No. 95645-6

SUPREME COURT
STATE OF WASHINGTON

LYNETTE ENEBRAD, individually and as Personal Representative of the ESTATE OF ROBERT ENEBRAD,

Appellant,

v.

MULTICARE HEALTH SYSTEM, INC., et al.,
Respondents.

RESPONDENT TSENG'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

I. INTRODUCTION

Plaintiff/Petitioner Estate of Enebrad, brings this Petition for Review. The Petition alleges that the Court of Appeals decision conflicts with *Mohr v. Grantham,* 172 Wn.2d 844, 862, 262 P.3d 490 (2011); *Dunnington v. Virginia Mason Med. Ctr.*, 187 Wn.2d 629, 634, 389 P.3d 498 (2017); and *Herskovits v. Group Health Coop of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983). Plaintiff's arguments are without merit.

Our courts recognize that successful application of the lost chance doctrine depends "on the quality of the appraisal of the decreased likelihood of a more favorable outcome." *Rash v. Providence*, 183 Wn. App. 612, 636-37, 334 P.3d 1154 (2014), *review denied*, 182 Wn.2d 1028 (2015) (internal citations omitted). A quality appraisal demands "accurate calculations and the use of percentages." *Id.* Consistent with the holdings of the cited cases, Division One here held that summary judgment was appropriate because the plaintiff failed to provide expert testimony establishing the amount of loss chance caused by the alleged negligence. Slip Opinion at 8 (citations omitted). Because this decision is consistent with the cited cases and does not raise an issue of substantial public interest,[1] review should be denied.

[1] Plaintiffs argue that the case raises an issue of "substantial public importance." Petition for Review at 2. RAP 13.4(b)(4) requires that the Petition raise an issue of "substantial public interest. Neither test has been met.

II. IDENITY OF RESPONDING PARTY

Respondent/Defendant Mark Tseng, M.D., was dismissed on summary judgment by the trial court.

III. COURT OF APPEALS DECISION

Division One of the Court of Appeals affirmed the trial court's order dismissing the case against Dr. Tseng on summary judgment. The Court held that the plaintiff had failed to raise a genuine issue of material fact on causation because she had failed to produce expert testimony on the percentage of loss chance caused by Dr. Tseng's alleged negligence.

IV. COUNTERSTATEMENT OF ISSUES

1. Does the Court of Appeals' decision raise an issue of substantial public interest under RAP 13.4(b)(4)?
2. Does the Court of Appeals decision conflict with existing precedent regarding the need to produce expert testimony causally linking the defendant's negligence to a lost chance so as to warrant review pursuant to RAP 13.4(b)(1)?

V. COUNTERSTATEMENT OF THE CASE

A. Facts Relevant to Medical Care

Respondent Tseng adopts the statement of facts relating to the medical care provided contained in the Slip Opinion at pages 2-4.

B. Procedural History Related to Respondent Tseng's Summary Judgment Motion

The Enebrads initially filed their lost chance claim on February 6, 2014 solely against MultiCare Health System. CP 1-12. On March 26, 2014, defendant MultiCare Health System filed a third party complaint against defendant Healogics and Diversified Clinical Services (hereafter "Healogics." CP 13-21.

On June 13, 2014, four months after commencement of the lawsuit, defendants MultiCare Health System and Healogics filed motions for summary judgment. CP 22-32, CP 76-82. Dr. Tseng was not a defendant at the time these motions were filed. On June 30, 2014, the Enebrads filed an opposition to the summary judgment, CP 95-104, supported by a declaration from the treating physician, Dr. Jason H. Ko., which stated: "The [nearly 8 week] delay in diagnosis caused a delay in known and effective treatments whose purpose is to significantly increase a patient's chance of a better outcome." CP 93. Plaintiff's CR 56(f) motion was granted in order to allow additional discovery. Dr. Tseng was subsequently added to the case.

In February 2015, the defendants renewed their motions for summary judgment. Again the plaintiff asked for more time to address the motion. The trial court continued until March 27, 2015 and ordered that the plaintiff was to submit a revised declaration for Dr. Ko by March 13, 2105 and that Dr. Ko should be deposed. CP 367.

Right before the March 27, 2015 summary judgment hearing, Dr. Ko notified the Enebrads' attorney he was unwilling and unable to provide a percentage or range of percentages to the alleged loss of a chance of a better outcome. CP 408, 420, 459-461. However, despite having actual knowledge of Dr. Ko's inability to assign a percentage to the lost chance since at least June 2014, the Enebrads' attorney inexplicably told the Court that "it appears that Dr. Ko is going to support our loss of a better chance of a better outcome, including survival. It looks like he will." CP 467-468. Based on the representation made by the Enebrads' attorney, the hearing was continued for a third time, and the Enebrads were ordered to file a supplemental declaration of Dr. Ko by April 1, 2015. CP 408, 470-472.

At his deposition, Dr. Ko was clear that he did not believe the delayed diagnosis affected Mr. Enebrad's outcome.

> Q [by Mr. Walsh]. . . And do you think that if Mr. Enebrad had received an earlier referral for treatment of cutaneous squamous

cell carcinoma that his chances of better outcome would have increased?
***
A: Again, very speculative ... This goes back to our earlier conversations on my own opinion, most of which is based on hindsight and retrospective information, that Mr. Enebrad most likely had stage III to stage IV cancer back in August. So, in the end, the end result would most likely have been the same.

CP 397 (Ko Dep. 72:23-73:9). While plaintiff's counsel pushed on this issue, Dr. Ko did not change his opinion:

A: Now that I have more information I probably- this is why I can't attribute any percentage. **Again, I still believe, in my opinion, that he most likely had stage IV back in August.**

Q: Okay. All right.

A: The delay in diagnosis was unfortunate and inexcusable... And continuing to treat the wound, treat this cancer like just a simple ulcer, these are all probably as a result or tied into the delay in diagnosis ... But again, you know, in the end, do I think any of this would have changed his ultimate outcome? .. Probably not. And so to ask me to answer questions about hypotheticals does not make sense to me.

Q: Well, I know there's a lot of things that lawyers ask that don't make sense. **So, you know, the bottom line is, you don't think it made any difference at all, this delay in diagnosis and delay in treatment?.**

A.: In the end, probably not.

Q. Not even – not even a little? Not even by one percent?

A. I can't assign a percentage to this.

CP 398-99 (Ko Dep. 77:14-78:8) (emphasis added).

On May 18, 2015, the Enebrads filed a declaration of a new expert, H. Thomas Temple, M.D. CP 492-499. Dr. Temple provided no opinions regarding Dr. Tseng or the delay in diagnosis from August 2013 to October 2013. *Id.*

On July 29, 2015, an order granting Dr. Tseng's motion for summary was filed. The order stated:

> The Court finds that the Declaration of H. Thomas Temple, M.D. filed by plaintiff in opposition to the motions for summary judgment addressed only the issue of care provided by Dr. Chang and did not address the issue of causation for medical care provided in August 2013. The Court concludes therefore that the motions for summary judgment should be GRANTED IN PART. As defendant Mark H. Tseng's care falls within this period of time summary judgment is appropriate. All claims against Dr. Tseng are hereby dismissed, with prejudice.

CP 679-83.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Decision is Consistent with Washington Law.

Plaintiff's Petition for Review asserts that the decision below conflicts with *Mohr v. Grantham, supra, Dunnington v. Virginia Mason Med. Ctr., supra,* and *Herskovits v. Group Health Coop of Puget Sound, supra.* To support this statement, counsel simply states that "[n]owhere in Herskovits or Mohr does this court state that a plaintiff is required to state a percentage of lost chance." Petition at 3,

That argument misconstrues the nature of the lost chance doctrine because it ignores the fact that the lost chance *is* the injury. Thus,

> [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.

Mohr, 172 Wn.2d at 862; *Dunnington*, 187 Wn.2d at 634.

Moreover, plaintiff ignores *Rash v. Providence, supra.* (plaintiff pursuing a loss of chance theory of causation must present expert opinion establishing "the percentage or range of percentage reduction in the chance." *Rash*, 183 Wn. App. at 636.) The Court explained:

> 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 on the percentage of loss.** *See Smith v. Dep't of Health & Hosps.*, 95-0038 (La. 6/25/96); 676 So. 2d 543, 546-47. 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. *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.**

Id. at 636 (emphasis added).

Like *Rash*, no evidence of the specific amount of lost chance was produced to defeat the motion for summary judgment. Here, the treating physician could not say that the delay would have produced a different outcome. CP 384 (Ko Dep. at 19:4-19:13. An aggressive cancer, not Dr. Tseng, caused Mr. Enebrad's death. Consistent with Washington law, summary judgment was required.

B. Because Division One Followed Settled Law, No Issue of Substantial Public Interest Exists.

Plaintiff argues that "If a defendant health care provider's negligence is likely a substantial factor in increasing the defendant's risk of harm but that negligence prevents any reviewing expert from opinion as to a specific from opinion as to a specific percentage the Court of Appeals (sic) decision will act to immunize tortious conduct by health care providers." Petition at 2. This argument should be rejected for two reasons.

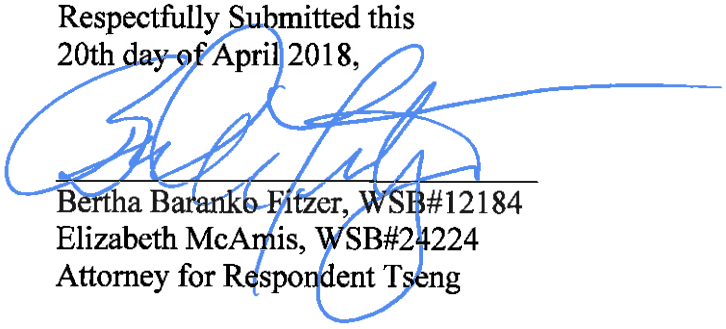
First, as pointed out by in the Answer by co-defendant MultiCare, plaintiff produced no evidence that Dr. Tseng did anything that interfered with the ability of an expert to offer an opinion on the amount of reduction of loss of chance. MultiCare Answer at 11.

Second, this Court rejected the "substantial factor" test in loss of chance cases in *Dunnington v. VMC, supra.* Plaintiff offers no argument in support of overturning that decision.

VII. CONCLUSION

The Court of Appeals followed clearly established precedents from this Court and from Division Three. Plaintiff's arguments to the contrary should be rejected and review denied.

Respectfully Submitted this
20th day of April 2018,



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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the date set forth below, I caused a true and correct copy of the foregoing document be served on the following in the manner indicated below:

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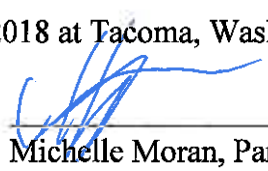
Dated this 20th day of April 2018 at Tacoma, Washington.



Michelle Moran, Paralegal

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