

FILED

FEB 18 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 312771

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBIN RASH, et al., Appellants

v.

PROVIDENCE HEALTH & SERVICES, et al., Respondents

SUPPLEMENTAL BRIEF OF RESPONDENT SACRED HEART MEDICAL
CENTER & CHILDREN'S HOSPITAL

RYAN M. BEAUDOIN, WSBA # 30598
MATTHEW W. DALEY, WSBA # 36711
WITHERSPOON · KELLEY, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: (509) 624-5265

Counsel for Respondent Sacred Heart Medical
Center & Children's Hospital.

I. INTRODUCTION & RELIEF REQUESTED

Sacred Heart Medical Center & Children's Hospital (hereinafter "Sacred Heart") respectfully submits this supplemental briefing pursuant to the Court's letter of February 3, 2014. The Court's letter requested additional briefing regarding whether any of the questions raised by this appeal were answered by the recent decision in *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, No. 308642, Slip Op. (November 14, 2013).

As noted in Sacred Heart's response brief, the sole issue on appeal is whether the traditional "but for" standard of causation applies to medical negligence cases alleging loss of a chance, or whether (as the Appellants contend) the less rigorous "substantial factor" standard applies. The Court of Appeals decision in *Dormaier* reaffirmed Washington's fidelity to the traditional "but for" standard. The *Dormaier* Court also reaffirmed the requirement that a loss of a chance plaintiff present sufficient expert testimony from which the jury could determine, beyond speculation and conjecture, the percentage chance that the plaintiff lost.

Both holdings confirm the propriety of the Trial Court's dismissal of the Appellants' loss of a chance claim. *Dormaier* should assist the Court of Appeals in affirming the Trial Court in every respect.

II. ANALYSIS OF THE *DORMAIER* OPINION

Mrs. Dormaier suffered a broken elbow and presented to Samaritan Hospital to undergo an orthopedic surgery to repair her elbow. *Id.* at 2-3. During surgery, Mrs. Dormaier suffered a cardiac event and passed away. *Id.* at 3. Mrs. Dormaier's family brought suit against Samaritan Hospital and some of the individual providers who were involved in Mrs. Dormaier's care. *Id.*

Despite arguments regarding whether the claim was properly asserted during discovery, the trial court instructed the jury on loss of a chance.¹ *Id.* at 6-7. The jury returned a verdict in the plaintiffs' favor and the defendants appealed. *Id.* at 7-8, 10. In addition to the procedural issues, the defendants asserted that the plaintiffs failed to prove a claim for loss of a chance because there was not sufficient evidence from which the jury could determine whether Mrs. Dormaier had, in fact, lost any chance of survival, and, if so, what percentage chance was lost. *See id.* at 10.

¹ There were additional issues involved in the *Dormaier* appeal. This supplemental briefing, however, focuses only on the Court of Appeals' analysis with respect to loss of a chance. Moreover, given the mootness of the purported procedural issues in this appeal, this supplemental briefing focuses only on the *Dormaier* Court's substantive discussions.

A. THE *DORMAIER* COURT REAFFIRMED THAT "BUT FOR" IS THE APPROPRIATE TEST FOR CAUSATION.

The *Dormaier* Court considered Washington's prior loss of chance cases, and observed that:

Herskovits [v. Group Health Cooperative of Puget Sound] and *Mohr [v. Grantham]* established a medical patient's lost chance of survival or a better outcome as an injury distinct from death or disability but nonetheless actionable under the wrongful death and medical malpractice statutes.

Id. at 11. The Court of Appeals went on to confirm that, even in loss of a chance cases, "traditional tort principles . . . require[] the plaintiff to prove the defendant breached a duty owed to the patient and, thereby, proximately cause the patient to lose a chance . . ." *Id.* The *Dormaier* Court then held that:

. . . a plaintiff must prove proximate cause by a " 'probably' or 'more likely than not' " standard, traditional tort principles would require the plaintiff to prove loss of a chance greater than 50 percent.

Id. at 12. The Court also explained that proximate cause principles require a plaintiff to prove that the defendant's conduct was both a "cause in fact of the injury" and that "as a matter of law liability should attach." *Id.* at 31 (citations and quotations omitted).

Lest there was any doubt regarding what is required to demonstrate that a defendant's conduct is a "cause in fact" of a plaintiff's injury, the *Dormaier* Court went on to hold that:

Cause in fact refers to the "but for" consequences of an act – the physical connection between an act and an injury. Thus, the plaintiff may prove factual cause by showing but for the defendant's breach of duty, the injury would not have occurred.

Id. (citations and quotations omitted). Finally, the *Dormaier* Court cautioned plaintiffs that "expert testimony is deemed based on speculation and conjecture if it does not go beyond . . . 'might have' or 'possibly did' . . ." *Id.* at 31-32 (citations and quotations omitted).

The *Dormaier* Court's reiteration of Washington's fidelity to the traditional "but for" standard of causation is conclusive of the sole issue in this case. The Appellants are asking the Court to reject the "but for" standard, in favor of the less stringent "substantial factor" standard. However, there is no support for the Appellants' position, and the *Dormaier* Court confirmed the "but for" standard's applicability in Washington.

B. THE *DORMAIER* COURT ALSO STRESSED THE NEED FOR EXPERT TESTIMONY IN LOSS OF A CHANCE CASES.

The *Dormaier* Court also analyzed whether Mrs. Dormaier had offered sufficient evidence to support her proffered loss of a chance instruction. *Id.* at 18-20. The *Dormaier* Court observed that the calculation of a lost chance must be "based on expert testimony." *Id.* at 19 (citations and quotations omitted). The Court also reaffirmed *Mohr v. Grantham's* holding, requiring that expert

testimony to be "based on significant practical experience and on data obtained and analyzed scientifically." *Id.* (quoting *Mohr*, 172 Wn.2d 844, 857-58 (2011)).

The court then analyzed the expert testimony offered by Mrs. Dormaier's experts. *Id.* at 19-20. Those experts testified that the defendants' conduct cost Mrs. Dormaier a 50 to 70 percent chance of survival. *Id.* The court observed that "[b]ecause the 51 to 70 percent figures rise above the balance of probabilities, they constitute substantial evidence to support [Mrs. Dormaier's] case theory under traditional tort principles." *Id.* at 20. And the court then held that the experts' "50 percent figure falls below the balance of probabilities [and, therefore] it constitutes substantial evidence . . . [of] loss of a chance." *Id.* The *Dormaier* Court, therefore, affirmed the trial court's decision to instruct the jury on loss of a chance. *Id.*


In this case, the Appellants offered no expert testimony to demonstrate any quantifiable loss of a chance. In fact, Appellants offered no expert testimony to demonstrate that any loss of a chance was proximately caused by Sacred Heart. The Appellants simply failed to come forward with expert testimony from which a jury could determine, beyond speculation and conjecture, that any chance was lost – much less what percentage chance was purportedly lost.

III. CONCLUSION

The Court of Appeals' recent decision in *Dormaier v. Samaritan Hospital* reaffirmed two important principles of Washington law on loss of a chance. First, the opinion reaffirmed Washington State's fidelity to "but for" as the standard for causation. Second, the opinion reaffirmed the plaintiff's burden to present expert testimony establishing the alleged loss of a chance beyond speculation or conjecture. Both principles are fatal to this appeal. Sacred Heart, therefore, respectfully asks the Court of Appeals to affirm the Trial Court in every respect.

RESPECTFULLY SUBMITTED, this 18th day of February, 2014.

WITHERSPOON· KELLEY, P.S.



RYAN M. BEAUDOIN, WSBA # 30598
MATTHEW W. DALEY, WSBA # 36711
Counsel for Respondent

CERTIFICATE OF SERVICE

On the 18th day of February, 2014, I caused to be served a true and correct copy of the within document described as SUPPLEMENTAL BRIEF OF RESPONDENT SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL on all interested parties to this action as follows:

Michael J. Riccelli 400 South Jefferson Street, Suite 112 Spokane, Washington 99204-3144 Email: holly@mjrps.net Counsel for Appellants	Via United States Mail [] Via Federal Express [] Via Hand Delivery [x] Via Facsimile [] Via Electronic Mail []
---	--



EVELYN M. HANSON, Legal Assistant