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No. 84712-6

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SUPREME COURT OF THE STATE OF WASHINGTON

LINDA MOHR and CHARLES MOHR, her husband,

Plaintiffs/Appellants,

v.

DALE C GRANTHAM, M.D. and JANE DOE  
GRANTHAM, and their marital community; BRIAN J.  
DAWSON, M.D. and JANE DOE DAWSON, M.D., 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,

Defendants/Respondents.

RESPONSE OF DEFENDANT KADLEC MEDICAL  
CENTER TO BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

JEROME R. AIKEN, WSBA #14647  
Attorneys for Defendant Kadlec Medical  
Meyer, Fluegge & Tenney, P.S.  
P.O. Box 22680  
Yakima, WA 98907  
(509) 575-8500

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## I. INTRODUCTION

Respondent Kadlec Medical Center respectfully submits the following response to the *Brief of Amicus Curiae Washington State Association for Justice Foundation* (hereinafter “WSAJF”).

WSAJF misconstrues the holding in Herskovits. An issue essential to both Justice Dore and Justice Pearson’s opinions was that Herskovits involved wrongful death claims and the wrongful death statute. This case, however, involves neither. Moreover, WSAJF’s representation regarding this Court’s holding in Daugert has no basis. This Court in Daugert did not specifically adopt Justice Pearson’s concurring opinion in Herskovits.

## II. ARGUMENT

### A. **Mrs. Mohr’s Stroke Was Inevitable**

As an initial matter, WSAJF makes a significant factual error in its Amicus Brief which must be addressed. WSAJF suggests, “There is no testimony that Mohr’s stroke would not have occurred with proper treatment.” (Amicus Brief at 4). This statement is incorrect. The testimony in this case from Mrs. Mohr’s expert witness, Kyra Becker, M.D., demonstrates that Mrs. Mohr would

have suffered a stroke regardless of what medical treatment she received. Dr. Becker testified that, on a more probable than not basis, even if Mrs. Mohr had received optimal care she still would have received some type of damage due to the stroke resulting in some cognitive disabilities. (CP 330-40, 369-84).

Moreover, Dr. Becker did not testify that Mrs. Mohr would have had a better chance if treatment had begun earlier. Dr. Becker was unable to quantify what difference, if any, earlier treatment would have made on Mrs. Mohr's condition. (CP 369-84).

**B. WSAJF's Reliance on Herskovits and Daugert is Misplaced**

WSAJF prefaces its arguments with an extensive overview of what it deems to be law regarding "loss of a chance" doctrine and its purported adoption in Washington. (Amicus Brief at 6-11). This overview expends significant time discussing Herskovits and, to a lesser extent, Daugert. WSAJF concludes that those cases collectively hold that "loss of a chance" is a conceptually distinct type of harm rather than a standard of causation.

WSAJF places too much reliance on Herskovits in light of that case's limited precedential value. Herskovits contains four

separate opinions, each with distinct legal reasoning, none of which was adopted by a clear majority of the Court. WSAJF relies on the opinions of only two of the nine justices, neither of whom had the support of more than an additional justice. The lack of a clear majority strips Herskovits of precedential value, and, in fact, WSAJF explicitly concedes this point: “[N]either opinion standing alone is precedential or binding.” (Amicus Brief at 10). WSAJF’s reliance on Herskovits in light of this concession is surprising.

If Herskovits is to be considered precedent at all, its application should be limited to the narrowest ground agreed upon by the plurality, viz., that a “loss of a chance” claim may be permitted in a *wrongful death or survival action*. Zueger v. Public Hospital Dist., 57 Wn. App. 584, 591, 789 P.2d 326 (1990) (“When no rationale for a decision in the appellate court receives a clear majority, the holding of the court is the position taken by those concurring on the narrowest grounds.”). Accordingly, this Court should not construe Herskovits as a broad mandate to rework Washington’s well-settled tort law.

WSAJF's reliance on Daugert is also misplaced. Daugert did not elevate Justice Pearson's theory that "loss of a chance" is a distinct type of injury rather than a replacement for proximate causation to the status of binding precedent. (Amicus Brief at 11). Daugert did not validate that theory or adopt it. In fact, this Court in Daugert declined to apply "loss of a chance" theory. Nonetheless, WSAJF claims that Daugert's purported "articulation" of "loss of a chance" as a distinct type of injury should be a controlling statement of the law even though the rule was not in fact applied to the facts of the case. (Amicus Brief at 12).

This argument overlooks the fact that the reference by this Court in Daugert to Justice Pearson's opinion was dictum. Dictum is language in an opinion which has no bearing on the ultimate decision. In the Matter of the Marriage of Rideout, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003). In Daugert, this Court held that it was inappropriate to apply the "substantial factor" test to a legal malpractice claim, because the facts of the case did not fit within the three types of cases where the "substantial factor" test has traditionally been applied. Daugert, 104 Wn.2d at 262. Instead, this

Court held that in a legal malpractice action “the client must prove that, but for the attorney’s negligence, the plaintiff would probably have prevailed upon appeal in a legal malpractice action wherein the negligence occurs at the appellate level.” Id. at 263.

This Court’s opinion in Daugert should clarify any misconception WSAJF may have as to the nature of its holding. Whether “loss of a chance” is conceptually distinct from proximate causation was not before this Court in Daugert and was not necessary to its holding. At most, Daugert’s discussion of Herskovits in its opinion was in passing. Daugert’s allusion that “loss of a chance” may be a type of injury had no bearing on the outcome of the case. As such, it is not controlling and has little, if any, precedential value: “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.” DCR, Inc. v. Pierce County, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380 (1998) (quoting State v. Potter, 68 Wn. App. 134, 149 n. 7, 842 P.2d 481 (1992)).

Other than its reliance on Herskovits and Daugert, WSAJF submits no other authority supporting its position that “loss of a chance” is a distinct type of injury instead of a standard of causation and thus it is not foreclosed by the medical negligence statutes, RCW 4.24.290 and RCW 7.70.040, which require proof of proximate cause. This Court should not alter well-established tort policy based upon such scant support.

**C. The “Loss of a Chance” Doctrine Is Limited to Wrongful Death and/or Survival Actions and Does Apply to *Inter Vivos* Actions**

WSAJF’s claim that Herskovits was intended to apply to *inter vivos* claims is entirely incorrect. Herskovits was based upon a very limited set of facts, and consequently its holding should be limited. One of the primary—and, indeed, the few—things agreed upon by all the Justices was that Herskovits was a wrongful death/survival action only involving the wrongful death statute. Consequently, the scope of their opinions did not extend beyond that limited category. This was specifically noted by Justice Pearson, on whose concurring opinion WSAJF heavily relies. Justice Pearson recognized that his ruling was predicated upon the fact that the case involved a wrongful

death/survival action, observing, “[T]his analysis raises the issue of whether an action for reduction of the chance of survival can be brought under the wrongful death statute, RCW 4.20.010.” Herskovits, 99 Wn.2d at 624 (Pearson, J., concurring).

Additionally, there are valid, persuasive, and rational policy reasons for limiting “loss of a chance” claims. The “loss of a chance” doctrine upends the long-standing preponderance of the evidence standard, alters the burden of proof in favor of the plaintiff, undermines the uniformity and predictability central to tort litigation, results in an expansion of liability, and is too complex to administer. See generally T.A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution*, 87 MASS. L.REV. 3 (2002); D.A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L.REV. 605 (2001).

Furthermore, adopting the “loss of a chance” theory fundamentally alters the meaning of proximate causation and accordingly should be limited to a very narrow set of cases. As the Supreme Court of Tennessee has eloquently articulated,

Relaxing the causation requirement might correct a perceived unfairness to some plaintiffs who could

prove the possibility that the medical malpractice caused an injury but could not prove the probability of causation, but at the same time could create an injustice. Health care providers could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result. No other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury. We cannot approve the substitution of such an obvious inequity for a perceived one.

The lost chance of survival theory does more than merely lower the threshold of proof of causation; it fundamentally alters the meaning of causation.

....  
[I]t is unwise to impose liability on members of the medical profession in such difficult circumstances as those now before this Court. Rather than deterring undesirable conduct, the rule imposed only penalizes the medical profession for inevitable unfavorable results. The lost chance of survival theory presumes to know the unknowable.

Kilpatrick v. Bryant, 868 S.W.2d 594, 603 (Tenn. 1993) (quoting Justice Riley's dissent in Falcon v. Memorial Hosp., 436 Mich. 443, 462 N.W.2d 44 (1990)).

More significantly, WSAJF does not appear to argue that "loss of a chance" doctrine should be limited to medical malpractice cases, *viz.*, wrongful death and *inter vivos* actions. However, even if

WSAJF believes “loss of a chance” doctrine should be limited to the medical malpractice context, it seems impossible to actually limit it to that narrow context based upon the principles discussed in the Amicus Brief. For example, WSAJF is arguing for adoption of “loss of a chance” doctrine primarily for deterrence policy reasons. It claims that the opinions by Justice Dore and Justice Pearson both rest on single policy choice: tortfeasors “should not be permitted to question the speculative nature of the lost chance when their negligence has put it beyond the possibility of realization.” (Amicus Brief at 7-8). Quoting Justice Pearson’s concurrence, WSAJF writes that the failure to recognize the doctrine “*subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses . . . .*” (Amicus Brief at 7) (emphasis added).

This emphasis on deterrence as a policy objective is important, because the same policy objective can be applied to *all* torts. There is nothing limiting it specifically to medical malpractice cases. Indeed, if a policy objective of deterrence is paramount in developing and adopting new tort doctrines, as the Amicus Brief

suggests, there is no principled reason why the “loss of a chance” doctrine should not eventually apply to *all* tort cases.

Moreover, it would result in the complete abrogation of the traditional concepts of proximate causation. The doctrine of “loss of a chance” is the antithesis of proximate cause, because it allows a plaintiff to recover when the defendant’s negligence possibly caused the plaintiff’s injury. It is primarily a theory of loss-allocation and deterrence. If deterrence, however, were the sole value to be served by tort law, courts could dispense with the notion of causation altogether and award damages on the basis of negligence alone. This concept is unworkable and contradicts the very fabric of Washington’s tort scheme.

What is more, it is unnecessary. Traditional notions of proximate causation appear to continue to function well within the medical negligence context, and Washington courts have frequently applied them to medical negligence cases in the years since Herskovits without agonizing over whether such notions represent fundamentally unfair policy choices. See, e.g., Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn. App 155, 194 P.3d 274, rev. denied,

165 Wn.2d 1047, 208 P.3d 554 (2009). The entire tort system appears to function quite properly; it does not require a complete overhaul.

There is an additional policy reason why “loss of a chance” doctrine should not be applied to *inter vivos* claims. The Amicus Brief does not take into account that many, if not most, medical malpractice claims in Washington involve delayed diagnosis or treatment. The delays are often a matter of minutes, hours, and days, not months or years. In these cases, the claimed “lost chance” may be one percent or less or some other *de minimis* amount. This is problematic in terms of calculating damages. How much is a day’s lost chance worth? An hour’s? This is not the type of situation addressed and anticipated in by either the majority or concurring opinions in Herskovits, where one of the crucial factors was that the negligence caused a significant loss of chance of survival. If Herskovits does apply “loss of a chance” doctrine, its application should be applied only where there is a significant loss.

Lastly, WSAJF’s claim that under Daugert “loss of a chance” claims should be cognizable where the harm is irretrievably lost is

incorrect and misconstrues the holding. As noted, this Court in Daugert refused to apply the “substantial factor” test to a legal malpractice claim. This Court did not address whether a “loss of a chance” claim is cognizable outside of the wrongful death/survival context, nor did it predicate its analysis on the fact that the injury to the plaintiff must be irretrievable. In fact, this Court concluded the “substantial factor” test did not apply, because the facts of the case did not fit within the three types of situations where courts have traditionally applied the test: (1) “where either one of two causes would have produced the identical harm”; (2) “where a similar, but not identical, result would have followed without the defendant’s act;” and (3) where one defendant has made a clearly proven but quite insignificant contribution to the result . . . .” Daugert, 104 Wn.2d at 262. There is no indication that this Court based its opinion on WSAJF’s “irretrievably lost” theory.

In short, WSAJF provides no authority supporting the application of “loss of a chance” doctrine to *inter vivos* actions. There are in fact valid, principled reasons for limiting the use of the

doctrine to a narrow set of cases, if in fact at all. Accordingly, this Court should decline to extend it to the case presented.

**D. This Court Should Consider That Other Jurisdictions Have Rejected “Loss of a Chance” Doctrine**

A substantial number of other jurisdictions have also rejected the loss of chance doctrine on the grounds that it is contrary to the basic standards of proof undergirding the tort system. See e.g. Grody v. Tulin, 170 Conn. 443, 365 A.2d 1076 (1976); United States v. Cumberbatch, 647 A.2d 1098 (Del. 1994); Gooding v. University Hosp. Bldg. Inc., 445 So.2d 1015 (Fla. 1984); Manning v. Twin Falls Clinic & Hosp., Inc., 122 Idaho 47, 830 P.2d 1185 (1992); Fennell v. Southern Maryland Hosp. Ctr., 320 Md. 776, 580 A.2d 206 (1990); Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993); Ladner v. Campbell, 515 So.2d 882 (Miss. 1987); Pillsbury-Flood v. Portsmouth Hosp., 128 N.H. 299, 512 A.2d 1126 (1986); Kramer v. Lewisville Memorial Hosp., 858 S.W.2d 397 (Tex. 1993). As the Supreme Court of South Carolina observed,

After a thorough review of the “loss of chance” doctrine, we decline to adopt the doctrine and maintain our traditional approach. We are persuaded that “the loss of chance doctrine is fundamentally at odds with

the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician.

Jones v. Owings, 318 S.C. 72, 76-77, 456 S.E.2d 371, 374 (1995).

This is because “[l]egal responsibility in this approach is in reality assigned based on the mere *possibility* that a tortfeasor’s negligence was a cause of the ultimate harm.” Kramer v. Lewisville Memorial Hosp., 858 S.W.2d 397, 405 (Tex. 1993) (emphasis in original). “This formula is contrary to the most basic standards of proof which undergird the tort system.” Jones, 318 S.C. at 76-77.

Assuming this Court takes the position that the Herskovits plurality adopted “loss of a chance,” this Court should be persuaded by the above-cited case law and limit the doctrine to cases with facts substantially similar to those present in Herskovits.

**E. WSAJF’s Proposed Method of Calculating Damages Contradicts Its Principal Position**

It should also be pointed out that WSAJF’s proposed manner of calculating damages contradicts its principal argument. WSAJF’s main position is that Justice Pearson’s concurring opinion in Herskovits that “loss of a chance” is a distinct type of injury and not a standard of causation is the law of this State. At the same time,

WSAJF rejects Justice Pearson's methodology for calculating damages, seeking to convince this Court to adopt its own manner of assessing damages, *i.e.*, that the jury should be able to assess damages in light of the totality of the evidence. (Amicus Brief at 14). In essence, WSAJF is attempting to cultivate the portions of Justice Pearson's concurring opinion with which it agrees, and prune those it rejects. Its reason is that "[t]here is no consensus in Herskovits regarding the measure of damages for loss of a chance . . . ." (*Id.* at 14).

How WSAJF can reach this conclusion in light of its preceding arguments is confusing. It vigorously asserts that Herskovits' disparate, far-from-unanimous opinions clearly represent a "consensus" that "loss of a chance" is a conceptually distinct injury, yet at the same time somehow do not arrive to represent a "consensus" as to the manner of assessing damages. These positions are contradictory. If WSAJF believes that Justice Pearson's view is the law of this State, it must adopt the opinion in its entirety, not piecemeal. If WSAJF's argument is correct and "loss

of a chance” is a distinct injury, that chance-interest *alone* should be completely redressed.

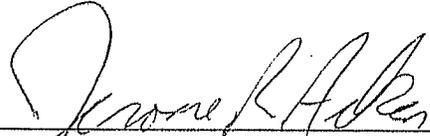
Assuming this Court finds Justice Pearson’s opinion controlling, it should in fact apply his methodology of calculating damages. Of the methodologies discussed in the Amicus Brief, Justice Pearson’s is the most just, as it would limit a plaintiff’s compensation to the amount of the loss-of-chance interest. This methodology is appropriate, because it recognizes that the lost chance-interest is the interest which must be redressed, not the ultimate result.

### III. CONCLUSION

The Amicus Party has not presented a compelling argument demonstrating that there should be a radical departure from the law that has developed over many years relating to medical malpractice cases in the State of Washington. Herskovits and Daugert do not call for the wholesale abandonment of the traditional proximate causation element in Washington. Herskovits is of limited application and precedential value. This Court should confirm that it

applies only in factual situations substantially similar or identical to those present in Herskovits.

Respectfully submitted this 27 day of January, 2011.



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JEROME R. AIKEN, WSBA #14647  
Meyer, Fluegge & Tenney, P.S.  
Attorneys for Defendant/Respondent,  
Kadlec Medical Center

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BY RONALD R. CARPENTER, CLERK **CERTIFICATE OF SERVICE**

I, ~~SHERYL JONES~~, declare under penalty of perjury of the laws of the state of Washington, that on the 27<sup>th</sup> day of January, 2011, I sent via e-mail and deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing RESPONSE OF DEFENDANT KADLEC MEDICAL CENTER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION to the following:

**Counsel for Plaintiffs/Appellants:**

Ms. Cheryl R.G. Adamson  
Rettig Osborne Forgette, LLP  
6725 West Clearwater Avenue  
Kennewick, WA 99336

**Counsel for Defendants Dr. Brooks Watson, II and Vanessa Watson**

Ms. Donna M. Moniz  
Johnson, Graffe, Keay, Moniz & Wick, LLP  
925 Fourth Ave, Suite 2300  
Seattle, WA 98104

**Counsel for Defendant Dr. Grantham, Dr. Dawson and Northwest  
Emergency Physician, Inc.**

Mr. Christopher H. Anderson  
Fain Sheldon Anderson & VanDerhoef, PLLC  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104

**Co-Counsel for Dr. Grantham, Dr. Dawson, Northwest Emergency  
Physicians, Inc., Dr. Brooks Watson, II and Vanessa Watson**

Ms. Mary H. Spillane  
Williams, Kastner & Gibbs, PLLC  
Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101

ORIGINAL

**Counsel for Washington State Association for Justice Foundation**

Mr. George Ahrend  
Ahrend Law Firm PLLC  
100 E. Broadway Avenue  
Moses Lake, WA 98837

**Co-Counsel for Washington State Association for Justice Foundation**

Mr. Bryan P. Harnetiaux  
517 E. 17<sup>th</sup> Avenue  
Spokane, WA 99203



A handwritten signature in black ink, appearing to read 'Sheryl A. Jones', is written over a horizontal line. The signature is stylized with loops and flourishes.

SHERYL A. JONES