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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 30864-2-III
(Consolidated with No. 30865-1-III)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re the Estate of RUTH M. DORMAIER, Deceased,
by and through LOURENCE C. DORMAIER, Personal Representative;
and LOURENCE C. DORMAIER, individually,
and as the Beneficiary of his wife's Estate,

Respondents,

v.

COLUMBIA BASIN ANESTHESIA, P.L.L.C., a Professional Limited Liability Company; ROBERT MISASI, C.R.N.A.; GRANT COUNTY HOSPITAL DISTRICT #1, d/b/a SAMARITAN HEALTHCARE, a/k/a SAMARITAN HOSPITAL, a Washington non-profit organization,

Appellants.

JOINT REPLY BRIEF OF APPELLANTS ROBERT MISASI, CRNA, COLUMBIA BASIN ANESTHESIA, PLLC, AND SAMARITAN HOSPITAL

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Appellants Misasi, and Columbia Basin Anesthesia

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

Leslie R. Weatherhead,
WSBA # 11207
Geana Mae Van Dessel,
WSBA #35969
WITHERSPOON KELLEY
Attorneys for Samaritan Hospital

422 W Riverside Ave, Suite 1100
Spokane, WA 99201-0369
Ph: (509) 624-5265

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I. ARGUMENT IN REPLY

A. *Mohr* Does Not Suggest, Much Less Hold, that a Plaintiff May Assert Both a Claim that the Defendant Negligently Caused a Patient's Death and a Claim that the Defendant Negligently Reduced the Patient's Chance of Not Dying.

It was error for the trial court to instruct on a "loss of chance" theory of injury ***at all*** because no such claim had been pleaded, disclosed, tried, or supported by competent "percentage diminution" expert testimony. It also was error to put the theory before the jury ***at all*** because a "loss of chance" theory was not legally viable, even as the trial court and plaintiff's counsel have attempted to articulate one since the verdict.

Neither *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011), nor *Herskovits v. Group Health Co-op of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983), supports the fallacious notion that the complete loss of a greater than even chance of not dying is an injury different from death and that a plaintiff can have a jury instructed on claims for both. A claim that a health care provider's negligence probably caused a patient not to survive is different only semantically from a claim that the provider's negligence is probably why the patient died. Not surviving, that is, is the same thing as dying. That is essentially the point the *Herskovits* plurality makes in the opinion the *Mohr* majority adopted, when it states:

> [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....

Herskovits, 99 Wn.2d at 631. What the *Herskovits* plurality was persuaded to do was to "recognize the loss of a ***less than even chance*** [of survival] as an actionable injury." *Id.* at 634 (emphasis added).[1] Thus, when the patient allegedly died despite having had a chance of survival greater than 50 percent, death is the injury, and an "unexceptional" one that the cause of action for wrongful death law already covers. To assert a loss of chance of *survival* claim, *Herskovits* requires that the preexisting likelihood of survival be lower than 50%. All *Mohr* does is extend "loss of chance" to cases where a patient is seriously injured, but does not die:

> We hold that *Herskovits* applies to lost chance claims where the ultimate harm is some serious injury short of death.

Mohr, 172 Wn.2d at 857. Because *Mohr* was not a death case – the patient was alive and a plaintiff – the *Mohr* court did not hold, and could not have held in that case, that expert testimony estimating the lost chance of a better outcome at greater than 50% would state a claim for loss of chance of not dying.[2] One cannot fairly extrapolate from *Mohr*'s adoption

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[1] The *Mohr* court quotes that statement limiting the *Herskovits* plurality opinion not just once, but twice. *Mohr*, 172 Wn.2d at 852 and 853.

[2] The decision in *Mohr* does not make clear what the reference point for the plaintiff's experts' "50 to 60% chance of a better outcome" testimony in that case had been, *i.e.*, whether the "loss of chance" had been a reduction from certainty

of *Herskovits* an expansion of *Herskovits* that allows personal representatives for deceased patients to sue both for wrongfully causing death and for reduction to zero of the patient's "chance of survival" and to recover the same damages on either theory. Neither *Mohr* nor *Herskovits* makes "loss of chance" a permissible fallback claim in a case where, as here, the plaintiff's experts attribute a patient's *death* to negligence[3] and plaintiff's counsel both (a) argues to the jury that the evidence permits it to find that the reduction in chance of survival was from 90% to zero,[4] and (b) acknowledges to the court that the jury would have to speculate, not follow the trial testimony, to find a reduction of less than 90% in the

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of a better outcome to a 40-50% chance, or a reduction from a 40% chance to a 16 to 20% chance of a better outcome. In briefing to this Court in *Mohr* before this Court certified *Mohr* to the Supreme Court, it was pointed out that neither of the Mohrs' medical causation experts had given definitive opinion testimony that Mrs. Mohr's chance of a better outcome was ever greater than fifty percent, but one did definitively state that she could not testify on a "more probable than not" basis that the ultimate injury Mrs. Mohr suffered had been caused by the defendants' negligence. *See Brief of Respondents Grantham, et al.*, Court of Appeals No. 28047-1-III, at pages 7-13 (quoting deposition testimony of plaintiff expert Dr. Becker, and citing to the clerk's papers) and 14-17 (quoting deposition testimony of plaintiff expert Dr. Harris, and citing to the clerk's papers).

[3] CP 1259-61, 1262-64, 1265-67, 1268-70; CP 52-53.

[4] RP 1472 ("There was testimony ... from plaintiffs, that [Mrs. Dormaier] had a 90 percent chance of survival [i]f they did the right thing. [T]he defense's position was that she had a zero percent chance of surviving. There's nothing in between. You get to decide whether you believe 90 percent or you believe zero percent. If you believe 90 percent, then we've met the loss of chance"); RP 1477 ("[I]f you go to this and you look at the testimony, you'll find that the loss of chance was 90 percent. And 90 percent is sufficient to answer those questions in the affirmative and move on").

patient's chance of survival.[5] Allowing the jury to consider the same claim under two different wordings is not authorized by either *Herskovits* or *Mohr*, and is manifestly unjust to a defendant.

What the trial court did in this case can also be characterized as allowing the plaintiff to proceed to verdict on differently worded but substantively redundant causes of action for wrongful death. It is reversible error to allow a plaintiff to assert redundant causes of action. *LaPlant v. Snohomish County*, 162 Wn. App. 476, 271 P.3d 254 (2011). Whether the remedy in some cases might be a retrial is beside the point here, because the plaintiff lost on the wrongful death claim that he was entitled to assert (and actually pleaded and tried).

B. It Was Error and Grossly Unjust to Defendants for the Trial Court to Instruct on a "Loss of Chance" Theory that Plaintiff Had Not Pleaded, Disclosed, or Tried, that Did Not Even Occur to Plaintiffs' Counsel until after the Close of Evidence, and Through an Instruction that Plaintiffs' Counsel Conceded Would Allow the Jury to Speculate Its Way to a Verdict in Plaintiff's Favor that Was Not Supported by the Evidence.

It manifestly violates the most basic notions of fair notice to hold defendants liable for someone's death on a theory as to which *the plaintiff*,

[5] RP 1420-21 (plaintiff's counsel stating to the trial court: "I don't want the jury to start speculating beyond what's been placed into the record. [My] recollection ... is that the jury has had two percentages of survival placed in front of them, 90 percent by the plaintiffs, and zero percent by the defendants. And ... the way the [court's] instruction is crafted allows the jury to speculate somewhat on both ends, and come up with a percentage that's perhaps not supported by the evidence").

not to mention the defendants, had no inkling was being pursued before or during trial. The judgment entered in this case not only does that, but does it even though the jury found the defendants did not do what plaintiff claimed at trial: cause the patient's death. It is ludicrous for plaintiff to argue, as he does, *Resp. Br. at 27*, that any error in this regard is harmless.

The defense was told that plaintiff's experts would express the "opinion that Ruth Dormaier suffered ***and died***" – not that her chance of survival was diminished by x% – as a result of allegedly negligent health care. CP 1259-61, 1262-64, 1265-67, 1268-70. In his trial memorandum, plaintiff characterized his case as "a claim ... for negligent care resulting in ***the death*** of ... Ruth Dormaier," and asserted that, with appropriate care, "Mrs. Dormaier ***would be alive*** today." CP 608-09.

In opening statement, plaintiff's counsel told the jury that the case "involves the death of Ruth Dormaier," RP 178, that decisions Mr. Misasi had made "resulted in her death," RP 197, and "took her life," RP 198, and that "[a]t the end [of trial], we're going to ask that you find Mr. Misasi and Samaritan Hospital culpable, liable for Mrs. Dormaier's death," RP 199. Plaintiff did not submit a proposed instruction on "loss of chance."

Plaintiff now proposes to treat "loss of chance" as nothing more than "an item of damage," *Resp. Br. at 33*, that does not need to be pleaded affirmatively. "Loss of chance" is hardly just an "item of

damage." In a proper case, such as *Herskovits*, it is – and in this case it was allowed to become – *the injury* for which the defendant is exposed to liability in tort. Basic notions of notice, due process, and fair play dictate that the claimed injury be pleaded or, at the very least, disclosed to the defendant before trial, while there is time to prepare accordingly.

Nothing resembling adequate notice was given in this case. And what the trial court did may not properly be characterized as exercising discretion under CR 15(b) to amend the complaint to conform to the evidence, *Resp. Br. at 35*, because "loss of chance" had not been tried by consent of *the plaintiff*, much less by consent of the defendants.

It was not the defense's obligation to guess that it was trying both the wrongful death case of which it had notice but also a "loss of chance of not dying" case that even plaintiff's counsel did not know he was trying. Even if defense counsel could be faulted for not anticipating before or during trial what plaintiff's counsel had not even thought of (much less argued), the medical testimony given in this case did not support the trial court's decision to instruct on "loss of chance." Plaintiff is simply wrong when he asserts, *Resp. Br. at 39-43*, that substantial evidence supported a "loss of chance" claim as well as (or instead of) a wrongful death claim.

"Loss of chance" or "diminution of a chance of survival" were not terms that any witness used or any lawyer for either side used before or

during the evidentiary phase of the trial. The jury did not hear any medical expert testify that there are steps (a) that actually could have been taken at Samaritan Hospital, in Moses Lake, Washington, starting at 11:00 a.m. on September 20, 2007, that (b) probably would have resulted in Mrs. Dormaier's massive pelvic clot being diagnosed and kept from migrating to her lungs within the three-to four-hour window that existed as of 11:00 a.m. No testimony was presented that the population of patients for which Dr. Swenson cited percentages, RP 258-60, included patients treated for pulmonary emboli who also have massive venous clots. Rather, the jury heard only that most people treated for pulmonary emboli – clots that are *already* in the lung(s) – don't die. According to *Mohr*, that isn't sufficient. Calculation of a "loss of chance" must be based on expert testimony "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***.'" *Mohr*, 172 Wn.2d at 857-58 (citations omitted; emphases added).

To the extent that Dr. Swenson tried to apply "data to the specific facts of Dormaier's case," *Resp. Br. at 38* (citing RP 259-60), he did so not to support a percentage-diminution-loss-of-chance theory, but in aid of plaintiff's stated theory, RP 184, 197-99, that Mrs. Dormaier would surely

not have died but for malpractice by defendants, and was effectively euthanized (Dr. Hattamer's term) when she was anesthetized, RP 395.

Even if one ignores the conflicting opinions of defense experts and accepts the opinions of plaintiff's experts that Mrs. Dormaier presented at Samaritan Hospital with symptoms of pulmonary emboli – smaller clots that had already migrated to her lungs, – she did not die at 3:00 p.m. on September 20, 2007, from the pulmonary emboli with which she presented that morning. RP 282, 569-70, 573-78, 596-98, 1157-58. She died, instead, because a massive but asymptomatic pelvic clot broke loose four hours later and became a new pulmonary embolism that proved fatal because of its massive size. RP 245, 280, 278-88, 632.

To patch the gap in the trial testimony between the efficacy of treatment for pulmonary emboli and prevention of detachment of massive venous clots, plaintiff repeatedly either glosses over the difference between venous clots and pulmonary emboli or pretends they are the same thing. They are not the same thing. Pulmonary emboli are clots that have left a vein, passed through the heart, and lodged in the lung. RP 222, 291-92, 334, 628-29, 904. Most are small enough to cause no more than minor temporary symptoms because they block only parts of a lung. RP 245-46, 577, 586-86, 595, 616, 905, 942. Massive ones – like the 1 cm. clot Mrs. Dormaier had – are rarer but kill quickly because they are big enough to

block the main pulmonary arteries. RP 244-45, 289-90, 407, 565-66, 585, 799-800, 906. Figuring out that Mrs. Dormaier had pulmonary emboli on the morning of her scheduled surgery and treating her pulmonary emboli with heparin would not have been the same thing as diagnosing and treating the massive clot she happened also to have lurking in a pelvic vein. RP 634, 1155-57. None of plaintiff's experts opined that *the clot* could have been found and dealt with in time to have probably prevented *that size clot* from detaching and killing Mrs. Dormaier barely more than four hours after Mr. Misasi first became involved in her health care. Indeed, plaintiff's experts acknowledged that whether and when clots will detach from veins is completely unpredictable. RP 413, 630, 634-35, 1188-89.

Plaintiff's experts did not opine that it was practically feasible to both order and obtain the necessary diagnostic scans to search for and find any large clots in the legs, and then arrange and perform an interventional procedure to remove the pelvic-vein clot (assuming it would have been found) in the few hours that elapsed between sometime after 10:30 a.m. on September 20, 2007, when Mr. Misasi first obtained information about Mrs. Dormaier's status, and 3:00 p.m., when she had her cardiac arrest. Nor did any of plaintiff's experts testify that anticoagulation therapy alone, if started at 11:00 a.m., would have acted quickly enough to have probably prevented what happened just four hours later at 3:00 p.m.

Dr. Swenson testified that giving heparin reduces the threat that clots will migrate to the heart and be pumped to the lungs, RP 251, but did not say by how much, or how quickly, the threat presented by a ***1 cm.*** pelvic vein clot – which Mrs. Dormaier undisputedly already had before Mr. Misasi first met her – is typically eliminated or reduced with heparin. Nor did he quantify Mrs. Dormaier's risk of death given the undiagnosed 1 cm. pelvic vein clot that she already had when Mr. Misasi first became involved in her care, or the extent to Mr. Misasi's care enhanced her risk of death from that clot. In fact, Dr. Swenson admitted that:

> Part of the reason that some people die with pulmonary embolism even if we start treatment is that the clots that may still be out elsewhere in the body may not have shrunk enough and become adherent enough to the blood vessels to remain there, and they still may migrate to the lung, and then if the lung function is already poor or there's already lots of clots in the lung, these new clots may be the straw that breaks the camel's back.

RP 282. He agreed that Mrs. Dormaier's fatal clot was "massive," RP 280, large enough to block the artery that feeds both lung branches, RP 245, and broke loose spontaneously, not because of the surgery, RP 287-88; that it takes five to ten seconds for a dislodged clot to reach the lungs, RP 316; that heparin would not have dissolved the clot, because the body takes "hours to days" to dissolve a clot, RP 294-95; that heparin only would have stopped new clots from forming, *id.*; and that Mrs. Dormaier

would have been lying down and remaining at risk for pulmonary embolism while any scans were done, if more had been ordered instead of proceeding with surgery, RP 310-12.

Dr. Hattamer did not opine at all as to the probability of survival of patients with very large pelvic clots, or as to the diminution of Mrs. Dormaier's chance of survival because of decisions in which Mr. Misasi joined.[6] He acknowledged that heparin would not have affected the large clot that killed Mrs. Dormaier, RP 410, and that it could have broken loose at any time, RP 413.

Dr. Reynolds acknowledged that heparin does not dissolve clots and the body takes days to do so, and that, even if a large clot in a leg vein is detected, one would have to be "very lucky" to have a qualified surgeon present to remove such a clot in time. RP 634.

Dr. Halpern likewise acknowledged that scans would not prevent a clot from breaking loose, RP 1189; that heparin only prevents the formation of new ones while the body breaks down existing ones, which, in the case of large clots can take days or weeks, RP 1189-90; that it is impossible to predict when a massive clot will break off from a vein, RP

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[6] Plaintiff's counsel did ask Dr. Hattamer whether he disagreed with counsel's characterization of Dr. Swenson's testimony about success in using anticoagulation treatment, and he responded: "A. No. In fact, I know it's a high number. I'm just not aware of the stat." RP 395-96.

1188-89; that it would take time (which he did not specify or estimate) to arrange surgery to remove a clot, RP 1190-91; and that there were no cardiothoracic surgeons (and he could not say whether there were any interventional radiologists) in Grant County in 2007, RP 1190-91. Even on redirect, Dr. Halpern did not offer an estimate as to how long it would have taken to do the tests he said should have been done to identify Mrs. Dormaier's pelvic clot. Nor did he testify that, starting late in the morning on September 20, all those steps probably could have been completed before 3:00 p.m., when Mrs. Dormaier's clot broke loose and killed her.

No defense medical witness was asked on direct or cross-examination about percentage survival rates or percentage risks, or how any decisions Mr. Misasi made on September 20, 2007 affected such rates.

Dr. Swenson testified that heparin makes clots "*begin* to stick more closely to and more solidly to the vessel wall, making it *harder* for them to be dislodged," RP 250-51 (italics added), and that the body takes *hours*, at least, to dissolve clots of any size, RP 295, not that heparin would *probably* have kept Mrs. Dormaier's pelvic clot bound to the vessel wall long enough for surgical intervention to have been arranged and performed successfully. Dr. Reynolds testified that gravity works against blood flow from the legs to the heart when a person is upright, RP 584, 590-91, 594, but not that Mrs. Dormaier's clot's separation would have

been delayed for any particular amount of time had she been kept upright, even when plaintiff's counsel gave him the chance to do so, RP 592-96.

Defense counsel simply were not aware before or during the presentation of evidence that they needed to meet a "loss of a chance" claim (a claim that plaintiff's own counsel never asserted until after the close of all the evidence). Defense counsel would have presented evidence on such a claim had they been apprised that such a claim was in the case.

C. Reconciliation Is Not Available to Plaintiff Because the Jury's "No" Answer to Question No. 2 Was Permissible Under Court's Instruction No. 11 and Precluded an Answer to Question 4 of Greater than Fifty Percent.

What occurred here is not simply that the jury answered verdict form questions in an apparently inconsistent but reconcilable way. What occurred is that the jury, after answering verdict form Question No. 2 in a way that the court's instructions permitted, answered Question No. 4 in a way that Instruction No. 11 and its answer to Question No. 2 did not permit.[7] Plaintiff cites no authority for removing the jury's answers from the instructional context in which the jury gave them and adding an interpretive gloss to the those answers in the guise of "reconciling" them. There is no legal basis for the contrivance of ignoring Instruction No. 11

[7] Instruction No. 11 stated in pertinent part that "If you find that the loss or diminution of a chance to survive was in excess of 50%, then you have found that such negligence was a proximate cause of the death." CP 273.

and interpreting the jury's answers, as the trial court did, as meaning Mr. Misasi had not caused Mrs. Dormaier's fatal clot but had caused her not to survive it. It is sophistry to say that Mr. Misasi's negligence was *not* a proximate cause of Ms. Dormaier's death but was a proximate cause of her loss of a chance to survive, particularly when plaintiff's experts and trial counsel insisted she almost certainly would have lived but for Mr. Misasi's decision to anesthetize her for surgery. Logic leads back, inexorably, to what the *Herskovits* court recognized, *i.e.*, that when plaintiff claims that defendant's negligence proximately caused the decedent's death and presents evidence that the decedent more probably than not would have survived with proper care, "loss of chance" analysis is unnecessary and inappropriate, because existing tort law – wrongful death law – already provides the framework for analysis and factfinding. No "loss of chance" instructions or verdict form questions were appropriate in this case and, because plaintiff lost on his wrongful death claim, the case should have been, and now should be, dismissed with prejudice.

D. The Plain Wording of Instruction No. 12 Precluded the Award of Any Damages to Mr. Dormaier Personally Once the Jury Answered "No" to Verdict Form Question No. 2.

Instruction No. 12, CP 274, permitted the jury to "determine the amount of money that will reasonably and fairly compensate [Mr. Dormaier] for such damages as you find were proximately caused by the

death of Ruth M. Dormaier," not by any loss of chance of survival, which plaintiff insists in his liability arguments (if not his damages arguments) are different things. Plaintiff took no exception to Instruction No. 12 and makes no challenge on appeal to the trial court giving it. Plaintiff cannot have it both ways. If the jury was entitled to award damages to Mr. Dormaier, personally, either for his wife's death or for diminution of her chance of survival, then loss of chance of survival and death were redundancies, as defendants argue, and it was error for the trial court to instruct on loss of chance as well as on wrongful death. If it was not error for the trial court to instruct on loss of chance of survival as well as on wrongful death, that has to be because the two things are not the same, in which case plaintiff is stuck with how Instruction No. 12 was worded and the $1,300,000 award cannot stand in light of the jury's "no" answer to verdict form Question No. 2.

E. Because of Testimony that Mr. Misasi's Decision to Proceed to Anesthetize Was One He Made Jointly with Drs. Canfield and Hart, and that a Physician's Standard of Care Applied to Mr. Misasi, the Trial Court Erred by Adhering to Its Pretrial Ruling that the Doctors' Fault Was Not Legitimately at Issue.

1. *Res judicata* did not preclude apportionment of fault.

Plaintiff's brief ignores the authorities Mr. Misasi and Samaritan cited, *App. Br. at 62-63*, to support their argument that application of *res judicata* was error. He offers only an *ipse dixit* argument, *Resp. Br. at 59*,

that *res judicata* has to apply because "the only fault that Misasi and Samaritan could possibly apportion to Drs. Canfield and Hart was based upon Dormaier's complaint."

That is no answer to defendants' argument, which is based both on how RCW 4.22.070(1) is worded, and on the fact that the jury heard testimony that Mr. Misasi's decision to go ahead and anesthetize Mrs. Dormaier was made jointly with Drs. Hart and Canfield, RP 1029-30, 1046-48, 1050, 1319-24, and that signs and symptoms of pulmonary embolus are ones that any physician, as well as a nurse anesthetist, should recognize, RP 260-61.

2. Defendants did not waive apportionment of fault.

Plaintiff argues, *Resp. Br. at 10 n.9, 11-12, 55-56*, that Mr. Misasi and Samaritan never intended to apportion fault to Drs. Canfield and Hart, and made statements during trial abandoning or waiving any right to do so. That does not fairly characterize the record.

It is true that, at the outset of the trial, defense counsel were not sure they would, in the end, *wish* to apportion fault to Drs. Canfield and Hart (the principal defense being, as counsel phrased it, that "none of the people involved in this case were negligent," RP 108, 110). But defense counsel opposed plaintiff's motion in limine to foreclose the admission of any evidence of fault on the part of Drs. Canfield and Hart, and asked the

court to "defer ruling on [the] apportionment issue." CP 746, RP 108. Defense counsel argued specifically that *res judicata* did not apply to preclude the presentation of evidence of what Drs. Canfield and Hart had thought and done, or to preclude apportionment of fault to them. CP 747, RP 107, 120, 122. The trial court simply disagreed with defense counsel and agreed with plaintiff's counsel concerning *res judicata*:

> I think the law of *res judicata* is that the preclusive effect is the same. Which then, in my view, precludes the claim, including the allocation of fault to Hart and Canfield. So I think that . . . this jury will never be asked to consider the negligence of Hart and Canfield, or to apportion fault to Hart and Canfield.

RP 127.

In his brief, plaintiff presents statements made during trial as if they had occurred before the court made that eve-of-trial ruling *in limine*. Plaintiff's counsel objected repeatedly whenever defense counsel began to elicit evidence concerning the conduct of Drs. Hart and Canfield, and secured rulings that testimony on that subject was admitted for the limited purpose of showing the reasonableness of Mr. Misasi's conduct. Statements defense counsel made in the context of a pretrial ruling they were bound to obey, or in response to plaintiff's during-trial objections when seeking to have evidence admitted for a purpose not foreclosed by the pre-trial ruling, were not waivers of their objections to the ruling itself.

Pending a possible appeal, defense counsel were obliged to follow the court's dispositive pre-ruling that apportionment was out of the case, and that evidence to support it could not be offered, however much they disagreed. *See Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968) (quoting Henry S. Drinker, Legal Ethics, p. 69 (1953)) ("'Although it is both the right and duty of a lawyer to protest vigorously rulings on evidence or procedure or statements in the judge's charge which he deems erroneous, nevertheless, when the ruling has been finally made, the lawyer must, for the time being, accept it and invoke his remedy by appeal to the higher court....'"). But a party who loses a ruling *in limine* "is deemed to have a standing objection and need not specifically object at trial to preserve the issue for appeal." *State v. Finch*, 137 Wn.2d 792, 819-20, 975 P.2d 967 (1999), *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); *State v. Koloske*, 100 Wn. 2d 889, 895, 676 P.2d 456 (1984)("[u]nless the trial court indicates that further objections at trial are required when making its ruling, the party losing the pretrial motion is deemed to have a standing objection"), *overruled on other grounds*, *State v Brown,* 113 Wn. 2d 520, 782 P.2d 1013 (1989).

Because defense counsel had made a record of their legal position and because the trial court's ruling was clear, it was not incumbent upon them to make any more of a record than they did in order to seek reversal

on appeal because of Court's Instruction 4, CP 266, which told the jury, consistent with the court's pretrial ruling, RP 127, that any fault of Drs. Hart and Canfield could not be considered. *See Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994) (even in the absence of an express objection to the instruction at trial, a party may challenge the instruction on appeal if the party's objection to a pretrial ruling clearly informed the trial court of the party's position and the instruction embodies the same matter as that which was decided in the pretrial ruling); and *Washington Appellate Practice Deskbook*, Vol. I (3d ed. 2005 and Supp. 2011), § 17.7(2)(a)(i), at p. 17-44 (citing *Queen City Farms* for that proposition).

F. Neither Washington Tort Law Nor the Law of this Case Framed by Trial Court's Jury Instructions Permit Entry of Judgment for 100% of the Jury's Damages Award.

Even if one speculatively extrapolates from *Mohr* a rule that a lost chance of a better outcome is an "injury" for which our Supreme Court would allow a patient to seek damages even when expert testimony pegs the chance of the allegedly lost better outcome at greater than 50%, the most one can say is that damages may be recovered for the lost value specifically of a greater-than-even chance of a better outcome.

In his effort to defend the trial court's decision to instruct on "loss of chance of survival," plaintiff seeks to *distinguish* such a claim from,

and argues that it is alternatively compatible with, a claim for wrongful death. Plaintiff *equates* causation of death and causation of "loss of chance of survival," however, when he is called upon to defend the trial court's inexplicable decision not to discount the jury's damages award by 30%, as its Instruction No. 11, CP 273, had informed the jury it would if the jury found for the plaintiff on his "loss of chance" claim (which the court and both sides understood would entail a finding of a diminution of a less than 50% chance of survival).

If, despite all the notice, procedural, substantive, and instructional errors that were made in this case concerning "loss of chance," the jury's finding somehow is permitted to stand, and if, despite the fact that Instruction No. 12, CP 274, did not permit the jury to award Mr. Dormaier any damages at all if the jury found (as it did, CP 357) that Mr. Misasi had not caused Mrs. Dormaier's death, the law – *Mohr* and Instruction No. 11 – and common sense dictate that the $1.3 million award must be reduced by 30% to reflect the jury's 70% loss of chance finding.

II. CONCLUSION

The rhetoric plaintiff offers cannot change and should not obscure the fact that a "loss of chance" claim was not pled, noticed, tried, or supported with pertinent "percentage diminution" medical opinion testimony, did not even occur to plaintiff's counsel until after the close of

evidence, and was framed, over defendants' protest, and to defendants' manifest prejudice, for the jury by an instruction that plaintiffs' counsel acknowledged would allow the jury to engage in impermissible speculation – which the jury then did.

The trial court erred in ruling at the beginning of the trial that Mr. Misasi and Samaritan could not seek to apportion any fault to Drs. Canfield and Hart, in adhering to that ruling throughout the trial, and, despite the evidence the jury heard, in instructing the jury consistent with that pretrial ruling.

The judgment entered on the verdict should be vacated and the case should be remanded for dismissal.

RESPECTFULLY SUBMITTED this 25th day of March, 2013.

WITHERSPOON KELLEY

By Mary H. Spillane for
Leslie R. Weatherhead,
WSBA # 11207
Geana Mae Van Dessel,
WSBA #35969

Attorneys for Appellant Samaritan Hospital

per e-mail authorization

WILLIAMS, KASTNER & GIBBS PLLC

By Mary H. Spillane
Mary H. Spillane,
WSBA #11981
Daniel W. Ferm,
WSBA #11466

Attorneys for Appellants Misasi and Columbia Basin Anesthesia

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 25th day of March, 2013, I caused a true and correct copy of the foregoing document, "Joint Reply Brief of Appellants Robert Misasi, CRNA, Columbia Basin Anesthesia, PLLC and Samaritan Hospital," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Respondents:	SENT VIA:
Mark D. Kamitomo, WSBA #18803 THE MARKHAM GROUP, INC., P.S. 421 West Riverside Ave., Suite 1060 Spokane, WA 99201-0406 Ph: (509) 747-0902 E-mail: mark@markamgrp.com	☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☐ E-file / E-mail
Counsel for Respondents: J. Gregory. Casey, WSBA #02130 CASEY LAW OFFICES 1318 W. College Ave. Spokane, WA 99201 Ph: (509) 252-9700 Email: greg@spokanelawcenter.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☐ E-file / E-mail
Counsel for Respondents: George M. Ahrend, WSBA #25160 AHREND ALBRECHT PLLC 16 Basin St SW Ephrata WA 98823-1865 Ph: (509) 764-9000 Email: gahrend@trialappeallaw.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☐ E-file / E-mail

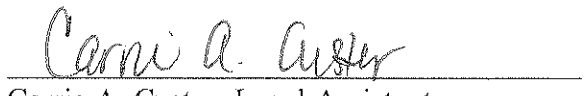
Co-counsel for Appellants Robert Misasi and Columbia Basin Anesthesia, PLLC:
Megan Murphy, WSBA #31680
THORNER KENNEDY GANO
101 S 12th Ave
PO Box 1410
Yakima, WA 98907-1410
Ph: (509) 575-1400
Email: mkm@tkglawfirm.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☐ E-file / E-mail

Counsel for Appellant Samaritan Hosp.:
Leslie R. Weatherhead, WSBA # 11207
Geana Mae Van Dessel, WSBA #35969
Brian T. Rekofke, WSBA #13260
WITHERSPOON KELLEY
422 W Riverside Ave, Suite 1100
Spokane, WA 99201-0369
Ph: (509) 624-5265
Email: lrw@witherspoonkelley.com
gmv@witherspoonkelley.com
btr@witherspoonkelley.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☐ E-file / E-mail

DATED this 25th day of March, 2013, at Seattle, Washington.



Carrie A. Custer, Legal Assistant