FILED
SUPREME COURT
STATE OF WASHINGTON
4/18/2018 2:41 PM
BY SUSAN L. CARLSON
CLERK

NO. 95645-6

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellant,

v.

MULTICARE HEALTH SYSTEM, d/b/a MULTICARE AUBURN MEDICAL CENTER, a Washington corporation doing business within the State of Washington, King County, et al.,

Respondents.

RESPONDENT MULTICARE HEALTH SYSTEM'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent MultiCare Health System submits this answer to Lynnette Enebrad's Petition for Review.

II. COURT OF APPEALS DECISION

On February 20, 2018, Division I of the Court of Appeals issued its unpublished opinion in this medical malpractice/wrongful death case, affirming both the trial court's summary judgment dismissal of Mrs. Enebrad's loss of chance claims for lack of expert testimony establishing the percentage or range of percentage chance allegedly lost and the trial court's admission of some evidence of her husband's intravenous drug use at the trial of the remaining medical negligence claim.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly grant summary judgment dismissing Mrs. Enebrad's loss of chance claim where the only expert testimony she presented concerning loss of chance did not identify a percentage or range of percentage chance lost?

2. Did the trial court properly exercise its discretion in admitting some evidence of Mr. Enebrad's history of drug use, but limiting the amount of such evidence and instructing the jury to consider it only for the limited purpose for which it was admitted?

IV. STATEMENT OF THE CASE

A. Mr. Enebrad's Care and Treatment.

Robert Enebrad, an established patient of Kent MultiCare Family Practice, first saw Dr. Von Chang there on January 18, 2013, for a physical examination. RP 134, 136, 138; Exs. 3, 102 (pp. 267, 269)[1]. He had no complaints or concerns. RP 139-40, 143; Exs. 3, 102 (p.269). Dr. Chang learned that Mr. Enebrad had been diagnosed with Hepatitis C, had a history of intravenous (IV) drug use and heroin and cocaine abuse, was taking methadone, and had a skin graft on his left arm. RP 140-41, 145-46; Exs. 3, 102 (pp. 267, 269-70, 272). Dr. Chang understood the skin graft was due to previous cellulitis infections from IV drug use and that Mr. Enebrad had had previous ulcerations in the graft's scar tissue that had been treated and healed. RP 169. Dr. Chang noted that the graft's donor site on Mr. Enebrad's left shin was dry, but that the graft on the left forearm looked normal. RP 154-57; Exs. 3, 102 (p.271).

Mr. Enebrad next saw Dr. Chang on August 7, 2013, at which time he had a two-inch open wound in his left forearm skin graft. RP 172; Ex. 103 (pp. 280, 282). Dr. Chang referred him to the Wound Healing Clinic at MultiCare Auburn Medical Center. RP 174; Ex. 103 (p.282).

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[1] Page numbers cited for Exhibits 3, 101, 102, and 103 are those found in the lower left hand corner of pages of those exhibits.

Dr. Mark Tseng saw Mr. Enebrad at the Wound Healing Clinic on August 12, 2013, examined the wound, measured it to be 8 by 8.5 centimeters, and obtained a biopsy. CP 23-24, 91 (¶17), 43-44. Dr. Tseng saw Mr. Enebrad six more times over the next seven weeks until early October 2013. CP 24, 46-57, 91 (¶16). Although the biopsy report was dated August 14, 2013, Dr. Tseng did not see the results until October. CP 190 (pp. 5-6), 205-06 (pp. 66-70), 208 (p. 76). The biopsy report revealed that the biopsy tissue was "extensively involved by well differentiated squamous cell carcinoma with areas of necrosis." CP 64. Dr. Tseng referred Mr. Enebrad to Harborview Medical Center. CP 24, 55-57.

Dr. Jason Ko examined Mr. Enebrad's wound at Harborview on October 8, 2013, obtained a copy of the biopsy report, and diagnosed a Marjolin's ulcer – a rare and very aggressive form of squamous cell carcinoma. CP 61, 88 (¶¶7-8), 226-27; RP 390-91, 528.

On October 14, Mr. Enebrad, with his wife, returned to see Dr. Chang to obtain stronger pain medication. Although reluctant to prescribe additional pain medication because Mr. Enebrad was already on a very high dose of narcotics, RP 179, Dr. Chang, at the Enebrads' urging, agreed to continue Mr. Enebrad's pain medication for another week and consult a pain specialist. RP 180. After the pain specialist advised against increase-ing the narcotic pain medication, Dr. Chang emailed the Enebrads about

possible alternatives, but did not hear from them again. RP 180-81, 186.

During surgery to remove the cancer at Harborview, it was found that the cancer had already spread deep into the bone, and Mr. Enebrad's arm was amputated on November 25, 2013. RP 185-86. The cancer continued to spread and Mr. Enebrad died on October 19, 2014. RP 355.

B. The Lawsuit and Its Procedural History.

In February 2014, Mr. and Mrs. Enebrad sued MultiCare, alleging negligent delay in diagnosis between the time of Dr. Tseng's biopsy on August 12, 2013 and Dr. Ko's diagnosis of cancer on October 8, 2013, that allowed Mr. Enebrad's cancer to spread and resulted in the amputation of his left forearm. CP 7-9. After MultiCare answered the complaint, denying the Enebrads' claims, pointing out that Dr. Tseng was not MultiCare's agent or employee, also pointing out that Healogics, Inc., an independent contractor, and Diversified Clinical Services, Inc. (DCS) operated the Wound Healing Center, and asserting third-party indemnity claims against Healogics and DCS, CP 17-18, the Enebrads in October 2014 amended their complain to add claims against Healogics, DCS, and Dr. Tseng, CP 330-45. After Mr. Enebrad's death, Mrs. Enebrad was substituted as personal representation of his estate. *See*, *e.g.*, CP 636.

In June 2014, MultiCare and third-party defendant Healogics both moved for summary judgment on grounds the Enebrads lacked the

requisite expert medical testimony to establish causation. CP 22-31, 76-82. After being added as a defendant, Dr. Tseng joined in the motions. *See* CP 632, 638, 681.

In response to the motions, on June 30, 2014, the Enebrads produced a declaration from Dr. Ko, stating that the eight-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, including Mr. Enebrad."[2] CP 93. The Enebrads also moved for a CR 56(f) continuance, arguing that they needed more time to depose some of Mr. Enebrad's treating physicians and obtain "relevant discovery." CP 110-19. MultiCare and Healogics agreed to postpone the hearing date to allow the Enebrads to conduct the requested discovery. CP 324, 407.

At the rescheduled summary judgment hearing in February 2015, Mrs. Enebrad's counsel claimed that he did not realize his expert would need to assign a percentage of lost chance until a few days before the hearing, and so requested a continuance. *See* CP 560. The trial court granted the continuance and ordered that Dr. Ko's revised declaration be

[2] At the time Dr. Ko signed that declaration, he had seen the radiologist's report, but had not reviewed the actual x-rays taken of Mr. Enebrad's arm in August 2013. CP 382, 597. After he had the opportunity to review the x-rays, he felt it most likely that Mr. Enebrad already had bone involvement and Stage III or IV cancer when he saw Dr. Tseng in August 2013, and thus was of the opinion that the delay in diagnosis and treatment of the cancer between August and October 2013 probably did not change Mr. Enebrad's ultimate outcome. CP 382, 384, 397, 398-99, 597, 598, 612, 613-14.

submitted within three weeks and that Dr. Ko be produced for deposition before the summary judgment hearing that was scheduled to take place five weeks later. CP 365-67.

At that subsequent summary judgment hearing, Mrs. Enebrad's counsel claimed that Dr. Ko intended to sign a declaration identifying a percentage to quantify the loss of chance claim, and again requested, and was granted, more time for her to submit a revised declaration of Dr. Ko. CP 560-61. Mrs. Enebrad ultimately, however, did not submit a revised declaration of Dr. Ko, who in emails had told Mrs. Enebrad's counsel and in deposition had testified that he could not assign a numerical percentage to any loss of chance as it would be purely hypothetical and that, after reviewing Mr. Enebrad's August 2013 x-rays, he was of the opinion that Mr. Enebrad most likely already had bone involvement and Stage III or IV cancer at the time he saw Dr. Tseng in August 2013, such that the delay in diagnosis and treatment probably did not change Mr. Enebrad's ultimate outcome. CP 382, 384, 397, 398-99, 403-04, 408, 427-29, 457-61, 597, 599, 612, 613-14.

Shortly before the final summary judgment hearing, Mrs. Enebrad, instead of a revised declaration of Dr. Ko, produced a declaration of Dr. Thomas Temple, who opined that: (1) Mr. Enebrad "likely had a cancerous lesion within the scar on his left forearm" on January 18, 2013, when

Mr. Enebrad saw Dr. Chang for a physical examination, CP 495; (2) Dr. Chang likely "did not examine, or did not examine sufficiently, the area of Mr. Enebrad's left forearm" because he did not chart whether the skin graft was "either normal or abnormal," CP 497; and (3) if Dr. Chang had observed and biopsied the lesion and referred Mr. Enebrad for specialty care, Mr. Enebrad "would have had a 98% chance or better to not only avoid amputation of his left forearm but to survive his disease," CP 495.

In reply, MultiCare argued that Mrs. Enebrad still lacked sufficient expert testimony to support a claim regarding the delay between Dr. Tseng's August 12, 2013 biopsy and Dr. Ko's October 8, 2013 diagnosis of cancer, that Dr. Temple's declaration supported a claim of negligence only as to Dr. Chang's January 18, 2013 physical examination of Mr. Enebrad, and that all other claims should be dismissed. CP 617-19. The trial court agreed and dismissed all claims against MultiCare, "except for the claim arising from Mr. Enebrad's appointment with Dr. Chang on January 18, 2013." CP 633. The trial court also dismissed all claims against Dr. Tseng because Dr. Temple's declaration "did not address the issue of causation for medical care provided in August 2013." CP 682.

Before trial of the claim arising from Mr. Enebrad's January 18, 2013 visit with Dr. Chang, MultiCare asked the trial court to admit evidence of Mr. Enebrad's history of drug use as relevant to (1) his

truthfulness in reporting symptoms; (2) MultiCare's affirmative defense of contributory negligence based on Mr. Enebrad's use of cocaine and illicit IV drugs that caused his cancer and compromised his doctors' ability to treat his pain; and (3) his life expectancy. CP 749-53.

On the first day of trial, the trial court considered the parties' arguments concerning the admissibility of drug use evidence, explicitly recognized the need to "balance the probative value" of the evidence "against the prejudicial impact" under ER 403, and acknowledged Mrs. Enebrad's "legitimate concern about the potential for prejudice." RP 13; *see also* RP 10-24, 54-55. The trial court ruled that evidence of Mr. Enebrad's drug use was relevant as to life expectancy and pain management issues, but reserved for later decision whether such evidence would be admissible on the contributory negligence issue, and indicated that a limiting instruction may be appropriate. RP 54-55.

At trial, Mrs. Enebrad's theory was that Mr. Enebrad had a visible lesion on his left forearm at the time of the January 18, 2013 visit with Dr. Chang, and that Dr. Chang negligently failed to observe, diagnose, or treat it. *See* RP 77-82, 86-87, 95. MultiCare's theory was that Dr. Chang performed a thorough examination on January 18, 2013, and did not observe any abnormality in the left forearm skin graft, because none was present then. *See* RP 94-100. One of MultiCare's experts, Dr. Kent

Carson, testified about how Mr. Enebrad's prior drug use and skin graft led to the cancer spreading deep into bone before it affected the skin. RP 391-92. And, during the testimony of another of MultiCare's experts, Dr. Michael Kovar, who ultimately opined that Mr. Enebrad's life expectancy "would be considerably shortened" by his "struggles with addiction," RP 485, the trial court not only limited the amount of evidence of drug use the jury was allowed to see and hear, but also sua sponte gave a limiting instruction telling the jury that it could consider that evidence only on the issue of life expectancy. RP 482-83; *see also* RP 476-83.

The jury returned a special verdict, answering "No" to the question whether Dr. Chang failed to comply with the standard of care on January 18, 2013. CP 1030.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) sets forth the considerations governing acceptance of review and provides that a petition for review will be accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mrs. Enebrad argues only that review should be granted under RAP 13.4(b)(1) and (4). Because the Court of Appeals' decision is not in conflict with any decision of this Court and does not involve any issue of substantial public importance, her petition for review should be denied.

A. The Court of Appeals' Decision is Not in Conflict with Any of the Supreme Court Decisions Mrs. Enebrad Cites.

Mrs. Enebrad asserts, *Pet. at 2-3*, that the Court of Appeals' statement that, in a loss of chance claim, "the amount of the plaintiff's damages is based on the percentage of lost chance proximately caused by the negligence" is in conflict with this Court's decisions in *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983), and *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011), because those decisions do not explicitly state that a plaintiff asserting a loss of chance claim "is required to state a percentage of lost chance." That non sequitur assertion is patently incorrect.

Whether or not the plaintiffs in *Herskovits* and *Mohr* were able to state a percentage of lost chance to support their loss of chance claims was not at issue in those cases, as the plaintiffs in both cases presented expert testimony establishing the percentage of chance lost. Moreover, both *Herskovits* and *Mohr* do indicate that, in a loss of chance case, the amount of plaintiff's damages is based on the percentage of lost chance

proximately caused by the negligence, and thus do not conflict with the Court of Appeals' statement in that regard. *See Herskovits*, 99 Wn.2d at 635 (Pearson, J., plurality opinion); *Mohr*, 172 Wn.2d at 858.

Although Mrs. Enebrad also asserts, *Pet. at 2*, that the Court of Appeals' decision is in conflict with this Court's decision in *Dunnington v. Virginia Mason Medical Center*, 187 Wn.2d 629, 389 P.3d 498 (2017), she fails to explain any basis for that assertion. Mrs. Enebrad's unsubstantiated assertion of a conflict does not warrant acceptance of review in this case.

B. The Petition Does Not Involve an Issue of Substantial Public Importance that Should Be Determined by this Court.

Mrs. Enebrad asserts, *Pet. at 2*, that the Court of Appeals' decision "subverts the deterrence effect" of medical malpractice tort law "by requiring harmed plaintiffs provide expert witness testimony stating a specific percentage, or range of percentages, of the 'lost chance' … in situations where the defendant health care provider's own conduct is a factor in creating uncertainty on what percentage chance was lost" and thus raises an issue of substantial public importance. Her assertion, however, ignores that Mrs. Enebrad never presented any evidence suggesting that Dr. Tseng's conduct prevented Dr. Ko from opining as to a specific percentage of chance lost. To the contrary, as Dr. Ko explained in

his deposition, ultimately it was his opinion that the delay in treatment between the biopsy Dr. Tseng obtained in August 2013 and Mr. Enebrad's referral to Dr. Ko in October 2013 probably did not change Mr. Enebrad's ultimate outcome. CP 397, 398-99, 612, 613-14. Based on his review of Mr. Enebrad's August 2013 x-rays, it was his opinion that Mr. Enebrad's cancer most likely had already invaded bone and was already at Stage III or IV in August 2013. CP 382, 384, 397, 597, 599, 612.

VI. CONCLUSION

Contrary to Mrs. Enebrad's assertions, the Court of Appeals' decision is not in conflict with any decision of this Court and the case does not involve any issue of substantial public importance that should be determined by this Court. Because the criteria for acceptance of review have not been established, this Court should deny Mrs. Enebrad's petition for review.

RESPECTFULLY SUBMITTED this 18th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 18th day of April, 2018, I caused a true and correct copy of the foregoing document, "Respondent MultiCare Health System's Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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April 18, 2018 - 2:41 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95645-6
Appellate Court Case Title:	Lynette Enebrad, et ano. v. Multicare Health System, et al.
Superior Court Case Number:	14-2-04244-2

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