, 1385 (1981).

estimate a patient's probability of survival to a reasonable degree of medical certainty;" "[s]urvival rates are not random guesses. They are estimates based on data obtained and analyzed scientifically and accepted by the relevant medical community . . ."; "[t]he key is the reliability of the evidence available to the fact finder . . . [and] at least for certain conditions, medical science has progressed to the point where physicians can gauge a person's chances of survival to a reasonable degree of medical certainty, and indeed routinely use such statistics as a tool of medicine;" "[r]eliable techniques of gathering and analyzing medical data have made it possible for fact finders to determine based on expert testimony – rather than speculate based on insufficient evidence – whether a negligent failure to diagnose a disease injured a patient by preventing the disease from being treated at an earlier stage, when prospects were more favorable");<sup>3</sup> and Joseph H. King, "Reduction of Likelihood' Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine," *28 U. Memphis L. Rev.* 492, 531 and 543 (1998) ("The best solution is to arrive at a percentage estimate of the likelihood that the victim would otherwise have achieved a better outcome," and "[t]he plaintiff's loss should be measured by the

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<sup>3</sup> The *Matsumaya* court consistently refers to lost chance of *survival* because the allegation in the case was that negligent health care diminished a patient's percentage chances of surviving longer.

extent to which the percentage likelihood of the victim achieving a more favorable outcome was reduced by the defendant's tortious conduct").

Neither *Herskovits* nor any of the other authorities WSAJF cites provide support for WSAJF's assertion that juries should "be allowed to determine damages for a loss of a chance based on the totality of the evidence, including, *but not limited to the available* statistical estimates of the chance lost," *Amicus Br. at 17 (italics added)*, and thus, apparently, even *without any* expert testimony establishing the specific "chance lost" in percentage terms, based on scientific analysis of actual data.

D. Use of a "Substantial Factor" Causation Test in "Loss of Chance" Medical Malpractice Cases is Foreclosed by Statute and Would Not Make Sense In Any Event.

1. RCW 7.70.040 and RCW 4.24.290 codify the "traditional" causation test, and therefore codify a "but for" test.

Without advocating its application in this case, WSAJF asserts, *Amicus Br. at 6*, that RCW 4.24.290 and RCW 7.70.040 "do not preclude application of the substantial factor test when it is appropriate under the facts." Contrary to WSAJF's assertion, RCW 7.70.040 and RCW 4.24.290, which were enacted in the mid-1970s, codified traditional "but for" causation in medical malpractice cases. Indeed, none of the common law decisions that those statutes codified held or implied that there was any alternative *to* "but for" cause-in-fact analysis.

It is settled law that, whenever an injury is alleged to have resulted from health care, only one of the causes of action enumerated in RCW 7.70.030 may be asserted.<sup>4</sup> RCW 7.70.030 provides in pertinent part that:

No award shall be made in any action . . . for damages for injury occurring as the result of health care . . . unless the plaintiff establishes one or more of the following propositions:

- ~~(1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;~~
- (2) That a health care provider promised the patient or his representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his representative did not consent. . . .

The elements of the first of these three available causes of action (malpractice) are listed in RCW 7.70.040:

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

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably

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<sup>4</sup> RCW 7.70.010 (“The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976”); *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335, *rev. denied*, 138 Wn.2d 1023 (1999) (“whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70 [and] the specific question of whether the injury is actionable is governed by RCW 7.70.030”); *Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 61-62, 995 P.2d 621, *rev. denied*, 141 Wn.2d 1022 (2000) (“The court in *Branom* . . . determined that RCW 7.70.010 modified the “procedural and substantive aspects of all civil actions for damages for injury occurring as a result of health care, regardless of how the action is characterized”); *Miller v. Jacoby*, 145 Wn.2d 65, 72, 33 P.3d 68 (2001) (“actions for injuries resulting from health care are governed by chapter 7.70 RCW”).

prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances; [and]

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

RCW 4.24.290 imposes the same proof requirements for health care provider malpractice claims.<sup>5</sup>

This Court has interpreted these statutory elements as “particularized expressions of the *four traditional elements* of negligence: duty, breach, proximate cause, and damage or injury [emphasis added].” *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001); *Caughell v. Group Health Co-op*, 124 Wn.2d 217, 233, 876 P.2d 898 (1994) (citing *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 468, 656 P.2d 483 (1983), and *Harris v. Groth*, 99 Wn.2d 438, 444-45, 663 P.2d 113 (1983)). Thus, when an injury results from “health care,” damages may be recovered only under one of the theories listed in RCW 7.70.030 and the malpractice claim at issue here requires the Mohrs to prove each of the particularly expressed

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<sup>5</sup> RCW 4.24.290 provides:

In any civil action for damages based on professional negligence against a hospital which is licensed by the state of Washington or against the personnel of any such hospital, or against a member of the healing arts . . . , the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, **and that as a proximate result of such failure the plaintiff suffered damages**, but in no event shall the provisions of this section apply to an action based on the failure to obtain the informed consent of a patient [emphasis added].

*traditional* elements of negligence, including proximate cause.

No serious argument can be made that the 1975-76 Legislature meant to use the term “proximate cause” in any sense other than the traditional one,<sup>6</sup> under factual causation questions are decided under “but for” causation principles. As the Court explained in a tort case in 1985:

Washington law recognizes two elements to proximate cause: Cause in fact and legal causation. [Citations omitted.] Cause in fact refers to the “but for” consequences of an act – the physical connection between an act and an injury . . . Some confusion probably has been generated by the imprecise use of the term “proximate cause” to encompass cause in fact and legal causation alone or in combination.

*Hartley v. State*, 103 Wn.2d 768, 777-78, 698 P.2d 77 (1985) (noting that WPI 15.01 “refers to proximate cause in its factual context as ‘a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of *and without which such injury would not have happened* [italics added; bracketed language selected]”).<sup>7</sup> In this respect, the law for purposes of medical malpractice claims under RCW 7.70.040 has remained unchanged. See *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162-63, 194 P.3d 274 (2008), *rev.*

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<sup>6</sup> RCW 7.70.030 and .040 were enacted by Laws of 1975-76, 2d Ex. Sess., ch. 56, §§ 8, 9. RCW 4.24.290 was enacted by Laws of 1975, 1<sup>st</sup> Exec. Sess., ch. 35, § 1. Neither statute’s proof/elements requirements have since been amended.

<sup>7</sup> See also *Daugert*, 104 Wn.2d at 260 (“Courts have consistently applied the ‘but for’ test in legal malpractice cases”).

*denied*, 165 Wn.2d 1047 (2009).

The 1975-76 Legislature that enacted RCW 7.70.040 and RCW 4.24.290 could not possibly have had in mind *Herskovits* when it codified the traditional elements of medical malpractice claims, because that decision lay eight years off in the future.<sup>8</sup> Nor could the 1975-76 Legislature have had in mind any Washington decisions applying “substantial factor” causation to tort cases, because no Supreme Court majority (or plurality) opinion, and no published Court of Appeals decision, had applied “substantial factor” causation in a tort case,<sup>9</sup> and no such decision would appear for another decade or in the tort context for another two decades. As of 2008, according to *Fabrique v. Choice Hotels Int’l, Inc.*, 144 Wn. App. 675, 685, 183 P.3d 1118 (2008), Washington courts had applied “substantial factor” causation analysis instead of “but for” causation only in cases involving discrimination or unfair employment practices (the earliest, *Allison v. Housing Auth.*, 118 Wn.2d 79, 95, 821 P.2d 34 (1991)), securities cases (the earliest, *Haberman v.*

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<sup>8</sup> Even if the 1975-76 Legislature was prescient and *did* have the situation in *Herskovits* in mind, it did not need use a nontraditional concept of proximate cause in order to draft RCW 7.70.040(2) to accommodate *Herskovits*, as the plaintiff there was able to present statistically-based expert medical testimony that the alleged negligence had been a but-for cause of the lowered probability of five-year survival, and only two justices in *Herskovits* were willing to use a “substantial factor” test for causation.

<sup>9</sup> In *Wells v. Vancouver*, 77 Wn.2d 800, 806-07, 467 P.2d 292 (1970), Justice Finley, in a concurrence, had discussed “substantial factor” analysis as one of several controversies in proximate causation jurisprudence.

*Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 131-32, 744 P.2d 1032, (1987)), and toxic tort cases (*Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 91-92, 896 P.3d 682 (1995)), including multisupplier asbestos injury cases (*Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 32, 935 P.2d 684 (1997)), in “medical malpractice cases where the malpractice reduces a patient’s chance of survival” (meaning *Herskovits*) (citing *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 420-21, 161 P.3d 406, *rev. denied*, 163 Wn.2d 1055 (2008)). See also *Blasick v. Yakima*, 45 Wn.2d 309, 315, 274 P.2d 122 (1954) (“We hope we have made it clear that we are not disposed to substitute the ‘materially contributed’ or ‘substantial factor’ test either as a definition of or a substitute for ‘proximate cause’ (as defined in our cases) in determining what is actionable negligence”).<sup>10</sup>

Thus, RCW 7.70.040 necessarily expressed and codified the traditional factual element of proximate cause – “but for” causation – for

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<sup>10</sup> In *Swanson v. Gilpin*, 25 Wn.2d 147, 151-52, 169 P.2d 356 (1946), the court used the term “substantial factor” in quoting from *Restatement of Torts*, § 447, in the context of its discussion of intervening and superseding cause, but held, 25 Wn.2d at 155, that:

It was a question of fact for the determination of the jury whether *but for* the illegal parking of the Gilpin automobile the accident would not have occurred. [Emphasis added.] It was for the jury to determine whether Gilpin, thus illegally parking his automobile, should have foreseen or reasonably anticipated that injury was apt to follow. The verdict reflects the finding of the jury that the act of Mrs. Hardy was simply a concurring cause; that, while the negligence of Mrs. Hardy was also a proximate cause, it merely combined or concurred with the continued effect of appellant Gilpin’s negligence to produce the result, but did not supersede it.

medical malpractice cases, and this Court's decisions recognize that. Were this Court to modify the legislature's codification of the traditional elements of medical malpractice law as WSAJF is suggesting, it would raise serious separation of powers, not to mention *stare decisis*, concerns.

2. Use of "substantial factor" analysis would not make sense in this or any other "loss of chance" case.

WSAJF fails to explain why a "substantial factor" causation test would be necessary or appropriate, or how it would work, in this case or any other "loss of chance" case. If *Herskovits* were to be extended to contexts other than loss of a chance of survival under the wrongful death and survival statutes, and "loss of chance" plaintiffs are required to support their claims with competent data-based expert medical testimony that the chance of a specifically identified "better" outcome was "X" percent before, but, as a proximate result of defendant's alleged negligence was substantially reduced to "Y" percent, then there is no logical reason to replace the traditional "but for" causation test with a "substantial factor" causation test. If, however, as WSAJF seems to advocate, "loss of chance" plaintiffs are to be excused from having to present any percentage-chance expert testimony if it is not "available," then using a "substantial factor" causation test instead of a "but for" test would serve only to compound the speculativeness of the fact-finding

process in cases alleging that a health care provider negligently failed to make an outcome that was destined to be bad any less bad.

WSAJF asserts, *Amicus Br. at 15*, that use of a “statistical estimate of the chance lost” imposes too much precision under “the law of damages,” and that “valuation of a loss of chance requires no more precision than” predicting “what the decedent’s life would have been if he or she had lived “in the course of assessing damages,” *Amicus Br. at 16*. Such assertions, however, conflate proof of causation (whether the defendant’s alleged negligence proximately caused the plaintiff’s claimed injury) with proof of damages (what monetary value should be assigned to a proven loss). Even under the plurality opinion in *Herskovits*, to establish liability for any loss of a chance of survival or amount of damages, a but-for causal link must be established between a substantial reduction in a decedent’s already less than even chance of survival over a given period of time and a defendant’s alleged negligence. In *Herskovits*, it was the presence of competent expert medical testimony, based on scientific analysis of actual data (like five-year survival rates), establishing in percentage terms, the chance that was lost and that the chance lost was substantial, that removed the jury’s determination of what, if any, lost chance of survival defendant’s alleged negligence caused from the realm of speculation and conjecture.

While Washington decisions and pattern jury instructions give juries latitude to assign a monetary value to noneconomic harm, they do so only after liability – fault plus causation – has been established, *see, e.g.*, WPI 30.01.01,<sup>11</sup> and it long has been the law in Washington that proximate causation must be established by evidence that rises above speculation, conjecture, or mere possibility, and must rise to the degree of proof that the resulting condition probably would not have occurred but for the defendants' conduct . . .” *E.g., Young v. Group Health Coop.*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975). It is fallacious, therefore, to invoke Washington cases that speak to the standard (or lack thereof) for valuing noneconomic harm as authority for an argument that plaintiffs should be allowed to prove a “loss of a chance” without expert medical testimony based on nonspeculative and scientifically valid data, expressed in terms of percentages – which, after all, is how we typically express the concept of “chance”.

### III. CONCLUSION

The evidence Ms. Mohr offered was insufficient to enable a jury to find, without speculating, that negligence on any physician defendant's

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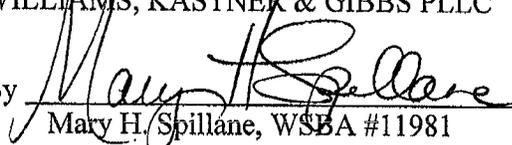
<sup>11</sup> WPI 30.01.01 tells the jury not only that “[i]f your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant,” but also that “[t]he law has not furnished us with any fixed standards by

part deprived her of a statistically supportable percentage chance of a specified and ascertainable better outcome. Thus, this is not an appropriate case for deciding whether or how *Herkovits* "loss of chance of survival" claim should be expanded to allow recovery for a loss of a chance of a "better" outcome in a medical malpractice case under RCW Ch. 7.70 or in tort cases generally, or to decide whether traditional "but for" proximate causation codified in RCW 7.70.040 should be replaced with "substantial factor" causation. Because of the insufficiency of Ms. Mohr's expert testimony, the trial court's summary judgment dismissal of her complaint should be affirmed regardless of whether an "injury" compensable under RCW chapter 7.70 includes the loss of a chance of a "better outcome" not limited to survival.

RESPECTFULLY SUBMITTED this 27th day of January, 2011.

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which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions."

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I hereby certify under penalty of perjury under the laws of the State  
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of Washington that on the 27th day of January, 2011, I caused a true and  
correct copy of the foregoing document, "Answer of Respondents  
Grantham, Dawson, Watson and Northwest Emergency Physicians to  
Brief of Amicus Curiae of Washington State Association for Justice  
Foundation," to be delivered to the following counsel of record in the  
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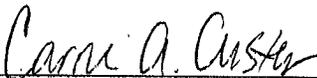
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DATED this 27th day of January, 2011, at Seattle, Washington.

  
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Carrie A. Custer