91124-0

No. 312771

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

ROBIN RASH, et al., *Appellant*,

v.

PROVIDENCE HEALTH & SERVICES, et al., *Respondent.*

APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT REQUESTED

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A. IDENTITY OF PETITIONER

Petitioner, Robin Rash as Personal Representative of the Estate of Betty Zachow, deceased, and on behalf of all statutory beneficiaries, asks this Court to accept review of the Court of Appeal's decision designated in Part "B" of this motion.

B. DECISION

Appellants request review of the Division III Appellate Court's published Opinion in this matter dated September 16, 2014, and the court's subsequent "Order Denying Motion for Reconsideration" dated November 6, 2014 (A-18). These are with respect to the trial court's "Order Denying Plaintiff's Motion to Amend and Granting Defendant's Motion to Strike" dated April 13, 2012 (A-9), and subsequent "Order Granting Defendant's Motion to Certify Order as Final Judgment Pursuant to CR 54(b)" (A-15). The effect of the appellate court's order is to dismiss an estate's claim for loss of chance in an action in which the wrongful death statutory beneficiary claimants may maintain such an action. Further, the court determined that Washington's mortality tables may not be used as evidence for a jury to consider in actions in which a party has preexisting medical conditions. Finally, the court's opinion requires medical testimony in a loss of chance case which establishes the magnitude or

quantity of the loss of chance. Appellants believe the appellate court is in obvious error in these regards and that without redress, further proceedings in the trial court level would be useless, as a subsequent appeal and determination by the appellate court or supreme court in these regards would require a retrial. The loss of chance claim is a substantial issue of damages in this litigation and reference to the mortality tables may be a necessary adjunct to the jury's assessment of damages. Further, there may be no medical testimony available to establish the quantitative nature of the loss of chance, although appellants expert medical testimony has testified about its substantial nature.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court committed probable or obvious error in dismissing loss of chance claims when Respondent conceded such claims are properly before the trial court.

2. Whether the appellate court committed probable or obvious error when, *sua sponte*, it characterized the proceedings below which resulted in the trial court's "Order Denying Plaintiffs' Motion to Amend and Granting Defendant's Motion to Strike," as a *de-facto* CR 56 summary judgment proceed dismissing the Estate's loss of chance claim, where appellants expert testified as to probable cause of loss of chance, but did not quantify it.

3. Whether the appellate court committed probably or obvious

error in determining that the insurance commissioner's mortality tables represent a population of healthy individuals rather than an average life expectancy of the population of all individuals, and that the mortality tables may not be used as evidence of life expectancy where a party has preexisting conditions.

D. STATEMENT OF THE CASE

- Betty Zachow's Complaint for negligence in health care was filed against Providence Sacred Heart Medical Center (SHMC - Respondent) on January 7, 2010. (CP 3 – A-1).
- Prior to trial, Ms. Zachow passed away on March 21, 2010. (CP 73, 84, 94 – A-4).
- On April 15, 2010, Ms. Zachow's counsel, the undersigned, sent a letter to Respondent's initial counsel, Brian Rekofke, of Spokane's Witherspoon Kelly law firm, notifying him of her death (CP 68-69 – A-4), and stated:

  > I will advise you when this is accomplished, and, when a new judge is appointed, will get an order entered substituting the Personal Representative as the plaintiff. **I'll also file an amended complaint to include the Estate's claims, and include the claims of the Zachow adult children as statutory beneficiaries.**

- Due to an administrative error between plaintiff's counsel and his office staff, the caption of the complaint was amended to include

"Robin Rash, as Personal Representative of the Estate of Betty L. Zachow, deceased, **and on behalf of all statutory claimants and beneficiaries**: Robin R. Rash, Keith R. Zachow and Craig L. Zachow, Plaintiff," but the complaint was not amended. (CP 84, 95 – A-6-7).

- Mr. Rekofke took the deposition of plaintiffs' expert cardiologist; Wayne Rogers, on March 8, 2011, in which Dr. Rogers testified to Respondent's errors as causal both of Ms. Zachow's diminished life expectancy, and of death. (CP 105-116 – A-7).
- Approximately one month before trial, the defense case was apparently assumed by Mr. Rekofke's law firm partner, Mr. Beaudoin. (CP 32, 35, 76, 81 – A-2, 3, 4, 5).
- Due to the impending trial date of April 23, 2012, Mr. Beaudoin moved on April 4, 2012, upon 8 days notice, to shorten time from the 12 days notice for ordinary motions, required by LCR 40(b)(10), for the trial court to hear the following motions: (1) to strike the surviving children's wrongful death claims based on surprise, and for failure to amended the complaint; and (2) to strike any loss of chance claim based on surprise, and for failure to plead (in which lack of evidence was also claimed); or , in the alternative, (3) continue the trial date. (CP 32, 35, A-2-3). Respondents' motion included:

> Trial is set to commence on April 23, 2012. Sacred Heart simply does not have time to investigate Plaintiffs' new theory, to test it with the testimony of Plaintiffs' witnesses, or to prepare a response to Plaintiffs' new theory of the case. **The loss of chance cause of action must be stricken, or the trial must be continued to allow Defendants to take discovery on Plaintiffs' new argument.**
>
> (Defendants' Memorandum in Support of Motion to Strike - CP 35 – A-3)

- Rash moved to amend the complaint, based on lack of both surprise and prejudice, due to prior written notice to Mr. Rekofke and the content of Dr. Rogers' deposition testimony. (CP 82 – A-6).
- On April 13, 2012, the trial court, issued an order which it stated would displease both parties. (VRP 29 – A-19). The Court's order striking, concluded that: (1) the statutory beneficiaries' claims and the loss of chance claims were new, and are disallowed, as Respondent would be disadvantaged if the claims were allowed at such a late date; and (2) the parties and the court are otherwise ready for, and shall proceed to trial. (CP 139 – A-8).
- Rash filed a new separate wrongful death lawsuit on behalf of the statutory beneficiaries, moved to stay the pending trial and moved to consolidate both matters into one with a new trial date. The trial court granted these motions on August 31, 2012. (CP 158, 182, 190 – A-10,

11, 12). The consolidated trial was not two separate actions, as the facts, circumstances, and witnesses are singular.

- SHMC moved to certify the part of the order striking the loss of chance claims. The trial court granted the motion on October 19, 2012. (CP 193, 220 – A-13, 15). Appellants objected (CP 213, 214 – A-14).
- Confident that the trial court recognized filing a new action on behalf of the statutory beneficiaries and consolidation cured any defect re: wrongful death claims, Rash appealed, presenting narrow issues on appeal, as follows: "A. DENYING AMENDMENT OF THE COMPLAINT WAS ERROR;" "B. STRIKING THE PR'S LOSS OF CHANCE CLAIMS WAS ERROR;" "C. CERTIFYING THE APRIL 13, 2012, ORDER RE: DENYING THE PR'S LOSS OF CHANCE CLAIMS WAS ERROR WITHOUT AN UNDERLYING CR 56 HEARING." (Appellant's Appeal Brief – A-16).
- **Respondent replied conceding** that as a result of the consolidation of the two lawsuits, wrongful death claims and loss of chance claims were properly before the trial court, and **that the only issue on appeal was whether "but for" or "substantial factor" is the standard for proximate cause of a loss of chance claim.**

As noted above, the trial court (on defense motions) struck both the loss of a chance claim and the wrongful death claim. The court also denied the Plaintiffs' motion to amend their complaint to assert those claims.

Thereafter, the Plaintiffs filed a new action asserting claims for wrongful death and loss of a chance, and that action was consolidated with this action. Therefore, regardless of the procedural aspects of the April Order, claims for wrongful death and loss of a chance are part of this action. **Thus, whether the trial court was correct to strike the claims and/or to refuse the Plaintiffs' motion to amend, is a moot point — the claims are part of the consolidated case regardless.**

Following the consolidation, Sacred Heart moved to certify the April Order as final, so that the substantive issue (viz., whether **"but for" or "substantial factor" is the appropriate standard for causation) would not be re-litigated.**

Respondent's reply brief, p. 4-5, A-17.

- Division III rendered its opinion on September 16, 2014. The opinion correctly rules that the trial court's certification of the April 13, 2012 order in dismissing the wrongful death claims (and, therefore, dismissing the statutory beneficiaries as real parties in interest) and dismissing the loss of chance claims, does not affect the wrongful death claims and loss of chance claims brought by the PR on behalf of the statutory beneficiaries in the refilled and consolidated action. The Division III Court did not address the trial court's denial of Appellants' motion to amend, stating consolidation cured any error.

See, generally, Opinion, 18). However, as to loss of chance claims, the Appellate court noted that such claims need not be separately plead. *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC,* 177 Wn. App. 828, 313 P.3d 431 (2013).

- Regarding this case, Division III also held that: **Medical testimony specifically quantifying the loss of chance of survival in (presumably) time of loss (days, months, years) or statistical data / percentages is necessary for establishing proximate cause in a loss of chance case**; that Appellant's case was lacking this testimony; and dismissal of the Estate's loss of chance claim was appropriate. See Opinion, A-18.

- **The basis of Division III's ruling was in its conversion, *sua sponte*, of the trial court Motion to Strike (due to surprise), to a de-facto CR 56 summary judgment motion.** The Court found Appellant's counsel did not object to proceedings in the nature of CR 56, and stated Appellants could have asked for time to obtain affidavit testimony. Further, the Division III Court rejected Appellant's arguments that: specific quantitative testimony from medical experts was not required; and that, among other things, a jury could consider the insurance commissioner's Mortality Tables as evidence of loss of chance, as no medical testimony existed to state

she had a decreased life expectancy due to any pre-existing condition, and she died earlier than the average life expectancy for a woman of her age, as found in the Mortality Tables. **The Division III Court held that the Insurance Commissioner's Mortality Tables did not represent average life expectancy, and were inappropriate to use in a loss of chance case, relying on Louisiana law, rather than Washington law**. See Opinion, A-18.

- Appellant's moved for Reconsideration, noting: the issue of the trial court's denial of amendment of the complaint was not moot, as had amendment been allowed, there would have been no dismissal of the loss of chance claim of the Estate for the Appellate court to affirm. Appellants also argued that the Motion to Strike for surprise and failure to plead was also obviated by consolidation, as the consolidated case was subject to a new Case Schedule Order which, at the time of the order certifying the underlying order for appeal, allowed for Appellants to name new experts and/or would allow Dr. Rogers to further expand on his testimony. Further, that Washington law only required medical testimony that, more probably than not, medical negligence was a proximate cause of a loss of chance, and that quantitative (statistical / percentage) type testimony, if available would assist a jury in determining damages, but is not required.

Appellant also argued against any CR 56 de-facto proceeding, noting that any use of Appellant's medical expert's testimony was to substantiate lack of surprise, in opposition to Respondent's motion to strike, as the medical Expert raised issues of medical negligence as a proximate cause of loss of chance of survival, in addition to proximate causation of death. Finally: the Motion to Strike proceeding below was virtually at time of trial, and did not allow time for obtaining affidavits; and it was inappropriate for the Division III court to suggest that Appellants should have demanded time to do so, so as to concede to converting a motion to strike into a motion for summary judgment. Reconsideration was Denied. See A-8 and A-20.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Concession by Defendants

Respondent clearly and unequivocally conceded that when Appellants filed a separate action for the claims of the Zachow children, and consolidated it with the existing Estate' action (in which the trial date was continued for many months), all loss of chance claims and wrongful death claims were before the trial court. This is only logical, as the basis for striking these claims was surprise.

III. FINDINGS

11. Defendants would not be prepared to meet the new claims and they **would** be put to a disadvantage if the claims were allowed at this late date.

IV. ORDER:

3. Defendants' Motion to Strike Plaintiffs' Claims for Loss of Chance and Wrongful Death on behalf of Mrs. Zachow's adult children is GRANTED.

(CP 141-42 – A-9)

In reply to Appellants' Appeal Brief, Respondent conceded:

> As noted above, the trial court (on defense motions) struck both the loss of a chance claim and the wrongful death claim. The court also denied the Plaintiffs' motion to amend their complaint to assert those claims.
>
> Thereafter, the Plaintiffs filed a new action asserting claims for wrongful death and loss of a chance, and that action was consolidated with this action. Therefore, regardless of the procedural aspects of the April Order, claims for wrongful death and loss of a chance are part of this action. **Thus, whether the trial court was correct to strike the claims and/or to refuse the Plaintiffs' motion to amend, is a moot point — the claims are part of the consolidated case regardless.**
>
> **Following the consolidation, Sacred Heart moved to certify the** April **Order as final, so that the substantive issue (viz., whether "but for" or "substantial factor" is the appropriate standard for causation) would not be re-litigated.**
>
> (Respondent's Reply brief - A-17)
>
> Per Respondent's briefing and concessions above, the only issue that

was before the Division III court had to do with the manner of testimony required for proving proximate cause in a loss of chance claim, not the sufficiency of factual medical testimony to support such a claim

2. Affirming Dismissal of Loss of Chance Claims

Division III committed error in affirming dismissal of loss of chance claims. First, the Court apparently confused Appellants use of its medical expert's defense discovery deposition testimony in the trial court Motion to Strike proceedings as de-facto CR 56 testimony. However, the clearly stated use was to prove lack of surprise as to loss of chance claims, as almost a year prior to the Motions to Strike, Dr. Rogers testified as to loss of chance:

> Subsequent to Ms. Zachow's death, Respondent took the deposition of Appellants' medical expert, Dr. Rogers, in which Dr. Rogers provided testimony to substantiate the loss of chance/reduced life expectancy and wrongful death nature of plaintiffs claims:
>
> "Q. BY MR. RICCELLI: **Do you have any opinion more probably than not as to any relationship between** the **post 2008 surgical condition caused by the beta-blocker withdrawal and anything leading up to or causing her death?**
>
> A. **Yes. Yes.**
>
> Q. Can you describe that.
>
> A. Her deterioration was accelerated over what I would have expected, knowing her four-year background before the – or five- year background before. If you look at her course in five years before the acute pulmonary edema episode and compare it with the two-year course afterward,

you see that she has developed marked deterioration in that period, both mentally and physically, and developed **new manifestations of the disease, which occurred before I would have expected them to, if she'd been on a good medical treatment program. And, namely, the fatal termination, the third cardiac embolus to the head causing a major stroke.**

Deposition of Wayne R. Rogers, M.D., p. 49, L. 13-p. 50, L. 6 (emphasis added)

Q. **Regarding her condition subsequent to the second surgery and the beta-blocker withdrawal, do you have any opinion as to the significance or the amount of acceleration caused by the event of 2008?**

A. **Well, I'd just say its significant I mean, it's only possible to estimate things like this.** And when you see that there's a change in the **life** pattern, which had ample opportunity to change before but hadn't, it becomes my opinion that this terrible weakening of her heart action that took place on March the 6th of 2008 aggravated the underlying condition.

Deposition of Wayne R. Rogers, M.D., p. 51, LL. 1-11 (emphasis added) (CP 108 – A-7).

"BY MR. REKOFKE: Q. Doctor, just a couple follow-ups. **Your bottom-line opinion is that because of the events in Sacred Heart in March of 2008, Ms. Zachow's deterioration was accelerated? Is that what you're basically saying?**

A. **Or promoted. She eventually would have died anyway, as we all do, but she had a promotion of her disease process.**

Q. **And you can't state, as we sit here today, how much her disease was promoted or accelerated; is that correct?**

> A. **I can't give you a mathematical figure, but I would say it was significant and led to her death.**
>
> Deposition of Wayne R. Rogers, M.D., p. 58, LL. 19-59, L5, P. 59, LL. 5 (emphasis added). See Declaration of Michael R. Riccelli Exhibit G. (CP 115-116 – A-7).

That Dr. Rogers chose to use the term "significant" rather than substantial" is, in and of itself, both insignificant and unsubstantial. This is because significant" and "substantial" are used interchangeably, as synonyms. See Exhibits E and F to the Declaration of Michael Riccelli. (CP 94, 103,104, A-7).

Judicial notice is requested as to these dictionary definitions. Appellants argued that, in addition to the letter notifying Appellants' Motion for reconsideration, PP 8-10.

The Division III Court further erred by determining Dr. Rogers' testimony above as insufficient for purposes of establishing proximate cause for loss of chance of survival. In addition to providing testimony on which a jury could conclude Respondent's admitted medical negligence was a proximate cause of death, alternatively, it provides sufficient testimony to support a loss of chance of survival claim. Both claims can co exist in a medical malpractice case, as the jury can only find one or the other, and cannot award cumulative damages. *See, e.g., Estate of Dormaier, supra.*

For assumed summary judgment purposes, assessing Dr. Rogers

testimony in a light most favorable to Appellants, his testimony is that the negligence of Respondent, more probably than not, decreased Ms. Zachow's life expectancy, and therefore, caused a loss of chance of survival.

Claims for "loss of chance of survival" and "reduced life expectancy" are flip sides of the same coin. That loss of chance of survival is synonymous to reduction of life expectancy, has previously been addressed by the Washington appellate court:

> Here, Shellenbarger argues not that he lost a chance of survival, but that he lost a 20% chance of slowing the disease. We find no meaningful difference between this and *Herskovits'* lost chance of survival. If the disease had been slowed, Shellenbarger could expect additional years of. life. Similarly, in *Herskovits,* if the disease had been cured, Herskovits could have expected additional years of life. Presumably the number of additional years could be measured by Herskovits' statistical life expectancy. Similarly, Shellenbarger's additional years of life could either be measured statistically or by the expert testimony of his physicians. But, whether afforded by a cure or by a slowing of the disease, the loss in each case is in length of life.
>
> *Shellenbarger v. Brigman,* 101 Wash. App. 339, 348-49, 3 P.3d 211, 216 (2000) (emphasis added)

Ms. Rash did not concur in a partial summary judgment motion proceeding.

> "In this instance, it was within the authority of the court to certify the order at issue in this motion, at the time of its ruling, April13, 2012, as to its actions effectively dismissing the statutory beneficiaries as real parties in interest from the litigation by dismissing their claims by and through the Personal Representative. The court did

> decline to certify the order at that time. **However, when the matter was consolidated and a new Case Schedule Order issued, new deadlines were applied, and it is uncertain at this time whether plaintiff will utilize Dr. Rogers as her expert medical witness, or supplement his testimony with that of another expert. Procedurally, the consolidated matter is a new action, and the prior order of April13, 2012, should be disregarded, as the basis for defendant's claim then was surprise, immediately before the trial date.** Therefore, the order should be withdrawn by the court, on its own authority. However, should the court disagree with plaintiff in this regard, then plaintiff joins in with defendant on requesting the order to be certified under CR 54(b)."

Plaintiffs' October 15, 2012, Response to Defendant's Motion to Certify Order as Final Judgment Pursuant to CR 54(b), p. 3, LL. 17-24; p. 4, LL. 1-4. (CP 213, 214 – A-14) (Emphasis added)

Quantitative medical testimony is not required to establish a loss of chance claim.

In *Herskovits v. Group Health Coop.,* 99 Wn.2d 609, 630, 664 P.2d *474* (Wash.1983) Justice Pearson, in the plurality opinion, carefully reviews other jurisdictions loss of chance cases. He then states.

> *"O'Brien v. Stover,* the decedent's 30 percent chance of survival was reduced by an indeterminate amount; in *McBride v. United States* the decedent was deprived of the probability of survival; in *Kallenberg v. Beth Israel Hosp.* the decedent was deprived of a 20 percent to 40 percent chance of survival; in *Hamil v. Bashline* the decedent was deprived of a 75 percent chance of survival; and in *James v. United States* the decedent was deprived of an indeterminate chance of survival, no matter how small.

Herskovits, Id, at 99 Wn. 2d 630(emphasis added)

Justice Pearson follows with a discussion of the nature of a loss of chance of survival claim, and a method of determining damages, as footnotes to that discussion, Justice Pearson states:

> (*footnote*)2. **In effect, this approach conforms to the suggestion of** Justice **Brachtenbach in his dissent at page 640, footnote**
>
> (*footnote*)3. **The statistical data relating to the extent of the decedent's chance of survival are considered to show the** amount **of damages, rather than to establish proximate cause.**
>
> *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 634-635,664 .2d 474 (Wash.1983) (emphasis added)

Recently, the Supreme court stated:

> "... Treating the loss of a chance as the cognizable injury "permits plaintiffs to recover for the loss of an opportunity for a better outcome, an interest that we agree should be compensable, while providing for the proper valuation of such an interest." *Lord v. Lovett, 146 N.H. 232, 236, 770 A.2d 1103 (2001).* In particular, the *Herskovits* plurality adopted a proportional damages approach, holding that, if the loss was a 40 percent chance of survival, the plaintiff could recover only 40 percent of what would be compensable under the ultimate harm of death or disability (i.e., 40 percent of traditional tort recovery), such as lost earnings. *Herskovits, 99 Wn.2d at 635* (Pearson, J., plurality opinion) (citing King *supra*, 90 Yale L.J. at 1382). **This percentage of loss is a question of fact for the jury and will relate to the scientific measures available, likely as presented through experts.** Where appropriate, it may otherwise be discounted for margins of error to further reflect the uncertainty of outcome even with a nonnegligent standard of care. *See* King, *supra, 28 U. Mem.*

L. Rev. at 554-57 ("conjunction principle").

Mohr v. Grantham, 172 Wn.2d 844,858,262 P.3d 490, 2011 Wash. LEXIS 821(Wash.2011) (emphasis added)

Synthesis of the *Herskovitz* and *Mohr* cases in the context of the favorable references to the *James* case, allow for loss of chance as a separate injury, and testimony that medical error probably reduced a chance of a better outcome or survival, as sufficient for causation. Further, their references to the nature of jury's deliberations on general damages in other types of cases where statistical or percentage evidence is not necessarily available either as to damages or apportionment of fault, leaves one to conclude that although statistical based testimony may be preferable, it does not preclude loss of chance claims where statistical scientific evidence of degree of loss of chance for calculation of damages unavailable. To determine otherwise is rule out any anomalous medical occurrence which has no peer review study, double blind statistical study of a medical population or cohort study, where median, mean, and standard deviation from which a statistic or percentage may be derived, to be excluded from consideration as a loss of chance case. This would also deny consideration of loss of chance where, although a medical practitioner cannot refer to such a study, anecdotally, and based upon the practitioner's knowledge of his own practice or the practices of others, a relative statement of experience may be sufficient for jury consideration.

This type of testimony is often developed during the course of many medical malpractice cases. The important consideration is whether there is sufficient evidence from which a jury can determine a reasonable allocation of damages. To determine otherwise, is to reward form over substance.

3. Error re: mortality tables

Appellants, in addressing the perceived lack of medical testimony quantifying loss of chance, argued that a jury could consider Mortality Tables as evidence (consistent with WPI 34.040), as Ms. Zachow's death occurred before the age indicated in the Mortality Tables. The Division III Court, in its published opinion, committed obvious error when it: assumed facts not contained in the record; and then applied them to a misconstruction and misinterpretation of Washington's Insurance Commissioner's Mortality (life expectancy) Tables. **First, the Court concluded, with no record to support it, that Ms. Zachow's pre existing health conditions would impact her life expectancy as a less than "healthy" person. Next, it concluded, based on Louisiana law, that Washington's Mortality Tables are premised only on "healthy" individuals.** The court then concluded that Washington's Mortality Tables cannot be used as evidence where a party has pre-existing conditions, such as Ms. Zachow. **This is patently erroneous. The Washington Mortality Tables are, by statute, based on average life expectancy, that of the population as a whole.**

RCW 48.02.160. Special duties.

- **The commissioner shall:**

  (1) **Obtain and publish <u>for the use of courts</u>** and appraisers **throughout** the state, **<u>tables showing the average expectancy of life</u>** and values of annuities and of life and term estates.

Further, **<u>WPI 34.04 contemplates preexisting conditions.</u>**

> WPI 34.04 **Mortality** Table—Limitation on Use
>
> According to mortality tables, the average expectancy of life of a _____ aged ____ years is ___ years. **<u>This one factor</u> is not controlling,** but **<u>should be considered in connection with all the other evidence bearing on the same question, such as</u> that pertaining to <u>the health, habits, and activity of the person</u> whose life expectancy is in question.**

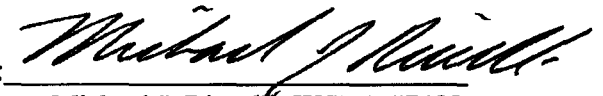
Further, the Division III Opinion is in conflict with the Supreme Court's decision in Bradshaw v. Seattle, 43 Wn.2d 766, 264 P.2d 265, 1953 Wash., which confirms Appellants' foregoing argument.

F. CONCLUSION

Appellant Rash respectfully requests the Supreme Court to accept review for the reasons indicated in Part "E", and reverse the appellate court's Opinion by: (1) allowing use of Mortality Tables as evidence of average life expectancy; and (2) allowing the Estate's loss of chance claim to proceed, or allowing any related deficiency in testimony to be resolved by a subsequent CR 56 proceeding in which supplemental testimony may be provided.

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

MICHAEL J RICCELLI PS

By: 

Michael J. Riccelli, WSBA #7492
Attorney for Appellant

APPENDIX

SUPERIOR COURT PLEADINGS			
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III APPELLATE COURT PLEADINGS			
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VERBATIM REPORT OF PROCEEDINGS		
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DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Steven Joseph Dixson
Matthew W. Daley
Ryan Beaudoin
Witherspoon, Kelley, Davenport & Toole
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201

____ Overnight Mail
____ U.S. Mail
__X__ Hand-Delivered
____ Facsimile
NO E-MAIL SERVICE ACCEPTED

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of December, 2014.

Holly Eastwood

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

BETTY L. ZACHOW, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants.	No. 10200084-9 COMPLAINT

Plaintiff, Betty Zachow, and by and through her attorney, Michael J. Riccelli, of Michael J. Riccelli PS, for cause of action against defendants, and each of them jointly and severally, states and alleges as follows:

I. PARTIES / JURISDICTION / VENUE

1.1 At times relevant to this litigation, Betty L. Zachow was, and is, an adult resident of the state of Washington, residing in Spokane County.

1.2 At times relevant to this litigation, Providence Sacred Heart Medical Center &

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries,

Plaintiff,

vs.

PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10,

Defendants.

Case No. 10-2-00084-9

DEFENDANTS' MOTION TO STRIKE LOSS OF CHANCE CAUSE OF ACTION, OR, IN THE ALTERNATIVE, TO CONTINUE TRIAL DATE

1. **Relief Sought.** Defendants move the Court for an Order striking Plaintiffs' "Loss of Chance" claim or, in the alternative, continuing the trial date in this matter to allow Defendants the opportunity to obtain discovery on Plaintiffs' new theory.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries,

Plaintiff,

vs.

PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10,

Defendants.

Case No. 10-2-00084-9

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE LOSS OF CHANCE CAUSE OF ACTION OR, IN THE ALTERNATIVE, TO CONTINUE TRIAL DATE

I. NATURE OF CASE/RELIEF SOUGHT

This is a wrongful death action brought against Providence Health & Services d/b/a Sacred Heart Medical Center ("Sacred Heart"). Plaintiffs claim that "but for" Sacred Heart's

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negligence, Betty Zachow would be alive today. Plaintiffs never pled a cause of action for a reduced loss of chance.

In their trial brief, Plaintiffs for the first time have indicated that, in addition to their claim for wrongful death, they intend to bring a claim for Mrs. Zachow's reduced loss of chance. This claim was never pled, never disclosed in any answers to written discovery and never developed by the required expert testimony. There is no support for this claim in the record of this case.

Trial is set to commence on April 23, 2012. Sacred Heart simply does not have time to investigate Plaintiffs' new theory, to test it with the testimony of Plaintiffs' witnesses, or to prepare a response to Plaintiffs' new theory of the case. The loss of chance cause of action must be stricken, or the trial must be continued to allow Defendants to take discovery on Plaintiffs' new argument.

II. STATEMENT OF FACTS

1. Plaintiffs filed their complaint against Sacred Heart on January 7, 2010. Mrs. Zachow was alive at the time the complaint was filed.

2. Plaintiffs' complaint does not plead a cause of action for loss of chance. *Id.*

3. Plaintiffs allege that "but for" Sacred Heart's negligence, "the physical injury and resulting damages would not have occurred." *Id.*, ¶ 2.6.

4. Mrs. Zachow passed away on March 21, 2010. Plaintiffs did not amend their complaint to add a claim for loss of chance at that time.

5. Plaintiffs' answers to Sacred Heart's interrogatories do not include any request for damages based upon a loss of chance. *Declaration of Steven J. Dixson*, ¶ 2, Ex. A.

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6. Plaintiffs correspondence following Mrs. Zachow's death, after the Complaint had been filed, states that "SHMC's failure to maintain Betty's medications, subsequent to her knee replacement surgery, led to her congestive heart failure, and was a **proximate cause** and substantial contributing factor to her death." *Dixson Dec.*, ¶ 3, Ex. B (emphasis added).

7. Plaintiffs have offered only one expert in this case - Dr. Wayne Rogers. Dr. Rogers did not offer any testimony in support of Plaintiffs' loss of chance theory, either by deposition or way of written report. He stated he was unable to provide a "mathematical analysis" of Sacred Heart's negligence to Mrs. Zachow's death. *Dixson Dec.*, ¶ 4, Ex. C.

8. Plaintiffs did not amend their complaint at any point after it was filed, despite Mrs. Zachow's death in the intervening years. In particular, Plaintiffs did not amend their Complaint after Betty died in March, 2010; prior to the deposition of their only expert witness, Dr. Rogers, in March, 2011; nor after the decision of the Washington State Supreme Court in *Mohr v. Grantham*, 172 Wn.2d 844 (2011), in October, 2011, upon which their loss of chance claim is now based.

9. On March 23, 2012, Sacred Heart's counsel informed Plaintiffs' counsel by letter that any attempt to bring a loss of chance claim was untimely and would not met with a motion to strike and/or a trial continuance Sacred Heart's counsel requested confirmation that Plaintiffs intended to bring a loss of chance claim and identification of the expert witness who would support such a claim. Plaintiffs did not respond to counsel's letter. *Dixson Dec.*, ¶ 5, Ex. D.

10. The first time that Sacred Heart learned of Defendants' new loss of chance theory was on April 2, 2012, when it received Plaintiffs' trial brief.

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MICHAEL J RICCELLI PS

Attorney At Law
A Professional Service Corporation

April 15, 2010

Brian T. Rekofke
Witherspoon, Kelley, Davenport & Toole
1100 U.S. Bank Bldg.
422 W. Riverside Ave.
Spokane, WA 99201

Re: Zachow v. Providence/SHMC

Mr. Rekofke:

This is written to acknowledge receipt of the Motion, Certificate and Order changing the judge in this matter. It is also written in response to your letter of April 1, 2010. It is still my intent to provide you a declaration of, at least, Dr. Williams who was an attending cardiologist for Betty Zachow at the time of the HMC occurrence. He is simply going to confirm that the conclusions made in his chart notes about causation were made on a more probable than not basis, and that he still holds those conclusions. Dr. Williams is not being offered as a CR 26(b)(5) expert. It is my assumption that even if I provide you a declaration from a designated testifying expert witness, you would still want to take his deposition. In that regard, then, I don't plan on providing such a declaration, but will coordinate with your office, and the expert, an appropriate scheduling for his deposition. That individual is Wayne Rogers, M.D., of Portland, Oregon. I will provide you a current CV and more information shortly.

As you may recall, Ms. Zachow first came to my office irritated by the fact that she continued to be billed by SHMC for her co-payments on the extended hospitalization at the time of the occurrence, subsequent to her knee replacement surgery. As this matter continued on, Betty stated that it appeared that SHMC wanted to wait her out until she died. Unfortunately, at least part of her hypothesis came true. Betty recently passed away due to a cardio-embolic stroke, and resulting respiratory failure, primarily due to her weakened heart condition and resulting atrial fibrillation.

The medical literature is replete with information and conclusions that congestive heart failure significantly increases the risk of stroke in an individual. A review of Betty's records indicate she had no instances of stroke prior to the occurrence, nor did she have any diagnoses of congestive heart failure. SHMC's failure to maintain Betty's medications, subsequent to her knee replacement surgery, led to her congestive heart failure, and was a proximate cause and substantial contributing factor to her death. As Betty only passed on recently, the Estate hasn't

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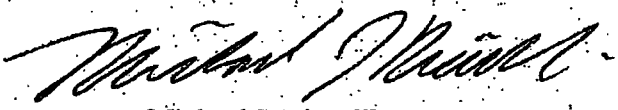
been opened up yet, and I haven't actually signed a new fee agreement with the Personal Representative. However, it is my understanding that this will be accomplished soon. I will advise you when this is accomplished, and, when a new judge is appointed, will get an order entered substituting the Personal Representative as the plaintiff. I'll also file an amended complaint to include the Estate's claims, and include the claims of the Zachow adult children as statutory beneficiaries.

Finally, I've enclosed a draft Civil Joint Case Status Report for your review. Please advise me of any questions or comments.

Respectfully,



Michael J. Riccelli

MJR:he

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be employed in a white-collared job, had reasonably good intellect.

And then, after she had this acute pulmonary edema and aspiration pneumonia, she was a deteriorated person, who normally would have been expected to stay in the hospital for only a day after the surgery. I mean, this is an in-and-out knee surgery, as I understand it, one or two days. But, instead, she had to stay for ten days postoperatively. So it was a profound illness, and it left her in a weakened state so that she was never back to par after that. Even -- let's see, she lived for, what, a year and a half after that, something like that.

Q I think she died, according to her probate file, on March 21 of 2010, so a little over two years.

A About two years. She deteriorated further in that time, which -- part of which is expected from the natural history of her heart disease. As you get older, your heart does not get stronger with this condition. But to give you a mathematical analysis of that, I can't do. I can just say, she was getting worse all the time after this; and before this, she was getting worse, slowly.

Q In your opinion, to a reasonable degree of medical probability or certainty, did Ms. Zachow's heart, itself, suffer any residual damage due to not having two doses of

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STEVEN J. DIXSON
Licensed to Practice in Washington
sjd@witherspoonkelley.com

March 28, 2012

VIA U.S. Mail

Michael J. Riccelli
Attorney at Law
400 S. Jefferson Street, Suite 112
Spokane, WA 99204-3144

Re: Zachow vs. SHMC

Dear Mr. Riccelli:

In the Trial Management Joint Report, you claim that "Betty's adult children suffered from the untimely loss of Betty, due to Providence's negligence." This is the first time that you have indicated you will be seeking survival damages for Mrs. Zachow's children separate and apart from the claims made by the Estate.

There is no discovery or testimony that I am aware of which supports this claim. In Answer to Interrogatory No. 5, submitted by you on February 3, 2012, you indicated three categories of damages, all of which are inherent to the Estate itself: increased medical costs, past pain and suffering and emotional distress and probable reduction in life expectancy. None of these alleged damages would be on behalf of Mrs. Zachow's children.

It is too late to add a claim. If you are going to try to add a claim, please disclose the specifics of the claim and the evidence that you will be offering to support it.

Very truly yours,

WITHERSPOON · KELLEY

By: Ryan M. Beaudoin

cc: William Tately - via email

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RYAN M. BEAUDOIN
Licensed to Practice in Washington and Idaho
rmb@witherspoonkelley.com

March 23, 2012

Via Facsimile and U.S. Mail
Michael J. Riccelli
Attorney at Law
400 S. Jefferson Street, Suite 112
Spokane, WA 99204-3144

Re: Zachow vs. SHMC

Dear Mr. Riccelli:

Thanks for your call today and your voicemail from yesterday. You referred in your voicemail to a "recent case" upon which you will rely to argue to the Court that you were only required to show defendants conduct was a "substantial contributing factor" to Ms. Zachow's death. I presume you are referring to the loss of chance case *Mohr v. Grantham*, 172 Wn.2d 844 (Oct. 11, 2011).

As I mentioned in our phone conversation today, a loss of chance claim was not plead in the complaint and has not been developed in discovery. This would be a completely new claim that was not previously disclosed. Plaintiffs' expert, Dr. Rogers, did not testify regarding loss of chance or specific percentages to support a loss of chance claim. In fact, he said that he could not give a mathematical analysis of her condition (pg. 37). We are 30 days from trial and it is too late to add new claims.

Please confirm immediately if you will be pursuing a new claim for loss of chance and what expert you will rely upon to provide the requisite testimony to support that claim. I will object to any new evidence being offered so close to trial and seek to have it stricken or for a trial continuance.

Very truly yours,

WITHERSPOON · KELLEY

By: Ryan M. Beaudoin

RMB:kc
cc: Brian Rekofke
William Tately - via email
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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants.	No. 10200084-9 MOTION AND BRIEF RE: AMENDMENT OF COMPLAINT AND SHORTENING TIME OF HEARING

I. MOTION

Plaintiff Robin Rash, by and through her attorney Michael J. Riccelli of Michael J. Riccelli, P.S., hereby moves the court to approve amendment of the Complaint filed herein. In addition, plaintiff joins in defendants' motion to shorten time to allow hearing on the motions of defendants' and plaintiff's in this matter, including this motion. This motion is based on CR6; CR 15; the files and pleadings herein; and the Declaration of Michael J. Riccelli and attachments thereto.

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discussion below. On March 21, 2010, Ms. Zachow died, allegedly due to, in part or in whole, the negligence of Providence. *See the death certificate as Exhibit B to the Declaration of Michael J. Riccelli.* Also, *see Exhibit G, excerpts of deposition of Wayne Rogers, M.D.* Shortly thereafter, on April 15, 2010, counsel for Providence was advised that: (1) plaintiffs' attorney was in the process of having a Personal Representative appointed to represent the interests of the Estate; (2) of Ms. Zachow's three surviving adult children; and (3) plaintiff's attorney's intent to amend the complaint accordingly. *See the Declaration of Michael J. Riccelli and Exhibit C thereto (excerpts from letter to attorney Rekofke).* Unfortunately, as this was the only time that plaintiff's attorney had experienced a client passing during the pendency of a litigation process, and the task of amendment of the complaint didn't get placed on a calendar to be accomplished, as is normally the case for litigation items or deadlines such as those found in a Case Schedule Order. *See the Declaration of Michael J. Riccelli.* Plaintiff's attorney only recently discovered that an amended complaint had never been filed. *See Declaration of Michael J. Riccelli.* However, since the appointment of Ms. Rash as Personal Representative of the Estate of Betty Zachow, on August 6, 2010, all plaintiff's and defendants' pleadings and discovery in this matter, have been captioned in the same manner in which this motion has been captioned. See, generally, the files and records herein. This caption clearly identifies Ms. Rash, both individually and in her capacity as Personal Representative of the Estate of Betty Zachow, and on behalf of all other "statutory beneficiaries." *See the Declaration of Michael J. Riccelli.* This is consistent with the intent and interpretation of Washington's survival and wrongful death statutory scheme. See, generally, RCW 4.20.

Further, it was clear that plaintiff was claiming for the loss of Ms. Zachow's life as a proximate result of Providence's negligence, as was directly testified to by plaintiff's expert medical witness. See *the Declaration of Michael J. Riccelli Exhibit G, excerpts of the deposition*

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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants.	No. 10200084-9 DECLARATION OF MICHAEL J. RICCELLI IN SUPPORT OF PLAINTIFF'S MOTION AND BRIEF RE: AMENDMENT OF COMPLAINT

I, Michael J. Riccelli, upon personal knowledge, information, and belief, hereby state and certify that attached hereto are true and correct copies of the following documentation:

1. This matter was filed in Spokane County Superior Court on January 7, 2010. Betty Zachow was alive then, and was my client. See Exhibit A.

2. Ms. Zachow died on March 21, 2010. Attached as Exhibit B is a copy of the death certificate of Ms. Zachow.

3. Attached as Exhibit C is a copy of page two of my April 15, 2010 letter to defense

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attorney Bryan Rekofke, which advises him that a Personal Representative was to be appointed for Betty Zachow's estate, who would then bring the estate and the living children's claims against defendants.

4. Attached as Exhibit D is an excerpt of Defendants' Answers to Plaintiff's First Interrogatories and Requests for Production Propounded to Providence, in which defendants' expert medical witness, Dr. Joseph Doucette, set forth the defense in this matter of lack of causation of any injury or harm to Ms. Zachow.

5. Attached as Exhibit E is a copy of the online thesaurus showing synonyms for the word "substantial" downloaded from thefreedictionary.com internet website.

6. Attached as Exhibit F is a copy from the synonym thesaurus for the words "significant/substantial," downloaded from synonyms.net internet website.

7. Up to the time of passing of Ms. Zachow, I had not experienced a client passing during the pendency of litigation. At the time of her passing I intended to amend the complaint in this matter, as I advised Mr. Rekofke (see Exhibit C). However, the task of amending the complaint didn't get placed on my calendar, as is normally the case for litigation items or deadlines such as those found in a Case Schedule Order. Therefore, I failed to file an amended complaint, even though I had intended to do so. I only recently was made aware that the complaint had not been amended.

8. However, Robin Rash was appointed as Personal Represntative of the Betty Zachow Estate, and the caption was amended to identify Ms. Rash, in her capacity as Personal Representative, representing the Estate, herself, and all other "statutory beneficiaries." The court's file on this matter, as well as the current plaintiffs and defendants pleadings, represent this amendment.

9. The defendants have had knowledge that plaintiff was claiming damages for the

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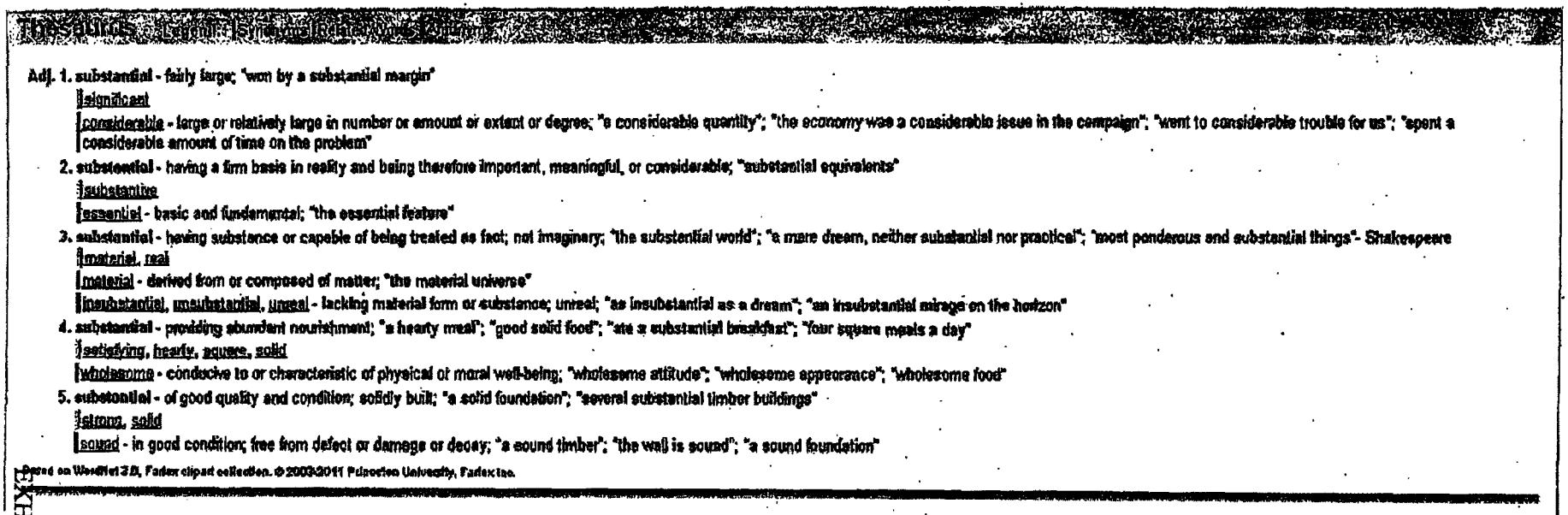

Thesaurus Legend: Synonyms Related words Antonyms

Adj. 1. substantial - fairly large; "won by a substantial margin"
- significant
- considerable - large or relatively large in number or amount or extent or degree; "a considerable quantity"; "the economy was a considerable issue in the campaign"; "went to considerable trouble for us"; "spent a considerable amount of time on the problem"

2. substantial - having a firm basis in reality and being therefore important, meaningful, or considerable; "substantial equivalents"
- substantive
- essential - basic and fundamental; "the essential feature"

3. substantial - having substance or capable of being treated as fact; not imaginary; "the substantial world"; "a mere dream, neither substantial nor practical"; "most ponderous and substantial things"- Shakespeare
- material, real
- material - derived from or composed of matter; "the material universe"
- insubstantial, unsubstantial, unreal - lacking material form or substance; unreal; "as insubstantial as a dream"; "an insubstantial mirage on the horizon"

4. substantial - providing abundant nourishment; "a hearty meal"; "good solid food"; "ate a substantial breakfast"; "four square meals a day"
- satisfying, hearty, square, solid
- wholesome - conducive to or characteristic of physical or moral well-being; "wholesome attitude"; "wholesome appearance"; "wholesome food"

5. substantial - of good quality and condition; solidly built; "a solid foundation"; "several substantial timber buildings"
- strong, solid
- sound - in good condition; free from defect or damage or decay; "a sound timber"; "the wall is sound"; "a sound foundation"

Based on WordNet 3.0, Farlex clipart collection. © 2003-2011 Princeton University, Farlex Inc.

EXHIBIT E

Source: The Free Dictionary .com

url: http://www.thefreedictionary.com/substantial

synonyms.net

Search for Synonyms: substantial Search

Synonyms for substantial

Translate substantial to

Synonyms, Thesaurus & Antonyms of substantial

1. (adj) **significant, substantial**
fairly large
Synonyms: substantial, significant, square, hearty, real, pregnant, important, material, substantive, solid, meaning(a), strong, satisfying
Antonyms: neriform, unreal, insubstantial, unwholesome, inconsiderable, wraithlike, unsound, airy, unsubstantial, shadowy, inessential, nery, stringy, aerial, ethereal, unessential

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff,	)	
vs.	)	Case No. 10-2-00084-9
PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants.	)	

DEPOSITION OF WAYNE R. ROGERS, M.D.

Taken on behalf of Defendants

* * *

BE IT REMEMBERED THAT, the deposition of WAYNE R. ROGERS, M.D. was taken before Kirsten J. Stevens, a Certified Court Reporter and Notary Public for the State of Washington, CCR No. 3217, on Tuesday, March 8th, 2011, commencing at the hour of 10:02 a.m., at LNS Court Reporting and Captioning, 1123 S.W. Yamhill Street, Portland, Oregon.

* * *

very damaging?
A. This has been known for, I would say, 15 or 20 years; it was known when I was in practice.
Q. Do you have an opinion more probably than not with reasonable medical certainly that the effects of the beta-blocker withdrawal and the congestive heart failure on her heart and circulatory system contributed to her death by embolic stroke?
MR. REKOFKE: Object to the form; it's leading. Go ahead and answer, Doctor.
MR. RICCELLI: I'll just rephrase the question.
Q. BY MR. RICCELLI: Do you have any opinion more probably than not as to any relationship between the post 2008 surgical condition caused by the beta-blocker withdrawal and anything leading up to or causing her death?
A. Yes. Yes.
Q. Can you describe that.
A. Her deterioration was accelerated over what I would have expected, knowing her four-year background before the -- or five-year background before. If you look at her course in five years before the acute pulmonary edema episode and compare it with the two-year course afterward, you see that she has developed marked

deterioration in that period, both mentally and physically, and developed new manifestations of the disease, which occurred before I would have expected them to, if she'd been on a good medical treatment program. And, namely, the fatal termination, the third cardiac embolus to the head causing a major stroke.

Q Prior to the 2008 surgery and subsequent to the 2009 -- excuse me, 2005 surgery, as I understand it, the records reveal that in 2005, she had one knee replacement, and then in 2008, the surgery that we're disconcerted about, she had another knee replacement; is that correct?

A On the opposite knee. That's right.

Q Subsequent to the first knee replacement and prior to the second knee replacement, is there any history that you can discern regarding any embolic strokes or conditions?

A No. But they were at risk, so she was treated to prevent them.

Q By metoprolol, or other type of medications?

A By the metoprolol, and also by -- I think she was given aspirin because in 2004 she was given Coumadin and had a gastrointestinal bleed. So that was stopped until toward the end of her life. It was started up again after the third stroke.

Q Regarding her condition subsequent to the second surgery and the beta-blocker withdrawal, do you have any opinion as to the significance or the amount of acceleration caused by the event of 2008?

A Well, I'd just say it's significant. I mean, it's only possible to estimate things like this. And when you see that there's a change in the life pattern, which had ample opportunity to change before but hadn't, it becomes my opinion that this terrible weakening of her heart action that took place on March the 6th of 2008 aggravated the underlying condition.

Q Do you recall representations or anything in the medical records to the effect that Sacred Heart, during the administration of her case, lost her medication orders or medication records prior to her surgery?

MR. REKOFKE: Object to the form; it's leading.

THE WITNESS: I think I read something about that. I wasn't entirely clear about who was responsible for what, so I related it in terms of the way I would have done it here.

Q BY MR. RICCELLI: Do you ever recall, yourself, participating in a case where medications or records were lost by a hospital that affected a cardiac patient?

A (Pause.)

Q Significantly.
A I can recall various medical mix-ups that have happened; these are called systems errors, nowadays. And a system error can be as simple as the drug is in an ampoule that looks like another ampoule of a different drug and the wrong ampoule is picked up by the nurse; things like this happen.

In fact, I've got an abstract for you, and you're both welcome to this, from the Peter Bent Brigham saying that one of our problems coming up nowadays is trying to get our communication straight in medicine so that we don't have these problems. Because they're -- they've got a figure, 41 percent of all malpractice cases are related to this communications problem.

Q When you were practicing, did you provide presurgical prescriptions to be followed by the nurses and the patients in care subsequent to surgery?
A Yes. We did not have hospitalists when I was practicing, so I would see the patient if he went in the hospital for anything important, including surgery. I would go see him. That's why I wanted an office across the street from the hospital.
Q Speaking of hospitalists, is it your understanding that Sacred Heart Medical Center has used for some time hospitalists?

MR. REKOFKE: Object to the form; it's leading. Go ahead and answer, Doctor.

THE WITNESS: Yes, I understand they did, but I don't understand whether he was responsible for seeing her or not.

Q BY MR. RICCELLI: When you did write orders for patients to be carried out by the nursing staff postsurgery, did you expect them to be followed?

A Absolutely.

Q When you reviewed the medical records, did you pay attention to the -- excuse me.

What part, if any, did your consideration of cardiac consultations pre and postsurgery and pre and post this event did you consider?

A Well, I considered, first of all, that no cardiologist saw her before she had the surgery in close proximity, which means the day she went in or the day before or the morning after.

Q I understand that. But did you see pre- and post-consultation notes?

A I didn't.

Q I'm talking about in the history of her treatment.

A Yes, I saw the notes, and I knew that it came from a cardiologist, although I don't know these men, myself. I knew they were cardiologists because there were notes

with regard to echocardiograms.
Q Did you rely on their assessment of their patient at the time --
A Yes.
Q -- as an accurate representation of her condition?
A Yes.
Q Okay.
A Especially with the echocardiogram, which is the single most important diagnostic modality in this disease.
Q And so since you didn't see this patient ever prior to her death, are you relying on her treating physicians, Dr. Hideg, Dr. Williams, Dr. Abate, at all, to make an assessment in this case?
MR. REKOFKE: Object to the form. Go ahead and answer, Doctor.
Q BY MR. RICCELLI: In other words, as an expert witness, are you relying on the medical records of the providers?
A The ones -- yes, I am.
Q Can you just describe, make the record clear, how the pulmonary edema, which is referred to as congestive heart failure, how that affects a person's physical nature and the heart muscle and other systems of the body, both at the time of the event and subsequent to?

MR. REKOFKE: Object to the form; it's compound. Go ahead and answer, Doctor.

THE WITNESS: Acute pulmonary edema simplistically reduces the oxygen saturation to the brain.

Q BY MR. RICCELLI: How is it caused, say, in this case?

A How is it caused?

Q How is it caused in this case?

A It's caused in this case like it's caused in all cases. Fluid fills the air sacs, oxygen cannot be transported, and the arterial oxygen saturation falls.

Q Why does the fluid fill the air sacs?

A The fluid fills the air sacs because the heart is inadequate in its pumping action since its pharmacological support has been taken away and it's been stressed. This causes the heart to become unable to pump blood out through the lungs into the body in sufficient quantities. The tachycardia is part of this, but it's a well-recognized phenomenon. There's nothing mysterious about it.

Q And due to the edema, you referenced hypoxia. What does that do to the body's systems, including the heart?

A Hypoxia -- oxygen is essential for the metabolism of all tissues, and the most sensitive tissue is the brain.

If the brain is without the oxygen supplied by blood for five minutes, you're essentially brain-dead, so that's the most sensitive. The heart muscle also is sensitive to deprivation of oxygen, particularly when it's overworking, as her heart was. When that happens, heart muscle fibers probably die. If you did an analysis of what's called biomarkers that indicate dead heart muscle, such as troponin or CPK, you would have found in her a considerable elevation of these markers. I don't know whether they were done or not. I didn't see her laboratory figures, but the heart muscle is damaged in severe hypoxia.

Q How does the subsequent event, and I'm speaking of this postsurgical beta-blocker withdrawal and the pulmonary edema, et cetera, and hypoxia, how does that relate to what you've observed or been characterized as a lack of vigor after that event?

A A weaker heart weakened by the acute episode and the rhythm disturbances, which went on for a while, is the proximate cause of the weakening of her activities of daily living that we've discussed, and a cause of the heart's dilating. The heart responds to injury by dilating, and her heart was dilated, particularly in the atria, because they were measured, not the ventricles, the atria were measured and that's what gave rise to her

strokes. So all of that is cumulative.

Q And you testified earlier today that her weakened heart, damaged heart, because of this event and the dilation because of this event, caused the heart to throw off emboli or embolus. Can you describe what an embolus is.

MR. REKOFKE: Object to the preface; this was a leading question that was actually never answered. Go ahead and answer, Doctor.

THE WITNESS: Answer which?

MR. RICCELLI: I think it was answered.

Q BY MR. RICCELLI: The question, again --

A How does the embolus develop?

Q And why does it develop in a case like this, in a weakened heart and a dilated heart?

A An embolus, in this case, is a blood clot which has formed, most probably, as is usually the case, in the upper parts of the heart, the atria. And, specifically, in the auricle, the little ear that comes off the side of the left atrium, this blood clots there because the blood does not have its usual vigor of movement, and stagnant blood clots. Stasis is a major factor in blood clotting.

Secondly, the atria were damaged in their organized beating, they became disorganized. We know that. We see here that she had atrial fibrillation in

'09. When the heart is fibrillating, there is a pile of literature to the effect that these people need to be continued on Coumadin, which she couldn't have been, according to her physicians, because they were afraid of bleeding. But after the third embolus, they finally got around to giving it to her. So does that answer your question? Is there anything more --

Q So basically because of the weakened --

A Weakened muscle --

Q The blood doesn't flow?

A The blood flow doesn't flow as well and it puddles in the left auricle. In fact, there's a little device made to fill up the left auricle so that these blood clots won't form. That's how important this is. But she didn't have that done.

Q No further questions. Thank you.

FURTHER EXAMINATION

BY MR. REKOFKE:

Q Doctor, just a couple follow-ups. Your bottom-line opinion is that because of the events in Sacred Heart in March of 2008, Ms. Zachow's deterioration was accelerated? Is that what you're basically saying?

A Or promoted. She eventually would have died anyway, as we all do, but she had a promotion of her disease

processes.
Q And you can't state, as we sit here today, how much her disease was promoted or accelerated; is that correct?
A I can't give you a mathematical figure, but I would say it was significant and led to her death.
Q Other than being significant and ultimately, in your opinion, resulting to her death, you can't go any farther than that?
A No, I don't think I can.
Q What records do you recall being provided relative to Ms. Zachow's strokes that ultimately took her life?
A They are there (indicating).
Q They are in the stack?
A They are in the stack, and I abstracted them.
Q When you say you "abstracted them," what do you mean?
A In my handwriting, the three, handwritten sheets.
Q And those records, if I read them, will indicate that Ms. Zachow's embolus was a blood clot that formed in her heart?
A I can't recall the exact wording that they use, but I think it was a consensus of the doctors at the time. The way they wrote, and the notes that I saw, indicate that they accepted what practically anyone would accept who's in cardiology, that in this situation, the clots come from the heart and cause the sudden -- these are not any

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROBIN RASH, individually and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries,

Plaintiff,

vs.

PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10,

Defendants.

Case No. 10-2-00084-9

~~[PROPOSED]~~

ORDER DENYING PLAINTIFFS' MOTION TO AMEND AND GRANTING DEFENDANTS' MOTIONS TO STRIKE

I. RELIEF SOUGHT

The parties appeared before the Court on April 12, 2012, on the parties' motions to shorten time, Plaintiffs' Motion to Amend the Complaint and Defendants' Motion to Strike, or

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III. FINDINGS

After reviewing the foregoing material and hearing argument of counsel, the Court finds:

1. Good cause exists to grant the mutual Motions to Shorten Time;

2. The Complaint in this matter was filed on January 7, 2010, and it named Betty L. Zachow as the sole plaintiff;

3. Mrs. Zachow died on March 21, 2010;

4. On April 15, 2010, Plaintiffs' counsel indicated he would amend the complaint. Plaintiffs only changed the caption to replace Mrs. Zachow as the plaintiff with Robin Rash, individually and as Personal Representative of the Estate of Betty L. Zachow, deceased, and on behalf of all statutory claimants and beneficiaries;

5. No other changes were made or attempted to be made to Plaintiffs' complaint between April of 2010 and April 6, 2012, when Plaintiffs' filed a Motion to Amend the Complaint;

6. Plaintiffs seek to add two new claims: (1) for loss of chance, and (2) for wrongful death damages on behalf of Mrs. Zachow's adult children.

7. With respect to the loss of chance claim, Plaintiffs lack the requisite evidence to support this claim and there is no justification to deviate from the traditional "but for" causation standard applied to medical malpractice cases;

8. With respect to the wrongful death claims, Plaintiffs have properly asserted survival claims pursuant to RCW 4.20.046 and RCW 4.20.060 but have not pled wrongful death claims pursuant to RCW 4.20.020.

9. Trial is set in this matter on April 23, 2012.

10. The parties have already submitted their pre-trial pleadings to include trial briefs, motions in limine, jury instructions and the trial management joint report.

11. Defendants would not be prepared to meet the new claims and they would be put to a disadvantage if the claims were allowed at this late date.

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12. Good cause exists to deny the motion to amend the complaint and grant Defendants' motion to strike.

IV. ORDER

Based on the foregoing, the Court hereby ORDERED, ADJUDGED AND DECREED:

1. The Motions to Shorten Time are GRANTED;

2. Plaintiffs' Motion to File an Amended Complaint is DENIED; and

3. Defendants' Motion to Strike Plaintiffs' Claims for Loss of Chance and Wrongful Death on behalf of Mrs. Zachow's adult children is GRANTED.

DONE IN OPEN COURT this 13th day of April, 2012.

The Honorable Linda G. Tompkins

Presented by:

WITHERSPOON · KELLEY, P.S.

By: _____
Ryan M. Beaudoin, WSBA No. 30598
Attorneys for Defendants

Approved as to form;
Notice of Presentment Waived.

MICHAEL J. RICCELLI, P.S.

By: _____
Michael J. Riccelli, P.S., WSBA No. 7492
Attorneys for Plaintiffs

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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

ROBIN RASH, as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries: Robin R. Rash, Keith R. Zachow and Craig L. Zachow, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants.	No. PLAINTIFF'S MOTIONS TO SHORTEN TIME AND TO STAY PROCEEDINGS FOR CONSOLIDATION
ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, et al, Defendants.	No. 10200084-9

I. RELIEF REQUESTED

Plaintiff, by and through her attorney, Michael J. Riccelli of Michael J. Riccelli, P.S.,

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THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

ROBIN RASH, as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries: Robin R. Rash, Keith R. Zachow and Craig L. Zachow, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants.	No. 12201478-1 PLAINTIFF'S MOTION FOR CONSOLIDATION, SUPPORTING MEMORANDUM AND DECLARATION OF MICHAEL J. RICCELLI
ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, et al, Defendants.	No. 10200084-9

RELIEF REQUESTED

Plaintiff Robin Rash, by and through her attorney Michael J. Riccelli of Michael J

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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10, Defendants.	No. 10200084-9 ORDER GRANTING PLAINTIFF'S MOTION FOR CONSOLIDATION (CLERK'S ACTION REQUIRED)
ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries, Plaintiff, vs. PROVIDENCE HEALTH & SERVICES, et al, Defendants	No. 10200084-9

THIS MATTER came before the Court on the plaintiff's Motion for Consolidation and the Court having heard the argument of counsel for plaintiff, Michael J. Riccelli, and for

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROBIN RASH, individually, as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries

Plaintiff,

vs.

PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10,

Defendants.

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZAHOW, deceased, and on behalf of all statutory claimants and beneficiaries,

Plaintiff,

vs.

PROVIDENCE HEALTH & SERVICES, et al.

Defendants.

Case No. 10-2-00084-9
12-2-01478-1

DEFENDANT'S MOTION TO CERTIFY ORDER AS FINAL JUDGMENT PURSUANT TO CR 54(b)

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requested the court to certify its order under CR54(b), which the court declined, at the April 13, 2012 hearing.

II. LAW AND ARGUMENT

Defendant's motion in this matter relies on CR 54(b).

> Under CR 54(b), when multiple claims are presented in an action or when multiple parties are involved, a final judgment may be entered as to one or more but fewer than all the claims or parties. Before doing so, however, the court must make an express determination that there is no just reason for delay and an express direction for entry of judgment. The court's determination, to be effective, must be supported by written findings. The principal implication of such a judgment is that it is immediately appealable, even though the case may continue on with the remaining claims and parties. Similar provisions can be found in RAP 2.2(d), which contains the same language as CR 54(b) and adds that the time for appeal begins to run upon entry of the trial court's findings supporting the determination that there is no just reason for delay.
>
> 4 Wash. Prac., Rules Practice CR 54 (5th ed.)

CR54(b) clearly contemplates the court's authority to certify, as a final judgment, an order which disposes of one or more claims of a party or parties, or one or more parties of a multi-party lawsuit. Equally clear is the fact that the rule assumes that any party or any claim about which an order is being certified under Rule CR 54(b) is, at the time of the order, properly before the court.

In this instance, it was within the authority of the court to certify the order at issue in this motion, at the time of its ruling, April 13, 2012, as to its actions effectively dismissing the statutory beneficiaries as real parties in interest from the litigation by dismissing their claims by and through the Personal Representative. The court did decline to certify the order at that time. However, when the matter was consolidated and a new Case Schedule Order issued, new deadlines were applied, and it is uncertain at this time whether plaintiff will utilize Dr. Rogers as her expert medical witness, or supplement his testimony with that of another expert. Procedurally, the consolidated matter is a new action, and the prior order of April 13, 2012,

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should be disregarded, as the basis for defendants claim then was surprise, immediately before the trial date. Therefore, the order should be withdrawn by the court, on its own authority. However, should the court disagree with plaintiff in this regard, then plaintiff joins in with defendant on requesting the order to be certified under CR 54(b).

DATED this 15th day of October, 2012.

MICHAEL J RICCELLI PS

By: _____
MICHAEL J RICCELLI, WSBA #7492
Attorney for Plaintiff

DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ryan Beaudoin
Steven J. Dixson
Witherspoon, Kelley, Davenport & Toole
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201

____ U.S. Mail
____ Hand-Delivered
__✓__ Facsimile
NO E-MAIL SERVICE ACCEPTED

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of Oct, 2012.

_____

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROBIN RASH, individually, as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries

Plaintiff,

vs.

PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10,

Defendants.

ROBIN RASH, individually, and as Personal Representative of the ESTATE OF BETTY L. ZAHOW, deceased, and on behalf of all statutory claimants and beneficiaries,

Plaintiff,

vs.

PROVIDENCE HEALTH & SERVICES, et al.

Defendants.

Case No. 10-2-00084-9
~~12-2-01478-1~~

~~[PROPOSED]~~

ORDER GRANTING DEFENDANT'S MOTION TO CERTIFY ORDER AS FINAL JUDGMENT PURSUANT TO CR 54(b)

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No. 312771

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

ROBIN RASH, et al., *Appellant*,

v.

PROVIDENCE HEALTH & SERVICES, et al., *Respondent.*

APPELLANT'S APPEAL BRIEF

ORAL ARGUMENT REQUESTED

Michael J. Riccelli, WSBA #7492
Attorney for Appellant
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TABLE OF AUTHORITIES

Cases

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I. INTRODUCTION

This matter arises from the treatment of an elderly Spokane resident, Betty L. Zachow (hereinafter "Ms. Zachow"), by Sacred Heart Medical Center (hereinafter "SHMC") in which, in the process of a routine orthopedic surgery, the hospital lost the list of medications to be taken by Ms. Zachow while at the hospital. Ms. Zachow suffered from a genetic condition of the heart known as hypertrophic cardiomyopathy. This is an enlargement of the heart. Ms. Zachow was on a beta blocker medication to control the rate of her heart beat. However, after the surgery, she did not receive her beta blocker medication and it is claimed that she suffered heart damage and resulting decline in health and disability. In the original complaint filed against SHMC it was claimed, among other things, that SHMC's negligence caused permanent physical injury, disability, and reduction in life expectancy for Ms. Zachow. Unfortunately, Ms. Zachow passed on prior to completion of the litigation. Ms. Zachow's counsel notified counsel for SHMC that Ms. Zachow had passed on and that a Personal Representative would be appointed to bring the Estate's claims and the claims on behalf of her three adult children, as statutory beneficiaries. Subsequent to her death, Ms. Zachow's daughter, Robin Rash, was appointed as Personal Representative of the Estate (hereinafter "PR") and the captions of the pleadings were changed appropriately. However, through an administrative

error, the complaint was never amended to reflect this. Subsequent to her death, the PR's medical expert testified, on a more probably than not basis, that SHMC's negligence caused Ms. Zachow physical injury and physical and mental decline, disability, and led to and was a significant factor in her premature death. At time of trial, SHMC admitted negligence, but denied causation and damages. The PR claimed that, among other things, damages were recoverable for loss of chance of a better outcome and/or loss of chance of survival. Newly substituted counsel for SHMC claimed surprise and moved to strike any loss of chance claims and any wrongful death claims on behalf of the statutory beneficiaries. The PR moved to amend the complaint accordingly. SHMC also claimed lack of evidence for loss of chance claims. The trial court denied the PR's motion to amend the complaint and granted SHMC's motions to strike loss of chance claims and wrongful death claims of Ms. Zachow's statutory beneficiaries. The PR then filed a separate action bringing the statutory beneficiaries' wrongful death claims and loss of chance claims; moved to consolidate the matters and moved to continue the litigation. This was ordered by the court, and the trial date was moved from April 23, 2012 to June 3, 2013. However, on October 19, 2012, based on SHMC's motion to certify as judgment under CR 54(b) the court certified as judgment the elements of the April 13, 2012 order striking loss of chance claims, apparently for both of the consolidated matters, subsequent to

consolidation. This was done of the PR's objection, argued for discovery, testimony from experts, and other offers of proof. It is from these two orders that this matter is appealed.

II. ASSIGNMENTS OF ERROR

No. 1

The court erred in its April 13, 2012 order denying the PR's motion to amend complaint, and granting SHMC's motion to strike the PR's loss of chance claims.

No. 2

The court erred in entry of judgment pursuant to CR 54(b) striking the PR's loss of chance claims without allowing for a CR56 summary judgment hearing.

Issues Pertaining to Assignments of Error

No.1

Where:

It was plead in the original complaint during Ms. Zachow's life that negligence in healthcare caused Ms. Zachow, among other things, serious physical injury, permanent disability, and reduced life expectancy; and after her death, the PR's medical expert testified in discovery that, more probably than not, that among other things, SHMC's negligence: caused acceleration of the deterioration of decedent's physical and mental health condition;

damage to her heart such that it was more likely to generate emboli which could cause the decedent to suffer from stroke; and, therefore, that the negligence led to and was a significant factor in causing Ms. Zachow's death from stroke.

A. Does the foregoing constitute sufficient notice to SHMC and its attorneys of a viable claim for loss of chance in order to defeat SHMC's motion to strike any claims of loss of chance, when based on claims of surprise and lack of evidence?

B. Does the foregoing provide the basis for an *inter vivos* survival loss of chance client *vis-a-vis Mohr v. Grantham,* 172 Wn.2d 844, 262 P.3d 490 (2011); and a post mortem wrongful death loss of chance claim *visa-a-vis Herskovits v. Group Health Cooperative of Puget Sound,* 99 Wn.2d 609, 664 P.2d 474 (1983)?

No. 2

Does the consolidation and continuance of the trial for more than a year, from April 23, 2012, to June 3, 2013, remove, as a basis of the trial court's prior order denying the PR's motion to amend the complaint SHMC's claim of surprise as to the PR's claims of loss of chance?

No. 3

Does the "substantial factor" test of proximate cause apply in loss of chance cases?

No. 4

Where the order of April 23, 2012 was not pursuant to CR 56 notice, hearing protocol, and submission of testimony by affidavit, does the continuance of trial for more than a year from April 23, 2012 to June 3, 2013, require that any partial judgment entered in this matter, on the basis of lack of evidence, be subject to CR56 notice, hearing, and submission of additional testimony by affidavit or declaration, especially when under the then consolidated case schedule order, plaintiffs' disclosure of lay and expert witnesses were not yet due, nor was the discovery cut-off to occur until April 1, 2013.

III. STATEMENT OF THE CASE

In the original complaint, Ms. Zachow claimed damages for, among other things, physical injury and disability and reduced life expectancy. (CP 6). Unfortunately, prior to trial, and during the time of discovery, Ms. Zachow passed away from causes which it is claimed arose from, were related to, and were the natural sequelae of injuries suffered by Ms. Zachow as a result of the negligence in healthcare by SHMC. (CP 94-98, 106-107). Subsequent to Ms. Zachow's death, the undersigned advised original defense counsel, Brian Rekofke of Witherspoon, Kelley, Davenport & Toole, in writing that it was the intent of Ms. Zachow's surviving children that the matter continue; that a Personal Representative ("PR) would be appointed;

that claims would be brought by the Personal Representative on behalf of the Estate and on behalf of Ms. Zachow's surviving adult children; and that an amended complaint would be filed to reflect that. (CP 94-95, 99). Robin Rash, one of Ms. Zachow's surviving adult children, was appointed PR. (CP 95). Unfortunately, due to administrative error in communication between the undersigned and his office staff, revision of the complaint was not properly calendared on the undersigned's calendar, but the caption of the matter was amended appropriately to reference Robin Rash, an adult daughter of Ms. Zachow, as PR as a substitute plaintiff on behalf of the Estate and on behalf of all "statutory beneficiaries." The caption appeared as follows: Robin Rash, as Personal Representative of the Estate of Betty L. Zachow, deceased, and on behalf of all statutory claimants and beneficiaries: Robin R. Rash, Keith R. Zachow and Craig L. Zachow, Plaintiff, v. Providence Health & Services, a Washington business entity and health care provider; Providence Health & Services-Washington, a Washington business entity and health care provider; Providence-Sacred Heart Medical Center & Children's Hospital, a Washington business entity and health care provider, and Does 1, Defendants.

During discovery subsequent to Ms. Zachow's death, a deposition was taken by Mr. Rekofke in which the Zachow's medical expert, Wayne Rogers, a cardiologist, testified more probably than not, and with reasonable medical

certainty, that Ms. Zachow had a pre-existing heart condition which was controlled by medication. That after routine surgery Ms. Zachow suffered an adverse condition, but due to SHMC's failing to provide her required heart medication. Further, that SHMC's error in providing healthcare services: weakened and enlarged her heart; made it more likely to create emboli which could cause her stroke; reduced Ms. Zachow's life expectancy; caused her changes in life patterns; and was a significant factor in causing and led to her death by stroke due to emboli created by her weakened and enlarged heart. (CP 106-08, 112-116). At the time of filing pre-trial briefing and motions, approximately one month prior to trial, trial matters were delegated by Mr. Rekofke to Mr. Beaudoin of Witherspoon, Kelley, Davenport & Toole, and Mr. Beaudoin then moved to strike (dismiss) the surviving children's wrongful death claims on the basis that the complaint was never amended to include these claims and moved to strike any claim that Ms. Zachow suffered a loss of chance of better outcome and/or survival (collectively, loss of chance) or in the alternative, continue the trial date (CP32-33). SHMC claimed it was a "surprise" and lack of evidence. (CP 117-129) Alternatively, SHMC moved for a continuance of the trial date to allow for additional discovery into the wrongful death claims of the surviving children and the issue of any loss of chance claim. (CP 127-129). In response, the PR moved to shorten time, amend the complaint according to: the facts and

circumstances of the case to date; a lack of prejudice to SHMC based on prior written disclosures to Mr. Rekofke by the undersigned; the fact that the caption was changed to name a PR on behalf of the Estate, and on behalf of the statutory beneficiaries; and according to the testimony provided by Dr. Rodgers on March 8, 2011, more than a year before SHMC's motions and trial date of April 23, 2012, which clearly provided the basis for loss of chance claims. (CP 82-92, 94-116). Further, the PR argued that a loss of chance was not a surprise to SHMC as a reduced life expectancy was pled in the original complaint, and that Washington case law equated reduced life expectancy with a loss of chance claim. (CP 86-88). Admittedly, the undersigned did have some confusion as to the effect of the holding of *Mohr v. Grantham,* 172 Wn.2d 844, 262 P.3d 490 (2011), as to its notice of a claim or as evidence of other claims. (CP 861-88). This did not take away from the intent to make a loss of chance of a better outcome claim, substantively. (CP 86-88). Finally, the PR noted that there was consensus between the parties that a continuance of the trial date would resolve any concerns, as SHMC could have discovery upon the children with respect to the wrongful death claims, and could further explore and have discovery on the loss of chance claims with their own experts and with the PR's experts. (CP 43, 85-86). This whole matter came before the court not on a summary judgment motion, with the opportunity of adequate notice and to provide additional testimony,

but on pre-trial motions under shortened time, filed within three weeks of trial, on April 4, 2012, and heard on April 12, 2012, 11 days before trial, with the order dated the next day. (CP 32-33, 82, 139-142). Under the conditions, it was apparent to the court that counsel for both parties believed the court would continue the trial date, as the court subsequently ruled in a manner in which the court thought would displease both counsel, in that there would be no continuance of the trial date (RP 4/12/2012 p. 20-21, 29). The wrongful death claims of the children, as statutory beneficiaries were stricken, as were any loss of chance claims. (CP 139-142). Striking the loss of chance claims was based on lack of evidence, and no justification to deviate from the "but for" causation standard for medical malpractice cases. (CP 141). This effectively dismissed the children as real parties in interest. This left the PR to immediately file a separate, new wrongful death lawsuit on behalf of the statutory beneficiaries; move to stay the pending trial; and move to consolidate both matters into one with a new trial date. (CP 190-192). This was granted by the court, and a new trial date of June 3, 2013 was eventually established. (CP 188-192). Subsequent to that, SHMC requested the trial court to certify that portion of the order striking the loss of chance claims. (CP 139-142). The trial court did so on October 14, 2012 from which this appeal arises. (CP 139-142).

IV. STANDARD OF REVIEW

Although there was never a formal CR 56 summary judgment proceeding in the trial court, certification of the April 13, 2012 pre-trial order constitutes a summary judgment. Review of the April 13 substantive order, and the October 19, 2013 procedural, certifying order is, therefore, *de novo*. *Mohr, supra,* at p. 859. Evidence is viewed in the light most favorable to the non-moving party, who, with specific facts, may show a genuine issue of fact existed. *Mohr*, *supra*, at p. 59; CR 56(e).

V. SUMMARY OF ARGUMENT

A. Where complaints are to be liberally construed; amendment of a complaint to reflect discovery, and even proof of fact at trial is allowed; and where SHMC was not prejudiced by any surprise, the court erred by denying the PR's motion to amend, and granting SHMC motion to strike all loss of chance claims on the grounds of surprise, alternatively, the interest of justice should have allowed continuation of the April 23, 2012 trial, as of the April 13, 2012 order.

Further, the Washington Supreme Court has recognized recovery in tort for loss of opportunity of survival/reduction in life expectancy as a post mortem wrongful death claim, and loss of chance to a better outcome in *inter vivos* actions and post mortem survival actions, in cases of harm less than

death, such as disability. Loss of chance is a distinct type of claim.

In loss of a chance claims, the trier of fact should be allowed to determine damages based on the totality of the evidence. This approach, referred to as the "jury valuation" approach, is in keeping with the traditional manner of assessing damages and is the proper role of the jury. Technical and statistical information, if available, may help the jury through expert testimony, but it is not required.

Because loss of chance claims are distinct types of injuries related primarily to claims of healthcare negligence, the "substantial factor" test of proximate cause is applied, as warranted by the particular facts of a given case. Washington recognizes the substantial factor test as a valid alternative test of proximate cause.

As of April 13, 2012, the facts and circumstances of the case known to the parties and argued to the trial court supported both an *inter vivos* survival loss of chance claim and a post mortem wrongful death loss of chance claim. Thus, the trial court erred in striking any loss of chance claims.

As there could be no surprise, claimed after the filing of the second lawsuit, and continuance of the trial date for more than a year, the only basis remaining to substantiate the April 13, 2012 order striking the loss of chance claims was lack of evidence. After the continuance of trial, the court erred by

not requiring or allowing for a CR 56 summary judgment motion and hearing, especially since the PR could have replaced or supplemented any perceived lacking testimony, as the PR, on the consolidated actions, had time to find or develop additional expert testimony. The disclosure date was not until January 14, 2013, approximately two months after the court certified the April 13, 2012 order.

VI. ARGUMENT

A. DENYING AMENDMENT OF THE COMPLAINT WAS ERROR

1. Allowing Amendment is Favored

In civil litigation, amendment of complaints is governed by CR 15 and related case law. About this, the commentators have comprehensively commented as follows:

> ... pleadings may be amended only by leave of court, or with the written consent of the adverse party. CR 15(a). The rule specifies that "leave shall be freely granted when justice so requires." The rules gives considerable discretion to the trial court judge, though a few generalized notions emerge from the case law. It is often said that the test as to whether the trial court should grant leave to amend is whether the opposing party is prepared to meet the new issue. *Quackenbush v. State*, 72 Wn.2d 670, 434 P.2d 736 (1967). Amendments should be freely granted unless the opposing party would be prejudiced. *Olson v. Roberts & Schaeffer Co.*, 25 Wn.App. 225, 607 P.2d 319 (1980). If no prejudice is evident, an amendment may be granted even after substantial delay. *Caruso v. Local Union No. 690*, Intern. Broth. of Teamsters, 100 Wn.2d 343, 670 P.2d 240 (1983).

> The complaint must, of course, name the defendant in order for the court to acquire personal jurisdiction over the defendant. However, if the complaint misidentifies the defendant, the error is not necessarily fatal. A dismissal for lack of jurisdiction is not the automatic remedy, and the court will normally allow the complaint to be corrected by amendment if the amendment would not prejudice the defendant. *Professional Marine Co. v. Underwriters at Lloyd's*, 118 Wn.App. 694, 77 P.3d 658 (2003) (amendment allowed).
>
> To successfully oppose a motion to amend, the adverse party must demonstrate actual prejudice that would result from the amendment. Boilerplate allegations about difficulties in preparing for trial are insufficient. Walla v. Johnson, 50 Wn.App. 879, 751 P.2d 334 (1988).
>
> 3A Wash. Prac., Rules Practice CR 15 (5th ed.)

CR 15(b) allows for amendment to conform to the evidence and CR 15(c) allows for relation back of amendments where the amendment arises from the basis of the original complaint, and the parties haven't changed. It has also been held that:

> "[A]mendment of complaint is appropriate where a new cause of action accrues that had not accrued at the time the action was commenced.
>
> *White v. Million*, 175 Wash. 189, 27 P.2d 320 (1933).

The amendment of the complaint, as proposed by the PR as of April 13, 2012, only addressed those issues and claims which defendants knew of or should have known of, which were reasonably consistent with and as a result of Ms. Zachow's medical treatment as discussed in the original complaint,

and the fact of her subsequent death. Further, the subsequent appointment of one of Ms. Zachow's adult children as PR of her estate and the resulting change in the caption of the litigation, confirms what was otherwise known to defendants and their counsel.

Finally, as all counsel were prepared to continue the April 23, 2012, trial date to remedy any perceived prejudice to SHMC, the court should have done so in the interests of justice, especially when the same result would have been and was accomplished by filing a second action and consolidating the actions and continuing the trial date.

2. There Was no Surprise to SHMC re: Loss of Chance Claims Reduced Life Expectancy and Loss of Chance of Survival are Synonymous

Plaintiffs are also aware that defendants object to plaintiffs referencing loss of chance of survival, even though in the original complaint, the claim for reduced life expectancy is made. Claims for "loss of chance of survival" and "reduced life expectancy" are flip sides of the same coin. That loss of chance of survival is synonymous to reduction of life expectancy, has previously been addressed by the Washington appellate court:

> Here, Shellenbarger argues not that he lost a chance of survival, but that he lost a 20% chance of slowing the disease. We find no meaningful difference between this and Herskovits' lost chance of survival. If the disease had been slowed, Shellenbarger could expect additional years of life. Similarly, in Herskovits, if the disease had been cured,

> Herskovits could have expected additional years of life. Presumably the number of additional years could be measured by Herskovits' statistical life expectancy. Similarly, Shellenbarger's additional years of life could either be measured statistically or by the expert testimony of his physicians. But, whether afforded by a cure or by a slowing of the disease, the loss in each case is in length of life.
>
> *Shellenbarger v. Brigman*, 101 Wash. App. 339, 348-49, 3 P.3d 211, 216 (2000) (emphasis added)

Shellenbarger involved a living plaintiff who claimed damages due to an alleged delay in the diagnosis of his asbestosis. Here, Ms. Zachow claimed harm, and disability while alive, including reduction of life expectancy, loss of chance of survival, and upon death, the PR's medical expert confirmed as much, and that the negligence of SHMC led to Ms. Zachow's death, and was a significant (potential) factor in her death. The elimination of both the survival and wrongful death loss of chance claims were apparent to SHMC.

B. STRIKING THE PR'S LOSS OF CHANCE CLAIMS WAS ERROR

This Court first recognized a claim for loss of a chance in *Herskovits*, where six justices concluded that the plaintiff had established a prima facie claim based upon a decrease in the statistical chance of survival. See 99 Wn.2d at 614 (Dore, J., lead opinion); *id.* at 634 (Pearson, J., concurring). *Herskovits* involved a wrongful death and survival action based on a healthcare provider's failure to diagnose and treat. See *id.* at 611 (lead opinion). There, the plaintiffs claimed the decedent had a loss of chance of

survival. The defendants moved for summary judgment, and the plaintiff responded with evidence that the alleged negligence left the decedent with a decreased five year survival probability, from 39% to 25%. See *id.* at 610-11. There was no dispute that the decedent's five-year survivability never exceeded 50%. The decedent passed on approximately three years after the alleged negligence. See id. at 611. The trial court granted summary judgment based upon the estate's failure to produce evidence that the alleged negligence more likely than not caused the decedent's death. See *id.* at 611-12.

The Supreme Court reversed and remanded the matter for trial. The lead opinion by Justice Dore, representing two justices, and the concurring opinion by Justice Pearson, representing four justices, conclude that, as a matter of public policy, negligent healthcare providers should be at risk if they caused a loss of chance, which has put recovery of health beyond the possibility of realization. [1]

In the concurrence, Justice Pearson justifies this policy choice, explaining that failure to recognize loss of chance

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1 See Herskovits at 614 (Dore, J., lead opinion, stating "[t]he underlying reason is that it is not for the wrongdoer, who put the possibility of recovery beyond realization, to say afterward that the result was inevitable"); id. at 634 (Pearson, l, concurring, stating "the all or nothing approach gives certain defendants the benefit of an uncertainty which, were it not for their tortious conduct, would not exist"); see also id. at 642-43 (Dolliver, l, dissenting, recognizing "the court is called upon to make a policy decision"); see generally Joseph H. King, Causation, Valuation, and Chance in Personal Injury Torts Involving Pre.existing Conditions and Future Consequences, 90 Yale L. l 1353, 1378 (1981) (explaining that"[d]estruction of a chance should also be compensated for reasons

> subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses .... A failure to allocate the cost of these losses to their tortious sources ... strikes at the integrity of the torts system of loss allocation.

Id. at 634 (quoting King, supra at 1377; ellipses in original). Justice Dore notes, in the lead opinion, that "[t]o decide otherwise would be a blanket release from liability for doctors and hospitals anytime there was less than a 50 percent chance of survival, regardless of how flagrant the negligence." Id. at 614.

In *Herskovits,* the concurring opinions propose implementing this policy choice in different ways. The lead opinion addresses adjustment in causation to accommodate loss of a chance, qualitatively, while the concurring opinion addresses the degree of injury attributable to the negligence, resulting in an adjusted calculation of damages, quantitatively.

Arguably, neither opinion standing alone is precedential or binding in areas of discord. See *Spain v. Employment Dec. Dep't*, 164 Wn.2d 252, 260 n.8, 185 P.3d 1188 (2008) (where "a plurality of the court may be persuasive to some but has little precedential value"). The Court of Appeals has, variously, referenced *Herskovits'* lead and concurring opinions. See *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 421-22, 161 P .3d 406 (2007) (loss of chance determined by the substantial factor test of proximate

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of fairness").

cause, citing the lead opinion in *Herskovits*); *Shellenbarger v. Brigman*, 101 Wn.App. 339, 348-49, 3 P.3d 211 (2000) (loss of chance described as "a compensable interest", relying on the concurrence in *Herskovits*); *Zueger v. Public Hosp. Dist. No.2*, 57 Wn.App. 584, 789 P.2d 326 (1990) ("if *Herskovits* stands for anything beyond its result, we believe the plurality represents the law on loss of the chance of survival").

Subsequently, in *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985), a legal malpractice case in which the court found loss of chance inapplicable, the Supreme Court noted that loss of a chance is a distinct type of injury:

> The primary thrust of *Herskovits* was that a doctor's misdiagnosis of cancer either deprives a decedent of a chance of surviving a potentially fatal condition or reduces that chance. **A reduction in one's opportunity to recover (loss of chance) is a very real injury which requires compensation.**

See *id.* at 261 (emphasis added); see also *id.* at 261-62 (stating "a doctor's misdiagnosis of cancer causes a separate and distinguishable harm, *i. e.* , diminished chance of survival").

In *Mohr v. Grantham*, 172 Wn.2d 844, 853-54; 262 P.3d 490 (2011), then, the Supreme Court confirmed the *Herskovits* loss of chance of survival as a post mortem action related to an alleged reduction in longevity (i.e. life expectancy), in the context of a wrongful death action. However, *Mohr*

expanded on *Herskovits*, by allowing for a loss of chance claim for harm which is less than death, including, but not limited to, disability. Such claims may be made in the context of an *inter vivos* action, or by a PR's action on behalf of an Estate. In all cases, a substantial (significant) factor test may be applied as an exception to the "but for" test of causation.

> Though this court has not reconsidered or clarified the rule of *Herskovits* in the survival action context or, until now, considered whether the rule extends to medical malpractice cases where the ultimate harm is something short of death, the *Herskovits* majority's recognition of a cause of action in a survival action has remained intact since its adoption. "Washington recognizes loss of chance as a compensable interest." *Shellenbarger v. Brigman,* 101 Wn. App. 339, 348, 3 P.3d 211 (2000); *see Zueger v. Pub. Hosp. Dist. No. 2 of Snohomish County,* 57 Wn. App. 584, 591, 789 P.2d 326 (1990) (finding that the *Herskovits* "plurality represents the law on a loss of the chance of survival");16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 4.10, at 155-56, § 15.32, at 488 (3d ed. 2006) *("Washington courts recognize the doctrine of 'loss of a chance' as an exception to a strict application of the but-for causation test in medical malpractice cases.").* In *Shellenbarger*, the Court of Appeals reversed summary judgment of a medical malpractice claim of negligent failure to diagnose and treat lung disease from asbestos exposure in its early stages. *101 Wn. App. at 342.* Expert witnesses testified that had Shellenbarger received non-negligent testing and early diagnosis, which would have led to treatment, he would have "had a 20 percent chance that the disease's progress would have been slowed and, accordingly, he would have had a longer life expectancy." *Id. at 348.* The court concluded, "We find no meaningful difference between this and *Herskovits*' lost chance of survival." *Id. at 349.*

Under the facts and circumstances pled by Ms. Zachow in the original

complaint claiming injury, disability, and loss of life expectancy, and given Dr. Rogers' testimony confirming same, and that SHMC's admitted negligence was a significant (substantial) factor in and led to the death of Ms. Zachow, the PR met its factual burden under the recognized exception to the "but for" rule of proximate cause.

C. CERTIFYING THE APRIL 13, 2012, ORDER RE: DENYING THE PR'S LOSS OF CHANCE CLAIMS WAS ERROR, WITHOUT AN UNDERLYING CR 56 HEARING.

Simply put, the original order of April 13, 2012, apparently did not afford the PR time to provide the trial court adequate briefing or testimony to address the trial court's perceived issues with accepting the sufficiency of Dr. Rogers' testimony, or a substantial factor test in loss of chance cases. A CR 56 hearing would have allowed this, and it was error to certify the April 13, 2012 order as a judgment, procedurally, when based on a shortened time pre-trial hearing. The PR requests a ruling to that effect. However, the parties are in agreement that this matter should not leave the court of appeals without guidance as to application of the "but for" test or the "substantial factor" test in loss of chance claims.

VII. CONCLUSION

Wherefore, Robin Rash, as Personal Representative of the Estate of Ms. Zachow, and on behalf of herself and her two brothers, as statutory

beneficiaries, request this court remove this issue to the trial court, overturning its judgment denying loss of chance claims, and otherwise, allowing for a CR56 hearing to be had, if factual clarification is appropriate.

RESPECTFULLY SUBMITTED this 8th day of April, 2013.

MICHAEL J RICCELLI PS

By: _____
Michael J. Riccelli, WSBA #7492
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2013, I caused a true and correct copy of the Brief of Appellant to be served on the following in the manner indicated below:

Counsel for Defendant/Respondent
Ryan Beaudoin
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X U.S. Mail
___ Hand-Delivered
X Facsimile

_____
Michael J. Riccelli

Following the consolidation, Sacred Heart moved to certify the April Order as final, so that the substantive issue (*viz.*, whether "but for" or "substantial factor" is the appropriate standard for causation) would not be re-litigated.

While the Plaintiffs' brief takes issue with a number of procedural issues pertaining to the April Order and the Certification Order, the Plaintiffs acknowledge that those issues are moot. The Plaintiffs acknowledge that any procedural issue regarding the motions to strike and amend was rendered moot in light of the facts that: (i) the Plaintiffs filed a separate action asserting the claims; and (ii) that action and this action have been consolidated. Similarly, despite assigning error to the Final Order, the Plaintiffs actually joined in the Sacred Heart's motion to certify the April Order as final. The Plaintiffs, therefore, cannot be heard to challenge the trial court's decision to certify the April order as final. Finally, while the Plaintiffs ask the Court to ascribe error to the Final Order, the Plaintiffs specifically ask the Court to reach and rule on the merits of the appeal. Those two positions are fundamentally incompatible with one another.

C. THE SUBSTANTIVE ISSUE BEFORE THE COURT IS WHETHER "BUT FOR" OR "A SUBSTANTIAL FACTOR" IS THE PROPER STANDARD FOR PROXIMATE CAUSE IN MEDICAL NEGLIGENCE CASES.

Though the Plaintiffs use "loss of a chance" language and cite loss of chance cases, this matter does not actually implicate the loss of a chance doctrine.

In fact, the Plaintiffs admit that they are not actually asserting a claim for loss of a chance.

Instead, this appeal is about whether "but for" or "substantial factor" is the appropriate standard for causation in this medical negligence case. The recognition of a cause of action for loss of a chance had absolutely no effect on the standard for causation. Washington law is clear on this issue: a medical negligence plaintiff must demonstrate that the alleged damages "more likely than not" or "more probably than not" caused the injuries alleged. It is not sufficient to demonstrate that the alleged negligence was a "substantial factor" in bringing about the claimed harm. That is the law regardless of whether the claim is cast as one for loss of a chance or is cast as plain vanilla medical negligence.

D. SACRED HEART RESPECTFULLY ASKS THE COURT TO AFFIRM THE TRIAL COURT IN EVERY RESPECT.

Though moot, the trial court was correct to strike the claims for wrongful death and loss of a chance. Neither claim was pled, and no effort to assert either claim made until the trial was at hand. The trial court was correct to deny the Plaintiffs' motion to amend for the same reasons. The trial court was also correct to certify its April Order as final. Insofar as they remain in this appeal, the procedural aspects of trial court's orders should be affirmed.

Rash v. Providence Health & Servs.

Court of Appeals of Washington, Division Three

March 18, 2014, Oral Argument; September 16, 2014, Filed

No. 31277-1-III

Reporter
2014 Wash. App. LEXIS 2280

ROBIN RASH, *AS PERSONAL REPRESENTATIVE AND ON BEHALF OF ALL STATUTORY CLAIMANTS AND BENEFICIARIES*, ET AL., *APPELLANTS*, V. PROVIDENCE HEALTH & SERVICES ET AL., *RESPONDENTS*.

PRIOR HISTORY: [*1] Appeal from Spokane Superior Court. Docket No: 10-2-00084-9. Judge signing: Honorable Linda G Tompkins. Judgment or order under review. Date filed: 10/19/2012.

Core Terms

life expectancy, trial court, chance of survival, consolidation, parties, causation, malpractice, reduction, survival, damages, disease, patient, substantial factor, cause of action, pleadings, pre existing condition, medical malpractice, proximate cause, accelerated, tables, motion to strike, summary judgment, decreased, summary judgment motion, certification, healthcare provider, superior court, healthcare, shortened, diagnose

Case Summary

Overview
HOLDINGS: [1]-Dismissal of the lost chance theory in the first suit did not apply to the plaintiff beneficiaries in the second suit because no such ruling was made and the consolidation did not make the ruling in the first suit applicable to the second suit; [2]-The lost chance theory was properly dismissed because the plaintiff failed to present evidence establishing that the defendants' negligence was a "but for" cause of the decedent's lost chance; [3]-The "but for" standard of causation was consistent with *Wash. Rev. Code § 7.70.030* and.040 because nothing in those statutes suggested that a substantial factor standard should be employed in a medical malpractice suit; [4]-The claim for decreased life expectancy was properly dismissed because the plaintiff failed to provide sufficient proof of causation and damages.

Outcome
Summary judgment for the defendants was affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Mootness > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN1 Generally, an appellate court will not consider a moot issue unless it involves matters of continuing and substantial public interest.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN2 An appellate court will not review an issue, theory, argument, or claim of error not presented at the trial court level. *Wash. R. App. P. 2.5(a)*. A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. The purpose of this general rule is to give a trial court an opportunity to correct errors and avoid unnecessary rehearings.

Civil Procedure > Trials > Consolidation of Actions

HN3 An order of consolidation effectively discontinues the separate actions and creates a single new and distinct action. This principle does not, however, suggest that new parties to the second suit are bound by rulings earlier made in the first suit.

Civil Procedure > Dismissal > Involuntary Dismissals > Appellate Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > Appeals > Summary Judgment Review > General Overview

HN4 When a court dismisses a claim as a matter of law after reviewing affidavits, an appellate court may consider the ruling to be a partial summary judgment order.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN5 Under summary judgment, a court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. A court may grant summary judgment if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

HN6 A lost chance claim is not a distinct cause of action but an analysis within, a theory contained by, or a form of a medical malpractice cause of action.

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

HN7 A plaintiff's pleading of a medical malpractice or health care provider negligence cause of action is sufficient to raise a lost chance claim.

Civil Procedure > Appeals > Standards of Review > General Overview

HN8 An appellate court can affirm a trial court on any grounds established by the pleadings and supported by the record.

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

HN9 Lost chance claims can be divided into two categories: lost chance of survival and lost chance of a better outcome.

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

HN10 In a lost chance of survival claim, a patient has died from a preexisting condition and would likely have died from the condition, even without the negligence of the health care provider. Nevertheless, the negligence reduced the patient's chances of surviving the condition. The quintessential example of a lost chance of survival claim is a preexisting cancer that a physician untimely diagnosed.

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

HN11 The courts distinguish between a lost chance of survival theory and a traditional medical malpractice theory. In the latter, but for the negligence of the health care provider, the patient would likely have survived the preexisting condition. In other words, the patient had a more than 50 percent chance of survival if the condition had been timely detected and properly treated. In a lost chance claim, the patient would likely have died anyway even upon prompt detection and treatment of the disease, but the chance of survival was reduced by a percentage of 50 percent or below.

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

HN12 In a lost chance of a better outcome claim, the mortality of the patient is not at issue, but the chance of a better outcome or recovery is reduced by professional negligence. In a traditional medical malpractice case, the negligence likely led to a worse than expected outcome. Under a lost chance of a better outcome theory, the bad result was likely even without the health care provider's negligence. But the malpractice reduced the chances of a better outcome by a percentage of 50 percent or below.

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Torts > Negligence > Elements > Breach of Duty

Torts > ... > Elements > Causation > General Overview

HN13 There is a cause of action in the medical malpractice context for the loss of a chance of a better outcome. A plaintiff making such a claim must prove duty, breach, and that there was an injury in the form of a loss of a chance caused by the breach of duty. To prove causation, a plaintiff must rely on established tort causation doctrines permitted by law and the specific evidence of the case.

Governments > Courts > Judicial Precedent

Civil Procedure > Appeals > Citations, Precedence & Publication

HN14 When no rationale for a decision of an appellate court receives a clear majority, the holding of the court is the position taken by those concurring on the narrowest grounds.

Torts > ... > Elements > Causation > Causation in Fact

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

HN15 The Washington Supreme Court 's plurality in Herskovits v. Grp. Health Coop. of Puget Sound represents the law on loss of chance of survival. The plurality opinion in Herskovits requires a plaintiff to present evidence that a defendant's negligence was the "but for" cause of the plaintiff's loss of chance.

Torts > ... > Causation > Proximate Cause > General Overview

Healthcare Law > Healthcare Litigation > Tort Reform

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Elements > Causation > Causation in Fact

Evidence > Burdens of Proof > Preponderance of Evidence

HN16 Under *Wash. Rev. Code § 7.70.030*, unless otherwise provided in Wash. Rev. Code ch. 7.70, a plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence. One essential element is that a health care provider's failure was a proximate cause of the injury complained of. *Wash. Rev. Code § 7.70.040*. Nothing in the statute suggests that a substantial factor standard of causation should be employed in a medical malpractice suit.

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > Causation in Fact

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

HN17 A lost chance of survival plaintiff need not forward medical testimony that negligence by the defendant was the likely cause of the decedent's death or of a bad outcome. But, the plaintiff must provide a physician's opinion that the defendant "likely" caused a lost chance of survival or a lost chance of a better outcome. A physician's testimony that the defendant's error was a substantial factor in accelerating death does not satisfy this requirement.

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > ... > Elements > Causation > Causation in Fact

Torts > ... > Causation > Proximate Cause > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

HN18 Every Washington decision that permits recovery for a lost chance contains testimony from an expert health care provider that includes an opinion as to the percentage or range of percentage reduction in the chance of survival. Without a percentage, a court would not be able to determine the amount of damages to award a plaintiff, since an award is based on a percentage of loss. Discounting damages by a percentage responds to a concern of awarding damages when the negligence was not the proximate cause or likely cause of the death. Otherwise, a defendant would be held responsible for harm beyond that which it caused.

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

HN19 A plaintiff may argue that a reduced life expectancy theory is different in nature than a lost chance theory and that different causation standards should apply to the former theory.

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

HN20 A potential claim for reduced life expectancy is one in which the patient had no chance of surviving the preexisting condition, but the health care provider's negligence accelerated the death. In other words, the preexisting condition would have precluded a normal life span, but the malpractice further shortened the life span.

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Torts > ... > Elements > Causation > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN21 The Washington Court of Appeals ' decision in Shellenbarger v. Brigman teaches that the same analysis that applies to a claim based upon a lost chance of survival should also be applied to a claim based upon a reduced life expectancy. Presumably, the same causation analysis applies to both claims. Under the Washington Supreme Court 's decisions in Herskovits v. Grp. Health Coop. of Puget Sound and Mohr v. Grantham, the injury is redefined as a "chance" for longer life, not life itself or a full life. Thus, under any reduced life expectancy theory, a plaintiff must still prove the negligence "likely" reduced the "chance" of a longer life.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

HN22 The analysis by the Washington Court of Appeals ' in Shellenbarger v. Brigman is questionable. The analysis creates a complicated quest to determine if a patient has likely been injured. A physician must first determine if the malpractice likely reduced the "chance" of a longer life and, thereafter, opine what is the percentage that the chance was reduced. The length in the reduced life span is apparently irrelevant. The better analysis would be to require a patient's expert to testify that the malpractice likely reduced the life span and then give an opinion as to the length of any life reduction, such that the jury may impose damages based upon that quantified reduction. A plaintiff may then receive the full award for the reduced life expectancy, not just a percentage of the award. A leading commentator advocates compensation for the full value of the months by which a decedent's life was probably shortened. In short, the analysis in the Washington Supreme Court 's decision in Herskovits v. Grp. Health Coop. of Puget Sound becomes problematic for a jury, if not a judge, in a bench trial. Applying the Herskovits analysis fits better with a lost chance of survival claim, since the lost chance is of a full life not some already known or unknown shortened life span.

Torts > Malpractice & Professional Liability > Healthcare Providers

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Torts > ... > Elements > Causation > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN23 In a medical negligence case, summary judgment is not appropriate if a reasonable person could infer, from the facts, circumstances, and medical testimony that a causal connection exists. But the evidence must rise above speculation, conjecture, or mere possibility. Medical testimony must demonstrate that the alleged negligence more likely than not caused the later harmful condition leading to injury; that the defendant's actions "might have," "could have," or "possibly did" cause the subsequent condition is insufficient.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

HN24 The Washington Court of Appeals refuses to adopt a new theory of causation and damages and declines to adopt a reduction in life expectancy theory with different causation rules, for two reasons. First, the adoption should come from the Washington Supreme Court. Second, differing causation rules should be adopted only if there is medical evidence as to the length of the reduction in life expectancy.

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Evidence > Types of Evidence > Documentary Evidence > General Overview

Evidence > Admissibility

Torts > Negligence > Proof > General Overview

HN25 A trial court should not allow use of life expectancy tables for a reduced life expectancy theory.

Healthcare Law > ... > Actions Against Facilities > Standards of Care > Expert Testimony

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Evidence > Admissibility > Expert Witnesses

Torts > Negligence > Proof > General Overview

HN26 Medical testimony as to the likely decrease in a patient's life span is required in a reduced life expectancy claim.

Civil Procedure > Remedies > Damages > General Overview

Insurance Law > Regulators > State Insurance Commissioners & Departments > Rules & Regulations

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Torts > Negligence > Proof > General Overview

HN27 Washington has not addressed whether the Washington Insurance Commissioner's life expectancy tables may be used to measure damages for one suffering from a preexisting condition that would otherwise shorten the decedent's life expectancy. Other courts have either discouraged or rejected use of life expectancy tables under such circumstances.

Torts > Negligence > Proof > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers > Types of Liability

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > Relevance > Relevant Evidence

HN28 The use of life expectancy tables is disfavored where a plaintiff has a preexisting condition or disease that adversely affects his or her projected life span, since the tables are based on the lives of healthy persons. The probative value of the mortality tables may be weakened, and even, perhaps, in some cases, destroyed by evidence of ill-health or disease of the person whose life expectancy is in issue. In ascertaining a plaintiff's life expectancy, a jury may take into consideration evidence as to the plaintiff's health, constitution, and habits. The mortality tables are not conclusive evidence of the life expectancy of a particular person, but are accepted only as an aid to a jury in connection with other relevant facts in arriving at the probable duration of the life of a person, such that it is error to charge that a particular person of a given age has a life expectancy of a certain number of years.

Headnotes/Syllabus

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Action for damages for medical negligence. The plaintiff claimed that as a result of the defendants' negligence, she developed cardiomyopathy and suffered physical injury, emotional distress, and "reduced life expectancy," among other injuries. The plaintiff died less than three months after filing the action. The deceased plaintiff's daughter, as personal representative of the deceased plaintiff's estate, was substituted as the plaintiff and subsequent pleadings captioned the plaintiff as "[daughter's name, individually and] as Personal Representative of the Estate of [the deceased plaintiff] and on behalf of all statutory claimants and beneficiaries."

Superior Court: The Superior Court for Spokane County, No. 10-2-00084-9, Linda G. Tompkins, J., on April 12, 2012, struck the personal representative's claims for lost chance of survival and wrongful death, ruling that (1) the personal representative lacked the requisite evidence to support a lost chance of survival or a lost chance of a better outcome claim, (2) there was no justification to deviate from

the traditional "but for" causation standard applied to medical malpractice cases, and (3) the personal representative failed to plead a wrongful death claim. The personal representative subsequently filed a second action claiming wrongful death by medical negligence. The trial court later consolidated the two actions on a motion by the personal representative. On October 19, 2012, the trial court certified its order striking the personal representative's claim for lost chance of survival.

Court of Appeals: Holding that the trial court's dismissal of the lost chance theory in the first suit did not apply to the plaintiff beneficiaries in the second suit because no such ruling was made and the consolidation did not make the ruling in the first suit applicable to the second suit, that the lost chance theory was properly dismissed because the plaintiff failed to present evidence establishing that the defendants' negligence was a "but for" cause of the decedent's lost chance, and that the claim for decreased life expectancy was properly dismissed because the plaintiff failed to provide sufficient proof of causation and damages, the court *affirms* the order dismissing the claims for lost chance and reduced life expectancy and *remands* the consolidated case for further proceedings.

Headnotes
WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1] [1]
Pleading > Amendment > Review > Moot Issue > Claim Raised in Second Action > Consolidation of Actions.

An appellate court may decline to rule on whether a trial court erred by denying a plaintiff's motion to amend a complaint to add a claim if the issue has been rendered moot by the plaintiff's filing a second action that raises the disputed claim and the trial court's consolidating the two actions.

WA[2] [2]
Appeal > Decisions Reviewable > Moot Questions > In General.

In general, an appellate court will not consider a moot issue unless it involves a matter of continuing and substantial public interest.

WA[3] [3]
Appeal > Review > Issues Not Raised in Trial Court > Court Rules > Purpose.

Under RAP 2.5(a), an appellate court may decline to review an issue, theory, argument, or claim of error not first presented to a trial court. A party seeking relief on a claim must inform the trial court of the rules of law it wishes the court to apply and must afford the trial court an opportunity to correct any error. The purpose of this general rule is to give a trial court an opportunity to correct errors and avoid unnecessary rehearings.

WA[4] [4]
Motions > Motion To Strike > Identical Claim Raised in Second Action > Consolidation of Actions > Effect.

A trial court's striking a plaintiff's claim or theory in one action does not automatically mean that an identical claim or theory is stricken from a second action subsequently filed by the plaintiff that is consolidated with the first action. Although an order of consolidation effectively discontinues the separate actions and creates a single new and distinct action, the parties to the second action are not bound by rulings earlier made in the first action. A ruling in one is not a ruling in the other unless directed by the court.

WA[5] [5]
Dismissal and Nonsuit > Review > Consideration of Materials Outside Pleadings > Summary Judgment Standard.

A trial court's order to dismiss a claim as a matter of law after considering the parties' affidavits may be treated by a reviewing court as a partial summary judgment.

WA[6] [6]
Judgment > Summary Judgment > Review > Interpretation of Facts.

An appellate court reviewing a summary judgment considers the facts of the case and the inferences therefrom in the light most favorable to the nonmoving party.

WA[7] [7]
Judgment > Summary Judgment > Determination > Test.

A summary judgment is properly granted if there is no issue of material fact and the moving party is entitled to judgment as a matter of law.

WA[8] [8]
Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > Nature of Action.

A claim against a health care provider for lost chance is not a distinct cause of action but is an analysis within, a theory contained by, or a form of an action for medical malpractice.

WA[9] [9]
Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > Pleading > Sufficiency.

A plaintiff's pleading a cause of action for medical malpractice or health care provider negligence is sufficient to raise a claim of lost chance.

WA[10] [10]

Judgment > Summary Judgment > Review > Disposition > Any Grounds Supported by Record.

An appellate court may affirm a summary judgment on any grounds established by the pleadings and supported by the record.

WA[11] [11]

Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > Categories of Claims.

Medical malpractice lost chance claims can be divided into two categories: (1) lost chance of survival and (2) lost chance of a better outcome. A claim for lost chance of survival arises when a patient dies from a preexisting condition and would likely have died from the condition, even without the negligence of the health care provider, but the patient's chances of surviving the condition were reduced by the healthy care provider's negligence. In a claim for lost chance of a better outcome, the mortality of the patient is not at issue, but the chance of a better outcome or recovery is reduced by the negligence of the health care provider.

WA[12] [12]

Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > Lost Chance of Survival > Distinguishing Characteristics.

In a traditional medical malpractice case, but for the negligence of the health care provider, the patient would likely have survived the preexisting condition—i.e, the patient had a more than 50 percent chance of survival if the condition had been timely detected and properly treated. By contrast, with a lost chance of survival theory, the patient would likely have died anyway, even on prompt detection and treatment of the disease, but the chance of survival was reduced by a percentage of 50 percent or below.

WA[13] [13]

Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > Lost Chance of a Better Outcome > Distinguishing Characteristics.

In contrast to a traditional medical malpractice case, in which the health care provider's negligence likely led to a worse than expected outcome, under a lost chance of a better outcome theory, the bad result was likely even without the health care provider's negligence, but the malpractice reduced the chances of a better outcome by a percentage of 50 percent or below.

WA[14] [14]

Courts > Stare Decisis > Plurality Opinion > Construction.

When no rationale for an appellate court's decision receives a clear majority of the court, the holding of the court is the position taken by those concurring on the narrowest grounds.

WA[15] [15]

Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > "But For" Causation > Proof > Necessity.

In an action for medical negligence on a theory of lost chance, the plaintiff must prove that the defendant's negligence was the "but for" cause of the patient's loss of chance. Nothing in precedents of the Supreme Court or in *RCW 7.70.030*, which establishes the burden of proof in a medical negligence action, suggests that a substantial factor standard of causation should be employed in an action for medical malpractice on a theory of lost chance.

WA[16] [16]

Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > "But For" Causation > Proof > Expert Testimony.

In an action for medical malpractice on a theory of lost chance, the plaintiff must provide a physician's opinion that the defendant's negligence "likely" caused a lost chance of survival or a lost chance of a better outcome. A physician's testimony that the defendant's error was a substantial factor in accelerating the patient's death does not satisfy that standard.

WA[17] [17]

Medical Treatment > Malpractice > Failure To Diagnose > Failure To Treat > Loss of Chance > Percentage > Expert Testimony > Necessity.

In an action for medical malpractice on a theory of lost chance, a physician must testify to the percentage of lost chance. Without a percentage, a court is not able to determine the amount in damages to award the plaintiff, since the award is based on a percentage of loss. Discounting damages by a determined percentage responds to the concern of awarding damages when negligence was not a proximate or likely cause of the death. Otherwise, a defendant would be held responsible for harm beyond what it caused.

WA[18] [18]

Medical Treatment > Malpractice > Decreased or Reduced Life Expectancy > Theory of Recovery > Distinguishing Characteristics.

In an action for medical negligence, a plaintiff may argue a theory of decreased or reduced life expectancy separately from a theory of lost chance. A claim for decreased or reduced life expectancy may be viewed as one in which the patient had no chance of surviving the preexisting condition, but the health care provider's negligence accelerated the patient's death; i.e., the preexisting condition would have precluded a normal life span, but the defendant's malpractice further shortened the life span.

WA[19] [19]

Medical Treatment > Malpractice > Decreased or Reduced Life Expectancy > "But For" Causation > Proof > Expert Testimony.

In an action for medical negligence on a theory of decreased or reduced life expectancy, the plaintiff must prove that the defendant's negligence was the "but for" cause of the patient's decreased or reduced chance for a longer life with a physician's opinion that the defendant's negligence "likely" decreased or reduced the chance of a longer life.

WA[20] [20]

Medical Treatment > Malpractice > Decreased or Reduced Life Expectancy > Percentage of Loss > Expert Testimony > Necessity.

In an action for medical malpractice on a theory of decreased or reduced life expectancy, a physician must testify to the percentage of the likely loss.

WA[21] [21]

Medical Treatment > Malpractice > Proximate Cause > Proof > Sufficiency.

In an action for medical negligence, a triable issue of fact on the issue of proximate cause requires facts, circumstances, and medical testimony from which a reasonable person could infer that a causal connection exists. The evidence must rise above speculation, conjecture, or mere possibility. The medical testimony must demonstrate that the alleged negligence more likely than not caused the later harmful condition leading to the injury. Evidence showing that the defendant's actions "might have," "could have," or "possibly" caused the subsequent condition is insufficient.

WA[22] [22]

Medical Treatment > Malpractice > Decreased or Reduced Life Expectancy > Proof > Life Expectancy Tables.

Life expectancy tables should not be used to determine causation or damages in an action for medical negligence on a theory of decreased or reduced life expectancy. The use of life expectancy tables is particularly disfavored if the patient had a preexisting condition or disease that adversely affected the patient's projected life span; life expectancy tables are based on the lives of healthy persons.

WA[23] [23]

Medical Treatment > Malpractice > Decreased or Reduced Life Expectancy > Proof > In General.

In an action for medical negligence on a theory of decreased or reduced life expectancy, the jury, in ascertaining the plaintiff's life expectancy, may take into consideration evidence of the patient's health, constitution, and habits. Mortality tables are not conclusive evidence of the life expectancy of a particular person, but may be accepted as an aid to the jury in connection with other relevant facts in arriving at the probable duration of the patient's life.

FEARING, J., delivered the opinion of the court, in which KORSMO, J., concurred. BROWN, A.C.J., concurred in the result only.

Appeal > Disposition of Cause > Affirmance on Other Grounds > Summary Judgment.

Counsel: *Michael J. Riccelli*, for appellants.

Ryan M. Beaudoin, *Steven J. Dixson*, and *Matthew W. Daley* (of *Witherspoon Kelley Davenport & Toole PS*), for respondents.

Judges: Authored by George B. Fearing. Concurring: Kevin M. Korsmo, Stephen M. Brown.

Opinion by: George B. Fearing

Opinion

¶1 FEARING, J. — Plaintiff Robin Rash invites us to enter a path untraveled. She brings a medical malpractice claim, on behalf of her mother's estate, in the form of a lost chance, when she has no expert testimony as to a percentage of a lost chance and only expert testimony that the medical negligence may have shortened her mother's life. She has no testimony as to the length of the mother's decreased life expectancy. We decline the request to follow an unchartered course, and we affirm the trial court's grant of summary judgment on behalf of Sacred Heart Medical Center. A higher authority will need to map any new trail.

FACTS

¶2 On March 5, 2008, Betty [*2] Zachow, age 82, underwent a right knee replacement surgery at Sacred Heart

Medical Center (SHMC). Prior to surgery, she provided SHMC a list of her medications, including metoprolol, a beta blocker used to treat high blood pressure. Before surgery, Zachow also suffered from hypertrophic cardiomyopathy, or enlargement of the heart, a genetic condition, left ventricle outflow obstruction, and mild to moderate mitral valve stenosis. Beta blockers reduced the heart rate. The beta blockers also reduced the chance of emboli and strokes.

¶3 After surgery, SHMC failed to give Betty Zachow two doses of metoprolol, one during the evening of March 5 and one the following morning. On March 6, Zachow suffered a series of complications, including tachycardia and acute pulmonary edema, and was transferred to the SHMC's Intensive Care Unit. Tachycardia is a rapid heartbeat and pulmonary edema is the filling of lungs with fluid. Zachow recovered and, 10 days after she entered the hospital, SHMC released her.

¶4 According to Robin Rash's medical expert, Dr. Wayne Rogers, Betty Zachow suffered acute pulmonary edema and aspiration pneumonia as a result of SHMC's failure to provide the two doses of metoprolol. [*3] The edema and pneumonia aggravated Zachow's weakened heart. Acute pulmonary edema also reduced oxygen saturation to the brain. According to Dr. Rogers, Zachow should have been discharged one day after the surgery, but instead a "profound illness" resulted in a 10-day stay. According to Rogers, Zachow left SHMC in a weakened state from which she never fully recovered. Rogers concedes, however, that Zachow's heart condition would have continued to deteriorate even without SHMC's omission of medication.

¶5 On April 18, 2008, the SHMC's Director of Risk Management acknowledged the medication error and offered to waive the charges for Betty Zachow's care. Zachow never responded. Over the next two years Zachow suffered two strokes.

PROCEDURE

¶6 This appeal has a complicated procedural background, which includes two lawsuits, later consolidated in the trial court. The background complicates a resolution of the appeal but does not impact its substantive outcome.

¶7 On January 7, 2010, Betty Zachow filed a complaint, under Spokane County Superior Court Cause No. 10-2-00084-9, alleging that as a result of SHMC's negligence, she developed cardiomyopathy and suffered physical injury, emotional distress, and [*4] "reduced life expectancy," among other injuries. Clerk's Papers (CP) at 6. She did not specifically allege a loss in her chances to survive. On March 21, 2010, Zachow suffered her third stroke and died. The stroke was the result of a cardiac embolism to the head.

¶8 On April 15, 2010, Betty Zachow's counsel sent a letter to SHMC informing it that he intended to substitute a personal representative for Zachow and "file an amended complaint to include the Estate's claims, and include the claims of the Zachow adult children as statutory beneficiaries." CP at 99. The beneficiaries are Robin Rash and her two brothers, sons of Betty Zachow. Robin Rash, Zachow's daughter, was appointed Zachow's personal representative but Rash never moved for leave to amend nor filed an amended complaint. The parties, nonetheless, beginning in at least March 2011, if not earlier, filed pleadings in Spokane County Superior Court Cause No. 10-2-00084-9, whose captions removed Betty Zachow as plaintiff and named, as plaintiff, "Robin Rash, [individually and] as Personal Representative of the Estate of Betty L. Zachow, deceased, and on behalf of all statutory claimants and beneficiaries." CP at 191.

¶9 On March 26, 2012, the parties filed a trial management [*5] joint report, in which Robin Rash wrote, "Betty's adult children suffered from the untimely loss of [Zachow], due to [SHMC's] negligence." CP at 13. In response, SHMC sent a letter claiming the report was the first time it heard Rash sought survival damages for Zachow's statutory beneficiaries separate and apart from the claims made by her estate.

¶10 In a motion in limine, filed on March 30, 2012, SHMC moved to preclude, at trial, any reference to Betty Zachow's loss of chance of survival theory because the theory was not pled. SHMC also argued in its trial brief that Rash must establish SHMC's negligence was the "but for" cause of Zachow's injuries. CP at 235.

¶11 Robin Rash's trial brief, filed on April 3, 2012, argued that her original complaint gave SHMC notice that she intended to bring a lost chance of survival claim. Rash cited the original complaint's language that Zachow suffered from "reduced life expectancy." In the brief, Rash also contended that one "can bring a claim for loss of chance of survival and/or for wrongful death, based upon the substantial factor doctrine." CP at 241. To support her claim, Rash cited to deposition testimony of Wayne R. Rogers, who opined that SHMC "promoted" or "accelerated" [*6] the disease process. CP at 242. Dr. Rogers could not provide a "mathematical figure" as to the degree SHMC accelerated the disease, but noted it was significant. CP at 73, 242.

¶12 During questioning by defense counsel at Dr. Rogers' deposition, Rogers testified:

> "Q. Doctor, just a couple follow-ups. Your bottom-line opinion is that because of the events in Sacred Heart in March of 2008, Ms. Zachow's deterioration was accelerated? Is that what you're basically saying?
>
> A. Or promoted. She eventually would have died anyway, as we all do, but she had a promotion of her disease process.
>
> Q. And you can't state, as we sit here today, how much her disease was promoted or accelerated; is that correct?
>
> A. I can't give you a mathematical figure, but I would say it was significant and led to her death.
>
> Q. Other than being significant and ultimately, in your opinion, resulting to her death, you can't go any farther than that?
>
> A. No, I don't think I can."

CP at 242 (emphasis omitted).

¶13 On April 4, 2012, SHMC moved to strike Robin Rash's loss of chance "cause of action or, in the alternative, to continue the trial date." CP at 35. In its motion, SHMC claimed Rash never pled, disclosed in any answers, or developed any expert testimony to support a [*7] reduced loss of chance claim. Dr. Rogers' testimony, SHMC contended, was insufficient to establish SHMC as the "but for" cause of Zachow's loss of chance. CP at 36. In response to SHMC's motion to strike any lost chance theory, Rash moved to amend her complaint to include two new claims (1) loss of chance and (2) wrongful death damages on behalf of all statutory claimants. Rash did not complain that SHMC's motion to strike was a disguised summary judgment motion. Nor did she contend she needed additional time to respond to the motion to strike. Instead, Rash joined with SHMC's request to shorten the time for the hearing on the motion to strike and her motion to amend the complaint.

¶14 On April 12, 2012, the trial court concluded that Robin Rash lacked the requisite evidence to support a lost chance of survival claim or a lost chance of a better outcome claim. The trial court ruled that there was no justification to deviate from the traditional "but for" causation standard applied to medical malpractice cases. CP at 141. The trial court also decided that Rash failed to plead the wrongful death claims. The court denied Rash's motion to amend her complaint and granted SHMC's motion to strike Rash's claims [*8] for loss of chance and wrongful death. Though SHMC cast its motion as a motion to strike, both parties and the trial court treated the motion as a motion for partial summary judgment. The parties submitted declarations and documentary evidence in support and in opposition to the motion. The motion focused on whether Rash made a prima facie case of a lost chance.

¶15 On April 16, 2012, Robin Rash, under Spokane County Superior Court Cause No. 12-2-01478-1, filed a separate action as personal representative of her mother's estate on behalf of the estate, her two brothers, and herself. She alleged SHMC's negligence in health care caused Betty Zachow a rapid and irregular heartbeat and permanent physical injury, exacerbated her genetic heart condition, increased the likelihood of an adverse heart attack or stroke, accelerated her decline, and was a proximate cause or substantial factor in her death. The second complaint also omits the term "lost chance of survival." The complaint seeks to recover damages on behalf of Betty Zachow's children under Washington's wrongful death laws.

¶16 In July 2012, Robin Rash moved to consolidate the two actions, Spokane County Superior Court Cause No. 10-2-00084-9 [*9] and Spokane County Superior Court Cause No. 12-2-01478-1, and the court granted her motion. The order of consolidation reads, in part:

> (2) Spokane County Cause No. 12201478-1 is hereby consolidated, for all purposes, into, and together with, Spokane County Cause No. 10200084-9, the remaining action to be recaptioned to reflect the addition of plaintiff Robin Rash as Personal Representative of the Estate of Betty L. Zachow, deceased, and on behalf of all statutory claimants and beneficiaries: Robin R. Rash, Keith R. Zachow and Craig L. Zachow.

CP at 191.

¶17 On September 21, 2012, SHMC moved, pursuant to CR 54(b), to certify the trial court's April order striking Rash's loss of chance claim in cause No. 10-2-00084-9. SHMC contended Rash asserted multiple claims for relief and no just reason existed to delay entry of judgment. The motion did not expressly seek the application of the April ruling to the second consolidated action. Nevertheless, the memorandum in support of the motion preached against a "second bite at the apple." CP at 204.

¶18 In response to the motion for certification, Robin Rash contended that procedurally the consolidated matter is a

new action and the prior order striking the loss of chance "claim" [*10] should be disregarded, as the basis for SHMC's earlier motion to dismiss was a surprise. CP at 212. In the event the trial court agreed that Robin Rash could not pursue a lost chance "claim" in the new action, Rash joined SHMC's request that the court certify its April 2012 order as final for purposes of appeal. Although Rash mentioned that she might hire a new medical expert, Rash did not ask the court for a continuance of the motion for certification. Nor did she ask the trial court for the opportunity to file additional affidavits or other evidence to thwart dismissal of the loss of chance claim.

¶19 On October 5, 2012, the trial court conducted a hearing on SHMC's motion for certification, although the parties filed additional pleadings in support and in opposition to the motion thereafter. On October 19, the trial court ruled in SHMC's favor and certified its order striking Rash's loss of chance claim. The trial court did not expressly rule that the dismissal of the lost chance claim applied to the second, but consolidated, suit. The order of certification included both suit's captions, but someone struck the number 12-2-01478-1 in the caption.

LAW AND ANALYSIS

¶20 ISSUE 1: Whether the trial court [*11] erred when it refused to permit Rash to amend her complaint in the first suit?

¶21 ANSWER 1: We do not address the question since the issue is moot.

WA[1,2] [1, 2] ¶22 Robin Rash assigns error to the trial court's refusal, in April 2012, to grant her motion to amend her complaint in the first filed action. The motion sought to add loss of a chance of survival and wrongful death claims. This court, after the trial court's ruling, held that a lost chance claim is not distinct from a medical malpractice claim and that the pleading of a medical malpractice cause of action suffices for the plaintiff to forward a claim of lost chance of survival. *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC, 177 Wn. App. 828, 313 P.3d 431 (2013)*. Nevertheless, we need not address this assignment of error since the filing of the second lawsuit and consolidation with the first suit cured any error. The 2012 complaint does not specifically allege a claim for lost chance of survival, but pleads a claim of health care negligence. The parties, on appeal, assume that the second complaint added the allegation of a lost chance. ***HN1*** Generally, this court will not consider a moot issue unless it involves matters of continuing and substantial public interest. *Bavand v. OneWest Bank, F.S.B., 176 Wn. App. 475, 510, 309 P.3d 636 (2013)*.

¶23 ISSUE 2: Did the trial court err when it entertained SHMC's motion [*12] to dismiss the lost chance theory in the 2010 case and certification of that order, without the filing by SHMC of a summary judgment motion?

¶24 ANSWER 2: Assuming any error, we do not address the error because Robin Rash failed to object to the process at the trial court.

¶25 Robin Rash contends the trial court erred in September 2012 when it certified as final its April 2012 ruling dismissing Rash's loss of chance claim and thereby applying the ruling to the second action brought for wrongful death and survival. The second action was consolidated with the first suit after the April ruling. In this second assignment of error, Rash asserts both substantive error and procedural error. According to Rash, the trial court should have granted Rash more time to defend the April 2012 motion to strike any lost chance theory, since the motion was essentially one for summary judgment. According to Rash, the trial court should have also granted her more time to respond to the September motion for certification and treated the *CR 54(b)* motion as a summary judgment motion under *CR 56*.

¶26 Robin Rash encounters an insurmountable obstacle when asserting that she should have received more time to prepare a response to the April [*13] motion to strike and the September motion to certify the April ruling as final. Rash never asked for additional time to develop more evidence before the trial court entertained either motion. Instead, Rash joined in SHMC's request for expedited review of the April motion. Rash, on neither occasion below, complained that either the motion to strike or the motion to certify were disguised summary judgment motions that required a lengthier notice than given.

WA[3] [3] ¶27 ***HN2*** An appeals court will not review an issue, theory, argument, or claim of error not presented at the trial court level. *RAP 2.5(a)*; *Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001)*. A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)*. The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary rehearings. *Postema v. Postema Enters., Inc., 118 Wn. App. 185, 193, 72 P.3d 1122 (2003)*. Thus, we refuse to entertain Robin Rash's argument that she should have been given more time to respond to both motions. She could have corrected any error and saved the court system time by asserting her argument before the trial court.

¶28 ISSUE 3: Did the trial court err when applying the dismissal of the lost chance theory in the 2010 suit to [*14]

the 2012 suit, when the statutory beneficiaries of the wrongful death action were not parties to the first case?

¶29 ANSWER 3: We do not address this assignment of error since we conclude that the trial court did not attach the dismissal of the lost chance theory to the 2012 suit.

¶30 Robin Rash next argues that the trial court erred when ruling that the April dismissal of the lost chance theory in the 2010 suit applied to beneficiaries of the new 2012 suit. This argument assumes that the trial court issued such a ruling. We read the record before us otherwise. The order of certification, after consolidation of the two suits, does not state that the dismissal of any lost chance theory applies to the 2012 suit. Someone struck from the order the case number of the 2012 suit. The striking of the number may be the result of the clerk's preference of only one cause number on the caption and the traditional use of the earliest cause number, rather than any desire that the dismissal not apply to the second suit. Nevertheless, the fact remains that the order of certification does not state that any lost chance theory is dismissed from the 2012 suit. Also, SHMC's motion did not expressly ask for a ruling [*15] applying the dismissal order to the 2012 case.

WA[4] [4] ¶31 We find no case that addresses whether a ruling from a first suit applies to a second suit after consolidation of the two suits, or, more particularly, whether dismissal of a theory in the first suit automatically means that same theory is dismissed in a second suit upon consolidation. Principles from many foreign decisions, decided in distinct contexts, support a conclusion that the ruling in the first case does not extend to the second case.

¶32 The pleadings and depositions in suit number one are not part of suit number two. *Bouldin v. Taylor, 152 Tenn. 97, 275 S.W. 340, 349 (1925)*. It is perfectly well settled in Tennessee that the order of consolidation has no such effect. *Bouldin, 275 S.W. at 349*. The rights of the litigants must still turn on the pleadings, proof, and proceedings of their respective suits. *Bouldin, 275 S.W. at 349*. Consolidation does not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits. *Bouldin, 275 S.W. at 349*. The parties in one suit do not thereby become parties in the other, and a decree in one is not a decree in the other, unless so directed. *Bouldin, 275 S.W. at 349*. It operates as a mere carrying on together of two separate suits supposed to involve [*16] identical issues and is intended to expedite the hearing and diminish expense. *Bouldin, 275 S.W. at 349*.

¶33 Consolidation does not merge two suits into a single cause, change the rights of the parties, or make those who are parties in one suit parties in another. *Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp., 665 F.3d 671, 676 (5th Cir. 2011)*. Under a consolidation order, the parties and the pleadings are not merged, and each action retains its own identity. *Ellis by Ellis v. Oliver, 307 S.C. 365, 415 S.E.2d 400 (1992)*. Missouri courts have recognized that when actions are consolidated only for joint hearing or trial, the rights of action are not merged into one but remain separate and distinct. *Moss v. Home Depot USA, Inc., 988 S.W.2d 627, 630 (Mo. App. E.D. 1999)*. Consolidation affects the procedure of the cases, but has no effect on the substantive rights of the parties in an individual case and does not destroy their separate identities. *CDI Contractors, LLC. v. Allbrite Elec. Contractors, Inc.*, 836 So.2d 1031, 1033 (Fla. 5th DCA 2002). Cases do not lose their separate status merely because they are consolidated for processing and trial. *County Comm'rs of Carroll County v. Carroll Craft Retail, Inc., 384 Md. 23, 33, 862 A.2d 404 (2004)*. A consolidation of actions does not affect the rights of the parties. *Wouldridge v. Burns, 265 Cal. App. 2d 82, 86, 171 Cal. Rptr. 394 (1968)*.

¶34 Where several actions are ordered to be consolidated for trial, each action retains its separate identity and thus requires the entry of a separate judgment. *Solomon v. Liberty Nat'l Life Ins. Co., 953 So.2d 1211 (Ala. 2006)*. Moreover, an order of consolidation does not merge the actions into a single action, change the rights or the parties, or make those who are parties [*17] to one action parties to another. *Pitts v. Jim Walter Resources, Inc., 994 So.2d 924, 930 (Ala. Civ. App. 2007)*. In consolidated actions, the parties and pleadings in one action do not become parties and pleadings in the other. *Pitts, 994 So.2d at 930*.

¶35 Finally, from the Napoleonic Code state, the consolidation of actions pursuant to LSA-C.C.P. art. 1561 is a procedural convenience designed to avoid multiplicity of actions and does not cause a case to lose its status as a procedural entity. *Howard v. Hercules-Gallion Co., 417 So.2d 508, 511 (La. App. 1st Cir. 1982)*. Procedural rights peculiar to one case are not rendered applicable to a companion case by the mere fact of consolidation; each case must stand on its own merits. *Howard, 417 So.2d at 511*. The consolidation of two cases did not in any way enlarge or decrease the rights of the litigants. *Johnson v. Shafor, 22 So.3d 935, 941 (La. App. 1st Cir. 2009)*. Procedural or substantive rights peculiar to one case are not rendered applicable to the companion suit by the mere fact of consolidation. *Williams v. Scheinuk, 358 So.2d 340, 341 (La. App. 4th Cir. 1978)*.

¶36 In our home courts, ***HN3*** an order of consolidation effectively discontinues the separate actions and creates a

single new and distinct action. *Jeffery v. Weintraub, 32 Wn. App. 536, 547, 648 P.2d 914 (1982)*. This principle does not, however, suggest that new parties to the second suit are bound by rulings earlier made in the first suit.

¶37 Our observation that the lost chance theory has not been dismissed in the 2012 suit may only be a momentary victory for the beneficiaries [*18] of Betty Zachow's estate. Upon remand, SHMC will have the opportunity to file a motion to dismiss the lost chance theory in the second suit, based upon our ruling affirming the dismissal of the theory in the 2010 suit.

¶38 ISSUE 4: Did the trial court err when it struck, on the merits, Robin Rash's loss of chance theory in the 2010 lawsuit?

¶39 ANSWER 4: No.

¶40 After an extended detour, we arrive at the epicenter of the appeal. We ask whether the trial court, under the facts read in a glow favorable to Robin Rash and based upon the testimony of Dr. Wayne Rogers, properly dismissed the 2010 suit's lost chance theory as a matter of law.

¶41 The trial court struck Rash's claim because she failed to present evidence establishing SHMC's negligence was a "but for" cause of Betty Zachow's loss of chance. Rash argues a plaintiff need only show defendant's negligence was a substantial factor, but does not distinguish between a substantial factor in causing harm and a substantial factor in causing a lost chance. According to Rash, Dr. Wayne Rogers' testimony that SHMC's negligence "significantly" accelerated her weakening heart satisfies the laxer proximate cause standard of negligence being a substantial factor [*19] in the harm.

¶42 Because of the esoteric nature of the contentions and the law on point, we find it helpful to pose discrete questions to assist in answering the overall issue of whether Robin Rash's version of the facts survive a summary judgment motion on the element of causation. First, may a plaintiff recover by establishing the negligence of the health care provider was a substantial factor, rather than the "but for" cause, under a lost chance analysis? Second, may a plaintiff recover in a medical malpractice suit for a reduced life expectancy? Third, may a plaintiff recover by establishing the negligence of the health care provider was a substantial factor, rather than the "but for" cause, under a reduced life expectancy analysis? Fourth, must a plaintiff have expert testimony of the length of the reduced life expectancy in order to sustain a claim for decreased life expectancy? Fifth and conversely, may a plaintiff recover under a decreased life expectancy analysis by the use of statistical averages, such as average life expectancy tables? We address these questions in such order, but conflate the last two questions.

WA[5-7] [5-7] ¶43 ***HN4*** Since the court dismissed the lost chance claim as a matter of law [*20] after reviewing affidavits, we consider the ruling to be a partial summary judgment order. ***HN5*** Under summary judgment, the court considers the facts and inferences from the facts in a light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)*. A court may grant summary judgment if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Jones, 146 Wn.2d at 300-01*. In forwarding its motion to dismiss, SHMC assumed those facts most favorable to Robin Rash, including the opinions rendered by Rash's expert, Dr. Wayne Rogers.

Causation in Lost Chance Analysis

WA[8,9] [8, 9] ¶44 ***HN6*** A lost chance claim is not a distinct cause of action but an analysis within, a theory contained by, or a form of a medical malpractice cause of action. *Dormaier, 177 Wn. App. at 854-57*. Thus, throughout this opinion, we do not refer to lost chance as a cause of action, but a doctrine, theory, claim, or analysis, unless we cite pleadings of the parties that use the term "cause of action." ***HN7*** A plaintiff's pleading of a medical malpractice or health care provider negligence cause of action is sufficient to raise a lost chance claim. *Dormaier, 177 Wn. App. at 857*.

WA[10] [10] ¶45 The trial court erred when dismissing the lost chance claim in the 2010 lawsuit on the ground that the theory was not pled by Betty [*21] Zachow. We still affirm the trial court's dismissal since the trial court correctly dismissed the theory on its merits. ***HN8*** We can affirm the trial court on any grounds established by the pleadings and supported by the record. *Gross v. City of Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978)*; *E. Wind Express, Inc. v. Airborne Freight Corp., 95 Wn. App. 98, 102, 974 P.2d 369 (1999)*.

WA[11-13] [11-13] ¶46 ***HN9*** Lost chance claims can be divided into two categories: lost chance of survival and lost chance of a better outcome. *Herskovits v. Grp. Health Coop. of Puget Sound, 99 Wn.2d 609, 664 P.2d 474 (1983)*; *Mohr, 172 Wn.2d 844, 262 P.3d 490 (2011)*. ***HN10*** In a lost chance of survival claim, the patient died from a preexisting condition and would likely have died from the condition, even without the negligence of the health care provider. Nevertheless, the negligence reduced the patient's chances of surviving the condition. *Herskovits, 99 Wn.2d 609*. The

quintessential example of a lost chance of survival claim is a preexisting cancer that a physician untimely diagnosed. ***HN11*** We distinguish between a lost chance of survival theory and a traditional medical malpractice theory. In the latter, but for the negligence of the health care provider, the patient would likely have survived the preexisting condition. In other words, the patient had a more than 50 percent chance of survival if the condition had been timely detected and properly treated. In a lost chance claim, the patient would likely have died anyway even upon prompt [*22] detection and treatment of the disease, but the chance of survival was reduced by a percentage of 50 percent or below.

¶47 ***HN12*** In a lost chance of a better outcome claim, the mortality of the patient is not at issue, but the chance of a better outcome or recovery was reduced by professional negligence. *Mohr, 172 Wn.2d at 857*. In a traditional medical malpractice case, the negligence likely led to a worse than expected outcome. Under a lost chance of a better outcome theory, the bad result was likely even without the health care provider's negligence. But the malpractice reduced the chances of a better outcome by a percentage of 50 percent or below.

¶48 Robin Rash points to the 50 percent or less causation standard in lost chance claims to argue that Washington has adopted a substantial factor test and removed the "but for" causation standard in a health care provider malpractice cause of action, or at least when the cause of action is based upon a lost chance theory. We do not read Washington decisions in this light. To address Rash's contention, we review a handful of Washington decisions on lost chance.

¶49 *Herskovits*, is the first Washington case to address a theory of lost chance in a medical malpractice suit. In *Herskovits* [*23] , the widow of Leslie Herskovits sued physician William Spencer, an employee of Group Health, for medical malpractice. The state high court assumed that Spencer negligently and untimely failed to diagnose Leslie Herskovits' lung cancer. If Spencer had timely diagnosed the cancer, Herskovits' chance of survival would have been 39 percent. Because of the late diagnosis, Herskovits' chance of survival was 25 percent. Thus, Spencer's negligence reduced Herskovits' chance of survival by 14 percent. Under traditional negligence jurisprudence, Herskovits' surviving wife would lose, because she could not prove that the alleged negligence of Dr. Spencer caused any damage, since Herskovits would have likely died anyway. The court addressed the question: "whether an estate can maintain an action for professional negligence as a result of failure to timely diagnose lung cancer, where the estate can show probable reduction in statistical chance for survival but cannot show and/or prove that with timely diagnosis and treatment, decedent probably would have lived to normal life expectancy [?]" *Herskovits, 99 Wn.2d at 610*.

¶50 A split state Supreme Court allowed Edith Herskovits to maintain her action. Justice Dore joined by one [*24] other justice wrote the lead opinion. Justice Dore relied upon *Restatement (Second) of Torts § 323(a)* (1965), which reads, in part, "'One who undertakes ... to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm.'" Justice Dore did not wish to provide a "blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence." *Herskovits, 99 Wn.2d at 614*. *Section 323(a)* constituted "authority to relax the degree of certitude normally required of plaintiff's evidence in order to make a case for the jury." *Herskovits, 99 Wn.2d at 615*. Justice Dore held that "medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury." *Herskovits, 99 Wn.2d at 619*.

¶51 Justice Pearson wrote a concurring opinion joined by three other justices. This plurality opinion spoke briefly of modifying the standard of proof for causation but emphasized redefining the injury:

> Therein lies [*25] the crux of this case, for it is possible to define the injury or "disability" to Mr. Herskovits in at least two different ways. First, and most obviously, the injury to Mr. Herskovits might be viewed as his death. Alternatively, however, the injury or disability may be seen as the reduction of Mr. Herskovits' chance of surviving the cancer from which he suffered.
>
> Therefore, although the issue before us is primarily one of causation, resolution of that issue requires us to identify the nature of the injury to the decedent. Our conception of the injury will substantially affect our analysis. If the injury is determined to be the death of Mr. Herskovits, then under the established principles of proximate cause plaintiff has failed to make a prima facie case.
>
> If, on the other hand, we view the injury to be the reduction of Mr. Herskovits' chance of survival,

> our analysis might well be different. Dr. Ostrow [Herskovits' expert] testified that the failure to diagnose cancer in December 1974 probably caused a substantial reduction in Mr. Herskovits' chance of survival.

Herskovits, 99 Wn.2d at 623-24. Justice Pearson chose to "view the reduction in or loss of the chance of survival, rather than the death itself, as the injury." [*26] *Herskovits, 99 Wn.2d at 632* (Pearson, J., concurring). He held 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." *Herskovits, 99 Wn.2d at 634* (emphasis added).

¶52 In *Shellenbarger v. Brigman, 101 Wn. App. 339, 3 P.3d 211 (2000)*, the court viewed the *Herskovits* plurality opinion as redefining the "harm" as a reduction in the chance of survival. In *Daugert v. Pappas, 104 Wn.2d 254, 704 P.2d 600 (1985)*, the Supreme Court declined to extend the lost chance doctrine to a legal malpractice claim. The court considered *Herskovits* to either modify the traditional "but for" causation test, redefine an injury to include a lost chance, or both. In *Sorenson v. Raymark Indus., Inc., 51 Wn. App. 954, 756 P.2d 740 (1988)*, the court declined to apply *Herskovits* in the context of an asbestos product liability suit. The court remarked that a second holding in *Herskovits* is that reduction in a patient's opportunity to recover from the illness is a real, distinct, and compensable injury. *Sorenson, 51 Wn. App. at 957*.

¶53 Twenty-eight years after *Herskovits*, our Supreme Court again addressed the notion of a lost chance, in a medical malpractice suit, in *Mohr, 172 Wn.2d 844*. Linda Mohr and her husband claimed that the alleged medical negligence decreased the extent of her recovery from a stroke. As a result of the stroke, Mohr suffered permanent brain damage. [*27] Plaintiffs' experts testified that had Mohr received nonnegligent treatment, she would have had a 50 to 60 percent[1] chance of a better outcome.

WA[14-16] [14-16] ¶54 In *Mohr*, the Supreme Court framed the issue as, "In the medical malpractice context, is there a cause of action for a lost chance of a better outcome?" *Mohr, 172 Wn.2d at 850*. The *Mohr* court addressed the question in the context of whether Mohr must prove "but for" causation or only that the negligence was a substantial factor in harm. The Supreme Court ruled that Linda Mohr could proceed to recover for a loss of a chance of a better outcome if she proved negligence. The *Mohr* court concluded:

> We hold that ***HN13*** there is a *cause of action* in the medical malpractice context for the loss of a chance of a [*28] better outcome. A plaintiff making such a *claim* must prove duty, breach, and that there was *an injury in the form of a loss of a chance* caused by the breach of duty. *To prove causation*, a plaintiff would then rely on established tort *causation doctrines* permitted by law and the specific evidence of the case. Because the Mohrs made a prima facie case of the requisite elements of proof, we reverse the order of summary judgment and remand to the trial court for further proceedings.

Mohr, 172 Wn.2d at 862 (emphasis added). The *Mohr* court rejected Justice Dore's approach of relaxing the causation standard and formally adopted the *Herskovits* plurality's rationale of redefining the injury as "the lost chance." *Mohr, 172 Wn.2d at 859*.

¶55 The *Mohr* court's adoption of Justice Pearson's decision in *Herskovits* is consistent with rules of analyzing splintered opinions. ***HN14*** When no rationale for a decision of an appellate court receives a clear majority, the holding of the court 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)*; *Zueger v. Pub. Hosp. Dist. No. 2 of Snohomish County, 57 Wn. App. 584, 591, 789 P.2d 326 (1990)*. Following this principle, ***HN15*** the *Herskovits* plurality represents the law on a loss of the chance of survival. *Zueger, 57 Wn. App. at 591*. The plurality opinion in *Herskovits* requires a plaintiff to present evidence [*29] that a defendant's negligence was the "but for cause" of the plaintiff's loss of chance. *Herskovits, 99 Wn.2d at 634-35*. Rash is therefore incorrect. She must establish SHMC's negligence was the "but for cause" of Zachow's loss of chance.

¶56 Robin Rash relies, in part, on *Sharbono v. Universal Underwriters Insurance Company, 139 Wn. App. 383, 161 P.3d 406 (2007)*, wherein this court characterized *Herskovits* as employing the "substantial factor test" for determining proximate cause in medical malpractice cases where the malpractice reduces a decedent's chance of survival. *Mohr*

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[1] One wonders if *Mohr* should be treated as a lost chance case, since under traditional proximate cause principles, Mohr needed to only establish by a 51 percent chance that the alleged negligence caused her increased disability. Perhaps the case was considered one involving a lost chance because the range of percentages dipped below 51 percent by one percent. The trial court granted Grantham summary judgment dismissing the suit because Mohr could not show "but for" causation.

v. Grantham, 172 Wn.2d 844, declares we were wrong. *Sharbono* was not even a decision involving medical malpractice, but rather a case involving insurance coverage and bad faith.

¶57 Washington decisions were decided with the backdrop of Washington's 1976 health care act that covers actions for injuries resulting from health care. *See ch. 7.70 RCW.* ***HN16*** Under *RCW 7.70.030*: "Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving *each fact essential* to an award by a *preponderance of the evidence*." (Emphasis added). One essential element is that the health care provider's "failure was a *proximate cause of the injury complained of*." *RCW 7.70.040* (emphasis added). Nothing in the statute suggests that a substantial factor standard of causation should be employed in a medical malpractice [*30] suit.

¶58 Based upon *Herskovits* and *Mohr*, ***HN17*** Robin Rash need not forward medical testimony that negligence of SHMC was the likely cause of Betty Zachow's death or of a bad outcome. But, Rash must provide a physician's opinion that SHMC "likely" caused a lost chance of survival or a lost chance of a better outcome. Dr. Wayne Rogers' testimony that the hospital error was a substantial factor in accelerating death does not satisfy this requirement. This lack of testimony is pivotal in Robin Rash's suit.

WA[17] [17] ¶59 Wayne Rogers also provided no testimony as to any percentage of a lost chance. ***HN18*** Every Washington decision that permits recovery for a lost chance contains testimony from an expert health care provider that includes an opinion as to the percentage or range of percentage reduction in the chance of survival. *Herskovits, 99 Wn.2d at 611* (14 percent reduction in chance of survival); *Mohr, 172 Wn.2d at 849* (50 to 60 percent chance of better outcome); *Shellenbarger, 101 Wn. App. at 348* (20 percent chance that the disease's progress would have been slowed). Without that percentage, the court would not be able to determine the amount of damages to award the plaintiff, since the award is based upon the percentage of loss. *See Smith v. Dep't of Health & Hosps., 676 So.2d 543, 546-47 (La. 1996)*. Discounting damages by that percentage responds to a concern [*31] of awarding damages when the negligence was not the proximate cause or likely cause of the death. *Mohr, 172 Wn.2d at 858; Matsuyama v. Birnbaum, 452 Mass. 1, 17, 890 N.E.2d 819 (2008)*. Otherwise, the defendant would be held responsible for harm beyond that which it caused. The leading author on the subject of lost chance declares:

> Despite the sound conceptual underpinnings of the doctrine, its successful application depends on the quality of the appraisal of the decreased likelihood of a more favorable outcome by the defendant's tortious conduct.

Joseph H. King, Jr., *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L. Rev. 491, 546-47 (1998)*. This quote promotes accurate calculations and use of percentages.

Decreased Life Expectancy

¶60 Because of the unique facts of the appeal, we do not end our analysis with a review of the causation standards in a lost chance claim. We explore other arguments and other possible related theories to answer whether Robin Rash's claim can survive a summary judgment motion. We note, however, that inevitably the outcome of the case returns to the same causation rules found in a lost chance claim.

WA[18] [18] ¶61 In Betty Zachow's complaint she asked for damages for a reduced life expectancy. Although she conflates her analysis of a reduced [*32] life expectancy theory with the lost chance doctrine, ***HN19*** Rash may argue that a reduced life expectancy theory is different in nature than a lost chance theory and that different causation standards should apply to the former theory. We explore whether a reduced life expectancy theory exists and whether its causation rules are laxer.

¶62 We believe that characterizing Robin Rash's claim as one for the decreased life expectancy presents a clearer picture of her claim than identifying the claim as one for a lost chance. We brand ***HN20*** a potential claim for reduced life expectancy to be one in which the patient had no chance of surviving the preexisting condition, but the health care provider's negligence accelerated the death. In other words, the preexisting condition would have precluded a normal life span, but the malpractice further shortened the life span.

¶63 One Washington Court of Appeals decision discusses a claim for reduced life expectancy in the context of a medical malpractice cause of action. In *Shellenbarger v. Brigman, 101 Wn. App. 339*, two of Gerald Shellenbarger's physicians failed to diagnose and treat his lung disease in its early stages. Shellenbarger had been exposed to asbestos during work. Shellenbarger's medical expert witness [*33] agreed that Shellenbarger would have died early regardless of timely treatment. The expert testified, however, that, if the physicians had diagnosed and treated the disease earlier, Shellenbarger would have had a 20 percent chance that the disease's progress would have been slowed. The trial court

granted the physicians' summary judgment on the question of proximate cause. We reversed.

¶64 In *Shellenbarger v. Brigman*, we noted that Gerald Shellenbarger did not argue that he had a lost chance of survival. Instead, he contended he had a lost chance of slowing the disease. We reasoned that Shellenbarger's claim was in essence the same as a lost chance of survival. We noted that, if Leslie Herskovits, in Washington's seminal decision, had been cured of lung cancer, he could have expected additional years of life. Similarly, Shellenbarger claimed he should have expected additional years of life.

Causation in Reduced Life Expectancy Analysis

WA[19,20] [19, 20] ¶65 ***HN21*** *Shellenbarger v. Brigman* teaches that the same analysis applied to a claim based upon a lost chance of survival should be applied to a claim based upon a reduced life expectancy. Presumably, the same causation analysis applies to both claims. Under *Herskovits* [*34] and *Mohr*, we redefine the injury as a "chance" for longer life, not life itself or a full life. Thus, under any reduced life expectancy theory, a plaintiff must still prove the negligence "likely" reduced the "chance" of a longer life. Shellenbarger's expert impliedly testified that the untimely diagnosis likely reduced the chance of a longer life and that chance was 20 percent. Shellenbarger could then recover 20 percent of the damages incurred because of a shorter life.

¶66 ***HN22*** We question the analysis in *Shellenbarger v. Brigman*. The analysis creates a complicated quest to determine if the patient has likely been injured. A physician must first determine if the malpractice likely reduced the "chance" of a longer life and, thereafter, opine what is the percentage that the chance was reduced. The length in the reduced life span is apparently irrelevant. We believe that a better analysis would be to require the patient's expert to testify that the malpractice likely reduced the life span and then give an opinion as to the length of any life reduction, such that the jury may impose damages based upon that quantified reduction. The plaintiff may then receive the full award for the reduced life [*35] expectancy, not just a percentage of the award. A leading commentator advocates compensation for the full value of the months by which the decedent's life was probably shortened. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1382-83 (1981). In short, the *Herskovits* analysis becomes problematic for a jury, if not a judge, in a bench trial. Applying the *Herskovits* analysis fits better with a lost chance of survival claim, since the lost chance is of a full life not some already known or unknown shortened life span.

¶67 We question the ability of a medical expert to retroactively predict the life expectancy of a patient with a preexisting condition before interference by medical malpractice. But any difficulty can be addressed another day. Determining the lost chance of survival by a percentage may be as difficult.

¶68 Dr. Wayne Rogers does not expressly testify that the failure to provide the two doses of beta blockers "likely" reduced Betty Zachow's "chances" of a longer life. Stretching the facts to the end of the light spectrum in favor of Robin Rash might lead us to conclude that Rogers impliedly so testified. Nevertheless, [*36] even under a *Shellenbarger* analysis, Rash's suit cannot survive a summary judgment motion. Assuming Wayne Rogers testified that SHMC's conduct likely reduced Zachow's life expectancy, he does not testify as to the percentage of that likely loss.

WA[21] [21] ¶69 *Shellenbarger v. Brigman* followed standard principles of proximate cause. The court wrote:

> ***HN23*** In a medical negligence case, summary judgment is not appropriate if "a reasonable person could infer, from the facts, circumstances, and medical testimony that a causal connection exists." But the evidence must "rise above speculation, conjecture, or mere possibility." "[M]edical testimony must demonstrate that the alleged negligence 'more likely than not' caused the later harmful condition leading to injury; that the defendant's actions 'might have,' 'could have,' or 'possibly did' cause the subsequent condition is insufficient."

101 Wn. App. at 348 (internal citations omitted).

Use of Life Expectancy Tables

¶70 We analyze now the heart of Robin Rash's theories of liability, causation, and damages. Robin Rash claims she can survive a summary judgment motion by comparing the life expectancy of a woman at Betty Zachow's age at the time of the negligence with the length of time Zachow lived [*37] after the negligence. Rash notes that, at the time of the knee surgery, the mortality table showed Betty Zachow's life expectancy was 7.56 years. She died two years later. Rash asks that the jury be able to determine damages based upon a shortened life of five and one-half years, since her expert witness testified that SHMC's conduct was a substantial factor in an accelerated death.

WA[22,23] [22, 23] ¶71 ***HN24*** We refuse to adopt Robin Rash's theory of causation and damages and decline the

adoption of a reduction in life expectancy theory with different causation rules, for two reasons. First, the adoption should come from the Washington Supreme Court. Second, differing causation rules should be adopted only if there is medical evidence as to the length of the reduction in life expectancy. We hold that ***HN25*** a trial court should not allow use of life expectancy tables for a reduced life expectancy theory. We further hold that ***HN26*** medical testimony as to the likely decrease in a patient's life span is required in a reduced life expectancy claim.

¶72 Using the average life expectancy for a woman the age of Betty Zachow is not fair, because her preexisting conditions would likely have led to a premature death without the negligence [*38] of SHMC. Although Dr. Rogers testified to an accelerated death, he never established a life expectancy for Zachow, before the professional negligence, nor testified to a reduction in years or months of Betty Zachow's life because of the malpractice. We know when Zachow's life ended, but we do not know the date of the likely ending without the negligence of SHMC.

¶73 ***HN27*** Washington has not addressed whether the insurance commissioner's life expectancy tables may be used to measure damages for one suffering from a preexisting condition that would otherwise shorten the decedent's life expectancy. Other courts have either discouraged or rejected use of life expectancy tables under such circumstances.

¶74 ***HN28*** The use of life expectancy tables is disfavored where the plaintiff has a preexisting condition or disease that adversely affects his or her projected life span, since the tables are based on the lives of healthy persons. *McWilliams v. Exxon Mobil Corp., 12-1288 (La. App. 3d Cir. 4/3/13); 111 So.3d 564, 574*. Missouri case law is well settled that "the probative value of the mortality tables may be weakened, and even, perhaps, in some cases, destroyed by evidence of ill-health or disease of the person whose life expectancy is in issue." *Sampson v. Missouri Pac. R.R., Co., 560 S.W.2d 573, 585 (Mo. banc 1978)* (quoting *Dorsey v. Muilenburg, 345 S.W.2d 134, 142 (Mo. 1961)*; *Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14, 28 (Mo. banc 1959)*. In ascertaining a plaintiff's life [*39] expectancy, the jury may take into consideration evidence as to his health, constitution, and habits. *Caudle v. Southern Ry. Co., 242 N.C. 466, 88 S.E.2d 138 (N.C. 1955)*. The mortality tables are not conclusive evidence of the life expectancy of a particular person, but are accepted only as an aid to the jury in connection with other relevant facts in arriving at the probable duration of the life of a person, such that it is error to charge that a particular person of a given age has a life expectancy of a certain number of years. *Louisville & Nashville R.R. Co. v. Richardson, 285 Ala. 281, 231 So.2d 316, 317 (1970)*.

¶75 In an ancient Michigan decision, *Norris v. Detroit United Ry., 193 Mich. 578, 160 N.W. 574 (1916)*, the parties agreed that the plaintiff was not an ordinarily healthy person at the time of her injury. Therefore, the court held it was prejudicial error to admit as evidence the mortality tables. Based upon the *Norris* decision, a federal court ruled, in a more recent decision, that Michigan law disfavors use of mortality tables when the plaintiff has a preexisting condition or disease that adversely affects his projected lifespan, since the tables are based on the lives of healthy persons. *Draisma v. United States, 492 F. Supp. 1317, 1329 (D.C. Mich. 1980)*.

¶76 In *Muller v. Lykes Brothers. Steamship. Company, 337 F. Supp. 700 (E.D. La.), aff'd, 468 F.2d 951 (5th Cir. 1972)*, plaintiff submitted to the Court the 1960 United States Department of Labor mortality tables that indicated that a normal person of plaintiff's age would have a life expectancy of 27.7 [*40] years and a work-life expectancy of 20.6 years. In an unflattering ruling, the court held the tables to lack any relevancy. Plaintiff suffered from the condition of constitutional obesity. His blood pressure was recorded at 260/140 and noted as "grossly abnormal." Plaintiff smoked and drank beer and other alcohol excessively. In consideration of plaintiff's physical condition and the general state of his health, apart from the injury that gave rise to the suit, the court held the tables inapplicable to a determination of plaintiff's life expectancy or work-life expectancy.

CONCLUSION

¶77 We affirm the dismissal of the claims for lost chance and reduced life expectancy forwarded in Spokane County Superior Court Cause No. 10-2-00084-9. We remand the consolidated case to the superior court for further proceedings consistent with our decision.

KORSMO, J., concurs.

BROWN, A.C.J., concurs solely in the result.

References

Washington Rules of Court Annotated (LexisNexis ed.)
Annotated Revised Code of Washington by LexisNexis

to this point.

By that ruling I have made each you very unhappy, and to that extent I may have succeeded here, but the case is presented in a fashion as it has been moving through the system through pretrial and should continue in that fashion with the clarification.

Mr. Beaudoin, I am going to ask you to draft the order consistent with the Court's ruling.

MR. BEAUDOIN: Yes, Your Honor.

THE COURT: And we have gone through our pretrial, I believe, and do take a look at your trial management joint report. Frankly, I couldn't see anything that needed to be modified there based on today's ruling.

MR. BEAUDOIN: Your Honor, the pretrial is actually tomorrow morning at 9:30.

THE COURT: All right. In reviewing that pretrial management report I have not seen anything in that that raises these issues so we will continue on with that pretrial, but the Court's ruling I don't want to reargue the issue here.

Mr. Riccelli.

MR. RICCELLI: Your Honor, with respect to the children's wrongful death claims, I think that I would like the Court's leave to between now and trial depose Mr. Rekofke because I believe his understanding was there would have been --

FILED
NOVEMBER 6, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ROBIN RASH, as Personal Representative of the ESTATE OF BETTY L. ZACHOW, deceased, and on behalf of all statutory claimants and beneficiaries; Robin R. Rash, Keith R. Zachow and Craig L. Zachow,

Appellants,

v.

PROVIDENCE HEALTH & SERVICES, a Washington business entity and health care provider; PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington business entity and health care provider; PROVIDENCE-SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL, a Washington business entity and health care provider, and DOES 1-10,

Respondents.

No. 31277-1-III

ORDER DENYING MOTION FOR RECONSIDERATION

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MICHAEL J RICCELLI PS

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of September 16, 2014 is hereby denied.

DATED: November 6, 2014

PANEL: Judges Fearing, Brown, Korsmo

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge

Appendix A-20