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Supreme Court No. 91374-9
King County Superior Court No. 13-2-21191-2

Ronald R. Carpenter
Clerk

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID DUNNINGTON and JANET WILSON,
Petitioners and Cross-Respondent

v.

VIRGINIA MASON MEDICAL CENTER,
Respondent and Cross-Petitioners

ANSWER OF RESPONDENT AND CROSS-MOTION FOR
DISCRETIONARY REVIEW

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I. INTRODUCTION

This response to plaintiffs' motion for discretionary review and defendant's cross-motion for discretionary review is filed on behalf of Respondent and Cross-Petitioner Virginia Mason Medical Center (hereafter VMMC). The parties join in a mutual request that this Court accept review of the trial court's order entered on February 4, 2015. This order determined that the traditional tort standards for causation should be used in this "lost chance" of a "better outcome" medical negligence claim.

The decision to seek pretrial appellate resolution of this issue is part and parcel of an agreement between counsel. That agreement provided that both the ruling as to the proper causation standard and an earlier order striking defendant's affirmative defense of comparative negligence should be certified, pursuant to RAP 2.3(b)(4). The parties and the trial court are thus in agreement that the issues raised in Plaintiffs' Motion for Discretionary Review and in Defendant's Cross-Motion for Discretionary review involve controlling questions of law that "materially advance the ultimate determination of the litigation." RAP 2.3(b)(4). The court's February 4th order appears in *Petitioner's Appendix at A-293-296*. The court's earlier ruling on the issue of comparative negligence appears at *Respondent's Appendix at RA-163-64*.

This agreement stemmed from the parties' desire to have all outstanding legal issues resolved in an efficient and effective matter. Accordingly, the plaintiff in the underlying action, David Dunnington (Petitioner), seeks discretionary review of the court's ruling regarding the proper causation standard for a "lost chance" claim, while defendant, VMMC (Respondent/Cross-Petitioner), seeks review of the court's comparative negligence ruling.

While the parties agree that this Court should accept review of these two issues, the parties fundamentally disagree about the correctness of the trial court's rulings. This Cross-Motion for Discretionary Review and Response discusses briefly the grounds for review but then focuses upon the legal issues that arise from both orders.

II. ISSUE PRESENTED FOR REVIEW IN CROSS-PETITION

Does a patient's failure to return for evaluation and failure to agree to an excisional biopsy create genuine issues of material fact that preclude summary judgment on a contributory negligence defense?

III. COUNTER-STATEMENT OF ISSUE RAISED BY PETITIONERS

Do the traditional concepts of tort liability and causation require that the standard “but for” proximate cause instruction be given in a “lost chance” case under RCW 7.70 *et seq.* and existing Washington case law?

IV. COUNTERSTATEMENT OF THE CASE

A. Facts Giving Rise to the Underlying Litigation.

Mr. Dunnington first presented to Dr. Ngan at a VMMC clinic on September 1, 2011. He reported that he had a foot lesion arising after a puncture wound “months ago.” *Petitioner’s Appendix at A-50* (hereafter “A”). Based on the patient’s history and the appearance of the wound, Dr. Ngan diagnosed a pyogenic granuloma, most likely post-traumatic. *A-51*. Dr. Ngan informed Mr. Dunnington that they could try conservative treatment or aggressively treat the lesion by surgical excision. *Id.* At this first visit, Dr. Ngan ordered x-rays, cleansed the wound, and then administered a round of silver nitrate. *Id.* He then instructed Mr. Dunnington to take measures to reduce friction to the area, and further requested that Mr. Dunnington return to the clinic in 10 days. *Id.*

Mr. Dunnington returned on September 15, 2011. At this appointment, he reported that the prior treatment initially “seemed to help” and left a dry, black blister. *A-53*. Mr. Dunnington reported that after the

initial improvement, the scab de-roofed and that the lesion was currently about the same as previously. *Id.* Again, Dr. Ngan offered both conservative and aggressive treatments. *Id.* At this visit, Dr. Ngan and informed Mr. Dunnington that, because the lesion appeared recalcitrant, he favored surgical excision. *A-53.* Mr. Dunnington again opted for conservative treatment and Dr. Ngan administered a second course of cryotherapy to the foot lesions. *A-53.* Dr. Ngan's medical records document that he requested that Mr. Dunnington return to him for further evaluation. The record thus contains the notation: "RTC 2 wks." *A-53; A-265.*

Whenever Dr. Ngan performs a procedure, such as the administration of cryotherapy, Dr. Ngan instructs patients to return so that he can evaluate whether or not the treatment was successful. *Id.* Despite these instructions, Mr. Dunnington did not return and did not contact the clinic until three more months had passed. *A-265.* In December 2011, Mr. Dunnington called to request an MRI, which Dr. Ngan immediately ordered. On December 27, 2011, Dr. Ngan reviewed the MRI results with Mr. Dunnington at his clinic. *Id.* At that visit, Dr. Ngan advised Mr. Dunnington that the next step was to excise the lesion and biopsy it. *Id.*

Mr. Dunnington informed Dr. Ngan that he wanted to think about the matter and discuss it with his family. *Id.* Despite Dr. Ngan's clear

instructions, Mr. Dunnington never returned to the clinic. *Id.* Dr. Ngan subsequently learned that Mr. Dunnington saw a second podiatrist and that ultimately the lesion was biopsied at the end of January 2012. *Id.*

Surgical excision and biopsy would have revealed the presence of melanoma whether or not Dr. Ngan suspected it. *A-266.* Unfortunately, Mr. Dunnington did not return to Dr. Ngan's care. Mr. Dunnington's conduct in not returning as instructed and not accepting Dr. Ngan's recommendations directly delayed the diagnosis of his cancer. His conduct in not returning as instructed denied Dr. Ngan the opportunity to re-evaluate the lesion after the second treatment. His choice to seek treatment elsewhere, rather than going through with surgical excision and biopsy as Dr. Ngan recommended on December 27, 2011 further delayed diagnosis of the lesions as cancerous. *Id.*

B. Procedural History Related to Contributory Negligence Defense.

The Complaint in this action alleged that Dr. Ngan failed to timely diagnose and treat Mr. Dunnington's cancerous foot lesions. Plaintiffs contend this caused a five-month delay in the diagnosis of the lesions as a melanoma. On December 13, 2013 and January 24, 2014, plaintiffs' counsel deposed Dr. Ngan. Dr. Ngan was asked whether he had included melanoma in his differential diagnosis on December 27, 2011. Dr. Ngan

responded that he had not included it. Plaintiffs' counsel later asked Dr. Ngan whether he would have included malignant melanoma in his differential diagnosis on October 1, 2011 if Mr. Dunnington had returned to clinic as instructed. Dr. Ngan replied that he would not have included it. *A-265-66*. Plaintiffs' counsel did not ask Dr. Ngan what would have been his recommendation had he returned to clinic as instructed. *A-266*.

Nevertheless, based upon the aforementioned deposition testimony of Dr. Ngan, plaintiffs sought an order striking the affirmative defense of contributory negligence. *Respondent's Appendix at 1-12*. (Hereafter "RA"). Plaintiffs asserted summary judgment was appropriate because Dr. Ngan "admitted" in his deposition that he would not have done anything differently had Mr. Dunnington complied with Dr. Ngan's instructions to return to clinic in two weeks after the September 15, 2011 office visit. *RA-11*.

The trial court granted Plaintiffs' Motion to Strike the Affirmative Defense Pursuant to CR 12(f) or, in the alternative, for Partial Summary Judgment on the issue of comparative fault, pursuant to CR 56(a). *RA-163-64*. The court dismissed defendant's affirmative defense. *Id.*

On October 20, 2014, VMMC filed a timely motion for reconsideration, pointing out the extensive case law that holds that a patient has a duty to follow his physician's orders and that he may be held

responsible for his injuries when he does not. *RA-165*. On October 31, 2014, the trial court, without oral argument and without asking for the plaintiffs' response, summarily denied the motion for reconsideration. *RA-173-74*.

No notice of discretionary review was filed at this time, because, candidly, standing alone it did not appear that the court's ruling met the requirements of RAP 2.3(b)(1-3). Following further discussions, including an interim mediation, the parties agreed that each side had issues for which appellate review was appropriate. *A-25*. They agreed further that it was in the best interest of their clients that the trial be stayed to allow the plaintiffs to present the remaining legal issues to the trial court and then seek appellate review. *A-26*. The full agreement appears at Petitioner's Appendix, A-25 through A-29.

C. Procedural History Related to Proximate Cause Instruction.

Pursuant to this agreement, plaintiffs moved for an order determining that they were entitled to a "substantial factor" causation jury instruction, as outlined by WPI 15.02. This request was based on plaintiffs' theory that diagnosis on September 1, 2011 would have altered the course of Mr. Dunnington's disease. Plaintiffs' expert, Dr. Thompson, opined that plaintiff lost a 40 percent chance that his cancer would not recur. *See Petitioner's Motion for Discretionary Review*.

Defendant's experts, Dr. Marc Garnick and Dr. Dennis Willerford, disagreed with Dr. Thompson regarding the "lost chance" claim. *A-253-257; A-268-271*. Dr. Garnick explained that by September 1, 2011, the disease had already metastasized at the microscopic level. *A-254*. This fact dictated the course of the disease. *A-256*. Dr. Willerford also agreed with Dr. Garnick. *A-268-271*. He observed that the patient's presentation in September and December "demonstrates that Mr. Dunnington's melanoma had a propensity to spread via lymphatic channels in the foot, and this process was already well established at the time of his initial presentation in September 2011. *A-270*. Dr. Willerford therefore concluded:

Mr. Dunnington had an aggressive cancer, with a demonstrated characteristic of spreading through lymphatic channels that was already well established at the time of his initial presentation. These characteristics make it highly unlikely that he would have responded in a markedly different and/or more successful manner had he been treated in September 2011.

A-271. Dr. Willerford further opined that Mr. Dunnington had a "zero" chance of avoiding recurrent melanoma on September 1, 2011. *A-270*.

This brief synopsis of the dispute in the expert testimony is meant to alert the court to the underlying scientific dispute. This testimony and the underlying science involved in the loss of chance debate in this case

will be more fully addressed in Respondent's Brief should the Court accept review of these issues.

After reviewing all of the materials, the trial court denied plaintiffs' motion to accept the substantial factor test for this case. *A-294*. Instead, the court concluded that if the matter went to trial she would give the standard "but for" causation instruction, as contained within WPI 15.01. *A-294*.

As part of an agreement by the parties to resolve potentially case dispositive issues before trial, the trial court certified the above issues for discretionary review pursuant to RAP 2.3(b)(4). *See A-295*.

V. ARGUMENT

A. Discretionary Review is Appropriate.

Under RAP 2.3(b)(4), discretionary review is appropriate where:

The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Here, the trial court certified, and the parties stipulated, that discretionary review is warranted because the issues presented for review involve a controlling question of law and resolution at this stage in the *proceedings advances ultimate, efficient termination of the litigation. See A-295*. This reasoning applies equally to the plaintiffs' issues regarding

standards for causation and to the defendant's issue regarding the dismissal of the defense of contributory negligence. Both issues affect the ability of the parties to evaluate the merits of their cases and both issues have the potential to require a new trial if not definitively resolved at this juncture.

As part of the agreement, the parties also determined that the most efficient use of appellate resources was to seek direct review by this Court. While defendant believes that the trial court correctly resolved the causation issue utilizing traditional tort principles, it agrees that direct review is appropriate to obtain final resolution of this issue.

Defendant acknowledges that review of the trial court's decision on the contributory negligence defense does not trigger RAP 4.2(a)(4). Nonetheless, the Court's interest in judicial efficiency weighs in favor of this matter being decided along with the proximate cause issue in order to avoid the potential for a retrial. *See, Daugert v. Pappas*, 104 Wn.2d 254, 263, 704 P. 2d 600 (1985). The remainder of this submission discusses the merits of the defendant's position that the trial court improperly struck the affirmative defense of contributory negligence and responds briefly to the plaintiffs' contention that this Court should change traditional tort principles regarding causation.

B. The Trial Court Improperly Dismissed VMMC's Contributory Negligence Defense.

1. Dunnington Had a Duty to Follow Dr. Ngan's Instructions.

The general principle that a patient has a duty to follow the instructions of his or her physician is widely recognized by appellate courts. *See e.g. George Washington Univ. v. Waas*, 648 A.2d 178, 183 (D. C. 1994); *Smith v. Hull*, 659 N.E.2d 185, 192 (Ind. Ct. App. 1995) *trans. denied*; *Merrill v. Odiorne*, 113 Me. 424, 425, 94 A. 753 (1915); *Walker v. Maine General Med. Ctr.*, 2002 ME 46, 792 A.2d 1074 (2002); *Zak v. Riffel*, 34 Kan. App.2d 93, 102, 115 P.3d 165 (2005) (citing *Cox v. Lesko*, 263 Kan. 805, 819-20, 953 P.2d 1033 (1998)).

Consistent with this rule, Washington law has long imposed on patients the duty to follow his or her physician's instructions and to return for care as instructed. *Brooks v. Herd*, 114 Wash. 173, 177, 257 P. 238 (1927). In *Brooks*, the Court approved an instruction stating that the patient has a duty to follow the advice of the physician. *Id.*

2. Dunnington Had a Duty to Return to Dr. Ngan's Office for Further Treatment.

Appellate courts also recognize that a patient who, after receiving treatment, fails to return to see the physician for further treatment, as instructed by the physician to do so, is responsible for any harm caused by his or her failure to return to clinic. Although no published Washington

cases address this concept, it is a well-recognized concept at the federal level and in other jurisdictions. *See e.g. Bayless v. Boyer*, 180 S.W.3d 439 (Ky. 2005) (holding that in an alleged failure to diagnose and timely treat a wrist fracture, comparative negligence instruction was warranted where the plaintiff waited 66 days between treatment in the emergency and room and decision to seek follow up care); *Pietrzyk v. Detroit*, 123 Mich. App. 244, 248-49, 333 N.W.2d 236 (1983) (holding comparative negligence instruction proper where plaintiff was instructed to return for evaluation of a gunshot wound in three weeks but failed to do so and where defendants introduced evidence that had the plaintiff returned, it was possible that they would have removed the bullet); *Faulk v. Northwest Radiologists, P.C.*, 751 N.E.2d 233, 239 (Ind. Ct. App. 2001), *trans. denied* (holding sufficient evidence exists to support contributory negligence instruction where plaintiff failed to follow otolaryngologist's instruction to return for a series of follow up visits following cancer treatment where plaintiff did not return to doctor for two years while seeking treatment from oncologists and was deemed cancer free).

3. Dunnington Breached His Duty by not Following-Up with Dr. Ngan as Instructed.

This principle is particularly important where the plaintiffs allege that the physician failed to diagnose cancer. In these cases, appellate

courts routinely find that a patient's delay in returning for follow up when advised to do so properly places the issue of contributory negligence before the jury. *Jama v. Krpan*, 116 Ariz. 216, 568 P.2d 1114 (App. 1977); *Grippe v. Momtazee*, 705 S.W.2d 551 (Mo. App. 1986); *Chudson v. Ratra*, 76 Md. App. 753, 548 A.2d 172 (1988), *cert. denied*, 314 Md. 628, 552 A.2d 894 (1989); *Hill v. Wilson*, 134 Md. App. 472, 760 A.2d 294 (2000).

Here, Mr. Dunnington's own medical record establishes that Dr. Ngan instructed him return to the clinic two weeks following the September 15, 2011 office visit. Petitioner disregarded his physician's instructions and did not return until three and one-half months had elapsed. *A-266*.

Rather than complying with Dr. Ngan's follow up instructions, Mr. Dunnington reasoned that because the lesions had scabbed over after the second cryotherapy treatment, he did not need to return to clinic. In not complying with Dr. Ngan's instructions, however, Mr. Dunnington denied Dr. Ngan the opportunity to evaluate the lesions, to determine whether cryotherapy was successful, and to once again recommend an excision and biopsy be done in accordance with Dr. Ngan's standard of practice. *Id.*

Mr. Dunnington's decision to rely on his judgment, rather than Dr. Ngan's medical instruction, constitutes a failure to act with "due care" for his own well-being and a breach of a patient's duty to follow his or her physician's instructions. Accordingly, the trial court erred in taking the issue of contributory negligence away from the jury. *See* WPI 11.01 and comments regarding contributory negligence.

4. Dunnington Breached His Duty by Delaying the Excision and Biopsy Recommended by Dr. Ngan.

Finally, a jury could find that Mr. Dunnington was contributorily negligent when he decided to seek a second opinion from another podiatrist after Dr. Ngan recommended an excision and biopsy in late December 2011, as it is undisputed that this decision delayed the diagnosis an additional month. *A-266*.

Because both the failure to return to clinic as instructed in September 2011 and the failure to comply with Dr. Ngan's advice to have an excision and biopsy in December 2011 constitute breaches of a patient's duty to follow his or her physician's instructions, removal of the issue of contributory negligence from the jury's consideration was improper. VMMC respectfully requests that this Court accept discretionary review of the issues delineated in the trial court's order and reverse the trial court's ruling striking this affirmative defense.

C. The Trial Court was Correct That “But For” Causation is the Appropriate Standard in This “Lost Chance” Case.

1. A “Lost Chance” Theory under RCW 7.70 *et seq.*, is Subject to the Same Preponderance of the Evidence Standard as Other Theories of Medical Negligence.

There are three causes of action under the medical malpractice statute: (1) health care provider failed to follow the applicable standard of care causing injury (“medical negligence”), (2) health care provider promised the injury would not occur (“promise”), and (3) patient did not consent to the health care that caused injury (“informed consent”). RCW 7.70.030. The burden of proof for each of these claims is identical:

Unless otherwise provided in this chapter, the plaintiff ***shall*** have the burden of proving ***each fact essential*** to an award by a ***preponderance of the evidence***.

RCW 7.70.030.

Here, plaintiffs are pursuing a medical negligence claim, as recognized in RCW 7.70.030 (1) and further delineated in RCW 7.70.040. In accordance with RCW 7.70.040, plaintiff has the burden of proving that the health care provider failed to follow the accepted standard of care and that ***“such failure was a proximate cause*** of the injury complained of.” *Id.* (emphasis added). The statutory meaning could not be plainer. One of plaintiff’s essential elements is causation and each essential fact **must** be proved by a preponderance of the evidence (“but for” causation). As the Court of Appeals in *Rash v. Providence Health & Services* recognized:

“Nothing in the [Washington health care act] statute suggests that a substantial factor standard of causation should be employed in a medical malpractice suit.” 183 Wn. App. 612, 636, 334 P.3d 1154 (2014), *review pending*.

2. This Court, in Redefining the Harm for “Lost Chance” Cases, has Already Reduced the Plaintiff’s Burden, Making Further Reduction Unnecessary and Unjust.

In a medical negligence cause of action, plaintiffs must prove that “but for” the alleged negligence, he would not have been injured (e.g. “but for” the surgeon’s negligence the patient would not have had a particular post-operative complication). *See* RCW 7.70 *et seq.* *See also, Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 476, 656 P.2d 483 (1983); *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). As *O’Donoghue* acknowledged, in medical malpractice cases proximate cause **must be established beyond the balance of probabilities.** *Id.* at 824 (emphasis added). Thus, the proximate cause standard in medical negligence is “but for” causation.

The “lost chance” cases tackle the unique circumstances where the injury would likely have occurred even in the absence of negligence, but a tortfeasor’s conduct contributes to the injury. The Court first recognized this theory in the context of a “lost chance of life.” *Herskovits v. Group Health Cooperative*, 99 Wn.2d 609, 664 P.2d 474 (1983). Under those

cases, the plaintiff suffers from a condition, unrelated to the negligence, that already carries with it a less than 50 percent chance of survival. Therefore, prior to *Herskovits*, plaintiffs could not make out a wrongful death claim because they were unable to prove that “but for” the negligence the patient would have survived. *Id.* at 622. In *Herskovits*, plaintiff’s expert, Dr. Ostrow, opined that the delay in diagnosis resulted in a 14 percent reduction in survival, from 39 percent survival to 25 percent survival. *Id.* at 621. The Court recognized that this testimony was insufficient to “establish a prima facie case that defendant’s alleged negligence probably (or more likely than not) caused Mr. Herskovits’ death.” *Id.* at 622. In turn, the justices grappled with the best way to address this “proof problem.” The Court saw two different avenues that would allow plaintiffs to recover in a “lost chance” scenario: either (1) reducing plaintiffs’ causation burden or (2) redefining the harm. This Court wisely elected the latter. *See Herskovits*, 99 Wn.2d at 619 (Pearson, J. concurring); *Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011).

As the *Herskovits* plurality explained:

If the injury is determined to be the death of Mr. Herskovits, then under the established principles of proximate cause plaintiff has failed to make a prima facie case. [Plaintiff’s expert] Dr. Ostrow was unable to state that probably, or more likely than not, Mr. Herskovits’

death was caused by defendant's negligence. On the contrary, it is clear from Dr. Ostrow's testimony that Mr. Herskovits would have probably died from cancer even with the exercise of reasonable care by defendant. Accordingly, if we perceive the death of Mr. Herskovits as the injury in this case, we must affirm the trial court, unless we determine that it is proper to depart substantially from the traditional requirements of establishing proximate cause in this type of case.

If, on the other hand, we view the injury to be the reduction of Mr. Herskovits' chance of survival, our analysis might well be different. Dr. Ostrow testified that the failure to diagnose cancer in December 1974 probably caused a substantial reduction in Mr. Herskovits' chance of survival. The *O'Donoghue v. Riggs* standard of proof is therefore met.

Herskovits, 99 Wn.2d at 623-24 (emphasis added). The *Herskovits* plurality, in redefining the harm, avoided disturbing the “but for” causation standard.

The *Mohr* decision simply extended the “lost chance” doctrine to injuries short of death. 172 Wn.2d 846. Further, *Mohr* clarified that the plurality opinion in *Herskovits*, the opinion that declined to adopt “substantial factor” as the causation standard, is controlling in “lost chance” cases. *Id.* at 857.

“A lost chance claim is not a distinct cause of action but an analysis within, a theory contained by, or a form of a medical malpractice cause of action.” *Rash*, 183 Wn. App. at 629-30. Thus, in a medical negligence case, under RCW 7.70.040 and RCW 7.70.030 (1), there are

three possible theories for recovery: (1) a health care provider's negligence caused injury, (2) a health care provider's negligence caused lost chance of survival (*Herskovits*), and (3) a health care provider's negligence caused lost chance of a better outcome (*Mohr*). Each of these theories define the injury in such a way so as not to disturb the standard "but for" causation that applies to the medical negligence cause of action.

Under the "lost chance" theory of recovery, plaintiffs' burden is straightforward. First, plaintiffs must define what the "better outcome" would have been. Second, plaintiffs' must present sufficient, non-speculative expert testimony quantifying the "lost chance" of that better outcome (e.g. in the present case, plaintiff's expert claims a 40 percent chance of a better outcome). Third, the plaintiffs must prove by a preponderance of the evidence, or more likely than not, that the lost chance was caused by the defendants' negligence. In the present case, it is plaintiffs' burden simply to prove that Dr. Ngan more likely than not caused Mr. Dunnington's lost chance at a 40 percent chance that his cancer could not recur. *See Dunnington's Motion for Discretionary Review, at 2.*

3. Plaintiffs' Concern that Requiring "But For" Causation to be the Standard in a "Lots Chance" of a Better Outcome Case Would Confuse the Jury is Unfounded.

Plaintiffs' argue that requiring a preponderance of the evidence on causation will confuse the jury with too many percentages. This is simply untrue. The standard proximate cause instruction is not phrased in terms of percentages. *See* WPI 15.01; 15.01.01. Skilled lawyers will focus on simple formulations such as a discussion of the traditional "but for" test. There is nothing about "but for" causation that is inherently more confusing than the "substantial factor" standard. What the plaintiffs' argument is really designed to do is to reduce the burden of proof below that required by centuries of tort law. No logical, legal or policy consideration supports such a change.

In addition, the jury is often asked to weigh different percentages when there are multiple defendants or issues of contributory negligence, as RCW 4.22.070 requires the trier of fact to determine the percentage of fault attributable to each entity. There is therefore no reason to depart from traditional standards for causation.

VI. CONCLUSION

VMMC respectfully requests that this Court grant discretionary review regarding the trial court's order striking the contributory negligence affirmative defense. VMMC further requests that this Court

reverse the trial court's ruling in this regard, and remand with instructions to permit the affirmative defense of contributory negligence.

Finally, while VMMC joins in the request for discretionary review of the trial court's decision to instruct the jury on "but for" causation in order to get a definitive appellate ruling on this matter, VMMC believes that the trial court correctly determined that "but for" causation is the appropriate standard in a "lost chance" case. VMMC looks forward to addressing these issues fully, with the assistance of amicus support, should this Court grant the joint request for direct, discretionary review.

Respectfully submitted this 24th day of April, 2015.

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Steven F. Fitzer, WSB #06792

CERTIFICATE OF SERVICE

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

Counsel for Plaintiff: James L. Holman Jessica F. Holman 4041 Ruston Way, Suite 101 P O Box 1338 Tacoma WA 98401-1338 jlh@theholmanlawfirm.com jhm@theholmanlawfirm.com	<input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Electronic Mail
Counsel for Plaintiff: George M. Ahrend Ahrend Law Firm PLLC 16 Basin St SW Ephrata, WA 98823	<input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Electronic Mail

SIGNED at Tacoma, Washington this 24th day of April, 2015.



Dawne Shotsman, Paralegal
FITZER, LEIGHTON & FITZER, P.S.