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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 280471

THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

LINDA MOHR and CHARLES L. MOHR, her husband,
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,
Respondents.

APPELLANTS' REPLY BRIEF TO KADLEC MEDICAL
CENTER
LINDA MOHR and CHARLES L. MOHR

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I. STATEMENT OF THE CASE

Appellants' statement of the case is contained in the *Brief of Appellants*. The following facts pertain directly to the new arguments raised in the *Brief of Kadlec Medical Center*.

At no time during Linda Mohr's two stays at Kadlec did Dr. Grantham, Dr. Dawson or Dr. Watson ever state or imply to her or to her husband that they were not employees of Kadlec Medical Center. (CP 268-70, 274-275). The physicians themselves admit to this fact. (CP 277-81, 287, 289-90). To the contrary, the emergency room was located at Kadlec, which routinely advertises its E.R. Department as a service of Kadlec Medical Center. (CP 268-70).

None of the three defendant physicians were Mrs. Mohr's regular doctor. (CP 268-270, 274-275). All were assigned to Mrs. Mohr when she went to Kadlec E.R. on the afternoon of August 31, 2004 and when she returned by ambulance the morning of September 1, 2004. *Id.* The Mohrs had no involvement, whatsoever, with their selection and assignment. *Id.*

Each defendant physician wore a name tag identifying

themselves as a Kadlec Physician during their interactions with the Mohrs. (CP 268-70, 287, 289-90). Likewise, there was no signage anywhere to inform the Mohrs that the physicians were not employees of Kadlec. (CP 268-70). In fact, Dr. Watson was identified to the Mohrs as a "Hospitalist" for Kadlec. (CP 268-70).

To Mr. Mohr's recollection, he never received any billing or statement of services from any of these physicians, separate from what Kadlec may have billed the Mohrs. (CP 268-70).

When Mr. Mohr signed for his wife's admission and Consent to Treatment at Kadlec E.R., he did not understand that the phrase "patient's attending physician," as stated in the form, referred to the various doctors assigned by Kadlec to care for his wife. (CP 268-70). He understood the phrase "patient's attending physician" to refer to his wife's regular doctor, James Leedy, M.D. who he understood was not an employee of Kadlec Medical Center. (CP 268-70).

Mrs. Mohr testified by deposition on March 10, 2008, as follows:

Q. All right. And I assume that when you went into

Kadlec you knew that the physicians there were not employed by Kadlec?

A. I don't, I guess I never really thought about it.

Q. You never gave it one thought one way or the other?

A. Well, you sort of hope that, that the hospital is conscientious and will give you the kind of care you need.

Q. I understand that. But you didn't go to Kadlec because of Dr. Watson or Dr. Grantham, right?

A. Heavens no.

Q. Right. You went to Kadlec because you really, that's where the ambulance took you?

A. That's right.

Q. Okay. And you didn't know what Grantham's relationship was with Kadlec, did you?

A. Well, you know, when you see a doctor there you assume they're working for the hospital. That's only, that's kind of common sense.

(CP 273-75).

Consistent with Mr. and Mrs. Mohr's understanding, Dr.

Dawson testified by deposition as follows:

A. We wear a name badge, yes.

Q. And what does it say?

A. It says "Kadlec Medical Center, Brian Dawson,
M.D., medical staff."

(CP 277-78).

Q. (By Mr. Rettig:) Was there something else that I'm missing here that projects in written form who you are in relation to Kadlec Medical Center to the patient?

A. Not specifically.

Q. Okay. Are you aware of any signage in the emergency room that informs patients, at least as of September of 2004, that the physicians at the Kadlec Medical Center emergency room are not employed by or under the control of Kadlec Medical Center?

A. I'm not aware of any signage, no.

Q. Are you aware of any literature, admission forms, documents that the patients are asked to sign, consent to treatment forms, any forms at all that are given to the patients that identify or refer to you as not being an employee or under the authority of Kadlec Medical Center?

MR. AIKEN: Object to the form, the documents

speak for themselves.

THE WITNESS: Yeah, I'm not aware of any documents.

(CP 278-79).

Q. (BY MR. RETTIG:) Do you yourself, when you're interacting with your patients, identify yourself as being a contract employee for NEP?

A. No.

Q. As not being employed by Kadlec Medical Center?

A. No.

Q. Have you occasionally seen advertising by Kadlec Medical Center that the physicians employed or working in the emergency room were not, in fact, employees or representatives of Kadlec Medical Center?

A. I have not seen that stated in any advertisement.

Q. Would you agree with me that by all outward appearances, that you, as a staff, medical staff physician at Kadlec Medical Center, certainly by appearance would appear to be an employee of the Kadlec Medical Center?

MR. ANDERSON: I'm going to object to the form of the question.

MR. AIKEN: Join.

MR. ANDERSON: Go ahead and answer if you can.

Q. (BY MR. RETTIG:) Go ahead.

A. It's possible that patients might assume that.

Q. Well, is there any reason why they wouldn't assume it, that you can think of?

A. No.

Q. And given the advertising, what's on your name tag, your physical presence there, wouldn't those facts support that conclusion, in your view?

MR. AIKEN: Object to the form.

MR. ANDERSON: Join the objection.

THE WITNESS: They could.

Q. (BY MR. RETTIG:) In your contact with Mr. and Mrs. Mohr on September 1st, did you ever inform them, or anyone talking to you on their behalf, that you were not an employee of Kadlec Medical Center but an independent contractor?

A. No.

(CP 279-81). Drs. Grantham and Watson testified similarly at their

depositions. (CP 287, 289-90).

II. ARGUMENT

A. Standard of Review

When reviewing an order for summary judgment, the reviewing court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). All evidence and reasonable inferences therefrom are construed in a light most favorable to the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). “A summary judgment may be granted only when the record before the trial court presents no genuine issues of material fact and entitles the moving party to judgment as a matter of law.” *Adamski v. Tacoma General Hospital*, 20 Wn.App. 98, 104, 579 P.2d 970 (1978).

B. Questions of Fact Preclude Judgment as a Matter of Law on the Issue of “Apparent Authority”

As an initial matter, it should be noted that the record is entirely devoid of any contracts between Kadlec and the defendant physicians affirmatively showing that the defendant physicians are “independent contractors.” Assuming *arguendo* that Kadlec has met its burden to

establish the defendant physicians' status as independent contractors, the issue of "apparent authority" is highly factual and the record is simply insufficiently developed decide the issue as a matter of law.

As to the legal standards, Kadlec makes every effort to avoid the import of the only reported Washington State case directly on point, *Adamski v. Tacoma General Hospital, supra*. In that case, Adamski brought suit against Tacoma General Hospital alleging it was vicariously liable for the acts of its emergency room physician, an independent contractor. *Id.* at 102. The trial court dismissed Adamski's claims against the hospital on summary judgment, and Division 2 reversed, holding issues of fact precluded summary judgment. *Id.* 108.

Based on its reading of Washington State case law, and notable cases from other jurisdictions, the *Adamski* court adopted two alternative legal tests for finding hospitals vicariously liable for torts committed by emergency room physicians:

(1) Vicarious liability attaches when the physician "was performing an inherent function of the hospital, a function without which the hospital could not properly achieve its purpose." *Id.* at 112. "The courts generally

look to all the facts and circumstances to determine if a hospital and doctor enjoy such a 'significant relationship' that the rule of respondeat superior ought to apply." *Id.* at 108.

(2) "Where a physician is found not to be the actual agent of the hospital, the latter may still be held responsible for his departures from good medical practice under the so-called "holding out" or "ostensible agent" theory." *Id.* at 112.

Based on the first test, the *Adamski* court held:

When, in fact, the hospital undertakes to provide medical treatment rather than merely serving as a place for a private physician to administer to his patients, the physician employed to deliver that service for the hospital may be looked upon as an integral part of the total hospital enterprise. In such cases, it should make no difference that the physician is compensated on some basis other than salary or that he bills his patients directly. These are artificial distinctions, the efficacy of which has long since disappeared and to the perpetuation of which we do not subscribe. *Id.* at 108.

Adamski was not given a choice of physician, he was simply assigned one. Substantial evidence showed that the physician, in treating *Adamski* and being assigned to him, was "performing an inherent function of the hospital." *Id.* at 111-12. Therefore, the court found that issues of fact precluded summary judgment on the issue of whether an actual principal/agent relationship existed whereby

respondeat superior would apply. *Id.*

Even if the physician was found not to be an “actual agent” of the hospital, *Adamski* held, vicarious liability could still attach through application the second test: ostensible agency. *Id.* at 112. *Adamski* adopted the Restatement (Second) of Agency § 267 (1958), which sets forth the following rule:

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.

The hospital in *Adamski* argued, as does Kadlec here, that ostensible agency requires reliance on some form of affirmative misrepresentation, or clear act on behalf of the hospital. *Id.* at 115. Kadlec claims the Mohrs did not rely on Kadlec’s representations because Mrs. Mohr was taken to Kadlec by ambulance. Rejecting the same line of reasoning, *Adamski* held:

On the contrary, a “holding out” or representation may arise when the hospital acts *or omits to act* in some way which leads the patient to a reasonable belief he is being treated by the hospital by one of its employees. *Id.* (emphasis added).

Likewise, “many courts presume reliance, absent evidence that the plaintiff knew or should have known the physician was not an agent of the hospital.” *Mejia v. Community Hospital of San Bernardino*, 99 Cal.App.4th 1448, 122 Cal.Rptr.2d 233, 237 (2002) (reviewing cases from various jurisdictions). In other words, when a hospital has “undertaken to provide emergency treatment to the community ... [a]n express invitation is not required.” *Themins v. Emanuel Lutheran Charity Board*, 54 Or.App. 901, 637 P.2d 155, 159 (1982) (Court also cited *Adamski* in adopting rule).

Here, the reliance occurred at the hospital. It is not necessary that the Mohrs’ reliance on Kadlec caused them to walk through the door. It is sufficient that the Mohrs chose not to leave, and that Kadlec’s acts and omissions lead them to believe the hospital was providing Mrs. Mohr medical care. Kadlec does not need to offer some special benefit above and apart from its services (although its advertising certainly makes such claims). Instead, it need only hold itself out as an emergency room that accepts patients. Reliance occurs when a patient, and her family, submit to the medical care.

Moreover, *Adamski* held discharge instructions are a factor in determining whether reliance occurred. *Id.* at 115. Here, the discharge instructions given on August, 31, 2004, were for the “Kadlec Medical Center-Emergency Department” and stated: “[t]hank you for visiting the Kadlec Medical Center-Emergency Department. You have been evaluated today by Dale C. Grantham, M.D. for the following conditions” (CP at 108). Nothing in the form indicates that Dr. Grantham was not an agent of Kadlec. *Id.* The form instructs Mrs. Mohr to “[r]eturn or contact your physician immediately if your condition worsens or changes unexpectedly, if not improving as expected, or if other problems arise.” *Id.* This is exactly what the Mohrs did the following day, just as the Kadlec Medical Center instructed. *Id.*

When viewed as a whole, the *Adamski* decision creates a totality of the circumstances test for apparent/ostensible agency between a hospital its physicians.¹ As such, Washington Pattern Jury Instruction

¹ See *Adamski*, 20 Wn.App. at 108-109 citing favorably cases and numbering facts which supported a genuine question of fact on the issue of agency.

105.02.03 (5th ed) was developed. It sets forth the following factors to determine apparent authority:

1. Whether the patient sought treatment primarily from the hospital or from the physician;
2. Whether it was the hospital who designated the physician to perform the services in question;
3. Whether the type of care provided was an integral part of the hospital's operation;
4. Whether the hospital handled the billing for the services of the physician;
5. Whether the hospital provided drugs and supplies utilized by the physician;
6. The nature and duration of any hospital-physician agreements; and
7. Whether the hospital made an representations to the patient, verbally or in writing, regarding their relationship with the physician.

Here, the defendant doctors were clearly “performing an inherent function of the hospital.” They were assigned to Mrs. Mohr, neither she nor her husband chose them. Kadlec held the physicians out through advertisements as agents. The physicians had names tags listing themselves as agents of Kadlec. Moreover, no physician claims

he did anything that would lead the Mohrs to believe he was not Kadlec's agent.

The only physical evidence Kadlec produces to rebut plaintiff's justifiable reliance is its admissions form, in which the "Consent to Treatment" information is provided under the heading "Kadlec Medical Center." The form contains the following confusing section:

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 the hospitalization (i.e. pathologists, anesthesiologists, radiologists). (CP 107).

The use of colons to separate sections of text makes the provision difficult to read, especially in a hospital emergency room setting. Moreover, the section refers to an "attending physician" who is not an agent, but also to "*other* physicians" who implicitly are agents. Exactly how a stroke victim, or her distraught husband, can differentiate between who is and is not an agent is not mentioned in the form.

Additionally, the form leaves sufficient room for Mr. Mohr's interpretation, which was that the phrase "patient's attending physician"

referred to his wife's regular doctor, James Leedy, M.D. who he understood was not an employee of Kadlec Medical Center. (CP 268-70). The form is insufficient evidence to rebut the acts and omissions of Kadlec, including its discharge instructions.

Kadlec's reliance on *D.L.S. v. Maybin*, 130 Wn.App. 94, 121 P.3d 1210 (2005) is misplaced. First, the case does not involve the special relationship between a hospital and its physicians. As *Adamski* discussed at length, the standard rules do not apply to that special relationship. *Adamski*, 20 Wn.App. at 104-105. Second, in *Maybin* a father brought suit on behalf of his 15 year old daughter against McDonald's for personal injuries his daughter sustained while working as an employee for a McDonald's franchise. There, the employee claimed she did not know she was employed by the franchise owner (as opposed to McDonald's itself), despite the fact her employment contract clearly spelled out the relationship.²

² The contract in *Maybin* stated, in relevant part: "I certify that I have read and fully completed both sides of this application ... I understand that my employer is an independent Owner/Operator of a McDonald's franchise and that I am not employed by McDonald's Corporation or any of its subsidiaries. The independent contractor is solely responsible for all terms, condition [sic] and any other issues concerning my employment." *Maybin*, 130 Wn.App. at 99-100.

The contract in *Maybin* was a clearly written statement. It uses the term “I” and describes a relationship between the plaintiff and the defendant. *Id.* at 99-100. In contrast, the “Consent to Treatment” form at issue here attempts to describe a relationship between two strangers to plaintiffs (i.e. Kadlec and its physicians). The form was provided during a period of intense stress, and for the reasons set forth above, is subject to several meanings. Therefore, there are genuine issues of material fact, and it would be error to determine the issue of agency, as a matter of law, based on one misleading section in a form.

C. Purported Principals Are Liable in Tort for the Actions of Their Apparent Agents Committed Within the Scope of the Apparent Agency

Kadlec misrepresents the law on vicarious liability by limiting it to situations when the purported principal has direct “control or the right to control” over the apparent agent. This argument is in complete disregard for *Adamski v. Tacoma General Hospital, supra*, *D.L.S. v. Maybin, supra*, and the Restatement (Second) of Agency §267, *supra*, all of which find purported principals are liable for torts committed by apparent agents acting within the scope of their apparent authority.

Kadlec describes *Maybin* as “the most recent and informative case on ostensible authority.” *Brief of Defendant Kadlec Medical Center*, at 6. This is odd, since *Maybin* is directly opposed to Kadlec’s position on vicarious liability in tort:

“Apparent agency occurs, *and vicarious liability for the principal follows*, 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.

Likewise, the “control or right to control” argument was expressly rejected by *Adamski*. 20 Wn.App. at 107, 115-116. In *Adamski*, the defendant hospital raised the exact same argument:

Tacoma General argues that the ordinary rules of agency must be applied and that if this is done, Dr. Tsoi must be held to be an independent contractor for whose negligent acts the Hospital is not responsible. We are referred to the case of *Hollingbery v. Dunn*, 68 Wn.2d. 75, 411 P.2d 431 (1966), which adopts the criteria of the Restatement (Second) of Agency § 220 (1958), and holds that the single most important factor to be considered in determining the status of one who performs services for another is the right of the latter to control the former, Tacoma General points out that nowhere in its contract with TECP does it reserve the right to exercise control over the actual medical treatment rendered to its emergency room patients. ...

The experience of the courts has been that application of

hornbook rules of agency to the hospital-physician relationship usually leads to unrealistic and unsatisfactory results, at least from the standpoint of the injured patient. Consequently, we have seen a substantial body of special law emerging in this area; the result has been an expansion of hospital liability for negligent medical acts committed on its premises. *Id.* at 104-105.

Adamski, of course, went on to hold that the issue of the hospital's liability in tort for the actions of its physicians was an issue of fact for the jury. *Supra, Id.* at 115-116.

Kadlec relies on non hospital-physician cases, and those involving the standard rule that an employer is not liable for torts his employees committed outside of the scope of their employment. *See Brief of Defendant Kadlec Medical Center*, at 12-19. Hence, an employer is not liable for injuries resulting from a car accident caused by a prospective employee traveling to a pre-employment physical. *McLean v. St. Regis Paper Company*, 6 Wn.App. 727 (1972). Kadlec further relies on a hand picked quote from a Division 1 case, *Torres v. Salty Sea Days*, 36 Wn.App. 668, 673, 676 P.2d 512 (1984), stating “[a]pparent authority is not .. a basis for liability in tort.” That very quote has been called into doubt by Division 3, which refused to decide

the issue holding:

That statement in *Torres*, ... however, is not supported by authority. Thus, we assume, without deciding, that the doctrine of apparent authority may be used to create a material question of fact with respect to a tort action. *Mauch v. Kissling*, 56 Wn.App. 312, 316, 783 P.2d 601 (1989).

An apparent principal is liable for the acts of an apparent agent that occur within the scope of the apparent agency. *See Adamski*, 20 Wn.App.at 115, *Maybin*, 130 Wn.App at 98. Therefore, Kadlec's argument fails, as a matter of law.

D. Appellants Do Not Have a Duty to Quantify Their Damages

The *Brief of Appellants*, and *Appellants' Reply to Respondent Defendant Physicians*, address the mechanism of finding liability and the speculative damages argument at length. Appellant incorporates those arguments herein.

As for Kadlec's specific assertions, it alleges that Appellants cannot meet either the traditional "more probable than not" causation standard, or the "lost chance" standard articulated by *Herskovits v. Group Health Co-Cop of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474

(1983), without “demonstrating damages quantifiably.” *Brief of Kadlec Medical Center*, at 21. This is simply not the law.

“Once liability is established, a more liberal rule is applied when allowing assessment of the damage amount.” *Wagner v. Monteilh*, 43 Wn.App. 908, 912, 720 P.2d 847 (1986). In *Wagner*, it was error for the trial court to instruct the jury that the plaintiff was required to “prove the extent of damage.” *Id.* The court held “the pain and suffering Mr. Wagner experienced from Dr. Field’s negligence is not susceptible of precise measurement.” *Id.* Likewise, damage caused by failure to timely diagnose a stroke is not susceptible to precise measurement.

“[W]e fail to see the logic in denying an injured plaintiff recovery against a physician for the lost opportunity of a better outcome on the basis that the alleged injury is too difficult to calculate, when the physician’s own conduct has caused the difficulty.” *Lord v. Lovett, M.D.*, 146 N.H. 232, 239, 770 A.2d 1103, 1108 (N.H.2001).

Moreover, Kadlec alleges two appellate decisions restrict *Herskovits* to “lost chance of survival”³ or solely to the issue of

³ *Fabrique v. Choice Hotels Int’l.*, 144 Wn.app. 675, 183 P.3d 1118 (2008).

damages.⁴ Neither of these cases examined “lost chance of a better outcome” in the medical malpractice context. *Fabrique* is a food poisoning suit against a hotel, and while *Rounds* involved medical malpractice, the opinion does not mention *Herskovits*. In addition, the *Rounds* case was based on a theory that a trach tube cuff was overinflated and the attending physician was not notified of the issue. *Id.* at 164. There, the plaintiff failed to introduce competent medical expert testimony showing the alleged breaches of the standard of care reduced plaintiff’s chance of a better outcome. *Id.* at 164-166. Here, proximate cause is established through expert medical testimony affirming the lost chance of a better outcome. *Brief of Appellants*, at 9-22.

E. Emergency Room Physicians Have a Duty to Render Aid with Due Care

Kadlec argues essentially that, had Mrs. Mohr not been taken to the hospital, she would have suffered the same injuries. Thus, Kadlec concludes there is no “but for” causation. Following Kadlec’s logic,

⁴ *Rounds v. Nellcor Puritan Bennett*, 147 Wn.App. 155, 194 P.3d 274 (2008).

physicians are immune from suit unless they affirmatively cause harm to a patient. Kadlec advocates a radical change in the law that would result in nothing less than total immunity for its physicians for any negligent misdiagnosis, whatsoever.

Fortunately, Kadlec's position has been clearly rejected by *McLaughlin v. Cooke, D.O.*, 112 Wn.2d 829, 774 P.2d 1171 (1989), a case Kadlec cites in its brief at page 23. *McLaughlin* held sufficient evidence existed to support jury verdict finding physician, who failed to intervene sooner and remove existing hematoma, was the proximate cause of plaintiff's non-fatal injury and resulting complications. In other words, once a physician undertakes to act, he is liable for failing to render aid in a reasonable manner, even if that failure did not lead to his patient's death. *See also Herskovits*, 99 Wn.2d at 613 (citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 239, 299, 545 P.2d 13 (1975)).

F. **The Overwhelming Majority of States That Have Adopted "Lost Chance of Survival" Have Recognized "Lost Chance of a Better Outcome" When Given the Opportunity**

After a long search for contrary authority, Kadlec has found exactly one state, Michigan, that adopted lost chance of survival, but

rejected lost chance of a better outcome of less than 50%. What Kadlec's brief left out was that the Michigan state legislature abrogated its lost chance doctrine prior to the court's decision, thereby rendering the court's opinion essentially moot. M.C.L. §600.2912a(1).

The only other case cited by Kadlec is *Richard v. Adair Hospital Foundation Corp*, 566 S.W.2d 791 (Ky.App.1978). However, Kentucky's own Supreme Court held, "the *Richard* opinion is silent as to whether the infant's estate could be compensated for lost chance of survival itself..." *Kemper, M.D. v. Gordon*, 272 S.W.3d 146, 151 (2009) (rejecting "lost chance of survival".)

Appellants stand by the statements made in the *Brief of Appellants*. The majority rule is that "lost chance of survival" and "lost chance of a better outcome" are both premised on the same general policies. 17 states currently recognize lost chance of a better outcome, and more importantly, every state that *currently* recognizes "lost chance of survival," has recognized "lost chance of a better outcome" when given the opportunity.

G. The Medical Malpractice Statutes Permit a Lost Chance Cause of Action

As addressed in *Appellants' Reply to Respondent Defendant Physicians*, the medical malpractice statutes (RCW 4.24.290 and RCW 7.70.040) permit a cause of action for lost chance of a better outcome.

Herskovits was decided *after* the material portions of the above referenced statutes were enacted. Moreover, a “lost chance” cause of action does not remove the requirement of “proximate cause.” Instead, it simply holds that proximate cause is a jury question once a prima facie case for lost chance is established. *Heskovits*, 99 Wn.2d at 619 (“We hold that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the *proximate cause* issue to go to the jury.”) The case Kadlec cites in support of its argument rejected *Herskovits*, and therefore, is irrelevant to this analysis.⁵

Finally, lost chance is not a radical departure from standard

⁵ At page 39 of Kadlec’s brief, Kadlec attempts to analogize *Herskovits* to a Texas case, *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 387 (Tex. 1993). That case held a wrongful death statute similar to RCW 4.20.010 did not permit recovery for lost chance of survival. This is the exact opposite of what both the majority and the concurrence in *Herskovits* held, and thus, cannot support Kadlec’s interpretation of *Herskovits*.

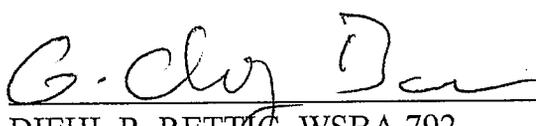
medical negligence. Even if a "lost chance" is established, liability will not attach unless a physician's conduct falls below the applicable standard of care. The applicable standard of care, its breach, and the fact of the "lost chance of a better outcome" itself, must all be supported by expert medical testimony. When a lost chance exists, it is merely a method to raise issues of fact regarding proximate cause.

V. CONCLUSION

Appellants respectfully request the trial court's Order Granting Defendants' Motion for Summary Judgment and dismissing plaintiff's claims be reversed.

RESPECTFULLY SUBMITTED this 12th day of November, 2009.

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FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

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

LINDA J. MOHR and CHARLES L.
MOHR, her husband,

Appellants,

vs.

DALE C. GRANTHAM, M.D. and
JANE DOE GRANTHAM and their
marital community; BRIAN J.
DAWSON, M.D. and JANE DOE
DAWSON, 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
PHYSICIAN, INC., a Washington
corporation,

Respondents.

NO. 28047-1-III

**AFFIDAVIT OF
MAILING**

AFFIDAVIT OF SERVICE-1

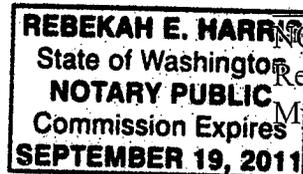
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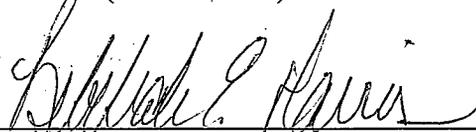
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CAROLINE G.D. FERGEN

SIGNED AND SWORN to (or affirmed) before me this 12th
day of November, 2009.




Residing at Kenmore
My Commission Expires 9/19/2011