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Supreme Court No. 91374-9
King Co. Superior Court Cause No. 13-2-21191-2 SEA

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SUPREME COURT OF THE STATE OF WASHINGTON

DAVID DUNNINGTON and JANET WILSON,

Plaintiffs-Petitioners,

vs.

VIRGINIA MASON MEDICAL CENTER,

Defendants-Respondents.

MOTION FOR DISCRETIONARY REVIEW

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 ORIGINAL

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1. IDENTITY OF PETITIONER

This motion is filed on behalf of Petitioners David Dunnington and Janet Wilson by undersigned counsel.

2. DECISION BELOW

Pursuant to RAP 2.3(b)(4), Petitioners seek direct discretionary review of the superior court order that the jury should be instructed on the “but for” rather than the “substantial factor” standard of proximate cause in this medical negligence case involving loss of a less than 50% chance of a better outcome. The order is reproduced in Petitioners’ separately bound Appendix to Motion for Discretionary Review, at A-293 to A-296.

3. ISSUE PRESENTED FOR REVIEW

Whether the jury should be instructed on the substantial factor standard of proximate cause in a medical negligence case involving loss of a less than 50% chance of a better outcome?

4. STATEMENT OF THE CASE

This medical negligence case arises out of the failure by a podiatrist, Alvin T. Ngan, DPM, to timely diagnose and treat a cancerous lesion on the left foot of Petitioner David Dunnington in September 2011. Ngan’s failure resulted in a five month delay in the diagnosis and treatment of the cancer, until February 2012,

depriving Dunnington of a 40% chance that the cancer would not recur. Dunnington's cancer returned in June 2012, and he had to undergo chemotherapy, radiation, and ultimately amputation of his left leg below the knee.¹

Dunnington and his wife, Janet Wilson (collectively Dunnington), filed suit against Ngan and his employer, Virginia Mason Medical Center, alleging claims against them for medical negligence. Before trial, Dunnington filed a motion asking the superior court to give Washington Pattern Jury Instruction 15.02, the substantial factor standard for proximate cause. *See* A-1 to A-21.

Although the superior court ruled that the jury should be instructed on the but-for standard of proximate cause, the court certified the issue for discretionary review pursuant to RAP 2.3(b)(4). In connection with certification, the court found:

1. The parties agree pursuant to Washington law, specifically, *Mohr v. Grantham*, 172 Wn. 2d 844, 857, 262 P.3d 490 (2011), that plaintiffs' injury, if proven, falls under the "a loss of chance of better outcome" doctrine;
2. The parties agree that the proper measure of damages under a loss of chance claim is a percentage "of what would be compensable under the ultimate harm of death or disability" as allowed for by

¹ The facts are summarized in more detail in Plaintiffs' Mot. for Jury Instr. Re Substantial Factor, reproduced in the Appendix at A-1 to A-21, and they are attested by the declarations filed in support of the motion, which are reproduced in the Appendix at A-22 to A-235.

“traditional tort recovery” (*Mohr* at page 858). This percentage is the difference between the probability of a better outcome in light of defendant’s negligence and the outcome absent defendant’s negligence;

3. Causation is an essential element of Plaintiff’s medical negligence claim under RCW 7.70.040(2). The standard of causation may be dispositive in this case involving a claim for loss of chance less than 50%

....

5. The parties have stipulated that this Order involves controlling questions of law as to which there is substantial grounds for difference of opinion regarding the standard of causation because (a) there is relatively little case law from the Washington appellate courts regarding the substantial factor standard of causation, (b) a claim for loss of a chance of a better outcome has only recently been recognized, and (c) despite the fact that *Mohr* described loss of a chance as a type of injury, the interplay between the standard of causation and a loss of chance less than 50% is unclear.

6. Definitive guidance regarding the standard of causation will advance the termination of this lawsuit by (a) removing uncertainty that is an impediment to settlement negotiations and (b) minimizing the potential for a second trial if the jury is instructed on what the appellate courts later determine to be the wrong standard of causation. The costs to the court and the parties of a potential retrial are especially compelling in light of the length of trial (anticipated 12 trial days), the number of expert witnesses (5 for plaintiff, 3 for defendant), and the anticipated financial costs associated with trying this matter

9. Although Mr. Dunnington’s cancer is currently in remission, given the seriousness of his prior condition, it is appropriate that this matter be resolved as expeditiously as possible.

A-294 to A-295 (ellipses added). Dunnington timely filed a notice of discretionary review to this Court.²

5. ARGUMENT IN SUPPORT OF REVIEW

RAP 2.3(b)(4) provides that discretionary review is appropriate under the following circumstances:

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 superior court has certified, and the parties have stipulated, that discretionary review is warranted.

The issue presented for review involves a controlling question of law. Proximate cause is an essential element of any medical negligence claim. *See* RCW 7.70.040(2). The medical negligence statute does not prescribe a particular standard of proximate causation, but rather incorporates established principles of tort causation. *See Mohr*, 172 Wn. 2d at 856 & 862. The particular standard of causation on which the jury is instructed may well be dispositive, especially when the claim is based on loss of a less than 50% chance of a better outcome. *See* A-294.

² A copy of the notice of discretionary review is reproduced in the Appendix at A-297 to A-303.

There is substantial ground for difference of opinion regarding the applicable standard of proximate cause when a medical negligence claim is based on loss of a chance less than 50%. In *Mohr*, 172 Wn. 2d at 862, the Court authorized recovery for loss of a chance of a better outcome in medical negligence actions. In so doing, the Court held that loss of a chance is a type of injury, approving the reasoning of the plurality opinion by Justice Pearson in its earlier decision in *Herskovits v. Group Health Co-op.*, 99 Wn. 2d 609, 619, 664 P.2d 474 (1983), which first recognized recovery for loss of a chance of survival.

The Court in *Mohr* declined to adopt the reasoning of the lead opinion by Justice Dore in *Herskovits*, which conceived loss of a chance in terms of the substantial factor standard of proximate cause, and appeared to adopt Justice Pearson's critique of Justice Dore's reasoning as "prescribing that causation in *all* lost chance cases is to be examined under the substantial factor doctrine." *Mohr*, 172 Wn. 2d at 853 (emphasis in original).

Nonetheless, while the Court did not prescribe use of the substantial factor standard in all cases, it did not preclude it in all cases either. On the contrary, the Court specifically contemplated that a plaintiff would be able to "rely on established tort causation

doctrines permitted by law and the specific evidence of the case.” *Mohr*, 172 Wn. 2d 862; *accord id.* (referring a second time to application of “established tort causation”). In any event, because *Mohr* merely involved recognition of recovery for loss of a chance of a better outcome, the Court did not decide which standard of proximate cause should be used to instruct the jury in that case.

There is, at minimum, substantial ground for a difference of opinion regarding the standard of proximate cause that should be used when the loss of chance is less than 50% percent. Initially, there is an incongruity and tension between the but-for standard of causation and this quantum of injury under the applicable burden of proof. The but-for standard of causation, as embodied in the pattern jury instructions, provides:

The term “proximate cause” means a cause which in a direct sequence [unbroken by any superseding cause,] produces the [*injury*] [*event*] complained of and without which such [*injury*] [*event*] would not have happened.

[There may be more than one proximate cause of an [*injury*] [*event*].]

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (6th ed.) (brackets & italics in original). The without-which-not language of this instruction focuses on the injury suffered by the plaintiff. Under the applicable preponderance of the evidence burden of

proof, it essentially means that there must be a greater than 50% chance that the plaintiff's injury would not have occurred in the absence of negligence. *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn. 2d 593, 608, 260 P.3d 857 (2011) (equating preponderance with "more than 50 percent").

The conception of loss of a chance as a form of injury does not mean that loss of a chance is different in *kind* from the ultimate injury of death or disability. Loss of a chance merely expresses a difference in *degree*, expressed as a percentage of the ultimate injury. *See Mohr*, 172 Wn. 2d at 858. As a result, application of the but-for standard of proximate cause is potentially problematic in any loss of chance case because the jury is essentially asked to combine percentages, by determining whether there is at least a 50% percent chance that a percentage of the ultimate injury would not have occurred in the absence of negligence. However, it is invariably problematic when the loss of chance in question is less than 50% because the percentage of ultimate injury is less than what appears to be required under the but-for standard and the applicable burden of proof.

The Court in *Mohr* did not have to confront this difficulty because the case involved loss of a chance in the range of 50-60%.

See 172 Wn. 2d at 849 & 860.³ The substantial factor standard of proximate cause solves the problem by permitting recovery for loss of chance less than 50%, which would otherwise be precluded under the but-for standard. See 6 Wash. Prac., *supra*, WPI 15.02 (stating “‘proximate cause’ means a cause that was a substantial factor in bringing about the [*injury*] [*event*] even if the result would have occurred without it”; brackets & italics in original). Defendants remain protected by the requirement to prove that their conduct was a “substantial” causal factor, as well as the proportionate award of damages under *Mohr*.

Under these circumstances, the substantial factor standard of proximate cause is consistent with established principles of tort causation. This Court recognized in *Daugert v. Pappas*, 104 Wn. 2d 254, 262, 704 P.2d 600 (1985), that:

the substantial factor test . . . is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the but for test. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it.

³ See also *Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 313 P.3d 431 (2013) (distinguishing between loss of chance greater than 50%, which is akin to a traditional negligence claim, and loss of chance less than or equal to 50%, which involves an award of damages for percentage of ultimate injury).

(Ellipses added; citing W. Prosser & W. Keeton, *Torts* § 41 (5th ed. 1984).) Here, Dunnington would have had a 40% chance of a better outcome—i.e., no recurrence of cancer, no radiation or chemotherapy, and no amputation—if Ngan had not been negligent. This means Dunnington still would have had a 60% chance of the outcome that ultimately occurred. Either one of these two causes, Ngan’s negligence or cancer, could have produced the identical harm, making it impossible for Dunnington to satisfy the but-for standard of proximate cause, and justifying use of the substantial factor standard.⁴

Lastly, the rationales underlying the recognition of loss of a chance in *Herskovits* and *Mohr* warrant the substantial factor standard of causation. In a given setting, the standard of causation reflects considerations of justice and public policy that may require more or less proximity between tortious conduct and the resulting harm. *See, e.g., Eckerson v. Ford’s Prairie Sch. Dist.*, 3 Wn. 2d 475, 482, 101 P.2d 345 (1940). Although the lead and plurality opinions in *Herskovits* did not agree regarding their formulations of the loss of chance doctrine, they did agree on the rationales. First, they

⁴ *But cf. Rash v. Providence Health & Services*, 183 Wn. App. 612, 334 P.3d 1154 (2014) (affirming dismissal of loss of chance claim where plaintiff’s expert testified that hospital’s negligence “significantly” accelerated her weakening heart” but did not otherwise quantify the loss, and seeming to find substantial factor standard inapplicable to loss of chance claim), *rev. pending*.

agreed that the doctrine rests upon considerations of justice and fairness. As stated by Justice Dore in the lead opinion, “it is not for the wrongdoer, who put the possibility of recovery beyond realization, to say afterward that the result was inevitable.” *Herskovits*, at 614. Similarly, as stated by Justice Pearson in the plurality opinion, “the all or nothing approach gives certain defendants the benefit of an uncertainty which, were it not for their tortious conduct, would not exist.” *Id.* at 634.

Second, the *Herskovits* opinions agreed that recovery for loss of a chance encourages careful conduct and deters negligence. As stated by Justice Dore, “[t]o decide otherwise would be a blanket release from liability for doctors and hospitals anytime there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.” *Id.* at 614 (brackets added). As explained by Justice Pearson, failure to recognize loss of a chance “subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses” and “strikes at the integrity of the torts system of loss allocation.” *Id.* at 634 (quotation omitted).

Both of the *Herskovits* rationales were approved by the Court in *Mohr*. See 172 Wn. 2d at 856 (relying on “the same

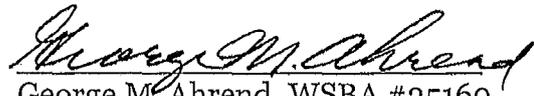
underlying principles of deterring negligence and compensating for injury” expressed in *Herskovits*). The Court should address whether these same rationales militate in favor of applying the substantial factor standard of proximate cause in cases involving loss of a chance less than 50%.

Immediate review of this issue would materially advance the ultimate termination of the litigation in this case. As already attested by the superior court and the parties, uncertainty regarding the standard of causation is an impediment to settlement negotiations, and engenders the risk of a potential second trial if the jury is instructed on what this Court ultimately determines to be the wrong standard. The costs to the court and the parties are significant in light of the length of the anticipated trial and the number of expert witnesses. Judicial economy would be served by discretionary direct review in this case.

6. CONCLUSION AND RELIEF REQUESTED

Petitioners respectfully ask the Court to grant discretionary review of this case, to reverse the decision of the superior court regarding the proximate cause instruction to be given to the jury, and to remand with directions to instruct the jury regarding the substantial factor standard for proximate cause.

Respectfully submitted this 17th day of March, 2015.



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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On March 17, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

James L. Holman at jlh@theholmanlawfirm.com
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Colleen Durkin Peterson at cdp@theholmanlawfirm.com

Signed on March 17, 2015 at Ephrata, Washington.



Shari M. Canet, Paralegal

OFFICE RECEPTIONIST, CLERK

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Cc: Steven Fitzer; Bertha Fitzer; James L. Holman; Jessica Holman; Colleen Durkin Peterson; George Ahrend
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Attached for filing please find:

1. Motion for Extension of Time to File Petitioners' Statement of Grounds for Direct Review; and
2. Motion for Discretionary Review.

The Appendix (300+ pages) is being transmitted today by postal delivery.

Thank you.

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