No. 91387-1

SUPREME COURT OF
THE STATE OF WASHINGTON

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NO. 318141

BEVERLY VOLK, et al.,
Appellants,

v.

JAMES B. DERMEERLEER, et al.,
Respondents

DEFENDANT ASHBY'S RESPONSE TO PLAINTIFFS' PETITION FOR REVIEW

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I. COUNTER STATEMENT OF CASE

This is a health care provider malpractice case against Respondent Dr. Howard Ashby, a psychiatrist, and Spokane Psychiatric Clinic P.S. (the hereinafter referred to collectively as "Dr. Ashby"). The petitioners, and plaintiffs below, are Brian Winkler and Beverly Volk, the guardian for Jack Schiering, a minor, and Personal Representative of the Estates of Phillip and Rebecca Schiering (hereinafter referred to collectively as "Ms. Volk").

Dr. Ashby has separately petitioned the Court for discretionary review of the Division III Court of Appeals Published Opinion filed November 13, 2014 regarding the extent of the legal duty owed by a private practice mental health professional to non-client/third parties and on the causation evidence and law applied by the Court of Appeals. Dr. Ashby adopts and incorporates herein the Statement of the Case contained within Dr. Ashby's Petition for Review.

II. ISSUE PRESENTED BY PETITIONERS

Ms. Volk asserts a conflict between the Court of Appeals' published opinion ("*Volk* decision") and an unidentified Supreme Court decision regarding what evidence is required to support a loss of chance claim. Ms. Volk asserts that no expert witness testimony on a percentage or range of percentage reduction in a plaintiff's loss of a chance is required. Dr. Ashby

contends there is no conflict between court decisions, and that discretionary review under RAP 13.4(b)(1) should therefore be declined.

III. ARGUMENT & AUTHORITIES

All claims alleging injury from a failure of a health care provider to follow the accepted standard of care are controlled by RCW 7.70 et. seq. Expert testimony is generally required to establish the professional standard of care, its breach and proximate cause. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). A medical malpractice cause of action may raise a loss of chance claim. *Rash v. Providence Health & Services*, 183 Wn. App. 612, 630, 334 P.3d 1154 (2014), *citing, Dormaier v. Columbia Basin Anesthesia*, 177 Wn. App. 828, 857, 313 P.3d 431 (2013).

Here, Ms. Volk asserted below that Dr. Ashby's purported violation of the standard of care as it relates to an alleged duty owed to non-clients reduced Phillip and Rebecca Schiering's chance of survival. However, in opposition to Dr. Ashby's summary judgment motion, Ms. Volk's expert witness, Dr. David Knoll, provided no percentages to quantify or define this alleged lost chance. *Volk v. Demeerleer*, 184 Wn. App. 389, 391, 337 P.3d 372 (2014). The Court of Appeals therefore correctly affirmed the summary judgment dismissal of that claim.

1. Basis for Petition - There Is No Conflict in Decisions

Ms. Volk's sole argument in favor of discretionary review is the claimed conflict between the *Volk* decision and an unidentified Supreme Court decision on loss of chance. RAP 13.4(b)(1). However, Ms. Volk does not cite a Supreme Court case where a loss of chance claim was allowed in the absence of expert testimony on the percentage or range of percentage reduction in the chances of survival. In fact, *Volk* specifically notes that "[e]very 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 change of survival." *Volk*, 184 Wn. App. at 391. Thus, Ms. Volk has not identified a basis for discretionary review and the petition should be denied. RAP 13.4(b).

2. Expert Testimony Required on Loss of Chance

Ms. Volk's counsel has asserted the same evidentiary position in *Rash v. Providence Health & Services*, 183 Wn. App. 612, 334 P.3d 1154 (2014). There, the Court of Appeals held that traditional tort causation is required. *Rash*, 183 Wn.App. at 635-37; *citing Mohr v. Grantham*, 172 Wn.2d 844, 862, 262 P.3d 490 (2011); *Herskovits v. Group Health*, 99 Wn.2d 609, 664 P.2d 1346 (1979) .

Expert opinion testimony on the diminution in chance of survival secondary to a standard of care violation has always been required. *Herskovits v. Group Health*, 99 Wn.2d 609, 619, 664 P.2d 1346 (1979)(the parties agreed, before arguing their motions for summary judgment, that the defendant's negligence was the proximate cause of reducing the plaintiff's chances of surviving cancer by 14%).

In *Mohr v. Grantham*, *supra*, the Court found that "a plaintiff bears the burden to prove duty, breach and that such breach of duty proximately caused a loss of chance of a better outcome" and that substantial evidence of loss was based on plaintiffs' expert's opinion of a 50-60% chance of a better outcome with timely, anti-thrombotic therapy. 862

In *Dormaier v. Columbia Basin Ansthesia PLLC*, *supra.*, the Court found that expert testimony supported a change in survival chances from 20-30% to a range of 80-90% had the standard of care been satisfied. 177 Wn. App. at 852. In *Shellenbarger v. Brigman*, 101 Wn.App. 339, 3 P.3d 211 (2000), the plaintiff's expert testified that there was a 20% chance of progression of the plaintiff's lung disease being slowed if the condition had been properly diagnosed and treated.

Significantly, in *Mohr*, the court cited with approval an article from the Yale Law Journal, Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences, 90 Yale

L.J. 1353 (1981). There, the author, in commenting on the process for valuing a loss of chance, stated:

> A better method of valuation would measure a compensable chance as the percentage probability by which the defendant's tortious conduct diminished the likelihood of achieving some more flexible outcome. Under this approach, the trier of fact would continue to make the valuation, but would do so within specific guidelines and parameters set by the court.

90 Yale L.J. 1353 at 1382.

On the requirement that the loss of chance be expressed as a statistical percentage, the author stated:

> Moreover, even if, as a general matter, there is some truth in Tribe's conclusion that "the costs of attempting to integrate mathematics into the fact-finding process of a legal trial outweigh the benefits," the use of probabilistic analysis in the limited context of loss valuation appears not only warranted, but essential, if chance is to be deemed a compensable interest. Especially if one considers the alternatives either of affording no meaningful guidance to the trier of fact or, even worse, retaining the all-or-nothing approach to loss of chance, the proposed percentage rule appears both workable and advantageous.

90 Yale L.J. at 1385.

Also, in *Rash*, addressing the requirement that loss of chance be expressed in a percentage, the court stated:

> 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. (Citation omitted.) Discounting damages by that percentage responds to a concern of awarding damages when the negligence was not the proximate cause or likely cause of

> the death. (Citations omitted.) 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 (1988). This "promotes accurate calculations and use of percentages."

Rash, 183 Wash. App. at 636-37.

Unlike Ms. Volk's invitation here, the Court in *Mohr* did not abandon established tort theories of causation. *Mohr*, 172 Wn.2d at 857. A plaintiff's causation burden requires admissible expert witness evidence comparing the percentage change in outcomes based on scientific data, analyzed and applied to the specific facts of the plaintiff's case. *Mohr*, 172 Wn.2d at 857-58.

Expert testimony must address "the adverse outcome discounted by the difference between the ex ante probability of the outcome in the light of the defendant's negligence and the probability of the outcome absent the defendant's negligence." *Id.* at 858. Consistent with traditional tort theories of causation, the percentage of loss is not admissible if its foundation rests in speculation or conjecture. In *Dormaier*, the court demanded that plaintiffs

supply expert testimony to provide substantial evidence and avoid a case theory supported by speculation and conjecture. *Id.* at 851-52.

Ms. Volk's disagreement with the existing case law does not create a conflict between the courts of this State.

3. Petitioners' Position Ignores Evidentiary Requirements on Expert Testimony And The Need For Substantial Evidence Supporting A Jury Determination.

Ms. Volk's argument invites speculation on many fronts. The *Volk* decision about "different levels of speculation" between summary judgment motions and trials invites speculation and conjecture on proximate cause where none was previously allowed. Speculative testimony on proximate cause will not allow a party to survive summary judgment, *Ruff v. County of King*, 125 Wn.2d 687, 707, 887 P.2d 886 (1995); *Miller v. Likins*, 109 Wn.App. 140, 145, 34 P.3d 835 (2001). It will not support a jury verdict at trial. *Dormaier v. Columbia Basin Anesthesia, PLLC.*, *supra* (finding a jury determination must be based on substantial evidence, and substantial evidence must be something that "rises above speculation and conjecture."); *Curtiss v. Young Men's Christian Ass'n,* 82 Wn.2d 455, 465, 511 P.2d 991 (1973)(holding that "a verdict cannot be based on mere theory or speculation").

Dr. Ashby finds no case law supporting the proposition that speculative expert testimony that is inadmissible at trial may be admissible

at the summary judgment stage. Indeed, in making this distinction, the court in *Volk* did not cite to any legal authority. *Volk*, 184 Wn. App. at 393.

Expert testimony is always required where the nature of "the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding." *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986). Expert testimony "must be sufficient to establish that the injury-producing situation 'probably' or 'more likely than not' caused the subsequent condition, rather than the accident or injury 'might have,' 'could have,' or 'possibly did' cause the subsequent condition." *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968); *Merriman v. Toothaker*, 9 Wn.App. 810, 814, 515 P.2d 509 (1973).

Under ER 702, expert opinion testimony may be allowed "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...." ER 702. Expert testimony "must be based on facts in the case and not speculation or conjecture." *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn.App. 155, 163, 194 P.3d 274 (2008), *quoting, Seybod v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001); *Queen City Farms, Inc. v. Cent. Nat'l. Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994); *Fabrique v. Choice Hotels Intern., Inc.*, 144 Wn.App 675, 687, 183 P.3d 1118 (2008).

Conclusory expert opinions lacking adequate foundation will be excluded. *Jonston-Forbes v. Matsunaga,* 181 Wn.2d 346, 357, 333 P.3d 388 (2014); *Miller v. Likins*, 109 Wn.App. 140, 148, 34 P.3d 835 (2001). In *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981), the Court found as follows:

> Where causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.

Here, the absence of expert witness testimony on any percentage or range of percentage reduction in plaintiffs' chances of a survival invites speculation. Dr. Knoll's opinion that plaintiffs might have survived Mr. Demeerleer's attacks, albeit under a hypothetical factual scenario unsupported by facts and contrary to the evidence that Mr. Demeerleer never mentioned any ideation to cause harm to the plaintiffs, is a conclusion without science or data. The jury would be cast adrift to make up its own percentages of diminished chances of survival without a foundation. The amount of the diminution is left to guess work as between competing causation theories. Plaintiffs would thereby abdicate their burden of proving causation on a "more probable than not basis" if they provide no scientific,

medical or psychological basis to define a quantifiable loss of a chance of survival.

Expert testimony that merely states a chance would have been "better" or "improved" under some other scenario of care or facts gives the jury no scientific, reliable data or evidence upon which to reach a determination on the extent of the diminution.

4. Analogies to Other Contexts

Ms. Volk's attempt to analogize a jury's role in determining a loss of chance to a jury allocation of fault or determination of an aggravation of a pre-existing condition ignores the fact that these determinations occur only after substantial, admissible evidence is first presented to the jury. Only after admissible and factually specific evidence is admitted can any party argue allocation of fault or an aggravation of a defined, pre-existing medical condition. Conversely, Ms. Volk asks this Court to allow a jury to overlook the absence of expert causation evidence on the loss of chance and instead allow the jury to guess as to appropriate figures on the purported loss.

5. Substantial Factor Causation Has Been Rejected.

Proving negligence that causes a compensable loss of chance requires plaintiffs to prove "but for" causation rather than negligence as "a substantial factor" in the harm. *Mohr v. Grantham*, *supra*. In *Mohr*, the Court held as follows:

> We hold that there is a cause of action in the medical malpractice context for the loss of a chance of 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 the 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 element of proof, we reverse the order of summary judgment and remand to the trial court for further proceedings.

Mohr, 172 Wn.2d at 862.

The *Mohr* Court followed the *Herskovits* pleurality which required "but for" causation of the plaintiff's loss of chance. *Herskovits*, 99 Wn.2d at 634-35.

There is no conflict between the Supreme Court and the Courts of Appeal. In *Rash v. Providence Health & Sciences*, *supra*, the Court of Appeals cited *Mohr*, *Herskovits* and the language of the controlling statute (RCW 7.70.030) in explicitly rejecting the invitation to use a substantial factors standard of causation. The *Rash* case contained the same arguments offered herein, and the Court of Appeals rejected those arguments. No Supreme Court decision conflicts with the *Rash* or *Volk* decisions. As there is no conflict on the causation standard applied in loss of chance claims, this Court should deny Ms. Volk's petition for discretionary review.

IV. CONCLUSION

Ms. Volk has not met the requirements of RAP 13.4(b). While Ms. Volk argues the *Volk* decision regarding loss of chance conflicts with other Washington case law, she fails to identify a single case with which the decision conflicts.

Ms. Volk failed to present admissible evidence in opposition to summary judgment which quantified in any manner the alleged loss of chance. The trial court properly dismissed the claim and the Court of Appeals properly affirmed that dismissal. Ms. Volk has not established that review of the *Volk* decision on loss of chance should be reviewed by this Court. Dr. Ashby therefore respectfully requests that the Court deny Ms. Volk's petition for discretionary review.

DATED this 23rd day of March, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 23, 2015, I caused to be delivered to the address below a true and correct copy of Defendant Ashby's Response to Plaintiffs' Petition for Review.

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DATED this 23 day of March, 2015.

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