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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ROBIN RASH, et al., Appellants  
v.

PROVIDENCE HEALTH & SERVICES, et al., Respondents

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SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL'S  
RESPONSE TO APPELLANTS' MOTION FOR DISCRETIONARY REVIEW

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 ORIGINAL

## TABLE OF CONTENTS

I.	IDENTITY OF RESPONDING PARTY .....	1
II.	DECISION SUBJECT TO THIS MOTION.....	1
III.	RESTATEMENT OF THE ISSUE.....	1
IV.	RESTATEMENT OF THE FACTS .....	2
	A. Ms. Zachow Had a Long History of Cardiac Disease, and She Underwent a Scheduled and Successful Knee Surgery. ....	2
	B. While at Sacred Heart, Ms. Zachow Missed Two Doses of Metoprolol.....	2
	C. Ms. Zachow Developed and Recovered From Post- Operative Complications.....	3
V.	RESTATEMENT OF CASE .....	3
	A. Sacred Heart Accepted Responsibility for the Missed Dosages. ....	3
	B. Ms. Zachow Brought Suit Against Sacred Heart.....	3
	C. Approximately Two Years After Her Knee Surgery and Two Months After Filing this Action, Ms. Zachow Passed Away.....	4
	D. Ms. Zachow's Adult Daughter was Named PR, and the Plaintiffs Asserted "Loss of Chance" in Their Trial Brief.....	4
	E. The Trial Court Struck the Claims for Wrongful Death and Loss of Chance; the Plaintiffs Filed a Separate Action Including Both Claims; and the Two Actions Were Consolidated. ....	5

IV.	SUMMARY OF ARGUMENT .....	6
	A. The Court of Appeals Properly Held that "But For" is the Necessary Standard for Medical Negligence Causation.....	6
	B. The Plaintiffs Failed to Meet Their <i>Prima Facie</i> Burden.....	7
	C. The Court of Appeals Properly Held that Mortality Tables Are No Substitute for Expert Testimony.....	8
	D. The Plaintiffs' Procedural Arguments Contradict their Substantive Arguments.....	9
V.	ARGUMENT.....	10
	A. Medical Negligence Claims, Regardless of How Pled, are Subject to the Traditional "But For" Causation Standard.....	10
	B. Independent of the Causation Failures, the Plaintiffs' Expert Testimony was Inadequate to Show any Loss of Chance. ....	12
	1. <i>Ms. Zachow Does Not Acknowledge a Less Than     Even Chance of Survival.</i> ....	12
	2. <i>The Plaintiffs Did Not Present Expert Testimony to     Quantify Any Lost Chance.</i> .....	14
	C. The Plaintiffs' Procedural Arguments Contradict Their Position on the Substantive Issue. ....	15
VII.	CONCLUSION.....	16
	CERTIFICATE OF SERVICE .....	18

## TABLE OF AUTHORITIES

### Cases

<i>Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.</i> , 177 Wn. App. 828 (2013) .....	10, 13, 14
<i>Herskovits v. Group Health Cooperative of Puget Sound</i> , 99 Wn.2d 609 (1983) .....	11
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829 (1989).....	10
<i>Mohr v. Grantham</i> , 172 Wn.2d 844 (2011) .....	10, 11, 14
<i>Sharbono v. Universal Underwriters Insurance Co.</i> , 139 Wn. App. 383 (2007) .....	11
<i>Shellenbarger v. Brigman</i> , 101 Wn. App. 339 (2000).....	11
<i>Sposari v. Matt Malaspina &amp; Co.</i> , 63 Wn.2d 679 (1964).....	15
<i>Zueger v. Public Hospital Dist. No. 2 of Snohomish County</i> , 57 Wn. App. 584 (1990) .....	11

### Statutes

RAP 13.4(d) .....	1
RAP 2.26(d) .....	6

## **I. IDENTITY OF RESPONDING PARTY**

This response is submitted by Sacred Heart Medical Center & Children's Hospital (hereinafter "Sacred Heart"), pursuant to RAP 13.4(d). Sacred Heart respectfully asks the Court to deny the Plaintiffs' Motion for Discretionary Review. The Court of Appeals correctly affirmed the trial court's summary dismissal of the Plaintiffs' claim for loss of chance.

## **II. DECISION SUBJECT TO THIS MOTION**

The Plaintiffs accurately identify Division III of the Washington State Court of Appeals' September 16, 2014 Published Opinion as the subject of the Plaintiffs' Motion for Discretionary Review.

## **III. RESTATEMENT OF THE ISSUE**

This case has been, and continues to be, complicated by the manner in which the Plaintiffs make their arguments. The Plaintiffs use loss of chance verbage, the Plaintiffs site loss of chance cases, but the Plaintiffs have never actually asserted a loss of a chance claim. In fact, the Plaintiffs have acknowledged that they are not seeking any loss of chance jury instruction. The Plaintiffs' claim is, and has always been, that Betty Zachow suffered compensable damages during her life and that she died prematurely, both as a result of Sacred Heart's negligence.

Substantively, this appeal asks whether "but for" or "a substantial factor" is the appropriate standard for causation. Established law confirms that "but for" is the necessary standard for causation in medical negligence cases. And the loss of chance doctrine does not alter that standard.

The Court of Appeals correctly held the Plaintiffs to their burden of proving that Sacred Heart's conduct was a "but for" cause of their claimed damages. There was no error in the Court of Appeals' analysis, and the State Supreme Court should deny review.

#### **IV. RESTATEMENT OF THE FACTS**

**A. MS. ZACHOW HAD A LONG HISTORY OF CARDIAC DISEASE, AND SHE UNDERWENT A SCHEDULED AND SUCCESSFUL KNEE SURGERY.**

Ms. Zachow reported to Sacred Heart on March 5, 2008 for a scheduled orthopedic surgery to treat degenerative arthritis in her right knee. CP 5, 13. At that time, Ms. Zachow was 82 years old and had a long history of cardiac disease, for which she was treated with a drug called Metoprolol. CP 13, 63, 101; Supp. Des., Sub No. 36, Defendants' Trial Brief.

**B. WHILE AT SACRED HEART, MS. ZACHOW MISSED TWO DOSES OF METOPROLOL.**

Due to a clerical error, Ms. Zachow's medical chart did not identify Metoprolol as one of her medications. Supp. Des., Sub No. 36, Defendants' Trial Brief; CP 13. Due to that error, Ms. Zachow did not receive an evening dose of

Metoprolol on the day of her surgery, nor did she receive a dose the following morning. Supp. Des., Sub No. 36, Defendants' Trial Brief; CP 13. Ms. Zachow resumed her Metoprolol regimen on the evening following her surgery. Supp. Des., Sub No. 36, Defendants' Trial Brief.

**C. MS. ZACHOW DEVELOPED AND RECOVERED FROM POST-OPERATIVE COMPLICATIONS.**

On March 6, 2008, Ms. Zachow developed shortness of breath, tachycardia, and wheezing. Supp. Des., Sub No. 36, Defendants' Trial Brief. She recovered and was discharged home on March 15, 2008. *Id.*

**V. RESTATEMENT OF CASE**

**A. SACRED HEART ACCEPTED RESPONSIBILITY FOR THE MISSED DOSAGES.**

Three days after Ms. Zachow's discharge, Sacred Heart wrote to Ms. Zachow and acknowledged responsibility for the missed medication dosages. Supp. Des., Sub No. 36, Defendants' Trial Brief. Ms. Zachow, however, never responded. *Id.*

**B. MS. ZACHOW BROUGHT SUIT AGAINST SACRED HEART.**

On or about January 7, 2010, Ms. Zachow brought suit against Sacred Heart. CP 3-7. She alleged that the two missed medication dosages caused her to "suffer from serious physical injury; permanent disability; reduced life expectancy;" and a variety of other purported harms. CP 6.

Sacred Heart admitted that it was negligent in failing to administer Ms. Zachow's medication. Supp. Des., Sub No. 36, Defendants' Trial Brief. Sacred Heart denied that the two missed medication dosages proximately caused any loss, damage, or harm. *Id.*

**C. APPROXIMATELY TWO YEARS AFTER HER KNEE SURGERY AND TWO MONTHS AFTER FILING THIS ACTION, MS. ZACHOW PASSED AWAY.**

Between July 2009 and March 2010, Ms. Zachow suffered three strokes.<sup>1</sup> Supp. Des., Sub No. 36, Defendants' Trial Brief; CP 13. On March 21, 2010, Ms. Zachow passed away as a result of those strokes. CP 13; 98.

**D. MS. ZACHOW'S ADULT DAUGHTER WAS NAMED PR, AND THE PLAINTIFFS ASSERTED "LOSS OF CHANCE" IN THEIR TRIAL BRIEF.**

Ms. Zachow's adult daughter, Robin Rash, was named PR of Ms. Zachow's estate, and the Plaintiffs amended this case's caption to include the PR. *Compare* CP 1 *with* CP 94, *see also* CP 94-95, 99. In their trial brief, which was filed 20 days before trial, the Plaintiffs raised both wrongful death and loss of chance for the first time. Supp. Des., Sub No. 37, Plaintiffs' Trial Brief; CP 36-37.

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<sup>1</sup> It is noteworthy that Ms. Zachow's strokes began before this action was filed, but the initial complaint does not contend that any stroke was proximately caused by the missed medication dosages. *See* CP 3-7.

**E. THE TRIAL COURT STRUCK THE CLAIMS FOR WRONGFUL DEATH AND LOSS OF CHANCE; THE PLAINTIFFS FILED A SEPARATE ACTION INCLUDING BOTH CLAIMS; AND THE TWO ACTIONS WERE CONSOLIDATED.**

Sacred Heart brought a successful motion to strike the Plaintiffs' claims for loss of chance and for wrongful death. CP 32-34, CP 139-142. Sacred Heart's motion (and the trial court's order) focused on the Plaintiffs' failure to present evidence satisfying the "but for" standard for causation. CP 33; CP 141. It is undisputed that the Plaintiffs' expert based his opinions on the "a substantial factor" test and that he could not (and cannot) satisfy the "but for" test. CP 105-116, *see also* Appellant's Appeal Brief, pp. 7, 15-20.

The Plaintiffs then filed a separate action asserting claims for wrongful death and loss of chance. CR 143-148. On the Plaintiffs' motion, the trial court consolidated the two cases. CP 190-192.

Once the actions were consolidated, it became apparent that the Plaintiffs intended to re-assert their position that the "substantial factor" test applied to the consolidated cases. Sacred Heart, therefore, asked the trial court to certify its prior determination that "but for" causation was required as a final order. CP 139-142, 193-195. The Plaintiffs joined in Sacred Heart's motion: ". . . I, on the record, stated if [the court is] going to retain the ruling as it stands, then I will join in the motion [to certify]." 10/19/2012 RP 11.

On September 12, 2012, the trial court certified its prior order as final. CP 220-225. The Plaintiffs took a timely notice of appeal. Supp. Des., Sub No. 87, Notice of Appeal to Court of Appeals, Division III RAP 2.26(d).

Before the Court of Appeals, and again in their Motion for Discretionary Review, the Plaintiffs object to procedural aspects of the case. Throughout it all, however, the Plaintiffs have insisted that the Court reach and resolve the substantive question: – to wit, whether "but for" or "a substantial factor" is the appropriate standard for causation.

#### **IV. SUMMARY OF ARGUMENT**

**A. THE COURT OF APPEALS PROPERLY HELD THAT "BUT FOR" IS THE NECESSARY STANDARD FOR MEDICAL NEGLIGENCE CAUSATION.**

Washington State law is settled. Medical negligence plaintiffs must demonstrate that the defendant's alleged negligence was a "but for" cause of the claimed injury, loss, or damage. That standard applies regardless of whether the claim asserts *inter vivos* damages, wrongful death, or a loss of chance.

The Plaintiffs advocate a substantial change in Washington State law. The Plaintiffs are asking the Court to reverse years of precedent by adopting "a substantial factor" as the standard for causation. The Plaintiffs are advocating for that change without justification in policy, law, or reason.

The "but for" standard is supported by precedent, by policy, and by praxis. The "but for" test compensates plaintiffs with valid claims while simultaneously protecting defendants against nuisance suits.

Despite the Plaintiffs' assertion to the contrary, Washington's recognition of the loss of chance doctrine did not affect Washington's fidelity to the "but for" standard. In fact, Washington's appellate courts have already rejected multiple invitations to adopt the "a substantial factor" standard in loss of chance cases. This case provides no warrant to depart from that position.

**B. THE PLAINTIFFS FAILED TO MEET THEIR *PRIMA FACIE* BURDEN.**

A medical negligence plaintiff must base her case on expert testimony. To make out a *prima facie* medical negligence claim (under traditional tort principles), the plaintiff's expert must opine that "but for" the defendant's negligence, the plaintiff would not have suffered the injury alleged. To make out a claim under the loss of chance doctrine, the plaintiff's expert must opine that "but for" the defendant's negligence, the plaintiff would have enjoyed a substantially greater chance of survival/a better outcome. In addition, the loss of chance expert must be able to quantify the amount of the plaintiff's lost chance, and the expert must do so beyond speculation or conjecture.

In this case, Dr. Rogers (the Plaintiffs' sole expert) could not get the Plaintiffs over their *prima facie* hurdle. Dr. Rogers could not opine that Sacred

Heart's conduct was a "but for" cause of Ms. Zachow's death. Dr. Rogers could not opine that Sacred Heart's conduct was a "but for" cause of any lost chance. And Dr. Rogers could not offer any opinion quantifying the amount of the chance Ms. Zachow allegedly lost. Instead, Dr. Roger's testimony was limited to an assertion that Sacred Heart's conduct was "a substantial factor" in Ms. Zachow's death. Dr. Roger's testimony was simply inadequate to meet the Plaintiffs' *prima facie* burden.

**C. THE COURT OF APPEALS PROPERLY HELD THAT MORTALITY TABLES ARE NO SUBSTITUTE FOR EXPERT TESTIMONY.**

The Plaintiffs attempted to use mortality tables as *prima facie* evidence that Ms. Zachow's death was caused by Sacred Heart's negligence. The Plaintiffs' attempted use of mortality tables was inconsistent with all applicable law, and the Court of Appeals was correct to hold the Plaintiffs to their burden.

The Plaintiffs' Motion for Discretionary Review seriously misconstrues this issue. This case has no bearing on how or when mortality tables can be used in jury instructions or for counsel arguments. Nor did the Court of Appeals make any ruling or comment regarding the use of mortality tables in jury instructions or arguments. This appeal arose from a summary judgment motion, and the Plaintiffs attempted to defeat summary judgment by relying on mortality tables as affirmative evidence of causation. The relevant inquiry, therefore, is whether a

published mortality table can serve as *prima facie* evidence of causation.

Mortality tables, however, cannot support the weight that the Plaintiffs place upon them. No mortality table can show that "but for" Sacred Heart's conduct, Ms. Zachow would have survived or would have enjoyed a greater chance of survival.

There is simply no support for the Plaintiffs' argument – no support in law, no support in historical usage, and no support in reason. Mortality tables cannot substitute for expert testimony. Mortality tables cannot establish the necessary causal link between the defendant's conduct and the plaintiff's harm. The Court should, therefore, completely disregard this aspect of the Plaintiffs' motion.

**D. THE PLAINTIFFS' PROCEDURAL ARGUMENTS CONTRADICT THEIR SUBSTANTIVE ARGUMENTS.**

While insisting that the Court rule on the substantive issue, the Plaintiffs complain about the procedural decisions that brought that issue before the appellate courts. The Court should disregard the Plaintiffs' procedural arguments and analyze this case solely on whether "but for" ought to remain the standard for causation in medical negligence cases.

The Plaintiffs never objected to the trial court's treatment of Sacred Heart's motion as one for summary judgment. As the Court of Appeals correctly noted, the Plaintiffs never requested additional time, the Plaintiffs never made a Rule 56(f) argument, and the Plaintiffs joined in the motion to certify the trial court's

decision as final and immediately appealable. In short, the Plaintiffs participated in the procedures to which they now object. The Court should disregard this aspect of the Plaintiffs' motion and focus exclusively on the substantive issue.

## V. ARGUMENT

### A. MEDICAL NEGLIGENCE CLAIMS, REGARDLESS OF HOW PLED, ARE SUBJECT TO THE TRADITIONAL "BUT FOR" CAUSATION STANDARD.

This appeal hinges upon the Plaintiffs' contention that the recognition of loss of a chance replaced the traditional "but for" causation test with the "substantial factor" test. *See generally*, Appellant's Appeal Brief.<sup>2</sup> That contention has already been considered and rejected by Washington's appellate courts.

Medical negligence claims are governed by the traditional "but for" causation test. *McLaughlin v. Cooke*, 112 Wn.2d 829, 837 (1989). The same test applies to claims for loss of chance. *Mohr v. Grantham*, 172 Wn.2d 844, 857 (2011). The Court of Appeals' recent decision in *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.* also confirmed that "but for" is the necessary standard for causation in loss of chance cases. 177 Wn. App. 828,

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<sup>2</sup> While the Plaintiffs cite loss of chance cases and use loss of chance language, the Plaintiffs' claims are not (and have never been) claims for loss of a chance. In fact, the Plaintiffs recognized that their claim is not one for loss of a chance. 4/12/2012 RP 16, 17. Moreover, the Plaintiffs did not submit any proposed jury instruction regarding loss of a chance. Supp. Des., Sub No. 64, Plaintiffs' Proposed Jury Instructions.

862-63 (2013). There is, therefore, no basis for the Plaintiffs' attempt to soften the standard for causation in loss of chance, or any other variety, of medical negligence cases. Washington's courts have repeatedly (and recently) confirmed fidelity to the "but for" standard.

None of the cases that the Plaintiffs cite support their contention. In fact, each court that has addressed the issue – from *Herskovits v. Group Health Cooperative of Puget Sound* to *Mohr v. Grantham* – has held that "but for" is the appropriate test for causation in loss of chance claims. See *Herskovits*, 99 Wn.2d 609, 623-24 (1983); *Mohr*, 172 Wn.2d at 851, 857; see also *Zueger v. Public Hospital Dist. No. 2 of Snohomish County*, 57 Wn. App. 584, 590-91 (1990); *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348-49 (2000).<sup>3</sup> The Plaintiffs' arguments are contradicted by prior case law, and the trial court and Court of Appeals were correct to reject them.

It is undisputed that the Plaintiffs cannot satisfy the "but for" standard.

That is, however, the necessary standard for medical negligence cases, regardless

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<sup>3</sup> The Plaintiffs cite *Sharbono v. Universal Underwriters Insurance Co.*, 139 Wn. App. 383 (2007), in support of their contention that the "substantial factor" test should apply to this medical negligence case. *Sharbono* does not address which standard of causation ought apply in a medical negligence or loss of chance claim. *Sharbono* was a bad faith case that arose in the insurance context. The *Sharbono* court offered no analysis on the propriety of using the "substantial factor" test in medical negligence or loss of chance cases. Most importantly, *Sharbono* holds that the trial court erred in giving a "substantial factor" jury instruction. In short, *Sharbono* has no bearing on this appeal.

of whether pled traditionally or under the loss of chance doctrine. The State Supreme Court should, therefore, deny the Plaintiffs' Motion for Discretionary Review.

**B. INDEPENDENT OF THE CAUSATION FAILURES, THE PLAINTIFFS' EXPERT TESTIMONY WAS INADEQUATE TO SHOW ANY LOSS OF CHANCE.**

The Plaintiffs failed to present expert testimony in support of their claim. Setting the Plaintiffs' inability to establish "but for" causation aside for the moment, the Plaintiffs were also unable to present expert testimony to establish a loss of chance claim. The Plaintiffs failed to offer any expert testimony to show either: (i) that Ms. Zachow had a 50% or lower chance of survival or a better outcome prior to Sacred Heart's negligence; or (ii) that Ms. Zachow lost any quantifiable chance of survival or a better outcome.

***1. Ms. Zachow Does Not Acknowledge a Less Than Even Chance of Survival.***

The *Herskovits* court recognized that "existing principles" of tort law fully address cases in which the plaintiff's pre-negligence chance of survival was better than even (*viz.*, more than 50%):

[C]ases where the chance of survival was greater than 50 percent . . . are unexceptional in that they focus on the death of the decedent as the injury, and they require proximate cause to be shown beyond the balance of probabilities. Such a result is consistent with existing principles in this state. . . ."

99 Wn.2d at 631. Thus, when the plaintiff's chance of survival is better than even, the claim is an "unexceptional" wrongful death action. And the plaintiff must prove that but for the defendant's conduct, the plaintiff would still be alive. *See id.*, *Dormaier*, 177 Wn. App. at 848-50.

The loss of chance doctrine applies only in cases involving "the loss of a less than even chance." *Herskovits*, 99 Wn.2d at 634; *Dormaier*, 177 Wn. App. at 848-50. In that manner, the doctrine does not apply unless the plaintiff acknowledges that he or she had a less than even chance of survival or a better outcome, independent of the alleged negligence.

In this case, the Plaintiffs do not actually assert any lost chance. The Plaintiffs do not acknowledge that Ms. Zachow enjoyed a less than even chance of survival prior to Sacred Heart's negligence. Quite the contrary – the Plaintiffs assert that Sacred Heart caused Ms. Zachow's death. The Plaintiffs simply want to be freed from the strictures of proving that Sacred Heart's conduct was a proximate cause of Ms. Zachow's death. This is, therefore, not a "loss of a chance" case, and the Plaintiffs' Motion for Discretionary Review should be denied on that basis alone.

2. *The Plaintiffs Did Not Present Expert Testimony to Quantify Any Lost Chance.*

Claims for loss of chance require medical evidence regarding the decedent's chance of survival or a better outcome, both independent of and as a result of the defendant's negligence. *Mohr*, 172 Wn.2d at 857-58; *Dormaier*, 177 Wn. App. at 850-53. As the *Mohr* Court explained:

The lost opportunity [for which a plaintiff can recover damages] may be thought of as the adverse outcome discounted by the difference between the ex ante probability of the outcome in light of the defendant's negligence and the probability of the outcome absent the defendant's negligence.

172 Wn.2d at 858 (citations omitted). The calculation of a lost chance must be:

based on expert testimony, which is in turn is based on significant practical experience and on data obtained and analyzed scientifically as part of the repertoire of diagnosis and treatment, as applied to the specific facts of the plaintiff's case.

*Id.* at 857-58 (citations, internal quotations, and ellipses omitted). Without expert medical testimony identifying (in percentage terms) the amount of chance that was lost, no claim can survive even the most summary scrutiny. Without such evidence, the jury would be left to speculation and conjecture regarding the nature and extent of damages. *See Dormaier*, 177 Wn. App. at 850-53; *see also Sposari*

v. *Matt Malaspina & Co.*, 63 Wn.2d 679, 688 (1964) ("testimony establishing the [plaintiffs] loss must be free of speculation and conjecture.").<sup>4</sup>

The Plaintiffs offered no expert testimony to demonstrate a quantifiable loss of a chance. The Plaintiffs failed to come forward with expert testimony from which a jury could determine, beyond speculation and conjecture, that any chance was lost – much less what percentage chance was lost. This failure was also fatal to the Plaintiffs' claim.

**C. THE PLAINTIFFS' PROCEDURAL ARGUMENTS CONTRADICT THEIR POSITION ON THE SUBSTANTIVE ISSUE.**

Though Sacred Heart's motion was cast as a motion to strike, it was treated by the parties and the trial court as a motion for partial summary judgment. The Plaintiffs submitted extensive briefing, declarations, and documentary evidence in opposition to the motion. CP 94-116. The trial court considered the Plaintiffs' evidence, considered the law, and analyzed whether the Plaintiffs had made out a *prima facie* case. 4/12/2012 RP 25-29; CP 139-142.

The Plaintiffs did not object to that procedure. The Plaintiffs did not ask for additional time. The Plaintiffs did not seek to continue the motion pursuant to Rule 56(f). And, most importantly, the Plaintiffs joined in Sacred Heart's motion

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<sup>4</sup>Scientific testimony is necessary to satisfy *Herskovits'* requirement that the reduction in chance be "substantial," though it is not yet clear what figure represents the boundary between a substantial loss of a chance and an insubstantial one. See *Herskovits*, 99 Wn. 2d at 634.

to certify the trial court's substantive decision as final and immediately appealable. 10/19/2012 RP 7, 11.

On appeal, however, the Plaintiffs have continually complained about the manner in which the trial court addressed Sacred Heart's motion. Irreconcilably, the Plaintiffs have raised this complaint while insisting that the appellate courts reach the substantive issue. *See* Appellant's Appeal Brief, p. 20. Either the trial court made procedural errors that render its substantive decision not yet ripe for review, or the appellate courts should resolve the substantive issue – but not both. The Plaintiffs' arguments are simply irreconcilable.

Moreover, the procedural dismissal of Ms. Zachow's initial claims for loss of chance and wrongful death were rendered moot by the consolidation of Ms. Zachow's estate claims with Ms. Zachow's initial claims. Procedurally speaking, loss of chance is a part of this consolidated action. Whether loss of chance is part of the action by virtue of Ms. Zachow's initial filing or by her Estate's second filing was rendered entirely academic, once the actions were consolidated. Thus, the only live question is whether that loss of a chance claim will be governed by the "but for" or by the "a substantial factor" test.

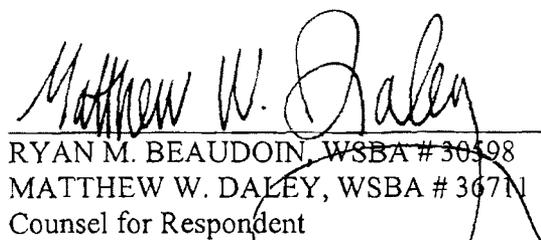
## VII. CONCLUSION

The trial court and the Court of Appeals were correct to hold that the Plaintiffs' failure to come forward with evidence satisfying the "but for" standard

was fatal to their claim for loss of chance. Likewise, the courts were correct to hold that mortality tables cannot serve in lieu of expert medical testimony. The State Supreme Court should deny the Plaintiffs' Motion for Discretionary Review and leave those holdings intact.

RESPECTFULLY SUBMITTED, this 7th day of January, 2015.

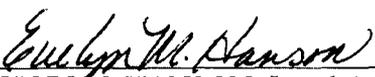
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Counsel for Respondent

**CERTIFICATE OF SERVICE**

On the 7th day of January, 2015, I caused to be served a true and correct copy of the within document described as SACRED HEART MEDICAL CENTER & CHILDREN'S HOSPITAL'S RESPONSE TO APPELLANTS' MOTION FOR DISCRETIONARY REVIEW on all interested parties to this action as follows:

Michael J. Riccelli 400 South Jefferson Street, Suite 112 Spokane, Washington 99204-3144  Email: <a href="mailto:holly@mjrps.net">holly@mjrps.net</a>  Counsel for Appellants	Via United States Mail     [ ] Via Federal Express        [ ] Via Hand Delivery          [x] Via Facsimile                [ ] Via Electronic Mail         [ ]
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\_\_\_\_\_  
EVELYN M. HANSON, Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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**To:** Evelyn Hanson  
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Attached for filing, please find Sacred Heart Medical Center & Children's Hospital's Response to Appellants' Motion for Discretionary Review.

If you have any questions, please feel free to contact our office.

Sincerely,

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