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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.

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

This medical negligence case arises out of the failure of a podiatric physician, Alvin T. Ngan, DPM, to timely diagnose and treat a cancerous lesion on the left foot of David Dunnington in September 2011. The doctor's conduct fell below the standard of care and 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 following treatment. The cancer returned in June 2012, and Dunnington had to undergo chemotherapy, radiation, and amputation of his left leg below the knee.

Dunnington and his wife, Janet Wilson (collectively Dunnington), filed suit against Ngan and his employer, Virginia Mason Medical Center (collectively Ngan), alleging claims for medical negligence. The parties agreed that Dunnington stated a claim for loss of a chance of a better outcome under this Court's decision in *Mohr v. Grantham*, 172 Wn. 2d 844, 262 P.3d 490 (2011).

Before trial, Dunnington filed a motion asking the superior court to give Washington Pattern Jury Instruction 15.02, the substantial factor standard of proximate cause. The superior court

denied this motion and determined instead that the jury should be instructed on the but for standard of proximate cause. However, the court recognized that the standard of causation may be dispositive in this case, involving loss of a chance of a better outcome less than 50%, and certified the issue of the correct standard of causation for review. CP 311-12 (paragraphs 4-6). In support of certification, the superior court noted:

(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.

CP 311-12 (paragraph 5).

This Court accepted direct discretionary review, and now has the opportunity to address the relationship between the standard of causation and recovery for loss of a chance less than 50%.

II. ASSIGNMENT OF ERROR

The superior court erred in determining that the but for standard of proximate cause is appropriate for this case, and in denying Dunnington's request to instruct the jury on the substantial factor standard of proximate cause. CP 311-12.

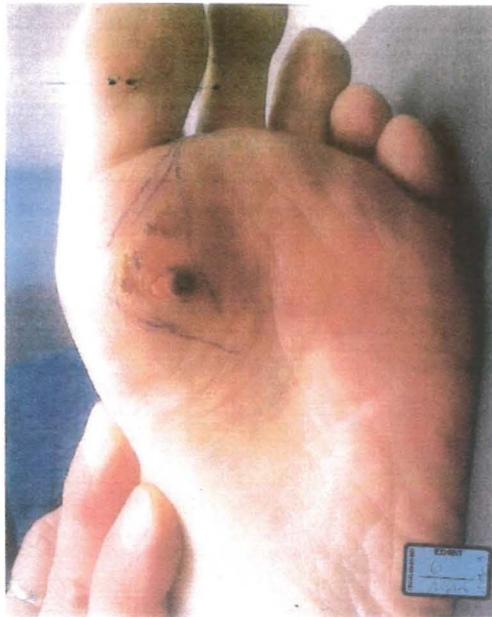
III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

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

IV. STATEMENT OF THE CASE

A. Ngan failed to diagnose cancerous lesions on Dunnington's foot, delaying proper treatment for approximately five months.

Ngan examined Dunnington three times for lesions on the bottom of Dunnington's left foot, on September 1 and 15 and December 27, 2011. CP 67-71. During the December examination, Ngan took a picture of the lesions, which appeared similar during the two previous examinations in September:



CP 73.¹ At the September examinations, the larger lesion was six by eight millimeters in size, and there was only one smaller “satellite” lesion. CP 67-68 & 207. At the December examination, the larger lesion was approximately one centimeter in size, and there were three adjacent satellite lesions. CP 71 & 207.

Ngan did not biopsy the lesions. He did not consider that they might be cancerous, nor did he warn Dunnington of that possibility. CP 206-09. For his part, Dunnington did not discover that the lesions were malignant melanoma until January 31, 2012, when he visited a dermatologist who performed a biopsy. CP 87-88. The lesions were then surgically removed. CP 89.

B. Ngan violated the standard of care.

According to Ngan, if a physician suspects that a lesion might be cancerous, a biopsy must be performed because that is the only way to rule out cancer. CP 2. Ngan also recognizes the “ABCD rule” recommended by podiatric and other medical literature for determining when a physician should suspect that a lesion is cancerous:

¹ A full size color version of the picture taken by Ngan, CP 73, is reproduced in the Appendix.

LEARN THE ABCDs OF MELANOMA

Here are some common attributes of cancerous lesions:

- Asymmetry - If divided in half, the sides don't match.
- Borders - They look scalloped, uneven, or ragged.
- Color - They may have more than one color. These colors may have an uneven distribution.
- Diameter - They can appear wider than a pencil eraser (greater than 6mm).

CP 77. The lesions on Dunnington's foot satisfied all of these criteria for suspicion of cancer when he was first examined by Ngan. CP 207. They were "highly suspicious for a carcinoma." CP 230. Nonetheless, Ngan diagnosed the lesions as "benign." CP 68 & 71. He violated the applicable standard of care by failing to consider and rule out the possibility of cancer, and failing to perform or refer Dunnington to a specialist to perform a biopsy. CP 206-09 & 230-31.

C. Ngan deprived Dunnington of a 40% chance of a better outcome, i.e., no recurrence of cancer, no radiation or chemotherapy, and no amputation of his leg.

Although the surgery to remove the lesions initially appeared to be successful, Dunnington's cancer returned in June 2012. CP 122. He required numerous treatments, including chemotherapy and radiation. CP 122. The cancer and the treatments ultimately led to the amputation of Dunnington's left leg below the knee. CP 122.

If Ngan had followed the standard of care, Dunnington would have had a 40% chance that his cancer would not have recurred, he would not have required chemotherapy and radiation, and he would not have had his leg amputated. CP 121-22, 209 & 229-31.

D. Dunnington brought a claim for loss of a chance against Ngan.

Dunnington filed suit against Ngan, alleging claims for medical negligence. CP 321-32 (complaint); CP 333-40 (amended complaint). The parties agreed that Dunnington stated a claim for loss of a chance of a better outcome, as follows:

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 "loss of a chance of better outcome" doctrine; [and]
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 "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[.]

CP 311 (paragraphs 1-2; brackets added).

E. The superior court declined to instruct the jury on the substantial factor standard for proximate cause.

Before trial, Dunnington filed a motion asking the superior court to give Washington Pattern Jury Instruction 15.02, the substantial factor standard of proximate cause. CP 1-21. While recognizing that the standard of causation may be dispositive, the superior court denied Dunnington's motion and determined instead that "the traditional 'but for' standard is appropriate to this matter[.]" CP 311-12 (paragraphs 3-4; brackets added).

The superior court certified this issue for review, and this Court accepted direct review.

V. ARGUMENT

A. Overview of proximate cause in the context of a medical negligence claim for loss of a chance.

In *Herskovits v. Group Health Co-op.*, 99 Wn. 2d 609, 664 P.2d 474 (1983), a divided Court approved a claim for loss of a chance of survival less than 50%. The lead opinion by Justice Dore conceived of loss of a chance in terms of the substantial factor standard of proximate cause. *See id.*, 99 Wn. 2d at 610-19. The plurality opinion by Justice Pearson conceived of loss of a chance as a distinct type of injury. *See id.* at 619-36. Under the plurality's reasoning, loss of a chance is not different in *kind* from the

plaintiff's ultimate injury. Instead, it represents a difference in *degree*: it is the chance, expressed as a percentage or range of percentages, that the plaintiff's ultimate injury would not have occurred in the absence of the defendant's negligence. *See id.* at 632-35.

In *Mohr v. Grantham*, 172 Wn. 2d 844, 856, 262 P.3d 490 (2011), a majority of the Court approved a claim for loss of a chance of a better outcome. In so doing, the Court adopted Justice Pearson's plurality opinion in *Herskovits* conceiving of loss of a chance as a type of injury. *See Mohr*, 172 Wn. 2d at 857. The Court approved the plurality's reasoning precisely because it did not dictate which standard of proximate cause to use in loss of chance cases:

We hold that *Herskovits* applies to lost chance claims where the ultimate harm is some serious injury short of death. We also formally adopt the reasoning of the *Herskovits* plurality. Under this formulation, a plaintiff bears the burden to prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome. This reasoning of the *Herskovits* plurality has largely withstood many of the concerns about the doctrine, **particularly because it does not prescribe the specific manner of proving causation in lost chance cases. Rather, it relies on established tort theories of causation, without applying a particular causation test to all lost chance cases.** Instead, the loss of a chance is the compensable injury.

Id., at 857 (emphasis added).

While the Court in *Mohr* did not prescribe the use of the substantial factor standard of proximate cause in loss of chance cases, it did not prohibit use of the substantial factor standard in such cases either. The Court specifically contemplated that a plaintiff would “rely on established tort causation doctrines permitted by law and the specific evidence of the case.” *Mohr*, 172 Wn. 2d 862; *accord id.* at 857 (quoted above). 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.

Proximate cause is an essential element of every medical negligence claim. *See* RCW 7.70.040(2). However, the medical negligence statute does not mandate a particular standard of causation. *See Mohr*, at 856 (noting that Ch. 7.70 RCW “does not define ‘proximate cause’”). Ultimately, the standard of proximate cause employed in a given case reflects considerations of justice and public policy that may require more or less proximity between tortious conduct and the resulting harm. *See Eckerson v. Ford’s Prairie Sch. Dist.*, 3 Wn. 2d 475, 482, 101 P.2d 345 (1940); *see also Herskovits*, 99 Wn. 2d at 636 (Brachtenbach, J., dissenting, noting

policy implications of causation in loss of chance context); *id.* at 642 (Dolliver, J., dissenting).

These considerations of justice and public policy are distinct from the concept of legal cause, related to the question of duty, which is the province of the court. *See Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (discussing legal cause). Instead, they are embedded in the standards of proximate cause presented as factual issues for the jury to resolve. The most common standard of proximate cause is the but for standard contained in WPI 15.01:

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.).²

Public policy based limits on causation embedded in this standard include the “direct sequence” language, the requirement that the sequence be unbroken by any superseding cause, the without-which-not (but for) language, and even the word “proximate” itself, which implies a degree of temporal and spatial closeness. Under

² WPI 15.01, including the official comment, is reproduced in the Appendix.

this instruction, if a cause is not direct, unbroken, and proximate, and the injury/event would not otherwise have happened, then the jury may not impose liability even if the defendant's conduct is a necessary antecedent of the plaintiff's harm. *See id.*

The principal alternative to the but for standard of proximate cause is the substantial factor standard contained in WPI 15.02:

The term "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.

6A Wash. Prac., *supra* WPI 15.02.³ While this definition of proximate cause is less exacting than the but for standard, it still contains public policy based limits on causation, primarily consisting of the "substantial factor" language and, as with WPI 15.01, the word "proximate." Under this instruction, if a cause is not substantial and proximate, then the jury may not impose liability. *See id.*

The issue to be addressed is, which standard of proximate cause should govern this case.

³ WPI 15.02, including the official comment, is reproduced in the Appendix.

B. The substantial factor standard of proximate cause should be used in this medical negligence case involving loss of a chance less than 50%.

The applicable standard of proximate cause presents a question of law that should be reviewed de novo. *See, e.g., Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn. 2d 46, 66-77, 821 P.2d 18 (1991) (treating choice of standard of causation as a matter of law in answering certified question); *see also Neher v. II Morrow Inc.*, 1998 WL 340087, at *1 (9th Cir., June 11, 1998) (reviewing de novo decision regarding application of the substantial factor test of causation under Washington law). The Court should hold that the substantial factor standard of proximate cause applies here, based on several independent grounds.

1. The substantial factor standard avoids the risks of rendering a de facto directed verdict for the defendant or confusing the jury.

The viability of a claim for loss of a chance less than 50% is threatened by application of the but for standard of proximate cause, especially in conjunction with the preponderance of the evidence burden of proof. The but for standard of causation requires the plaintiff to prove his/her injury would not have occurred in the absence of the defendant's negligence. The plaintiff may not be able to satisfy this requirement in cases involving loss of

a chance less than 50% because, even though the injury is conceived in terms of the loss of a chance, the chance in question is still defined with reference to the plaintiff's ultimate injury.⁴ The plaintiff is effectively placed in the position of having to prove that something likely to happen regardless of whether the defendant was negligent—e.g., a chance of recurrence of cancer—would not have happened in the absence of the defendant's negligence.

The difficulty is compounded by the preponderance of the evidence burden of proof that applies in a medical negligence case.

WPI 21.01 defines the applicable burden of proof as follows:

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

⁶ Wash. Prac., *supra* WPI 21.01.⁵ This burden of proof requires the plaintiff to persuade the jury that s/he has established the elements of the case with a confidence level greater than 50%. *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn. 2d 593, 608, 260 P.3d 857

⁴ *See, e.g., Herskovits*, 99 Wn. 2d at 634 (Pearson, J., plurality opinion, stating "I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival").

⁵ WPI 21.01, including the official comment, is reproduced in the Appendix.

(2011) (stating “[i]n order to establish a causal connection in most civil matters, the standard of confidence required is a ‘preponderance,’ or more likely than not, or more than 50 percent”). In cases involving loss of a chance less than 50%, the confidence level required by the burden of proof is greater than the nature of the injury will permit. Requiring the plaintiff alleging injury in the form of loss of a chance less than 50% to satisfy the but for standard of proximate cause by a preponderance of the evidence is tantamount to directing a verdict in favor of defendant, assuming the jury understands and is able to follow the instructions.⁶

Using the but for standard engenders the risk of confusing the jury because of a basic incongruity between this standard of proximate cause and recovery for injury in the form of loss of a chance. Application of the but for standard requires the jury to make a type of categorical choice, i.e., would the plaintiff’s injury have occurred in the absence of the defendant’s negligence, or not? In contrast, loss of a chance requires the jury to evaluate the plaintiff’s injury along a continuum, assigning a percentage or range of percentages that correspond to the chance of a better

⁶ This issue is foreshadowed in Justice Madsen’s dissent in *Mohr*, 172 Wn. 2d at 864, which highlights the need to reconcile the probability required by burden of proof with the possibility involved in recovering for loss of a chance.

outcome in the absence of the defendant's negligence. This conceptual disconnect makes it difficult for the jury to understand and follow the instructions.

The substantial factor standard of proximate cause avoids these problems by eliminating the requirement to prove that the plaintiff's injury would not have occurred in the absence of the defendant's negligence. The defendant remains protected by the requirements to prove that his/her conduct was negligent, and that his/her conduct played a substantial and proximate causal role in the plaintiff's injury, as well as the proportional reduction of damages that occurs in loss of chance cases.

2. The substantial factor standard is consistent with established principles of tort causation.

While the but for standard of proximate cause is undoubtedly appropriate in many, if not most, types of cases, this Court has recognized that the substantial factor standard is justified when a plaintiff is unable to show that one event alone was the cause of the injury. *See Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985). The Court explains:

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.

Id., 104 Wn. 2d at 262 (brackets added).

In this case, Dunnington would have had a 40% chance of a better outcome—i.e., no recurrence of cancer, no radiation or chemotherapy, and no amputation of his left leg—if Ngan had not been negligent. This means that 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, even if the harm is properly conceived in terms of the loss of a chance of avoiding the recurrence of cancer. This makes it impossible for Dunnington to satisfy the but for standard of proximate cause, and justifies use of the substantial factor standard.

3. The substantial factor standard is in keeping with the purposes underlying recovery for loss of a chance.

Although the lead and plurality opinions in *Herskovits* disagreed regarding how loss of a chance should be conceived, they agreed on the rationales supporting a recovery. First, they agreed that recovery for loss of a chance rests upon considerations of justice and fairness because the difficulty of proof is a result of the defendant’s conduct. *See Herskovits*, at 614 (Dore, J., lead opinion,

stating “it is not for the wrongdoer, who put the possibility of recovery beyond realization, to say afterward that the result was inevitable”); *id.* at 634 (Pearson, J., plurality opinion, stating “the all or nothing approach gives certain defendants the benefit of an uncertainty which, were it not for their tortious conduct, would not exist”).

Second, the *Herskovits* opinions agreed that recovery for loss of a chance encourages careful conduct and deters negligence. *See Herskovits*, at 614 (Dore, J., lead opinion, stating “[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 634 (Pearson, J., plurality opinion, indicating failure to recognize loss of a chance undermines “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”).

These rationales were approved by the Court in *Mohr*. *See* 172 Wn. 2d at 856 (recognizing “the same underlying principles of deterring negligence and compensating for injury” expressed in *Herskovits*). They reflect public policies that warrant application of

the substantial factor standard of proximate cause in cases involving loss of a chance less than 50%.

This Court has recognized that application of the substantial factor standard of proximate cause can be independently warranted by public policy considerations. *See, e.g., Wilmot*, 118 Wn. 2d at 66-77. In *Wilmot*, the Court adopted the substantial factor standard for cases involving termination of an employee in retaliation for filing a claim under the Industrial Insurance Act, Title 51 RCW, given the public policy at issue, and the allocation of burdens of proof in a retaliatory discharge case, balancing the interests of the parties. *See id.* at 72. With respect to allocating the burdens of proof, the Court in *Wilmot* recognized that employees generally do not have “access to proof” of the employer’s retaliatory motive. *See id.* With respect to the interests of the parties, the Court noted that employers “must be accountable” for interfering with the statutory rights of injured workers to obtain compensation for their injuries, and “[i]t must be kept in mind that the employer controls his or her own conduct.” *Id.* at 71-72.

Similar considerations militate in favor of applying the substantial factor standard of proximate cause here. While *Wilmot* involved the Industrial Insurance Act, the Act is a substitute for the

common law right of compensation for injured workers provided under tort law. A similar right to compensation is at issue in cases such as this one, and the right to compensation is one of the rationales that originally prompted the Court to recognize recovery for injury in the form of loss of a chance in *Herskovits* and *Mohr*.

Also similar to *Wilmot*, difficulties of proof result from the defendant's conduct in loss of chance cases, creating the potential for the defendant to avoid responsibility for that conduct, thereby subverting the compensatory and deterrent functions of tort law. In *Herskovits* and *Mohr*, the Court has attempted to balance the rights of the parties by allowing the plaintiff to recover for injury in the form of loss of a chance while allowing the defendant to obtain a proportional reduction of damages. The Court should now place the balance in equipoise by holding that the substantial factor standard of proximate cause applies when the loss of chance is less than 50%.⁷

⁷ See *Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 313 P.3d 431 (2013) (distinguishing 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).

VI. CONCLUSION

Based on the foregoing argument and authority, the Court should reverse and vacate the superior court order determining that the but for standard of proximate cause is appropriate for this case and denying Dunnington's motion to instruct the jury on the substantial factor standard of proximate cause.

The Court should remand this case for trial with directions to instruct the jury on the substantial factor standard of proximate cause.

Respectfully submitted this 13th day of January, 2016.

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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 January 13, 2016, 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:

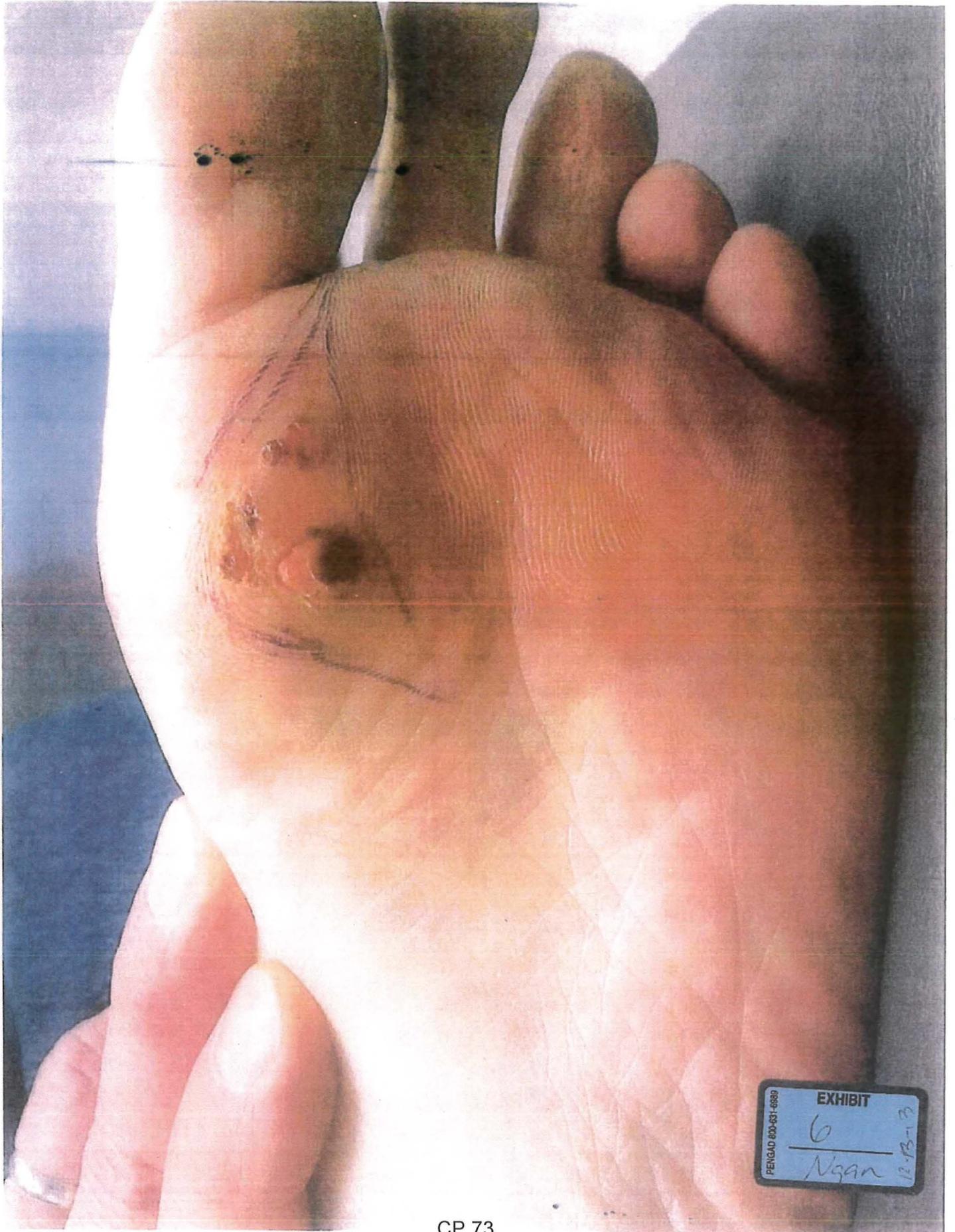
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Signed on January 13, 2016 at Moses Lake, Washington.

s/Shari M. Canet
Shari M. Canet, Paralegal

APPENDIX

Color picture of Dunnington's foot taken by Ngan on December 27, 2011, CP 73	A-1
6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (6th ed.)	A-2
6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.02 (6th ed.)	A-5
6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 21.01 (6th ed.)	A-7



CP 73

A-1

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (6th ed.)

Washington Practice Series TM
 Washington Pattern Jury Instructions--Civil
 Database updated June 2013
 Washington State Supreme Court Committee on Jury Instructions
 Part II. Negligence—Risk—Misconduct—Proximate Cause
 Chapter 15. Proximate Cause

WPI 15.01 Proximate Cause—Definition

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].]

NOTE ON USE

This instruction is the standard definition of proximate cause. For alternative wording, see WPI 15.01.01, Proximate Cause—Definition—Alternative.

When the substantial factor test of proximate causation applies, use WPI 15.02, Proximate Cause—Substantial Factor Test, instead of WPI 15.01 or WPI 15.01.01.

Use bracketed material as applicable. Use the bracketed phrase about a superseding cause when it is supported by the evidence. If this bracketed phrase is used, then WPI 15.05, Negligence—Superseding Cause, must also be used.

The last sentence in brackets should be given only when there is evidence of a concurring cause. If the last sentence is used, it may also be necessary to give WPI 15.04, Negligence of Defendant Concurring with Other Causes.

COMMENT

Elements of proximate cause. Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See *Christen v. Lee*, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985), and cases cited therein. Cause in fact refers to the “but for” consequences of an act — the physical connection between an act and an injury. WPI 15.01 describes proximate cause in this factual sense. *Hartley v. State*, 103 Wn.2d at 778. The question of proximate cause in this context is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion, in which case cause in fact is a question of law for the court. *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986); *Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections*, 122 Wn.App. 227, 95 P.3d 764 (2004) (estate could not show that, but for negligent supervision, parolee would have been in jail and unable to kill plaintiff decedent); *Estate of Jones v. State*, 107 Wn.App. 510, 15 P.3d 180 (2000) (jury question whether had juvenile offender's score been non-negligently calculated, he would have been in prison and unable to murder plaintiff decedent).

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 478–79. This inquiry depends on “mixed considerations of logic, common sense, justice, policy, and precedent.” See *Hartley v. State*, 103 Wn.2d at 779; *Tyner v. State Dept. of Social and Health Services, Child Protective Services*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The existence of a duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues (see *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992)), “[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 479–80.

There have been many attempts to define “proximate cause.” In Washington it has been defined both as a cause which is “natural and proximate,” *Lewis v. Scott*, 54 Wn.2d 851, 341 P.2d 488 (1959), and as a cause which in a “natural and

continuous sequence” produces the event, *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799 (1950). Some jurisdictions, in an effort to simplify the concept of proximate cause for jurors, have substituted the term “legal cause.” See, e.g., Connecticut’s civil jury instruction 3.1-1 and Restatement (Second) of Torts § 9 (1965). However, the “direct sequence” and “but for” definition adopted in this instruction is firmly entrenched in Washington law. See *Alger v. City of Mukilteo*, 107 Wn.2d 541, 730 P.2d 1333 (1987) (“direct sequence”); *Tyner v. State Dept. of Social and Health Services, Child Protective Services*, 141 Wn.2d at 82 (“but for”).

Superseding cause. The pattern instruction includes the bracketed phrase “unbroken by any superseding cause.” Prior to 2009, this phrase was worded as “unbroken by any new independent cause.” The committee rewrote this phrase so that the instruction better integrates with the wording of WPI 15.05. No change in meaning is intended — the phrase “unbroken by any new independent cause” is an expression of the doctrine of superseding cause. See *Humes v. Fritz Companies, Inc.*, 125 Wn.App. 477, 499, 105 P.3d 1000 (2005). The bracketed phrase should be used only when there is evidence of the doctrine’s applicability. See *Humes v. Fritz Companies, Inc.*, 125 Wn.App. at 499 n.5.

Negligence concurring with other causes. An instruction combining parts of WPI15.01 and WPI15.04 15.04, Negligence of Defendant Concurring with Other Causes, was approved in *Stevens v. Gordon*, 118 Wn.App. 43, 74 P.3d 653 (2003) (WPI 15.04 was previously numbered as WPI 12.04).

Substantial factor test. Section 431 of the Restatement (Second) of Torts sets forth the substantial factor test of proximate cause, under which a defendant’s conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected this approach in favor of the “but for” definition contained in WPI 15.01 for general negligence actions. Courts continue to reject the substantial factor test except in limited circumstances. *Fabrique v. Choice Hotels Intern., Inc.*, 144 Wn.App. 675, 183 P.3d 1118 (2008) (salmonella exposure); *Gausvik v. Abbey*, 126 Wn.App. 868, 107 P.3d 98 (2005) (negligent investigation of child abuse). For a more detailed discussion of the substantial factor test and the types of cases to which it applies, see WPI 15.02, Proximate Cause—Substantial Factor Test.

Multiple proximate causes. Using WPI 15.01 without the last paragraph is error if there is evidence of more than one proximate cause. *Jonson v. Chicago, M., St. P. and P. R. Co.*, 24 Wn.App. 377, 601 P.2d 951 (1979).

An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985); *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983). Failure to give WPI 15.04, Negligence of Defendant Concurring with Other Causes, may be reversible error even though WPI 15.01 is given including the bracketed last paragraph. WPI 15.01 does not inform the jury that the act of another person does not excuse the defendant’s negligence unless the other person’s negligence was the sole proximate cause of the plaintiff’s injuries. *Brashear v. Puget Sound Power and Light Co., Inc.*, supra (failure to give WPI 15.04 was reversible error); *Jones v. Robert E. Bayley Const. Co., Inc.*, 36 Wn.App. 357, 674 P.2d 679 (1984) (failure to give WPI 15.04 was error, but harmless given the jury’s special verdict findings), overruled on other grounds in *Brown v. Prime Const. Co., Inc.*, 102 Wn.2d 235, 684 P.2d 73 (1984). In *Torno v. Hayek*, 133 Wn.App. 244, 135 P.3d 536 (2006), it was not error to refuse WPI 15.04 where both defendants admitted liability (successive car accidents) but disagreed on which defendant caused particular medical expenses.

Foreseeability. It is error to add to WPI 15.01 the words “even if such injury is unusual or unexpected.” *Blodgett v. Olympic Sav. and Loan Assoc’n*, 32 Wn.App. 116, 646 P.2d 139 (1982). It is improper to inject the issues of foreseeability into the definition of proximate cause. *State v. Giedd*, 43 Wn.App. 787, 719 P.2d 946 (1986); *Blodgett v. Olympic Sav. and Loan Association*, supra.

Whether to supplement the pattern instructions on proximate cause. The preferred practice is to use the proximate cause language from the applicable pattern instruction or instructions. See *Stevens v. Gordon*, 118 Wn.App. at 53; *Humes v. Fritz Companies, Inc.*, 125 Wn.App. at 498. Washington case law has occasionally approved instructions that supplement WPI 15.01 with more specific language as to what does, or does not, constitute proximate cause. See, e.g., *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103, 107–08, 431 P.2d 969 (1967); *Young v. Group Health Co-op. of Puget Sound*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975); *Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 277–78, 796 P.2d 737 (1990); *Safeway, Inc. v. Martin*, 76 Wn.App. 329, 885 P.2d 842 (1994).

Practitioners should use care in deciding whether to expand upon the standards in the pattern instructions. Such modifications are not always necessary, and they need to be written neutrally so as to avoid unduly emphasizing one party's theory of the case. See *Ford v. Chaplin*, 61 Wn.App. 896, 899–901, 812 P.2d 532 (1991).

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6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.02 (6th ed.)

Washington Practice Series TM
 Washington Pattern Jury Instructions--Civil
 Database updated June 2013
 Washington State Supreme Court Committee on Jury Instructions
 Part II. Negligence—Risk—Misconduct—Proximate Cause
 Chapter 15. Proximate Cause

WPI 15.02 Proximate Cause—Substantial Factor Test

The term “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.

NOTE ON USE

Use this instruction instead of WPI 15.01, Proximate Cause—Definition, or WPI 15.01.01, Proximate Cause—Definition—Alternative, in the narrow class of cases (discussed in the Comment below) for which the “but for” test of causation is inapplicable.

COMMENT

Section 431 of Restatement (Second) of Torts sets forth the “substantial factor” test of proximate cause, under which a defendant's conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected this approach for general negligence actions in favor of the “but for” definition contained in WPI 15.01. However, in *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985), while the court declined to apply the “substantial factor test” to a legal malpractice case, it indicated that the test may be appropriate in three types of cases:

First, the 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. Second, the test is used where a similar, but not identical, result would have followed without the defendant's act. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

Daugert v. Pappas, 104 Wn.2d at 262.

The substantial factor test has been adopted by Washington courts in a variety of cases involving discrimination or unfair employment practices. See *Donahue v. Central Washington University*, 140 Wn.App. 17, 163 P.3d 801 (2007) (retaliation for constitutionally protected speech); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002) (disability discrimination); *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 69–70, 821 P.2d 18 (1991) (retaliation for filing workers' compensation claim); *City of Federal Way v. Public Employment Relations Com'n*, 93 Wn.App. 509, 513–14, 970 P.2d 752 (1998) (retaliation for union organizing activity); *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995) (gender discrimination); *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 93–95, 821 P.2d 34 (1991) (age discrimination); and *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996) (handicap discrimination in public accommodations). For related pattern jury instructions using the substantial factor test, see WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof, WPI 330.05, Employment Discrimination—Retaliation, and WPI 330.31, Disability Discrimination—Treatment—Burden of Proof.

The Washington Supreme Court has also adopted the substantial factor test to determine the status of “seller” under the Securities Act of Washington. *Haberman v. WPPSS*, 109 Wn.2d 107, 744 P.2d 1032 (1987). The court retained the test for such cases even after federal courts abandoned a similar prior interpretation of federal securities law. See *Hoffer v. State*, 113 Wn.2d 148, 776 P.2d 963 (1989), and *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990). In *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 32, 935 P.2d 684 (1997), the Court of Appeals concluded that the substantial factor test should be used in multi-supplier asbestos-injury cases when expert testimony establishes that “all of the plaintiff's

exposure probably played a role in causing the injury and that it was not possible to determine which exposures were, in fact, the cause of the condition.” 86 Wn.App. at 32. The *Mavroudis* court reasoned that “[t]his is exactly the kind of situation that calls for application of the substantial factor test, in order that no supplier enjoy a causation defense solely on the ground that the plaintiff probably would have suffered the same disease from inhaling fibers originating from the products of other suppliers.” 86 Wn.App. at 32.

The instruction used by the trial court in *Mavroudis* included a definition of “substantial factor”:

If you find that two or more causes have combined to bring about an injury and any one of them operating alone would have been sufficient to cause the injury, each cause is considered to be a proximate cause of the injury if it is a substantial factor in bringing it about, even though the result would have occurred without it. A substantial factor is an important or material factor and not one that is insignificant.

86 Wn.App. at 28. The Court of Appeals in *Mavroudis* did not expressly approve the wording of this instruction. Rather, the court held that any error that might exist in the instruction was not prejudicial. The court noted that the instruction may be unclear with regard to an insubstantial cause that combines with other causes to produce an injury, and the court further questioned whether the instruction went further than the Supreme Court would require in an asbestos-injury case. 86 Wn.App. at 30–31.

In another toxic tort case, *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995), the Supreme Court approved application of the substantial factor test to a claim for damages from the drift of a chemical cloud where the claim was brought against the manufacturer, the applicator, and numerous upwind wheat growers who had used the chemical at various times. The court required the plaintiff to prove that an individual defendant used the pesticide, that it became part of the drifting cloud, and that the cloud caused damage to the plaintiff.

In *Herskovits v. Group Health Co-op. of Puget Sound*, 99 Wn.2d 609, 613–19, 664 P.2d 474 (1983), the lead opinion of two justices applied the substantial factor test to a medical malpractice case in which it was claimed that a misdiagnosis reduced the decedent's chance of survival from 39% to 25%. The plurality opinion of four concurring justices, however, applied the traditional “but for” test, interpreting the loss of chance, as opposed to the death, as the distinct injury to which the test could be applied. The Court of Appeals in *Zueger v. Public Hosp. Dist. No. 2 of Snohomish County*, 57 Wn.App. 584, 591, 789 P.2d 326 (1990), concluded that “if *Herskovits* stands for anything beyond its result, we believe the plurality represents the law on a loss of the chance of survival.” The Court of Appeals declined to apply the *Herskovits* reasoning to an asbestos case in *Sorenson v. Raymark Industries, Inc.*, 51 Wn.App. 954, 756 P.2d 740 (1988), where the defendant claimed an increased chance of contracting mesothelioma, rather than claiming to have actually contracted it.

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6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 21.01 (6th ed.)

Washington Practice Series TM
Washington Pattern Jury Instructions--Civil
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Washington State Supreme Court Committee on Jury Instructions
Part III. Issues—Burden of Proof
Chapter 21. Burden of Proof

WPI 21.01 Meaning of Burden of Proof—Preponderance of the Evidence

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

NOTE ON USE

This instruction should be given in every case in which the burden of proof is preponderance of the evidence. This is true even though the only issue in the case is the amount of damages. The bracketed material should be used if limited purpose testimony has been introduced or if any propositions require a certain type of evidence for proof, as in malpractice cases. See WPI 1.06, Evidence for Limited Purpose.

For a fraud case, or for any case in which the burden of proof is by clear, cogent and convincing evidence, see WPI 160.02, Fraud—Burden of Proof, or WPI 160.03, Fraud—Burden of Proof—Combined with Preponderance of Evidence.

COMMENT

The “more probably true than not true” definition set forth in this instruction is generally accepted. See, e.g., *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

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Attached for filing please find Petitioners' Opening Brief.

Please note that page 3 of Petitioners' Opening Brief and page A-1 of the Appendix contain color images. Per instructions from your office this date, we will mail color prints of those two pages to be inserted in the appropriate place after printing of the attached brief by your office.

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