

84712-6

FILED

OCT 15 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 280471-III

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

---

**LINDA MOHR and CHARLES MOHR, her husband,**

**Plaintiffs/Appellants,**

**v.**

**DALE C GRANTHAM, M.D. and JANE DOE  
GRANTHAM, and their marital community; BRIAN J.  
DAWSON, M.D. and JANE DOE DAWSON, M.D., and  
their marital community; BROOKS WATSON II, M.D. and  
JANE DOE WATSON, and their marital community;  
KADLEC MEDICAL CENTER, a Washington corporation;  
and NORTHWEST EMERGENCY PHYSICIANS, INC., a  
Washington corporation,**

**Defendants/Respondents.**

---

**BRIEF OF DEFENDANT KADLEC MEDICAL CENTER**

---

**JEROME R. AIKEN, WSBA #14647  
PETER M. RITCHIE, WSBA #41293  
Attorneys for Defendant Kadlec Medical  
Meyer, Fluegge & Tenney, P.S.  
P.O. Box 22680  
Yakima, WA 98907  
(509) 575-8500**

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii-vii
I. INTRODUCTION.....	1
II. STATEMENT OF CASE .....	2
III. ARGUMENT .....	4
A. Defendant KMC Is Not Liable Under Agency Law .....	4
B. There Is No Vicarious Liability Here .....	12
C. Plaintiffs Have Not Proven Causation .....	19
1. Plaintiffs Have Not Proven The Traditional Elements Required for Proximate Causation .....	19
2. Plaintiffs Have Produced No Adequate Substitute for the Traditional Requirements Of Proximate Causation .....	24
<i>i. There is no Legal Basis for a “Loss               of Chance of a Better Outcome”               Action in Washington Law .....</i>	<i>25</i>
<i>ii. Plaintiffs Point to no Washington               Cases Supporting the Adoption of               the “Lost Chance” Rule .....</i>	<i>33</i>
D. The Washington Medical Malpractice Statutes Do Not Allow For A Cause Of Action For “Lost Chance” Or “Lost Opportunity For A Better Outcome”.....	36
IV. CONCLUSION .....	39

TABLE OF AUTHORITIES

CASES

<u>Adamski v. Tacoma General Hospital</u> 20 Wn. App. 98, 579 P.2d 970 (1978) .....	10,11
<u>Alfonso v. Lund</u> 783 F.2d 958, 965 (10 <sup>th</sup> Cir. 1986) .....	35
<u>Amtruck Factors v. Int'l. Forest Prods.</u> 59 Wn.App. 8, 795 P.2d 742 (1990) .....	9
<u>Baxter v. Morningside, Inc.</u> 10 Wn.App. 893, 521 P.2d 946 (1974) .....	14
<u>Boren v. Weeks</u> 251 S.W.3d 426 (Tenn. 2008) .....	12
<u>Borowski v. Sacheti</u> 43 Conn.App. 294, 682 A.2d 1095 (1996) .....	35
<u>Bromme v. Pavitt</u> 5 Cal.App.4 <sup>th</sup> 1487, 7 Cal.Rptr.2d 608 (1992) .....	34
<u>Brown v. St. Vincent's Hospital</u> 899 So.2d 227 (Ala. 2004) .....	12
<u>Carter v. King County</u> 120 Wash. 536, 208 P. 5 (1922) .....	14
<u>Chhuhth v. George</u> 43 Wn.App. 640, 714 P.2d 562, <u>rev. denied</u> , 106 Wn.2d 1007 (1986) .....	21
<u>Churkey v. Rustia</u> 768 N.E.2d 842 (Ill. App. 2002) .....	10
<u>Clayton v. Thompson</u> 475 So.2d 439, 455 (Miss. 1985) .....	34

<u>Daugert v. Pappas</u>	
104 Wn.2d 254, 704 P.2d 600 (1985) .....	21,29
.....	31,32
<u>Davis v. Glow Machinery Mfg. Company</u>	
102 Wn.2d 68, 684 P.2d 692 (1984) .....	21
<u>Delaney v. Cade</u>	
255 Kan. 199, 873 P.2d 175 (1994) .....	29
<u>Dent v. Exeter Hospital, Inc.</u>	
931 A.2d 1203 (N.H. 2007) .....	10,12
<u>D.L.S. v. Maybin</u>	
130 Wn. App. 94, 121 P.3d 1210 (2005) .....	4,5,6,7,
.....	12,14,
<u>Fabio v. Bellomo</u>	
504 N.W.2d 758 (Minn. 1993) .....	35
<u>Fabrique v. Choice Hotels Int'l.</u>	
144 Wn.App. 675, 183 P.3d 1118 (2008) .....	30
<u>Falcon v. Memorial Hosp.,</u>	
436 Mich. 443, 462 N.W.2d 44 (1990) .....	29
<u>Fennell v. So. Md. Hosp. Ctr. Inc.</u>	
320 Md. 776 580 A.2d 206 (1990) .....	34
<u>Garrett v. L.P. McCuiston Comm. Hospital,</u>	
30 S.W.3d 653 (Tex. App. 2000).....	12
<u>Gooding v. University Hosp. Bldg., Inc.</u>	
445 So.2d 1015 (Fla. 1984) .....	34
<u>Greene v. Rothschild</u>	
60 Wn.2d 508, 374 P.2d 566 (1962) <u>overruled on other grounds</u>	
<u>Greene v. Rothschild</u> , 68 Wn.2d 1, 402 P.2d 356 (1965) .....	5
<u>Guadagno v. Lifemark Hospitals of Florida, Inc.</u>	
972 S.2d 214 (Fla. 2007) .....	10

<u>Hartley v. State</u> 103 Wn.2d 768, 698 P.2d 77 (1985) .....	20
<u>Henry v. Flagstaff Medical Center, Inc.</u> 132 P.3d 304 (Ariz. 2006) .....	12
<u>Herskovits v. Group Health Co-Op of Puget Sound</u> 99 Wn.2d 609, 664 P.2d 474 (1983) .....	24,25
26,27,28,29,30,31,32,33,34,34,38,39	
<u>Holt v. Wagner</u> 344 Ark. 691, 43 S.W.3d 128 (2001) .....	35
<u>Jackson v. Standard Oil Company</u> 8 Wn.App. 83, 505 P.2d 139 (1972) .....	14
<u>James v. Ingalls Memorial Hospital</u> 701 N.E. 2d 207 (Ill. App. 1998) .....	9
<u>Jennison v. Providence St. Vincent Medical Center</u> 174 Or.App. 219, 25 P.3d 358 (2001) .....	12
<u>Jones v. Health South Treasure Valley Hospital</u> 147 Id. 109, 206 P.3d 473 (2009) .....	13
<u>Jones v. Owings</u> 456 S.E.2d 371 (S.C. 1995) .....	34,35
<u>Joshi v. Providence Health Sys. of Or. Corp.</u> 342 Or. 152, 149 P.3d 1164 (2006) .....	35
<u>Kilpatrick v. Bryant</u> 868 S.W.2d 594 (Tenn. 1993) .....	34,35
.....	36
<u>King v. Riveland</u> 125 Wn.2d 500, 886 P.2d 160 (1994) .....	5,6
<u>Kramer v. Lewisville Memorial Hosp.</u> 858 S.W.2d 397 (Tex. 1993) .....	34,39

<u>Kwiatkowski v. Drews</u>	
142 Wn.App 463, 176 P.3d 510 (2008) .....	4
<u>Landenburg v. Campbell</u>	
56 Wn.App 701, P.2d 1306 (1990) .....	4
<u>Lunt v. Mt. Spokane Skiing Corp.</u>	
62 Wn.App. 353, 814 P.2d 1189, <u>rev. denied</u> ,	
118 Wn.2d 1003 (1991) .....	21
<u>Manning v. Twin Falls Clinic &amp; Hosp.</u>	
122 Id. 47, 830 P.2d 1185 (1992) .....	35
<u>McLaughlin v. Cooke</u>	
112 Wn.2d 829, 774 P.2d 1171 (1989) .....	23
<u>McLean v. St. Regis Paper Co.</u>	
6 Wn.App. 727, 496 P.2d 571 (1972) .....	12,14
.....	15,16
<u>Nejin v. Seattle</u>	
40 Wn.App. 414, 498 P.2d 615 (1985) .....	22
<u>Richard v. Adair Hospital Foundation Corp.</u>	
566 S.W. 2d 791 (Ky. App. 1978) .....	34
<u>Rounds v. Nellcor Puritan Bennett, Inc.</u>	
147 Wn.App. 155, 194 P.3d 274, <u>rev. denied</u> ,	
165 Wn.2d 1047, 208 P.3d 554 (2009) .....	20,30
.....	31
<u>Sanchez v. Haddix</u>	
95 Wn.2d 593, 627 P.2d 1312 (1981) .....	22
<u>Smith v. Parrott</u>	
175 Vt. 375, 833 A.2d 843 (2003) .....	35
<u>Sorenson v. Raymark Industries, Inc.</u>	
51 Wn.App. 954, 756 P.2d 740 (1988) .....	32,33

<u>Stephens v. Omni Inc. Co.</u>	
138 Wn.App. 151, 159 P.3d 10, <u>rev. denied</u> ,	
163 Wn.2d 1012 (2007) .....	16,17
<u>Thompson v. Sun City Community Hosp., Inc.</u>	
141 Ariz. 597, 688 P.2d 605 (1984) .....	29
<u>Torres v. Salty Sea Days</u>	
36 Wn.App. 668, 676 P.2d 512, <u>rev. denied</u>	
101 Wn.2d 1008 (1984) .....	15,17
.....	19
<u>Udall v. T.D. Escrow Servs., Inc.</u>	
159 Wn.2d 903, 154 P.3d 882 (2007) .....	6
<u>United States v. Cumberbatch</u>	
647 A.2d 1098 (Del. 1994) .....	35
<u>Vanstelle v. MacAskill</u>	
255 Mich.App. 1, 662 N.W.3d 41 (2003) .....	12
<u>Watson v. Medical Emergency Services, Corp.</u>	
532 N.E.2d 1191 (Ind.App. 1989) .....	35
<u>Weymers v. Khera</u>	
454 Mich. 639, 563 N.W.2d 647 (1997) .....	34
<u>Zueger v. Public Hospital Dist.</u>	
57 Wn.App. 584, 789 P.2d 326 (1990) .....	27,29

**COURT RULES AND STATUTES**

RCW 4.24.290 .....	36-37,
.....	38
RCW 7.70.040 .....	37,38

**OTHER AUTHORITIES**

Restatement (Second) of Agency § 250 .....	14,15,
.....	16
Restatement (Second) of Agency § 267 .....	5
Restatement (Second) of Torts § 323 .....	25
W. Prosser, Law of Torts, ch. 13 § 69, at 479 (3d ed. 1964) .....	16
David Robertson, <i>The Common Sense of Cause and Fact</i> 75 Tex. L. Rev. 1765 (1997) .....	35

## I. INTRODUCTION

This is a medical malpractice case involving the unfortunate injury of Plaintiff Linda Mohr (hereinafter "Mrs. Mohr"). Mrs. Mohr was injured in an automobile accident in 2004 and subsequently suffered a stroke. Plaintiffs have added numerous defendants to this action. The sole claim that Plaintiffs have brought against Defendant Kadlec Medical Center (hereinafter "KMC") is for various liability under the doctrine of *respondeat superior*. Plaintiffs allege that KMC is liable for the negligent acts of co-defendant physicians because the physicians who treated Mrs. Mohr were acting as agents of the hospital. Plaintiffs also allege that there is sufficient proximate cause to find a liability based upon medical malpractice law.

Plaintiffs' claims, however, must be dismissed for two reasons. First, under Washington law, KMC cannot be liable under the doctrine of *respondeat superior* because co-defendant physicians were not KMC's agents. Second, Plaintiffs have not proven the requisite element of proximate cause.

## II. STATEMENT OF CASE

Mrs. Mohr is a diabetic. On the afternoon of August 31, 2004, she suffered a low blood sugar level known as hypoglycemia. The hypoglycemia caused an altered state of consciousness in Mrs. Mohr. In that state Mrs. Mohr hit several cars and eventually ran off the road. (CP 90-108, 111-115).

An ambulance arrived at the scene of the accident and took her to KMC. At KMC, Mrs. Mohr was examined by Dr. Grantham in the emergency room. (CP 90-108, 304).

Mrs. Mohr's condition at the emergency room is disputed. According to the records, however, she exhibited no real signs or symptoms of any type of head injury. A CT scan was done of her head. The CT scan did not reveal any significant abnormality. As a result, Mrs. Mohr was discharged from KMC late on the evening of August 31, 2004. (CP 90-108).

Mrs. Mohr's husband, Plaintiff Charles Mohr (hereinafter "Mr. Mohr"), had accompanied his wife to the emergency room and took her home. According to Mr. Mohr, Mrs. Mohr was very lethargic when he took her home. Mr. Mohr stated that he carried her

to bed where she slept until the early morning hours. Once she woke up at around 6:00 a.m. in the morning, she complained of left-side weakness. Mrs. Mohr once again was taken to the emergency room at KMC on September 1, 2004. (CP 223-227).

Dr. Brian Dawson was the emergency room physician who provided care to her while in the emergency department. He once again ordered a CT scan. The CT scan demonstrated that the patient had suffered a cerebral vascular accident or stroke. Dr. Dawson recommended that Mrs. Mohr be hospitalized and that additional studies be performed. (CP 118-143).

KMC then admitted Mrs. Mohr to the Kadlec Intermediate Care Unit. Hospitalist Dr. Brooks Watson undertook her care. After Dr. Watson ordered additional studies, he diagnosed a dissected carotid artery. The decision later was made to transfer Mrs. Mohr to the University of Washington Hospital. KMC transferred Mrs. Mohr there on the evening of September 1, 2004. (CP 118-143).

On both August 31, 2004 and September 1, 2004, Mr. Mohr signed a document entitled Consent to Treatment and Conditions of

Admissions, which specifically states that the physicians at the hospital are independent contractors. (CP 108, 305-06).

### III. ARGUMENT

#### A. Defendant KMC Is Not Liable under Agency Law

Plaintiffs claim that KMC is vicariously liable for the acts of the co-defendant physicians. Since, however, none of the co-defendant physicians involved is or was at the time of incident in question employees of KMC, Plaintiffs' claim can only rest on the tort theory of apparent or ostensible agency.<sup>1</sup> Based upon this theory, Plaintiffs' claim must fail.<sup>2</sup>

Ostensible authority occurs when a party forms a reasonable and justifiable belief that another individual is the agent of the alleged principal and relies upon that belief. In Washington, "[t]he doctrine is intended to protect third parties who justifiably rely upon the belief that another is the agent of a principal." D.L.S. v. Maybin, 130 Wn.App. 94, 98-99, 121 P.3d 1210, 1213 (2005). Ostensible

---

<sup>1</sup> It should be noted that apparent agency and ostensible agency are essentially the same. Thus, the terms will be used interchangeably.

<sup>2</sup> It is important to note that, while the Superior Court's Order regarding Summary Judgment was premised on the issue of proximate cause, in Washington a trial court's decision may be affirmed on *any* correct ground, even if the trial court did not consider it. See, Landenburg v. Campbell, 56 Wn.App 701, 784 P.2d 1306 (1990); Kwiatkowski v. Drews, 142 Wn.App 463, 176 P.3d 510 (2008). Thus, because KMC's agency argument is a valid ground upon which to affirm the Superior Court, this Court may consider it.

authority is based on the RESTATEMENT (SECOND) OF AGENCY § 267, which provides that,

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (1957).

Washington courts have held that there are three basic requirements for ostensible agency:

[1] the actions of the putative principal must lead a reasonable person to conclude the actors are employees or agents; [2] the plaintiff must believe they are agents; and [3] the plaintiff must, as a result, rely upon their care or skill, to her detriment.

Maybin, 130 Wn.App. at 98-99, 121 P.3d at 1213. See also, King v. Riveland, 125 Wn.2d 500, 886 P.2d 160 (1994); Greene v. Rothschild, 60 Wn.2d 508, 513-14, 374 P.2d 566 (1962) (quoting RESTATEMENT § 267), overruled on other grounds by Greene v. Rothschild, 68 Wn.2d 1, 402 P.2d 356 (1965).

Thus, for ostensible authority to occur there must be words or conduct of the principal, communicated to a third party that give rise to the appearance and belief that the agent possesses authority to act

on the principal's behalf of the. "A person asserting apparent agency must have a subjective belief that the agent is acting for the principal." Maybin, 130 Wn.App. at 98-99, 121 P.3d at 1213. Nonetheless, the rule is that the subjective belief of the plaintiff that the alleged agent has authority to act for the principal is not alone sufficient. The plaintiff's subjective belief must be *objectively* reasonable. King v. Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1964); Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 913, 154 P.3d 882 (2007).

The most recent and informative case on ostensible authority is Maybin. In that case, the plaintiff contended there was an issue of apparent authority whether the McDonald's Corporation as the principal was vicariously liable for the acts of a person that worked at an independently-owned McDonald's franchise. Maybin, 130 Wn.App. at 95-97. The court ruled that it was not, holding that more "is required of the principal before its acts can create liability under the apparent authority doctrine" than acts or conduct that merely connects or ties the agent to the principal. Id. at 102. There, the plaintiff had argued that McDonald's, through its standardized,

nationwide advertising campaign, had held out its franchisees as agents. The court emphasized that the advertisements were too tenuous a connection to establish ostensible authority, and that the plaintiff had proffered no direct proof that he had relied on them to his detriment:

Beyond the general impression created by its advertising that McDonald's restaurants offer a wholesome environment, D.L.S.'s father points to no representations or acts by McDonald's upon which he relied in believing that D.L.S. worked for the Corporation or that McDonald's would ensure a safe working environment in its franchise restaurants.

Id. at 103.

Here, Plaintiffs cannot satisfy the necessary elements to establish an ostensible agency relationship. First, there is no evidence that KMC took any action that would lead a reasonable person to conclude that any of the co-defendant physicians were KMC's agent. There are simply no facts developed in discovery or presented by Plaintiffs which would establish this element. Second, and more importantly, there is no evidence that Mrs. Mohr or her husband relied upon any conduct of the hospital or its agents to form the belief that the co-defendant physicians were KMC's agents.

As noted above, ostensible authority requires a party to rely on the principal's acts or conduct to his *detriment*. Here, however, Plaintiffs have not established the slightest evidence that the Mohrs chose to receive medical treatment at KMC in reliance of the fact that co-defendants were agents thereof, or that they would have sought to receive medical care from another provider had they been in possession of that knowledge.

Additionally, Plaintiffs Mohr have a more sophisticated understanding of the way in which hospitals operate. The Mohr's two sons are both physicians, one of whom has been both an employed physician at a hospital and an independent contractor physician with simply staff privileges at a hospital. (CP 147-48, 306). At the time of the incident, the Mohrs were aware of the various relationships a physician can have with a hospital. Thus, as a matter of law there could have been no reliance.

Further, the record makes it clear that the Mohrs were specifically notified that co-defendants were actually *independent contractors*, not agents. On two separate occasions, August 31, 2004 and September 1, 2004, Mr. Mohr signed a document entitled

“Consent to Treatment and Conditions of Admissions.” That document specifically states, in relevant part:

**PHYSICIAN CARE:** Patient care is under the control of the patient’s attending physician *who: is an independent provider and not an employee or agent of the hospital:* may request other physicians to provide services during hospitalization (i.e. pathologist, anesthesiologist, radiologist).

(CP 108) (emphasis added).

This consent form makes it clear that Mr. Mohr was on notice that the physicians were independent contractors, and thus could not have formed a reasonable belief that they were agents of KMC. In Washington, it is well established that one cannot claim the existence of an apparent agency when that person is put on notice that no agency relationship exists. Amtruck Factors v. Int’l. Forest Prods., 59 Wn.App. 8, 19, 795 P.2d 742 (1990).

Case law from several jurisdictions has also addressed the issue of whether an apparent agency relationship can exist when a patient signs a document containing similar language. The overwhelming majority of these cases have held there can be no agency relationship under such circumstances. See, e.g., James v. Ingalls Memorial Hospital, 701 N.E. 2d 207 (Ill. App. 1998)

(“Certainly, having the patient sign a consent for treatment form which expressly states that “the physicians on staff at the hospital are not employee or agents of the hospital” makes the proving of this element [reliance] extremely difficult.”). See also, Churkey v. Rustia, 768 N.E.2d 842 (Ill. App. 2002); Guadagno v. Lifemark Hospitals of Florida, Inc., 972 S.2d 214 (Fla. 2007); Dent v. Exeter Hospital, Inc. 931 A.2d 1203 (N.H. 2007).

Plaintiffs will doubtless argue that this argument is precluded by the ruling in Adamski v. Tacoma General Hospital, 20 Wn.App. 98, 579 P.2d 970 (1978). In Adamski, the Court of Appeals held that under a specific set of facts present in that case, an emergency room physician could be the agent or ostensible agent of a hospital. Any reliance on Adamski, however, is misplaced.

First, the Adamski decision is an exception to Washington’s well-defined agency law, and thus under well-established rules of judicial construction the case has limited applicability and precedential value. Second, the facts of Adamski are easily distinguishable. For example, in Adamski, the plaintiff suffered a minor wound to his finger and sought out treatment from the hospital

on his own volition. Further, and more importantly, the plaintiff was not notified that the physicians were independent contractors. Id. at 115 (“[P]laintiff reasonably believed Dr. Tsoi was employed by the Hospital to deliver that emergency room service. It appears plaintiff *was not advised to the contrary* and, in fact, he believed he was being treated by the Hospital’s agent.”) (emphasis added). Those facts led the court to find that the hospital’s acts led the plaintiff to a reasonable belief that he was being treated by an actual employee of the hospital. Id. In the case at hand, however, there can be no reasonable belief. Unlike the plaintiff in Adamski, Mrs. Mohr did not specifically select KMC for medical treatment. She was involved in a serious automobile accident and brought to the hospital via ambulance without regard to her volition. This is essentially true for September 1, 2008, when Mrs. Mohr was brought to KMC because it was the closest hospital from the Mohr’s home. Further, in this case, unlike in Adamski, KMC provided the Mohrs with written notice that the physicians were not agents of the hospital, and Mr. Mohr *twice* signed and consented to the notice form.

The case at hand is much more similar to Maybin. In Maybin, the plaintiff was unable to demonstrate specific acts or conduct upon which he justifiably relied. This has likewise occurred here. Plaintiffs have not shown that KMC held out co-defendants as agents, and in fact the consent form twice signed by Mr. Mohr proves the contrary. As the most modern view of the theory of ostensible authority in Washington,<sup>3</sup> Maybin controls the issue at hand and should be followed.<sup>4</sup>

**B. There Is No Vicarious Liability Here**

It is true that apparent authority may be sufficient to attach liability in contract. McLean v. St. Regis Paper Co., 6 Wn.App. 727, 731, 496 P.2d 571, 573 (1972) (“[T]he question of vicarious tort

---

<sup>3</sup>According to Washington Practice, Maybin is the paramount case on the issue of ostensible agency. 16 Wash. Practice § 3.18 (2009).

<sup>4</sup>In addition to Maybin, several other jurisdictions that have clarified the ostensible agency doctrine and limited its applicability. See, e.g., Brown v. St. Vincent's Hospital, 899 So.2d 227 (Ala. 2004) (no ostensible authority where consent form was signed showing that physicians were independent contractors); Garrett v. L.P. McCuiston Comm. Hospital, 30 S.W.3d 653 (Tex. App. 2000) (no ostensible authority in absence of evidence that hospital *took affirmative action* to hold out radiologist as agent); Jennison v. Providence St. Vincent Medical Center, 174 Or.App. 219, 25 P.3d 358 (2001) (no ostensible authority unless patient had actual knowledge of physician's status as agent); Boren v. Weeks, 251 S.W.3d 426 (Tenn. 2008) (no ostensible agency where hospital provided notice of independent contractor status); Dent v. Exeter Hospital, Inc., 155 N.H. 787, 931 A.2d 1202 (2007) (same); Vanstelle v. MacAskill, 255 Mich.App 1, 662 N.W.2d 41 (2003) (ostensible agency relationship does not arise merely by going to the hospital; must be an affirmative act); Henry v. Flagstaff Medical Center, Inc., 132 P.3d 304 (Ariz. 2006) (ostensible agency cannot be presumed merely from fact that physician has staff privileges).

liability involves different policy considerations than the question of an agent's ability to bind his principal in business dealings with third persons.”). There is, however, substantial evidence demonstrating that a party cannot be liable for a tort under the theory of apparent authority.

Before a court can address whether a hospital can be liable for the acts of a physician that is alleged to be the apparent agent of the hospital, it first needs to be determined whether in the state of Washington an alleged principal can be vicariously liable for the acts of an alleged apparent agent. See, Jones v. Health South Treasure Valley Hospital, 147 Id. 109, 206 P.3d 473 (2009) (holding that before a hospital could be vicariously liable for a healthcare provider, Idaho agency law first needed to be examined to determine if the state permitted vicarious liability for a tort based upon an ostensible agency theory). Here, Washington law clearly does not provide that a principal can be vicariously liable for the acts of an agent that the principal has no right to control.

As noted above, in Washington an agency relationship can be established through apparent or ostensible agency: “Apparent agency

occurs, and vicarious liability for the principal applies, where a principal makes *objective manifestations* leading a third person to believe the wrongdoer is an agent of the principal.” Maybin, 130 Wn.App. at 98, 121 P.3d at 1213 (emphasis added). It is well-settled law in Washington that a principal is not vicariously liable for the tortious acts of an apparent agent over whom the principal does not possess or exercise the right of control. See, McLean, 6 Wn.App. at 732, 496 P.2d at 574 (“[T]he label ‘employee,’ or ‘agent’ does not per se create vicarious tort liability. Vicarious tort liability arises only where one engaging another to achieve a result controls or has the right to control the details of the latter’s physical movements”); Carter v. King County, 120 Wash. 536, 208 P. 5 (1922) (no vicarious liability for county where agent was under the sole control of sheriff who appointed him); Jackson v. Standard Oil Company, 8 Wn. App. 83, 505 P.2d 139 (1972); Baxter v. Morningside, Inc., 10 Wn. App. 893, 521 P.2d 946 (1974). This idea is based on RESTATEMENT (SECOND) OF AGENCY § 250, which provides that,

///

///

A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, *if he neither intended nor authorized the result nor the manner of performance*, unless he was under a duty to have the act performed with due care

RESTATEMENT (SECOND) OF AGENCY § 250 (1958) (emphasis added).

One court has articulated this rule with even more bluntness. In 1984, the Court of Appeals addressed whether an alleged principal could be vicariously liable in tort for an apparent agent, and held that, "Apparent authority is not . . . a basis for liability in tort." Torres v. Salty Sea Days, 36 Wn.App 668, 673, 676 P.2d 512, rev. denied, 101 Wn.2d 1008 (1984).

Thus, for the doctrine of *respondeat superior* to apply, the principal charged with imputed liability must either have control of the physical actions of the negligent agent or have the right to control them. As the McLean court opined, "the Restatement of Agency make[s] it clear that vicarious liability of a principal for the negligent acts of any agent or servant is dependent upon whether the principal controls or has the right to control the details of the physical movements of the agent while such person is conducting

the authorized transaction.” McLean, 6 Wn.App. at 729, 496 P.2d at 573 (citing RESTATEMENT (SECOND) OF AGENCY § 250, comment a). This principle was given further and more articulate emphasis by the eminent legal scholar Dean Prosser, who stated that, “[s]ince an agent who is not a servant is not subject to any right of control by his employer over the details of his physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which he may commit.” W. PROSSER, LAW OF TORTS, ch. 13 § 69, at 479 (3d ed. 1964).

The most recent case regarding this is Stephens v. Omni Ins. Co., 138 Wn.App. 151, 159 P.3d 10, rev. granted, 163 Wn.2d 1012 (2007). In Stephens, the plaintiff claimed that the defendant was vicariously liable for the acts of an alleged agent. In that case, the alleged agency relationship was based solely on an apparent agency principal, as the principal (the defendant) had no right to control the agent. Finding that the principal was not liable, the Stephens court held that:

*The right to control is indispensable to vicarious liability. Because [the plaintiff] Stephens has not shown that Omni controlled any aspect of notice sent*

by Credit [the alleged agent], there was no basis upon which to impose vicarious liability.

Id. at 183 (internal citations omitted) (emphasis added).

Here, KMC had no control over the actions of co-Defendants, and therefore cannot be liable for tort under the theory of apparent/ostensible authority. Plaintiffs have proffered no evidence showing that KMC had the right to control co-defendants, made any attempt to control their actions and the manner in which they practice medicine, or made any objective manifestations to Plaintiffs suggesting that the physicians were KMC's agents. Further, as noted in Part A, Mr. Mohr twice signed a document particularly stating that co-Defendants were not employees of KMC. In the absence of control, liability cannot attach to the principal in this case.

To counter this argument, Plaintiffs have curiously suggested that Torres and the other pertinent cases holding that a party cannot be liable for a tort under apparent agency are inappropriate and incorrect, because the relationship between Mrs. Mohr and KMC is based primarily upon *contract* law and not tort law. As Plaintiff's counsel vehemently contended during oral argument for summary judgment, the relationship between Mrs. Mohr and KMC is really "a

hybrid tort contract action.” (RP 21). Consequently, liability may still attach.

This argument, however, is at once entirely unsupported by case law or any other legal authority. Tellingly, Plaintiff has never proffered any evidence that medical malpractice claims are based upon a contractual relationship; and Defendant contends that any such interpretation can only be reached by a severely tortured and unnatural reading of the law. Plaintiffs’ Complaint makes it abundantly clear that the relationship between Mrs. Mohr and KMC was never alleged or viewed to be either contractual or a hybrid of contract and tort. The Complaint says nothing about breach of contract; it is merely concerned with medical negligence. As demonstrated by the Complaint, Plaintiffs base their theory of liability of Defendant KMC on the doctrine of *respondeat superior*, an undisputed tort doctrine, and the theory of liability of the other Defendants on a general theory of negligence: “[t]he foregoing damages and injuries sustained by plaintiffs were the direct and proximate result of the negligence of the defendants . . . .” (CP 410).

In the absence of any evidence that medical malpractice claims are hybrid contract/tort actions, Torres and the other aforementioned cases regarding liability in apparent authority remain controlling law and govern the result of this issue. Because Washington law clearly and unambiguously states that liability cannot attach for claims based upon the theory of apparent authority, Plaintiffs' claim to the contrary must fail.

**C. Plaintiffs Have Not Proven Causation**

**1. Plaintiffs Have Not Proven the Traditional Elements Required for Proximate Causation**

In their Brief, Plaintiffs argue that the trial court erred in finding that they had not met the traditional proximate causation standard. Plaintiffs point out that medical expert testimony "is not required to establish every cause," and assert that their experts' deposition testimony taken as a whole "establish a 'more probable than not' causal link." (Plaintiffs' Brief, at 33). Apart from these conclusions, Plaintiffs proffer no evidence that they have satisfied the traditional but-for causation required to find liability in tort law. Plaintiffs repeatedly assume that co-defendants' negligence significantly decreased Mrs. Mohr's chance of recovering from the

head trauma caused by the car accident. Plaintiffs claim that they have clearly demonstrated through the testimony of their experts that the physicians' negligence denied Mrs. Mohr "the opportunity or chance of receiving significant or meaningful benefit in lessening the damage to her brain that has left her with her current disabilities and impairment." (Plaintiffs' Brief, at 12). Plaintiffs' assertions, however, are conclusory and not supported by the facts. As the record demonstrates, Plaintiffs have produced no competent expert testimony proving the element of proximate cause.

This Court has previously defined the element of proximate cause as "a cause which, in direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have occurred . . . ." Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn.App 155, 194 P.3d 274, rev. denied, 165 Wn.2d 1047, 208 P.3d 554 (2009). Cause in fact, in turn, "concerns 'the 'but-for' consequences of an act, or the physical connection between an act and the resulting injury.'" Id. (quoting Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)) (internal citations omitted).

The Supreme Court of Washington has held that, to satisfy the traditional element of causation for a tort claim, a party must “establish that the act complained of more likely than not caused the subsequent disability.” Daugert v. Pappas, 104 Wn.2d 254, 263, 704 P.2d 600, 606 (1985). Further, there can be no proximate cause in event or injury if the event or injury would have occurred no matter what the defendant allegedly did: “A breach of a duty is not a proximate cause of injury if the event which produced the injury would have occurred regardless of the defendant’s conduct.” Lunt v. Mt. Spokane Skiing Corp., 62 Wn.App. 353, 362, 814 P.2d 1189 rev. denied 118 Wn.2d 1003 (1991); Davis v. Glow Machinery Mfg. Company, 102 Wn.2d 68, 74, 684 P.2d 692(1984); Chuhth v. George, 43 Wn.App. 640, 714 P.2d 562, rev. denied 106 Wn.2d 1007 (1986). Importantly, the plaintiff has the burden of demonstrating damages *quantifiably*, and not based upon mere speculation:

Where causation is based on circumstantial evidence, *the factual determination may not rest upon conjecture*; if there is nothing more substantial to proceed upon then two theories, under one of which defendant would be liable and the other of which there

would be no liability, a jury is not permitted to speculate on how the accident occurred.

Sanchez v. Haddix, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981); Nejin v. Seattle, 40 Wn.App. 414, 420, 498 P.2d 615 (1985) (emphasis added).

Here, Plaintiffs have failed to satisfy this burden of proof. First, Plaintiffs have not demonstrated that the injury to Mrs. Mohr would not have occurred *sans* the physicians' alleged negligent treatment. Although Plaintiffs' experts could testify medically that the alleged negligence deprived Mrs. Mohr "of the opportunity to have a better outcome," (Plaintiffs' Brief, at 22), these opinions are woefully inadequate to prove traditional proximate causation, because there is no dispute in this case that some injury to Mrs. Mohr would have occurred regardless of the conduct of any of the Defendants. Thus, the physicians cannot be liable for any injury that would have occurred despite their alleged negligent acts.

Second, Plaintiffs have failed provide experts to quantify their damages. Damages may not be speculative. Here, Plaintiffs' causation experts, Dr. Kyra Becker and Dr. Basil Harris, both testified that, on a more probable than not basis, even if Mrs. Mohr

had received optimal care she still would have suffered some type of neurologic injury resulting in some cognitive disabilities. (CP 330-40, 369-84). Neither expert, however, can quantify Mrs. Mohr's injury with particularity. (CP 369-84).

Consequently, Plaintiffs are essentially asking that this Court permit the jury to speculate what Mrs. Mohr's injuries would have been assuming, *arguendo*, that she received the care that Plaintiffs' experts testify was appropriate. As noted above, Plaintiffs argue that medical expert testimony is not required where a reasonable person can infer the causal link. Defendant KMC submits that there is no obvious causal link here. As the Supreme Court of Washington has articulated,

[I]n a case where medical testimony is required to establish a causal relationship between the liability-producing situation and the claimed physical disability resulting from it, the evidence will be considered insufficient to support the trial verdict *if it can be said that, considering all the medical testimony presented at trial, the jury must resort to speculation or conjecture in determining the causal relationship.*

McLaughlin v. Cooke, 112 Wn.2d 829, 837, 774 P.2d 1171, 1175 (1989) (emphasis added).

The law is clear that a jury should not be allowed to indulge in such speculation. Thus, Plaintiffs have not met the requirements of traditional proximate causation.

2. **Plaintiffs Have Provided No Adequate Substitute for the Traditional Requirements of Proximate Causation**

Plaintiffs' Brief illustrates that they have an erroneous and mistaken understanding of both the "lost chance" test and the "substantial factor" test. This misunderstanding has led them to lay their hopes on a non-existent legal theory for which the facts, the record, and legal authority offer no support.

Plaintiffs present a number of arguments in their Brief. First and foremost Plaintiffs contend that the Superior Court erred in not recognizing the non-existent "lost chance of a better outcome" legal theory that Plaintiffs have conjured up. Second, Plaintiffs argue that the Superior Court's ruling was erroneous because it refused to apply the substantial factor test universally to all medical malpractice cases. (Plaintiffs' Brief, at 37). To support their argument, Plaintiffs rely on the sentinel Herskovits case. Plaintiffs point out that Justice Dore's opinion in the Herskovits case

abandoned the traditional “but for” test of causation, and instead adopted RESTATEMENT (SECOND) OF TORTS §323 (1965), which bases the determination of causation on whether the negligence was a substantial factor in bringing about the harm. (Plaintiffs’ Brief, at 28).

Third, Plaintiffs spend a good deal of time citing cases from other jurisdictions to show that the majority of jurisdictions now hold that medical malpractice “is, at its heart, a ‘lost chance’ case.” (Plaintiffs’ Brief, at 1). Plaintiffs’ arguments, however, are entirely flawed. Contrary to Plaintiffs’ assumptions, there is no legal basis for a “loss of chance of a better outcome” action in Washington. Further, Herskovits is not a substantial factor” causation case in the medical malpractice context; it applies solely to “loss of chance” of survival claims. And where there is no wrongful death, as is the case here, Herskovits cannot apply.

*i. There is No Legal Basis for A “Loss of Chance of A Better Outcome” Action in Washington Law*

Plaintiffs base their “lost chance of a better outcome” theory upon a trio of cases, none of which offers anything more than *de*

*minimis* support for their argument. With cursory analysis and even less legal authority, Plaintiffs confidently state that, “Based on the cases of *Herskovits*, *Daugert* and *Sorenson*, a lost opportunity for a better outcome from a stroke is actionable under Washington law. (Plaintiffs’ Brief, at 36). Plaintiffs point out that because the physicians’ alleged negligence caused Mrs. Mohr “a 50-60% lost opportunity for a better outcome from the stroke,” this is sufficient to bypass the traditional proximate causation standard. Plaintiff’s conclusion, however, is based upon a confused understanding of the cases, and can only be maintained by a tortured reading of the precedent. Tellingly, none of these cases stand for the proposition that a lost opportunity for a better outcome is a valid cause of action under Washington law.

Plaintiffs’ confusion regarding Herskovits is understandable. Herskovits is a complex case because the holding is a plurality decision. Contrary to Plaintiffs’ repeated reference to the “majority opinion,” Herskovits contains four separate opinions, each with distinct legal reasoning, none of which was adopted by a clear majority of the court. It is significant that the opinion upon which

Plaintiffs rely was adopted by only two of the nine justices. While Justice Dore penned an opinion, which adopted a “substantial factor” test rather than the traditional “but for” test for proving causation, importantly only one additional justice concurred in Justice Dore’s opinion.

Four other justices joined in the concurring plurality opinion, which rejected the “substantial factor” test and retained the traditional “but for” test for proving causation. This concurring plurality defined the injury as a substantial reduction in the chance of survival rather than death -- or, as a “loss of chance.” Id. at 622-24, 634-35 (Pearson J., concurring by plurality opinion); Zueger v. Public Hospital Dist., 57 Wn. App. 584, 590, 789 P.2d 326 (1990).

The fact that Herskovits is a plurality decision is important. Under Washington law, “When no rationale for a decision in the appellate court receives a clear majority, the holding of the court is the position taken by those concurring on the narrowest grounds.” Zueger, 57 Wn.App. at 789. In Herskovits, the majority of the court clearly rejected application of the substantial factor test in favor of a

“loss of chance” theory. Although two justices discussed the “substantial factor” test, this does not establish binding precedent.

In Herskovits, the narrowest ground agreed upon was that the claim was permitted upon a “loss of chance” theory. Herskovits does not stand for the proposition that a medical malpractice plaintiff no longer has to prove that, more probably than not, but for the defendant’s alleged malpractice the plaintiff’s injury would not have occurred. Likewise, Herskovits does not stand for the proposition that a medical malpractice plaintiff may recover simply by showing that the defendant’s alleged malpractice reduced an already less-than-even chance that plaintiff might have been able to achieve a different outcome. Herskovits stands only for the proposition that, under the wrongful death and survival statutes, recovery may be had when the defendant’s alleged malpractice in failing to diagnose or treat a condition (cancer) caused a substantial reduction in decedent’s chance of survival. Id. at 634-35 (Pearson, J., concurring by plurality opinion). Although Plaintiffs argue that nothing in the Herskovits plurality actually states that it applies only to lost chance of survival cases, and therefore should not be so limited, such has

been the interpretation. See, e.g., Daugert, 104 Wn.2d at 261. Herskovits does nothing more than define the law on “loss of chance” of *survival*. And since this is not a loss of chance of survival case, any application of Herskovits would be inapposite.

Other legal authority supports this conclusion as well. As the Zueger court emphasized, “if Herskovits stands for anything beyond its result, *we believe the plurality represents the law on the loss of the chance of survival*. The plurality would allow instructions on a loss of chance of survival in the case only if the evidence shows (1) a substantial reduction in the chance of survival, and (2) the negligence of the defendant caused the reduction.” Id. at 591 (emphasis added). See also, 16 Wash. Practice § 4.10.<sup>5</sup>

Thus, because the Herskovits plurality opinion merely defines the law on the loss of chance of survival, it does not, as Plaintiffs vociferously contend, support the theory that the “substantial factor” theory of proximate cause applies to all medical malpractice cases.

---

<sup>5</sup> Other jurisdictions have also cited Herskovits with some frequency. The vast majority of these cases have cited Herskovits as standing for the adoption of the “loss of chance” theory, not the “substantial factor” theory. See, e.g., Delaney v. Cade, 255 Kan. 199, 873 P.2d 175 (1994); Thompson v. Sun City Community Hosp., Inc., 141 Ariz. 597, 688 P.2d 605 (1984); Falcon v. Memorial Hosp., 436 Mich. 443, 462 N.W.2d 44 (1990).

Herskovits has no applicability to this action because this is not a case of lost chance of survival.

One of the most compelling arguments against Plaintiffs' claim that Herskovits provides support for a "loss of chance of a better outcome" theory is demonstrated by the fact that that theory is directly contrary to two recent decisions by this Court. First, in Fabrique v. Choice Hotels Int'l., 144 Wn.App. 675, 183 P.3d 1118 (2008), this Court conducted a detailed examination of the substantial factor test of proximate cause in the state of Washington. The Fabrique court ruled that the substantial factor test only applies in four distinct and unique types of cases. Although this included medical malpractice cases, the Court held that the substantial factor test only applies "where the malpractice reduces a patient's *chance of survival.*" Id. at 685 (emphasis added).

Second, in Rounds v. Nellcor Puritan Bennett, 147 Wn.App. 155, 194 P.3d 274 (2008), rev. denied, 165 Wn.2d 1047 (2009), the plaintiff relied heavily upon Herskovits because she could not establish the traditional proximate cause elements. The Superior Court rejected the plaintiff's argument that the substantial factor test

and/or the loss of chance theory applied. On appeal, the plaintiff also argued to this Court that Herskovits applied. This Court refused to consider the loss of chance theory as a theory of proximate cause. Instead, this Court focused on the traditional “but for” theory of proximate cause, and commented that the loss of chance theory was not even an alternative to the traditional proximate cause element but instead was an issue relating to damages: “Because Ms. Rounds fails to make out a prima facie case on causation, we do not need to discuss it if her loss of chance theory applies on the issue of damages.” Id. at 166.

Thus, Rounds presented this Court with the opportunity to discuss Herskovits and its application in general to medical malpractice cases. This Court correctly declined that invitation and in doing so provided precedent binding upon the superior courts of the state of Washington, and particularly those in Division III. Plaintiffs are asking this Court to blindly ignore this precedent and create an entirely new rule in Washington.

Plaintiffs’ reliance of Daugert is also misguided. Plaintiffs seem to believe that the court in Daugert adopted a “lost opportunity

for a better outcome” theory. Nothing could be further from the truth. In Daugert, the court merely refused to overturn the “but for” test for legal malpractice claims. Daugert, 104 Wn.2d at 261, 704 P.2d at 605. With regard to medical malpractice cases, Daugert said nothing about extending the “lost chance” theory outside of the wrongful death arena. Importantly, in discussing Herskovits, the Daugert court stated that, “The primary thrust of *Herskovits* was that a doctor’s misdiagnosis of cancer either deprives a decedent of a chance of *surviving* a potentially fatal condition or reduces that chance. A reduction in one’s *opportunity to recover* (loss of chance) is a very real injury which requires compensation.” Id. at 261 (emphasis added). As the court makes clear, Herskovits applies only where there is a loss of life. Since this is not a wrongful death or loss of chance of survival case, Daugert does little to advance Plaintiffs’ argument.

Likewise, Plaintiffs misunderstand the nature of the third case upon which they rely, Sorenson v. Raymark Industries, Inc., 51 Wn.App. 954, 957, 756 P.2d 740, 741-742 (1988). First, Sorenson is a products liability case and has nothing to do with medical

negligence. Second, while the Sorenson court certainly discussed Herskovits' substantial factor analysis, nothing in Sorenson suggests, as Plaintiffs allege, that a "lost chance" establishes proximate cause when a defendant is negligent, the lost opportunity can never return, and the harm is separate and distinguishable; nor does the case state that the "lost chance" theory in tort applies outside of the wrongful death arena. See, Id.

ii. **Plaintiffs Point to No Washington Cases Supporting the Adoption of the "Lost Chance" Rule**

Plaintiffs' reliance on cases from other jurisdictions to argue that Washington should adopt the "lost chance" rule is misguided. Tellingly, Plaintiffs point to no Washington case law to support their argument. In fact, there is not a single reported Washington appellate case that has applied the "substantial factor" test in a medical malpractice claim, and Plaintiffs admit as much. (Plaintiffs' Brief, at 34). On the other hand, numerous Washington appellate cases since Herskovits have addressed the elements of a medical malpractice

claim in Washington. These cases have uniformly adopted the traditional “but for” proximate cause element.<sup>6</sup>

Other jurisdictions have also dealt with the issue of whether to apply a “lost chance” tort rule. Contrary to what Plaintiffs would have this Court understand, there is no overwhelming consensus from other jurisdiction as to the propriety of adopting a “lost chance” theory for medical malpractice cases,<sup>7</sup> let alone as to the propriety of adopting a “lost chance” theory in wrongful death cases.<sup>8</sup> As Plaintiffs indicate, only “twenty-two states have adopted a ‘lost chance rule,’ some of which have also implicitly adopted Plaintiffs’

---

<sup>6</sup> Counsel for the Hospital has conducted a thorough Westlaw search attempting to identify all Washington appellate cases decided after Herskovits which have discussed the proximate cause element of a medical malpractice claim. We have identified over 40 reported appellate cases that have discussed and/or adopted the traditional proximate cause element. There is not one case that has adopted the “substantial factor” test to a medical malpractice case.

<sup>7</sup> Some of the jurisdictions which have adopted the “loss of chance” theory specifically limit it to wrongful death cases. See, e.g., Weymers v. Khera, 454 Mich. 639, 649, 563 N.W.2d 647, 653 (1997) (“[W]e hold that no cause of action exists for the loss of an opportunity to avoid physical harm less than death”); Richard v. Adair Hospital Foundation Corp., 566 S.W.2d 791 (Ky.App. 1978). Thus, even in the states in which “loss of chance” theory is a viable cause of action there is dispute as to the extent of its application. Contrary to Plaintiffs’ assertion, there is no obvious evidence that courts are willing to extend “loss of chance” theory to all medical malpractice cases.

<sup>8</sup> A number of jurisdictions have rejected the “loss of chance” theory even in wrongful death cases. See, e.g., Kilpatrick, 868 S.W.2d 594; Jones, 456 S.E.2d 371; Fennell v. So. Md. Hosp. Ctr. Inc., 320 Md. 776, 580 A.2d 206 (1990); Kramer v. Lewisville Memorial Hosp., 858 S.W.2d 397 (Tex. 1993); Gooding v. University Hosp. Bldg., Inc., 445 So.2d 1015 (Fla. 1984); Clayton v. Thompson, 475 So.2d 439, 445 (Miss. 1985) (“Mississippi law does not permit recovery of damages because of mere diminishment of the “chance of recovery”); Bromme v. Pavitt, 5 Cal.App.4th 1487, 1505, 7 Cal.Rptr.2d 608, 619 (1992).

“lost opportunity of a better outcome” theory. (Plaintiffs’ Brief, at 38). This is hardly a majority view, as Plaintiffs posit. (Plaintiffs’ Brief, at 1). The plain fact of the matter is that jurisdictions are still divided.<sup>9</sup> As one legal scholar has pointed out, “American courts are sharply divided in their reaction to the “loss of chance” theory emanating from *Herskovits*.” David Robertson, *The Common Sense of Cause and Fact*, 75 TEX. L. REV. 1765, 1786 (1997).

Indeed, while some jurisdictions have adopted “loss of chance” theory, a substantial number of others have emphatically rejected it, see supra nn.8, 9, some courts even characterizing the theory as “fundamentally at odds with the requisite degree of

---

<sup>9</sup> The following jurisdictions have rejected any form of the “loss of chance” theory and have focused on the importance of traditional causation principles: Kilpatrick v. Bryant, 868 S.W.2d 594, 602 (Tenn. 1993) (describing the “loss of chance” theory as “fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician.”); Jones v. Owings, 456 S.E.2d 371 (S.C. 1995); Manning v. Twin Falls Clinic & Hosp., 122 Id. 47, 830 P.2d 1185 (1992); Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993); Borkowski v. Sacheti, 43 Conn.App. 294, 682 A.2d 1095 (1996) (requiring plaintiff claiming recovery on loss of chance to prove his entitlement to do so by the traditional approach of reasonable medical probability); Watson v. Medical Emergency Services, Corp., 532 N.E.2d 1191, 1196 (Ind.App. 1989) (“Indiana precedent has not specifically adopted the medical malpractice rule of proximate cause which is couched in terms of “loss of chance”); Alfonso v. Lund, 783 F.2d 958, 965 (10th Cir. 1986) (“In malpractice cases the New Mexico courts have remained firm in requiring that proximate cause be shown as a probability.”); Smith v. Parrott, 175 Vt. 375, 833 A.2d 843 (2003); United States v. Cumberbatch, 647 A.2d 1098, 1102-1104 (Del. 1994) (“loss of chance” claims incompatible with wrongful death statutes); Joshi v. Providence Health Sys. of Or. Corp., 342 Or. 152, 149 P.3d 1164 (2006) (same); Holt v. Wagner, 344 Ark. 691, 43 S.W.3d 128 (2001) (not yet adopting the “loss of chance” theory).

medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician.” Kilpatrick v. Bryant, 868 S.W.2d 594, 602 (Tenn.1993). What is clear is that a majority of states have not adopted the theory. Further, states in which the courts have adopted the “loss of chance” theory have not adopted it to such an extent that it applies to all medical malpractice actions. Given the lack of consensus among the other jurisdictions regarding the application of the “loss of chance” theory and the refusal of a significant number of states to adopt the theory, KMC contends that it would be inappropriate for the Court to craft a new rule in this case.

**D. The Washington Medical Malpractice Statutes Do Not Allow for A Cause of Action for “Lost Chance” or “Lost Opportunity for A Better Outcome”**

The Court should dismiss Plaintiffs’ causation arguments because Washington’s medical malpractice statutes do not allow for a cause of action for “lost chance,” “substantial factor,” or “lost opportunity for a better outcome.” In Washington, a cause of action for alleged medical malpractice is governed by two statutes, RCW

4.24.290 and RCW 7.70.040, which set forth the requirements for pursuing a medical malpractice claim. RCW 4.24.290 provides that,

In any civil action for damages based on professional negligence against a . . . a physician . . . the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a *proximate result* of such failure the plaintiff suffered damages . . . .

RCW 4.24.290 (emphasis added).

Further, RCW 7.70.040 specifically states that,

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a *proximate cause* of the injury complained of.

RCW 7.70.040 (emphasis added).

What is most notable about these two statutes is that they use the terms “proximate cause” and “proximate result” to describe the requisite causal proof needed to support a claim for medical

malpractice. Tellingly, nowhere do the statutes refer to “lost chance,” “substantial factor,” or “lost opportunity for a better outcome.” Based on the unambiguous statutory language, the Washington Legislature has clearly mandated that a plaintiff in a medical malpractice case must satisfy the traditional element of proximate cause, and may not rely on alternatives to causation. It is therefore inappropriate for Plaintiffs to seek to contravene express legislative intent by relying on select decisions from other jurisdictions.

Plaintiffs will doubtless argue that the sentinel decision in Herskovits altered the legal landscape. It is important to remember, however, that Herskovits was a *wrongful death* case. Consequently, even though the Herskovits decision was rendered after the medical malpractice statutes took effect, the Herskovits court did not discuss RCW 4.24.290 or RCW 7.70.040. Rather, it focused its attention on Washington’s wrongful death and survival statutes, none of which contains any reference to “proximate cause,” “traditional causation,” or “proximate result.” See, Herskovits, 99 Wn.2d at 664. Thus, the Herskovits court appropriately never took the medical malpractice

statutes into account.<sup>10</sup> Therefore, insofar as its plurality decision may or may not endorse an alternative approach to proximate cause, its ruling is limited to wrongful death cases.

#### IV. CONCLUSION

Plaintiffs have brought only one claim against Defendant KMC: vicarious liability under the doctrine of *respondeat superior*. This Court should dismiss Plaintiffs' appeal for two reasons. First, the theory of apparent or ostensible agency does not apply, since Plaintiffs have proffered no evidence that Mrs. Mohr's physicians were agents of KMC. In order for a plaintiff to prevail against a hospital based upon an agency or ostensible agency claim, the plaintiff must establish that the patient formed a reasonable belief that the physician treating the patient in the hospital was the hospital's agent. There must also be reasonable reliance. Given the fact that Mr. Mohr twice signed a consent form specifically stating

---

<sup>10</sup> This plain reading of *Herskovits* has support. In *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397(Tex. 1993), the Supreme Court of Texas addressed the issue of whether the "loss of chance" theory applied to the Texas Wrongful Death statute. Similar to Washington's statute, the Texas Wrongful Death statute did not refer to "proximate cause" or "proximate result," and instead used more general causation language. Nonetheless, the Kramer court found that the statutory language prohibited the application of the "loss of chance" theory. As the court stated, "First, the Act authorizes recovery solely for injuries that cause *death*, not injuries that cause the loss of a less-than-even chance of avoiding death. Hence, the Act on its terms does not authorize recovery under the separate injury approach to loss of chance." *Id.* at 404 (emphasis in original).

that the physicians were not agents, there can be no reliance or reasonable belief here.

Second, Plaintiffs have failed to establish the element of proximate cause. Further, contrary to Plaintiffs' argument, there is no basis for a "lost chance of a better outcome" cause of action in Washington. Plaintiffs' argument is based solely upon hand-selected cases from other jurisdictions and law review articles. This is insufficient to uproot long-established rules regarding proximate cause. Further, Washington's medical malpractice statutes do not permit a cause of action to be brought on alternative theories of causation. Thus, the Court should dismiss Plaintiff's appeal.

Respectfully submitted this 12 day of October, 2009.

  
\_\_\_\_\_  
JEROME R. AIKEN, WSBA #14647  
PETER M. RITCHIE, WSBA #41293  
Meyer, Fluegge & Tenney, P.S.  
Attorneys for Defendant/Respondent,  
Kadlec Medical Center

**CERTIFICATE OF SERVICE**

I, SHERYL JONES, declare under penalty of perjury of the laws of the state of Washington, that on the 12<sup>th</sup> day of October, 2009, I deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing BRIEF OF DEFENDANT KADLEC MEDICAL CENTER to the following:

**Counsel for Plaintiffs/Appellants:**

Mr. Diehl R. Rettig  
Rettig Osborne Forgette, LLP  
6725 West Clearwater Avenue  
Kennewick, WA 99336

**Counsel for Defendants Dr. Brooks Watson, II and Vanessa Watson**

Ms. Donna M. Moniz  
Johnson, Graffe, Keay, Moniz  
& Wick, LLP  
925 Fourth Ave, Suite 2300  
Seattle, WA 98104

**Counsel for Defendant Dr. Grantham, Dr. Dawson and Northwest  
Emergency Physician, Inc.**

Mr. Christopher H. Anderson  
Fain Sheldon Anderson & VanDerhoef, PLLC  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104

**Co-Counsel for Dr. Grantham, Dr. Dawson, Northwest Emergency  
Physicians, Inc., Dr. Brooks Watson, II and Vanessa Watson**

Ms. Mary H. Spillane  
Williams, Kastner & Gibbs, PLLC  
Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101

  
\_\_\_\_\_  
SHERYL A. JONES