

66294-5

66294-5

No. 66294-5-I

2011 FEB 11 11:24:05 E

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

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

Appellants,

vs.

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

Respondents.

---

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

---

BRIEF OF APPELLANTS

---

Georgia Trejo Locher, WSBA No. 24150  
Attorney for Appellants

GEORGIA TREJO LOCHER, P.S.  
237 SW 153<sup>rd</sup> Street  
Burien, WA 98166  
Tel: (206) 246-6100  
Fax: (206) 246-6105

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

I. ASSIGNMENTS OF ERROR .....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....1

III. STATEMENT OF THE CASE.....1

    A. Facts .....1

    B. Procedural History .....12

IV. ARGUMENT .....16

    A. Standard of Review .....16

    B. Medical Negligence Claims In Washington Requires Expert Opinion  
    That The Health Care Provider Breached The Standard Of Care.....16

    C. These Parents Do Not Have The Burden Of Proving To A Reasonable  
    Degree Of Medical Probability That Baby Diego Would Have  
    Survived Had Dr. Fitzgerald Attempted Resuscitation.....18

    D. Diego Was Viable And Lived For Three Hours .....22

    E. Paternity Is Not Disputed And Is Not An Issue.....24

    F. Vicarious Liability .....25

    G. The Parents Need Not Present Evidence of Objective Symptoms of  
    Emotional Distress .....27

    H. When The Trial Court Considers New Substantive Facts In The  
    Moving Party’s Rely, The Non Moving Party Should Be Permitted An  
    Opportunity To Be Heard .....29

V. CONCLUSION.....31

TABLE OF AUTHORITIES

**Cases – Washington**

Adamski v. Tacoma General Hosp., 20 Wn. App. 98, 579 P.2d 970 (1978).....13, 25, 26

Baum v. Burrington, 119 Wn. App. 36, 79 P.3d 456 (2003), rev. denied, 151 Wn.2d 1035 (2004) .....23

Brown v. Peoples Mortgage Co., 48 Wn. App. 554, 739 P.2d 1188 (1987) .....29

Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 914 P.2d 728 (1996) .....16

D.L.S. v. Maybin, 130 Wn. App. 94, 121 P.3d 1210 (2005) .....26

Guard v. Jackson, 83 Wn. App. 325, 921 P.2d 544 (1996), aff'd, 132 Wn.2d 660, 940 P.2d 642 (1997).....24

Herskovits v. Group Health Cooperative of Puget Sound, 99 Wn.2d 609, 664 P.2d 474 (1983).....14, 18, 19, 20, 21

Hinzman v. Palmanteer, 81 Wn.2d 327, 501 P.2d 1228 (1972) .....28

Jobe v. Weyerhaeuser Co., 37 Wn. App. 718, 684 P.2d 719 (1984) .....29

Marincovich v. Tarabochia, 114 Wn.2d 271, 787 P.2d 562 (1990) .....16

Meridian Minerals Co. v. King County, 61 Wn. App. 195, 810 P.2d 31 (1991) ..29

Moen v. Hanson, 85 Wn.2d 597, 537 P.2d 266 (1975) .....22, 23, 31, 32

Pedroza v. Bryant, 101 Wn.2d 226, 677 P.2d 166 (1984) .....17

Seattle-First Nat'l Bank v. Rankin, 59 Wn.2d 288, 292, 367 P.2d 835 (1962).....32

S.H.C. v. Lu, 113 Wn. App. 511, 54 P.3d 174 (2002).....25

Shellenbarger vs. Bringman, 101 Wn. App. 339, 3 P.3d 211 (2000).....20

Shoemaker v. St. Joseph's Hospital, 56 Wn. App. 575, 784 P.2d 562 (1998) .....27

<u>Van Diuter v. City of Kennewick</u> , 121 Wn.2d 38, 846 P.2d 522 (1993).....	16
<u>White v. Kent Med. Ctr., Inc.</u> , 61 Wn. App. 163, 810 P.2d 4 (1991).....	31
<u>Wilson v. Lund</u> , 80 Wn.2d 91, 491 P.2d 1287 (1971).....	28
<u>Wilson v. Steinbach</u> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	16
<b>Cases – Other Jurisdictions</b>	
<u>DocuSign, Inc. v. Sertifi, Inc.</u> , 468 F.Supp.2d 1305 (W.D.Wash. 2006).....	31
<u>Hamil v Bashline</u> , 481 Pa. 256, 272, 392 A.2d 1280 (1978).....	19
<u>Hicks vs. United Sates</u> , 368 F.2d 626 (1996) .....	19
<u>JG v. Douglas County School Dist.</u> , 552 F.3d 786 (9th Cir. 2008).....	30
<u>Provenz v. Miller</u> , 102 F.3d 1478, (9th Cir.1996), cert. denied 522 U.S. 808 (1997).....	30
<b>Statutes</b>	
RCW 4.24.010 .....	13, 22, 23, 24, 27
RCW 7.70.040 .....	17
<b>Rules</b>	
CR 56 (c) .....	56
KCLR 56(c) (1) (B) .....	29
<b>Other Authorities</b>	
Black’s Law Dictionary (Abridged 6th ed., 1991) .....	23
Restatement (Second) of Agency sec. 267, at 578 (1958).....	26

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by granting Defendants' motions for summary judgments and dismissing all claims.
2. The trial court erred by denying Plaintiffs' motion for reconsideration.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should the loss of chance doctrine provide the necessary proximate cause when there is medical expert opinion that the attending physician's failure to attempt resuscitation on a premature infant caused a significant reduction in the infant's chance of survival?
2. Should the trial court allow a party to supplement their evidence when the moving party in a motion for summary judgment of dismissal presents new, prejudicial substantive facts in their reply brief?

## **III. STATEMENT OF THE CASE**

### **A. Facts**

#### **a. Admission to Valley Medical Center**

On February 18, 2008, Maria Perez Guardado was admitted to Valley Medical Center. CP 153, p. 3, l. 2. She was in early labor at approximately 23 weeks 5 days gestation. CP 169 - 170. The admitting

obstetrician, Dr. David Lawrence discussed the plan of care with Ms. Guardado. CP 173.<sup>1</sup> He explained that he did not recommend a cesarean section if the fetus was less than 24 weeks. CP 173. Dr. Lawrence assured her that “we are doing all that we can.” CP 175. Ms. Guardado was told that the doctors would do everything that they could to save her baby if the baby was born that day. CP 209, pg. 27, ll. 1-5, CP 212, pg. 31, ll. 13-18, CP 214, pg. 34, ll. 3-25, CP 216, pg. 39, ll. 14-18.

The next day, Ms. Guardado told her labor and delivery nurse, Yvonne Duncan that she wanted her baby to be resuscitated. Nurse Duncan then told the doctors and her charge nurse that the mother wanted full resuscitation. CP 282, pg. 34, ll. 3-21. Nurse Duncan even charted, “Patient states that she DOES want resuscitative measures taken when birth occurs.” (Emphasis in original) CP 177. When Nurse Duncan was questioned why she capitalized the word “does,” she explained that the mother was very adamant in wanting resuscitation. CP 284, pg. 67, ll. 3-13, CP 131, pg. 40, ll. 20-25.

Defendant Dr. Kerri Fitzgerald maintains that no one ever told her that Ms. Guardado wanted resuscitation of her baby. CP 287, pg. 42, ll. 11-25.

---

<sup>1</sup>“Comments” are found in upper right corner and include the date and time of occurrence.

When a mother is in labor and is ready to deliver her baby, the obstetrician is responsible for resuscitation of the baby while it is within her uterus. CP 299, pg. 17, ll. 23-25, CP 300, pg. 18, ll. 1-6. The neonatologist or pediatrician is then responsible for resuscitation after the baby is out of her uterus. Id. The obstetrician makes the decision about when and how the baby is going to be delivered. CP 300, pg. 18, ll. 1-4. The neonatologist informs the parents about the viability of the baby at the particular gestational age and what options are available for the baby. CP 300, pg. 18, ll. 4-6.

Dr. Fitzgerald is trained in neonatology. CP 289, pg. 8, ll. 9-11. On February 19, 2008, Dr. Fitzgerald was paged and asked to provide a neonatology consult for the parents. CP 88, pg. 3, ll. 19. She consulted Ms. Guardado at approximately 9:40 a.m., on the morning of Baby Diego's birth. CP 290, pg. 46, ll. 9-11, CP 181. Dr. Fitzgerald discussed the likely outcome of a baby born at 23 weeks gestation with the mother. CP 31, pg. 31, ll. 7-25, CP 291, pg. 32, ll. 1-25, CP 292, pg. 33, ll. 1-18.

Ms. Guardado fully understood that the baby likely would die even with resuscitation. She further understood that if her baby survived, he or she would likely have mental and/or physical disabilities. Even knowing the odds were against a perfectly healthy baby, she wanted to do everything possible to save Diego's life. CP 213, pg. 32, ll. 8-10, CP 217,

pg. 42, ll. 1-4, CP 226, pg. 64, ll. 1-4, CP 227, pg. 66, ll. 3-6. Nurse Duncan charted that Ms. Guardado said that “if the resuscitation is not successful,” she wanted to hold her baby. CP 284, pg. 67, ll. 14-20, CP 177.

Dr. Dorcas McLennan, OB/GYN and Dr. Fitzgerald claim that the parents did not want resuscitation for their baby. CP 301, pg. 12, ll. 9-19, CP 302, pg. 36, ll. 4-24, CP 292, pg. 33, ll. 13-18. This is not so. Even the interpreter, who was retained by the hospital, recalls that the mother and father at all times wanted resuscitation and lifesaving measures for their baby. CP 272, pg. 33, ll. 4-16, CP 277, pg. 153, ll. 12-25, CP 278, pg. 154, ll. 1-10.

Elizabeth Reyes was the interpreter. CP 270, CP 273, pg. 46, ll. 1-23. She was with Maria from the early morning on February 19, 2008, until after the baby was delivered just before noon. CP 274, pg. 49, ll. 13-23. Both Drs. McLennan and Fitzgerald verified that the interpreter was competent. CP 293, pg. 34, ll. 1-4. In fact both doctors understand and speak Spanish, and both confirmed that Ms. Reyes properly translated their discussions. CP 292, pg. 33, ll. 24-25, CP 303, pg. 11, ll. 10-11, CP 304, pg. 33, ll. 2-23.

At no time did the parents ever agree to “comfort care only.” Ms. Reyes testified that after the birth of their son, Diego, the family was

distraught and upset, even angry because there were no attempts to resuscitate Diego. They continued to ask for help for their son. Yet, nothing was done to help save their baby. CP 278, pg. 154, ll. 3-10, CP 272, pg. 33, ll. 4-16, CP 276, pg. 93, ll. 15-22, CP 277, pg. 153, ll. 12-24.

Diego Esteban Campos Perez was born on February 19, 2008, at 11:38 a.m., with a heart rate of 80 beats per minute. CP 320, CP 193. The State of Washington Department of Health issued a “Certificate of Live Birth” documenting the date, time, and place of Diego’s birth as February 19, 2008, at 11:38 a.m., at Valley Medical Center. CP 189. He was delivered with a persistent heart rate, spontaneous movement, and agonal breaths. He was pronounced dead almost three hours after delivery. CP 191, 193, 194. The hospital birthing records confirmed that the delivery was a live birth. CP 191, CP 150.

After his birth, Dr. Fitzgerald wrapped the baby in a blanket and gave him to the family to hold. CP 302, pg. 36, ll. 10-11, CP 193-194. According to Nurse Duncan, Diego had a heartbeat until just before 2:15 p.m. She charted, “Several checks of neonate HR [heart rate] since 1215, @ parents’ request, each time HR noted at less than 40 bpm [beats per minute]. CP 348.

No life-saving measures were ever performed on Diego Esteban. CP 193. He slowly died in the arms of his parents. CP 193.

**b. Standard of Care**

Plaintiffs retained Marcus C. Hermansen, MD, who has been a neonatologist since 1982. CP 253, pg. 6, ll. 14-23. Dr. Hermansen's opinion is simple: If the parents wanted resuscitation for their 23 week premature baby, then Dr. Fitzgerald should have resuscitated the baby. CP 255, pg. 15, ll. 5-11, CP 256, pg. 30, ll. 10-20, CP 257, pg. 34, ll. 6-14, CP 260, pg. 70, ll. 19-23, CP 261, pg. 71, ll. 1-5, CP 261, pg. 71, ll. 9-13.

Dr. Fitzgerald also testified that if the parents wanted resuscitation for Diego, she would have attempted resuscitation. CP 292, pg. 33, ll. 16-18, CP 294, pg. 294, pg. 63, ll. 8-25, CP 295, CP 64, ll. 1-18.<sup>2</sup>

Even an excerpt from Dr. Alan R. Spitzer's book entitled Intensive Care of the Fetus and Neonate offered by defense counsel<sup>3</sup> sets forth the standard, "the parents should be counseled before delivery about their desires regarding resuscitative efforts. If there is any doubt regarding viability on a particular neonate, resuscitative efforts should be instituted."

(Emphasis added) CP 186.

---

<sup>2</sup> The lone physician who did not agree with this standard of care was the attending obstetrician Dr. McLennan. She testified that "the standard" was not to offer resuscitation, or not to perform resuscitation on this baby. CP 305, pg. 40, 1-5.

<sup>3</sup> CP 258, pg. 41, ll. 20-23.

**c. Chance of Survival**

Dr. Hermansen offered the following expert opinion: Diego had a 30 to 40% chance of survival if resuscitation had been performed. CP 262, pg. 75, ll. 20-23, CP 263, pg. 76, ll. 1-23, CP 264, pg. 77, ll. 1-23, CP 265, pg. 78, ll. 1-23, CP 266, pg. 79, ll. 1-23, CP 267, pg. 80, ll. 18-23, CP 268, pg. 81, ll. 1-13. At his gestational age, 30 to 40 % that survive with resuscitation at 23 weeks, one-third of those babies will live without disability or significant injury. CP 266, pg. 79, ll. 15-18. Another statistical opinion offered by Dr. Hermansen was that if a 23-week preemie is resuscitated and survives one week, he or she most likely will be a long-term survivor. CP 268, pg. 81, ll. 1-13.

Dr. Hermansen explained simply, “we have been saving 23-weekers for 20 years now, since 1990.” CP 266, pg. 79, ll. 12-13.

**d. Facts Pertinent To Request for Reconsideration**

In Dr. Fitzgerald’s original motion for summary judgment, she never mentioned or contended that Diego was infected with “E coli.” CP 86-101. At most, Dr. Fitzgerald claimed, “Dr. McLennan was highly suspicious that infection, including chorioamnionitis, was the likely cause of the premature birth further decreasing the fetus’s chances of survival.” CP 93. Valley Medical Center remained completely silent on the issue of an infection. CP 23-33.

Within Dr. Fitzgerald's reply brief, she emphasized in a heading, "The issue is whether this particular 23 week gestation fetus with an apgar of one and with an E. coli infection was viable" and submitted 14 pages of evidence to support her allegation. CP 334. In a desperate attempt to respond to this last minute false, attention-grabbing acquisition, counsel for the plaintiffs filed and served a Sur-Reply with additional evidence to rebut this accusation. GTL Decl., Exhibit 2.

At the hearing for summary judgment, Judge Cheryl Carey directly challenged the undisputed fact "that doctors have been saving 23-weekers with resuscitation and support for more than 20 years" and asked, "What about the infection though?" RP 5, ll. 10-15.

The parents had retained medical expert, Dr. Michael Jude Hussey. CP 438, pg. 4, l. 16. He is a Maternal/Fetal Medicine<sup>4</sup> specialist to offer his professional obstetrical opinions. CP 439, pg. 15, l. 2. He is associated with Rush University in Chicago, Illinois. Dr. Hussey is an active clinician, who spends 90 to 95% of his time in the clinic, delivering 350 babies a year. CP 439, pg. 15, 3-7. During his deposition, Dr. Hussey made it very clear that there was no convincing evidence that the

---

<sup>4</sup> Maternal-Fetal Medicine (MFM) is the branch of obstetrics that focuses on the medical and surgical management of high-risk pregnancies. An obstetrician who practices maternal-fetal medicine sometimes is known as a perinatologist. This is a subspecialty to obstetrics and gynecology mainly used for patients with high risk pregnancies. Wikipedia, 17 February 2011, Maternal-fetal Medicine, [http://en.wikipedia.org/wiki/Maternal-fetal\\_medicine](http://en.wikipedia.org/wiki/Maternal-fetal_medicine).

mother had chorioamnionitis. CP 444, pg. 36, ll. 17-21.

Dr. Hussey explained that at most there was an “inflammation” of the placenta, not an infection. When specifically asked by Dr. Fitzgerald’s counsel Mary McIntyre, he testified:

Q. So you disagree with the pathology report; is that correct?

A. No, I don't disagree with it. But, in reading the proceedings in this case, I think people took a step going from inflammation to infection. And it's almost universal, depending on which study you look at, but the rates of inflammation under the microscope with spontaneous preterm birth is inversely related to the gestational age of delivery. And when you're less than 28 weeks, it's at least 80 percent, and essentially 100 percent that you see inflammation.

CP 444, pg. 36, ll. 22-, CP 445, pg. 37, ll. 1-7.<sup>5</sup>

In sum, Dr. Hussey opined and explained to Ms. McIntyre that more likely than not there was no infection in this case. Dr. Hussey testified:

A. What I'm saying is that when there's a chorioamnionitis at term it's more likely that an infection is present as the cause of that inflammation. Whereas, in preterm, because it's almost every single delivery at those early gestational ages, that more often than not infection is not present.

CP 448, pg. 43, ll.8-14. (Emphasis added)

---

<sup>5</sup> See also CP 446, pg. 41, ll. 12-25, CP 447, pg. 42, ll. 1-25, CP 448, pg. 43, ll. 2-21, CP 35, 12- 25, CP 444, pg. 36, ll. 1-10, CP 450, pg. 75, ll. 9-25, CP 451, pg. 76, ll. 1-1-25, CP 452, pg. 77, 1-11.

With all that we've heard about contaminated meat and the many serious illnesses and deaths caused by "E coli," it is easy to understand that the word E coli carries with it an image of incurable or deadly illnesses. Dr. Hussy explained in his deposition that there are many strains of E coli. In essence, one should not conclude that "E coli" is per se deadly. He testified:

Q. What about E. coli, is that considered to be a more virulent organism?

A. It varies. There is a lot of different strains of E. coli. So just as we see in the news periodically, someone eating ground beef that's contaminated by E. coli dies. There's plenty of other instances where people are exposed to E. coli and do just fine. So it depends on the particular strain.

CP 442, pg. 31, ll. 13-20.

Dr. Hussey further explained to Ms. McIntyre why the E coli found on Valley Medical Center's pathology report was unreliable.<sup>6</sup> During the process of delivering the placenta through the birth canal, it becomes contaminant with the normal bacteria in the birth canal and fecal contamination in the surrounding area. CP 453, pg. 86, ll. 15-25, CP 454, pg. 87, ll. 1-4. Dr. Hussey pointed out that under these circumstances placental cultures are unreliable and are often misleading.

Q. Dr. McLennan ordered cultures of the placenta. You

---

<sup>6</sup> Notably, a copy of the pathology report was included in Dr. Fitzgerald's reply brief. No mention of E coli or the pathology report was made in her opening brief. CP 365.

don't have any criticisms of her for doing that, do you?

A. Well, only in the sense that most people do not feel that placental cultures obtained in that fashion are reliable, and therefore there's the potential to come up with clinical information which can be confusing. So by that, I mean, number one, that, as you know, the placenta is delivered through the birth canal, that you're going to pick up both normal flora from the birth canal, as well as things like fecal contaminant, things such as this which occur in the birth process.

\*\*\*

Most people agree that short of what I said the amniocentesis and then culture the amniotic fluid being a method of diagnosing intrauterine infection.

\*\*\*

Q. So are you going to testify in this case that Dr. McLennan violated the standard of care by obtaining cultures of the fetal side of the placenta?

A. I don't know that it is at the level or is something that you specifically say that there's a standard of care that requires. But, again, with the understanding that generally in clinical medicine you obtain a test at this point to alter your clinical management, and for the reasons that I mentioned, generally most people recommend against doing it.

CP 450, pg. 75, ll. 9-25, CP 451, pg. 76, ll. 1-7.

Dr. Fitzgerald confirmed, based on her examination of Diego, he had no signs of infection or sepsis. CP 458, pg. 66, ll. 15-17.

**B. Procedural History**

This is a medical negligence/wrongful death action. The complaint in this matter was filed on January 20, 2009. CP 3. Diego's parents asserted claims for damages against both neonatologist, Dr. Kerri Fitzgerald and Valley Medical Center for failing to follow their requests to give resuscitative and survival measures to their baby. CP 5-6. They sought damages for injuries to include wrongful death, emotional distress, and injury to the parent/child relationship. CP 4-5.

Valley Medical Center filed its Answer on May 1, 2009, and Dr. Kerri Fitzgerald filed her Answer on June 30, 2009. CP 11, CP 16. Both defendants placed all claims in dispute. CP 11-22.

On June 30, 2010, a stipulation and order was entered dismissing all claims of independent negligence against Valley Medical Center. Valley Medical Center however, would remain vicariously liable for the acts of Dr. Fitzgerald. CP 38-40.

On September 3, 2010, Defendant Valley Medical Center moved for summary judgment asserting that Plaintiffs had failed to set forth expert testimony establishing that Valley Medical Center caused injury to plaintiffs. CP 23-85, CP 29. On September 20, 2008, the parents filed their response and reaffirmed that their claims were limited to claims of

vicarious liability, pursuant to Adamski vs. Tacoma General Hospital.<sup>7</sup>  
CP 322-330, CP 325.

On September 3, 2010, Defendant Kerri Fitzgerald also filed her motion for summary judgment. CP 86-102. Valley Medical Center, along with Dr. Fitzgerald, asserted that the parents did not have a cause of action under the wrongful death statute for the death of their child because he was “a non-viable fetus.” CP 30, CP 95. The parents countered and presented evidence in their response that not only was Baby Diego “viable;” he had lived for more than three hours without any life support or aid. CP 326-328.

Both Valley Medical Center and Dr. Fitzgerald asserted in their respective motions that the parents had failed to present evidence objective symptoms of emotional distress as required in a negligent infliction of emotional distress claim. CP 30, CP 95. The parents argued that objective symptoms of emotional distress supported by medical evidence are not required under Washington’s wrongful death statute, RCW 4.24.010. CP 328-329. In such wrongful death actions, emotional distress damages along with damages for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship may be

---

<sup>7</sup> 20 Wash. App. 98, 579 P.2d 970 (1978)

recovered without a showing of objective symptoms of emotional distress.  
CP 329.

Dr. Fitzgerald, along with Valley Medical Center, argued that the parents have the burden of proving that resuscitation more probably than not would have saved the baby's life. CP 86-98, CP 86, CP 96, CP 28.

On September 20, 2010, the parents timely responded to Dr. Fitzgerald's motion asserting that they did not have the burden of proving resuscitation more probably than not would have saved their baby's life. Rather, the "loss of chance" doctrine, citing Herskovits v. Group Health Cooperative of Puget Sound,<sup>8</sup> which enables this family to obtain damages for injury of the lost chance of survival, rather than the death itself, caused by Dr. Fitzgerald's negligence. CP 151-321.

On September 24, 2010, Dr. Fitzgerald served her reply in support of her motion for summary judgment. CP 333-365. Within Dr. Fitzgerald's reply brief, she asserted new factual allegations, not previously raised in her motion. She proclaimed that Diego had an E. coli infection. This allegation was false and prejudicial. To rebut the allegations, the parents filed and served a Sur-Reply brief with additional contrary evidence. CP 418 - 426.

---

<sup>8</sup> 99 Wn.2d 609, 614-619, 664 P.2d 474 (1983)

On October 1, 2010, at the hearing on defendants' motions for summary judgment, Judge Cheryl Carey promptly posed the following question to the Plaintiffs?

I'd like to focus on the question, and the question may very well be directed to the plaintiffs, but the question that I wrote out is: **Can you establish, based on reasonable medical probability, that the infant would have survived even if resuscitation efforts were made by Dr. Fitzgerald?** So, that seems to be a significant question, and I may be looking at the issue of proximate cause when I ask that question.

RP 3, ll. 2-10.

On October 1, 2011, Judge Cheryl Carey, in open court, struck Plaintiffs' Sur-reply and entered an order granting Dr. Fitzgerald's motion for summary judgment of dismissal. Dr. Fitzgerald's motion to strike Dr. Hermansen's untimely declaration was denied. CP 388, CP 392-395. At that same hearing, Judge Carey entered an order granting Valley Medical Center's motion for summary judgment and dismissed all remaining claims. CP 389 – 391.

The parents filed a motion for reconsideration on October 11, 2010. CP 396-511. This motion was denied in an order dated November 1, 2010. CP 512- 515. This appeal was then timely filed. CP 516 – 528.

## IV. ARGUMENT

### A. Standard of Review

In reviewing a grant of summary judgment, an appellate court engages in the same inquiry as the trial court. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996); Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Degel, supra, at 48; Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. Degel, supra, at 48; Van Diuter v. City of Kennewick, 121 Wn.2d 38, 44, 846 P.2d 522 (1993).

### B. Medical Negligence Claims In Washington Requires Expert Opinion That The Health Care Provider Breached The Standard Of Care.

In a medical negligence action, a plaintiff must establish that (1) a health care provider failed to exercise the degree of care of a reasonably prudent health care provider acting in the same or similar circumstances,

and (2) such failure was the proximate cause of injury. RCW 7.70.040; Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

In this case, the standard of care required a physician to attempt to resuscitate a 23 week gestational age baby if that's what the parents requested. Dr. Fitzgerald accepts this standard. She testified that she would have resuscitated the baby, if that's what the parents wanted. This is the factual dispute in this case. Dr. Fitzgerald claims she never heard that Ms. Guardado wanted resuscitation for her baby. Yet, the mother, father, Nurse Duncan, and independent interpreter all confirm that these parents asked the nurse and doctors to resuscitate their baby.

These parents never agreed to only "comfort care." These parents are no different than the majority of parents who want to do everything possible to help their child. Ms. Reyes, the interpreter retained by the hospital affirmed that even after the birth, the family was distraught and upset, and continued to ask for help for their son, but Dr. Fitzgerald did nothing to help their baby.

Viewing the evidence and all inferences in favor of the family, the standard of care requires a physician to follow the requests of the family, these parents requested life saving measures to be taken, and that's what Dr. Fitzgerald should have done.

The real issue in this case is the element of proximate cause.

**C. These Parents Do Not Have The Burden Of Proving To A Reasonable Degree Of Medical Probability That Baby Diego Would Have Survived Had Dr. Fitzgerald Attempted Resuscitation.**

The loss of chance doctrine provides that the proximate cause issue may go to the jury when there is medical testimony that the breach in the standard of care caused a reduction in the chance of survival. Herskovits v. Group Health Cooperative of Puget Sound, 99 Wn.2d 609, 619, 664 P.2d 474 (1983). Loss of chance becomes an issue in cases of medical negligence such as this case, where the health care provider's negligence terminates a chance to recover, and it is impossible to state what would have happened in the absence of negligence.

The Herskovits Court flat out rejected the argument that the plaintiff must show that patient "probably" would have had a 51 percent chance of survival if the hospital had not been negligent. Herskovits v. Group Health Cooperative of Puget Sound, 99 Wn.2d at 619. The Washington Supreme Court held that medical testimony of a reduction of a 14% chance of survival, from 39 percent to 25 percent, is sufficient evidence to allow the proximate cause issue to go to the jury. Id.

In Herskovits, the plaintiff's expert testified that "if the tumor was a 'stage 1' tumor in December 1974, Herskovits' chance of a 5-year survival would have been 39 percent. In June 1975, his chances of

survival were 25 percent assuming the tumor had progressed to ‘stage 2.’ Thus, the delay in diagnosis may have reduced the chance of a 5 year survival by 14 percent. Herskovits, 99 Wn.2d at 612. The complaint in Herskovits alleged that the defendant’s failure to diagnose the decedent’s lung cancer “led to and caused his death.” Id. at 620.

The Herskovits Court citing Hamil v Bashline,<sup>9</sup> confirmed at page 617 that “It is not necessary for a plaintiff to introduce evidence to establish that the negligence resulted in the injury or death, but simply that the negligence increased the risk of injury or death. The step from the increased risk to causation is one for the jury to make. Id.

The plurality in Herskovits reasoned that the harm caused by the defendant's negligence was not his death, but the reduction in his chance of survival. Id. at 634. The Court noted that this harm was present even though plaintiff had less than a 50% chance of surviving the disease even with proper treatment. Id. at 610-11.

The Herskovits Court set forth the rationale for deviating from the normal requirements of proof by quoting Hicks vs. United Sates:<sup>10</sup>

Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a certainty that the

---

<sup>9</sup> 481 Pa. 256, 272, 392 A.2d 1280 (1978)

<sup>10</sup> 368 F.2d 626 (1996)

patient would have lived had she been hospitalized and operated on promptly.

Id. at 616.

Since the 1983 Herskovits decision, loss of chance has been the accepted law in Washington. In 2000, the Shellenbarger court reaffirmed that “Washington recognizes loss of chance as a compensable interest.” Shellenbarger vs. Bringman, 101 Wn. App. 339, 348, 3 P.3d 211 (2000). In Shellenbarger, the Plaintiff alleged that his physicians failed to diagnose and treat his pulmonary fibrosis, an incurable disease, at an earlier stage. The Washington Court of Appeals reversed the trial court’s summary judgment order. The Shellenbarger reasoned that there was no meaningful difference between Herskovits’ loss of chance of survival and Shellenbarger’s loss of 20% chance of slowing the disease.

This situation is the same here. Dr. Hermansen’s testimony is sufficient to create an issue of proximate cause for the jury on the basis of Washington law. Diego had a 30 to 40% chance of survival with resuscitation. Furthermore, Drs. Hermansen, Fitzgerald,<sup>11</sup> and Hussey<sup>12</sup>

---

<sup>11</sup> Dr. Fitzgerald testified that this baby had less than a 9 % chance of survival without major lung or brain disability. CP 288, pg. 31, ll. 15-18.

<sup>12</sup> Dr. Michael Hussey, a Board Certified Maternal/Fetal Medicine Specialist, agreed with these percentages, and in fact corrected himself when he misspoke and mixed up the terms morbidity and mortality, when he testified: “And so I think my preceding answer kind of blended in mortality and morbidity.” But in the end, he agreed with these

all agree that Diego had approximately a 10% chance to survive without severe disability.

In Herskovits, Group Health's negligence diminished Mr. Herskovits' chance by 14 percentage points, and the Court accepted this as significant. Id. at 619. In this case, a 30-40% diminished chance of survival was lost and that is likewise significant.

The Herskovits plurality proposed that the negligent elimination or reduction of survival is to be treated as a compensable injury in its own right. Herskovits, 99 Wn.2d at 634, 664 P.2d at 487 (Pearson, J., concurring). In order to recover, the plaintiff must prove that but for the negligence of the defendant, the victim would have enjoyed an enhanced, though less than probable, expectation of survival. Id.

Judge Carey in granting summary judgment declared:

I do not believe that the plaintiffs can prove more probable than not that the infant would have survived even if resuscitation efforts were made by the doctor, therefore, as a result, I am granting defendant's motion.

RP 17, ll. 8-12.

The Court's decision is contrary to Washington law. In accordance with Washington law, the granting of summary judgment in this case was in error. The jury should decide the significance of a lost 30

---

percentages. CP 308, pg. 15, ll. 2-23, CP 441, pg. 28, ll. 10-22.

to 40% chance of survival. Our law does not stand for the inherent unfairness and imprudence of not holding a physician accountable when the standard of care is not followed just because his or her patient is probably going to die anyway. Fairness and justice require absolute protection of one's' interest in a quantifiable "chance" of survival.

**D. Diego Esteban Was Viable And Lived For Three Hours**

The defendants in their motions for summary judgment claimed that Baby Diego was not a "viable fetus" therefore the parents cannot recover under Washington's wrongful death statute for the death of their son.

RCW 4.24.010 provides, in pertinent part:

A mother or father, or both, who has regularly contributed to the support of his or her minor child may maintain or join as a party an action as plaintiff for the injury or death of the child.

Chapter 4.24 RCW does not define "minor child." However, the Washington Supreme Court ruled in Moen v. Hanson, that RCW 4.24.010 permits recovery for the death of an unborn fetus provided that the fetus is viable. Moen, 85 Wn.2d 597, 601 (1975). In Moen, the mother and unborn fetus died as a result of an automobile collision. Id. at 597. At the time of death, the mother was approximately eight months pregnant and

viability was implicitly acknowledged by the parties. Id. at 597, n.1. The Moen defendants argued that “viability is an inappropriate point of demarcation for determining the beginning of legal personality.” Id. at 601. The court stated that it was “satisfied that the alternative . . . , recovery only if live birth occurs, is productive of unreasonable results.” Id. The court explicitly rejected birth as the demarcation.” Id.

Thereafter in Baum v. Burrington, the Washington Court of Appeals ruled that RCW 4.24.010 does not permit recovery for the death of a nonviable fetus. Baum v. Burrington, 119 Wn. App. 36, 79 P.3d 456 (2003), review denied, 151 Wn.2d 1035 (2004). The Baum court stated that “Black’s Law Dictionary defines a viable child as one who is ‘capable of independent existence outside of his or her mother’s womb, . . . even if only in an incubator.’” 119 Wn. App. at 39 n. 3 (citing Black’s Law Dictionary (Abridged 6th ed., 1991)). The Baum court affirmed the trial court’s summary judgment dismissal “on the grounds that Washington does not recognize a cause of action for the wrongful death of a nonviable fetus that is not born alive.” Id. at 39.

Not only was Diego viable, he was born alive. Diego was delivered with a persistent heart rate, spontaneous movement, and capable to take breaths. He lived for nearly three hours before he was pronounced dead. The State of Washington issued him a certificate of live birth.

Dr. Hermansen confirmed that premature infants born at 23 weeks are viable and have been so for a very long time, since as early as 1990. Diego was a “child,” a “minor child” for purposes of Washington’s wrongful death statute, RCW 4.24.010. Viewing the evidence in the nonmoving party’s favor, Baby Diego was viable.

**E. Paternity Is Not Disputed And Is Not An Issue**

The former RCW 4.24.010 required the father, but not the mother, of an illegitimate child to have regularly contributed to the support of the minor child in order to recover for the wrongful death of that child. In Guard v. Jackson, 83 Wn. App. 325, 921 P.2d 544 (1996), *aff’d*, 132 Wn.2d 660, 940 P.2d 642 (1997), the court held the statute violated equal protection guaranties. Illegitimacy is not an issue in this case. Should Dr. Fitzgerald attempt to create a challenge to this couple’s manner of marriage, birth out of any wedlock is not an issue and irrelevant.

Likewise, this couple has never questioned paternity of this child. They have been married or in unity for 10 years. Together Cain Rafael and Maria have two living children, and one child, Diego who passed away. The father was the sole wage earner of his family. Baby Diego’s birth certificate identifies Cain Rafael Campos as his father.

**F. The Vicarious Liability**

With the stipulation and dismissal of all independent claims against Valley Medical Center, the parents need not bring forth medical expert testimony establishing that Valley Medical Center caused injury to plaintiffs on a more probable than not basis.

The remaining basis of liability against Valley Medical Center is vicarious or ostensible liability. In Adamski v. Tacoma General Hosp., 20 Wn. App. 98, 112, 579 P.2d 970 (1978), the court considered whether a hospital could be held liable for the negligence of an emergency room doctor. The hospital argued that it could not be held liable under a theory of respondeat superior because the doctor was an independent contractor, and therefore not an agent of the hospital. The Adamski court held that the jury could find that the hospital held itself out as providing emergency care services to the public, and that the hospital could be held liable for the doctor's actions as its ostensible agent. Id. at 115-16. The Adamski court did not distinguish between a hospital's liability under a theory of respondeat superior and a theory of ostensible agency. S.H.C. v. Lu, 113 Wn. App. 511, 54 P.3d 174 (2002). In S.H.C., the hospital held out the doctor as an employee, failed to tell the patient otherwise, and the patient relied on the care and skill of the doctor, thus the issue of agency was left

for the jury. Id. at 115; D.L.S. v. Maybin, 121 P.3d 1210, 130 Wn. App. 94 (2005).

Under this doctrine, one who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such. Adamski, 20 Wn. App. at 112 (quoting Restatement (Second) of Agency sec. 267, at 578 (1958)).

The facts in this case parallel the facts in Adamski. Valley Medical Center represented to the public that the “Neonatal intensive care at Valley Medical Center offers neonatologist and nurse practitioners available around the clock.” CP 196. Maria and her baby received treatment by the Valley Medical Center’s neonatologist. Dr. McLennan ordered that the in-house neonatologist, Dr. Fitzgerald consult with the family. The nurses paged Dr. Fitzgerald to attend the baby’s birth. The parents did not independently seek out Dr. Fitzgerald. Valley Medical Center held out their neonatologist as its agent and employee of the hospital. The parents never met Dr. Kerri Fitzgerald until the morning of Diego’s birth. The Plaintiffs justifiably relied on the care and skill of not just Dr. Fitzgerald, but all the doctors, nurses, and health care providers at Valley Medical Center.

When one considers all the facts and circumstances of the relationship between Valley Medical Center and its neonatologists, a substantial and genuine issue arises as to whether that relationship is one of principal and agent.

**G. The Parents Need Not Present Evidence of Objective Symptoms of Emotional Distress**

Objective symptoms of emotional distress supported by medical evidence are required in the common law claim of “negligent infliction of emotional distress claim.” See, Shoemaker v. St. Joseph’s Hospital, 56 Wn. App. 575, 581, 784 P.2d 562 (1998).<sup>13</sup> However, objective symptoms of emotional distress are not required in a claim brought under Washington’s wrongful death statute for the death of a child. RCW 4.24.010 provides, in pertinent part:

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, **damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as**, under all the circumstances of the case, may be just. (Emphasis added)

RCW 4.24.010.

---

<sup>13</sup> Of note, in Shoemaker, the mother’s claim for loss of consortium for the loss of her son was dismissed under RCW 4.24.010. At the time of his death, her son was an adult and she was not dependent upon him for support, a statutory prerequisite of the statute. Shoemaker 56 Wn. App at 578.

In wrongful death actions of a child, along with damages for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship, emotional distress damages are recoverable. The statute does not require a showing of objective symptoms of emotional distress supported by medical evidence.

In Hinzman v. Palmanteer, Laretta Lee, age 7, died from injuries sustained in an accident while riding as a passenger. The parents were awarded damages at trial. The defendant argued that the child's parents were entitled to recover only for loss of love and companionship and her funeral expenses, and that the jury should not have been instructed they could award damages for "destruction of the parent-child relationship" as well. In ruling that the trial court did not err in instructing the jury in the words of the statute, the Washington Supreme Court held, "[o]ur court has held the statutory terms "loss of love and injury to or destruction of the parent-child relationship" were intended by the legislature to add the elements of "parental grief, mental anguish and suffering" as elements of damages as well as those elements contained within the term "loss of companionship." Hinzman, 81 Wn.2d 327, 501 P.2d 1228 (1972), citing Wilson v. Lund, 80 Wn.2d 91, 491 P.2d 1287 (1971).

**H. When The Trial Court Considers New Substantive Facts In The Moving Party's Reply, The Non Moving Party Should Be Permitted To An Opportunity To Be Heard**

The trial court may consider additional evidence even after a decision on summary judgment has been rendered, but before a formal order has been entered. Meridian Minerals Co. v. King County, 61 Wn. App. 195, 202-03, 810 P.2d 31 (1991). Whether to accept or reject untimely filed affidavits is within the trial court's discretion. See Brown v. Peoples Mortgage Co., 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987) (citing KCLR 56(c)(1)(B), the court found no abuse of discretion when a trial court struck a supplemental affidavit **filed on the same day** as the scheduled SJM hearing) (citing Jobe v. Weyerhaeuser Co., 37 Wn. App. 718, 684 P.2d 719 (1984)).

Plaintiffs should have been permitted to respond to Defendant Fitzgerald's highly disputed and prejudicial acquisition that Baby Diego was infected with E coli. It was inherently unfair for Defendant Fitzgerald to raise this issue in her reply; thereby denying Plaintiffs an opportunity to respond. This tactic apparently worked.

During oral argument, after the parents argued that doctors have been saving 23-weekers with resuscitation and support for more than 20 years, Judge Carey directly challenged counsel's argument.

Your Honor, the evidence does support that Baby Diego was no less than 23 weeks old, the evidence supports that doctors have been saving 23-weekers with resuscitation and support for more than 20 years.

THE COURT: What about the infection though?

RP 5:10-15.

Asserting that this baby was infected with E coli and submitting new evidence in her reply brief was inherently unfair and prejudicial as the court gave weight and deference to the “infection.” Dr. Hussey had testified that obtaining cultures post-delivery are inherently untrustworthy. Even Dr. McLennan testified that E coli is the most common bacteria in the bowel, and during deliveries you often get fecal contamination of tissues, but Dr. Fitzgerald did not bring this to the court’s attention. CP 462, pg. 45, ll. 12-23.

Other Courts and jurisdictions do not allow such conduct. “Where ‘new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the non-movant an opportunity to respond.’” JG v. Douglas County School Dist., 552 F.3d 786 (9th Cir. 2008), quoting Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir.1996), cert. denied 522 U.S. 808 (1997) (considering both evidence submitted by defendants in their reply and evidence submitted by plaintiffs in their supplemental declaration, in order to avoid

“unfair” result); accord DocuSign, Inc. v. Sertifi, Inc., 468 F.Supp.2d 1305, 1307 (W.D.Wash. 2006). See also White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (party seeking summary judgment may not raise issues at any time other than in its motion and opening memorandum). Justice is not served by allowing a moving party to unfairly surprise and prejudice the non-movant by producing evidence of new, substantive facts at the last minute when there is no opportunity for the non-movant to respond.

## V. CONCLUSION

Valley Medical Center argues against Herskovits and the loss of chance doctrine because the testimony “provides no basis for the jury to assess the value of a wrongful death case on these facts. If resuscitated, would this infant have survived more than a week? And if he had, what would his condition have been? What expenses would survival have entailed?” Such arguments have long been raised, and are properly struck down by the courts.

In Moen v. Hansen, the defendants and supporting amicus argued that permitting a claim for the death of an unborn viable fetus would result in a double recovery, because recovery would be allowed for the wrongful death or injury of the mother, which by itself should be ample

compensation. They also argued that proof of causation and viability would be severely problematical and would encourage fraudulent claims. The Moen Court acknowledged these arguments and noted that our Supreme Court had disposed of such arguments, quoting Seattle-First Nat'l Bank v. Rankin, 59 Wn.2d 288, 292, 367 P.2d 835 (1962).

We are not unmindful of the fact that a claim for prenatal injuries is prone to present difficult causation issues. This, however, is no reason to deny the sufficiency of the pleading. **Difficulty of proof does not prevent the assertion of a legal right.**" (Emphasis added).

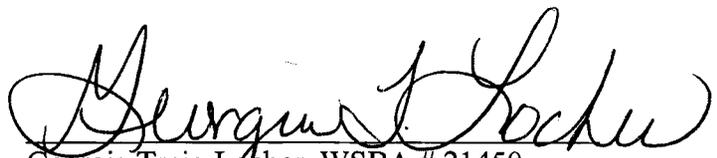
Moen v. Hanson, 85 Wn.2d 597, 537 P.2d 266 (1975)

This is a very important case, with many material facts in dispute. To deny these parents the opportunity to have their day in court at this juncture would be insult to our civil justice and to our jury system.

The trial court's orders of dismissal should be reversed, and the matter should proceed to trial.

Dated this 1<sup>st</sup> day of April 2011.

Respectfully submitted,

  
Georgia Trejo Locher, WSBA # 21450  
Attorney for Appellants