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SUPREME COURT  
OF THE STATE OF WASHINGTON

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BEVERLY VOLK, et al., *Appellants*,

v.

JAMES B. DEMEERLEER, et al., *Respondents*.

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VOLK'S ANSWER TO AMICUS CURIAE BRIEF OF  
WASHINGTON DEFENSE TRIAL LAWYERS

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Michael J. Riccelli, WSBA #7492  
Bruce E. Cox, WSBA #26856  
Attorneys for Appellants  
400 South Jefferson St., #112  
Spokane, WA 99204  
(509) 323-1120



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## **I. IDENTITY OF PETITIONER/RESPONDENT**

Petitioners/Respondents Brian P. Winkler and Beverly R. Volk (“Ms. Volk”), as Guardian for Jack Alan Schiering, a minor, and as Personal Representative of the Estates of Phillip and Rebecca Schiering, deceased, and on behalf of all statutory claimants and beneficiaries (hereinafter “Volk” or “plaintiffs”), respectfully answers the brief of Amicus Curiae Washington Defense Trial Lawyers (hereinafter WDTL).

## **II. SUMMARY OF ARGUMENT**

1. WDTL makes a brazen attempt to recast the fact issues of this instant matter pertaining to Ms. Volk’s claims in the trial court.

2. In particular, it fails to segregate arguments based on inaccurate or misconstrued interpretations of the facts and issues of this matter made by the Division III Appellate Court, as compared to the actual facts and issues plead or raised by Ms. Volk in briefing and argument in the trial court and on appeal.

3. Primarily, this action is based on a breach of the standard of care in Dr. Ashby and Spokane Psychiatric Clinic’s failure to properly assess and treat Mr. DeMeerleer. (CP 082 through 091) (Knoll Declaration).

4. Ms. Volk argues that loss of chance to Ms. Schiering, et al., resulted from Ashby’s failure to treat DeMeerleer within the standard of care.

This resulted in DeMeerleer being unable to maintain any semblance of normalcy. DeMeerleer lost the chance to achieve and maintain mental ability and normalcy, Ms. Schiering, et al, were foreseeable in the zone of risk of harm from DeMeerleer, and their loss of chance of survival and of a better outcome claims are derivative from DeMeerleer's loss of chance. Further, they have direct loss of chance claims *vis a vis* the possibility that if clinical treatment of DeMeerleer within the standard of care failed, Dr. Ashby may have had the knowledge and ability to either provide adequate warning to them, and/or have DeMeerleer civilly committed. CP 082-92 (Knoll's Declaration).

5. Therefore, tissues of warning Ms. Schiering, et al, as third parties at risk and/or, civil commitment are only tangential as something that, had Ashby maintained treatment and the standard of care, might have been utilized at a later date than this tragic occurrence, if the need arose. (CP 090)(Knoll Declaration p. 9, LL. 7-15). However, Dr. Knoll believes, more probably than not, that treatment of DeMeerleer consistent with the standard of care would have obviated any exigent risk to third parties. Under Washington law (*Herskovits* and *Mohr*) a loss of chance claim is a separate claim that may be brought individually or, in the alternative, with an ordinary tort claim for causation of injury and/or death due to medical negligence. The claim of loss of chance of either survival or of a better outcome, is a claim

apart from the ordinary tort encompassing the ultimate harm of death or a bad outcome. Conceptually it may be brought for a loss of chance, however small or large (obviously excluding 0% or 100%). The magnitude of the loss of chance may be determined by a jury as it normally determines damages, comparable fault, contribution, etc., based on substantive evidence and the “battle of experts,” and other available scientific evidence. This may include statistical testimony if valid statistic studies actually study and evaluate a population of persons who have suffered a loss of chance due to medical negligence. To merely recite a study that rejects a 70 percent survival or good outcome rate is not competent evidence, because it doesn’t reflect a study of the effect of medical negligence on the subjects of the study. It simply means that 70 percent are fortunate and 30 percent unfortunate in the absence of medical negligence. Valid statistical studies of loss of chance producing statistical loss of chance percentages in the context of medical malpractice are assuredly rare, if they exist at all. Percentage testimony based on anecdotal experience and study of a particular case may give an expert some insight into a relative value or order of magnitude of a loss of chance and such testimony may be permissible if the extent and nature of foundation provided by the expert is appropriate and the testimony is helpful to the jury. See Supplemental Brief of Respondent filed August 28, 2015, at p. 9-20.

6. Regardless, to the extent a duty to warn may be considered as

a possible mitigating future act Dr. Ashby had he treated DeMeerleer within the standard of care, current Washington law, *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), could be relied on by Dr. Ashby to allow such a warning. *Peterson* is *Stare Decisis*, and there has been no showing of any harm to society resulting from the *Peterson* decision. Therefore, *Peterson* should not be overturned.

7. Arguments made by WDTL in its amicus curiae brief regarding duty to warn, and civil commitment are cumulative of other amicus curiae briefs and will not be addressed directly in this answer. Ms. Volk will address these issues in answers to other amicus curiae briefs.

### III. ARGUMENT

#### A. Adequate Testing Exists to Allow Volk's Loss of Chance Claim to Proceed to Trial.

Dr. Knoll's declaration sets forth the required elements of loss of chance in paragraphs 6, 10 and 14. His opinions are rendered on a more probable than not basis and are made with reasonable medical certainty. Therefore, the Court is requested to reject WDTL's argument and reverse the court of appeals on the loss of a chance issue.

#### B. Washington Loss of Chance Laws

Turning to damages, in *Mohr*, when considering loss of chance and related damages, considered:

“First, we fail to see the logic in denying an injured plaintiff recovery against a physician for the lost opportunity of a better outcome on the basis that the alleged injury is too difficult to calculate, when the physician’s own conduct has caused the difficulty. Second, we have long held that difficulty in calculating damages is not a sufficient reason to deny recovery to an injured party. Third, loss of opportunity is not inherently unquantifiable. A loss of opportunity plaintiff must provide the jury with a basis upon which to distinguish that portion of her injury caused by the defendant’s negligence from the portion resulting from the underlying injury. This can be done through expert testimony just as it is in aggravation of pre-existing injury cases.”

*Lord v. Lovett*, 146 N.H. 232, 239; 770 A.2d 1103, 1108 (2001) (internal citations omitted).

In the case at bench, based on *Herskovits, Mohr* and *Lord*, Volk has presented sufficient and admissible evidence of a loss of chance injury. She has produced testimony, on a more probable than not basis, that defendant’s breach of duty caused a loss of chance. Dr. Knoll’s declaration addresses loss of chance in paragraphs 10 and 14. (CP 090 – 091).

This Court’s recent opinion in *Grove v. Peace Health St. Joseph Hosp.*, 182 Wn. 2d 136, 341 P3d 261 (2014) supports Volk’s argument. In that case, two experts testified for the plaintiff during a medical malpractice trial. Neither expert testified as to a percentage or range of percentage reduction in the chance of survival. Dr. Ghidella opined that Grove would not have suffered permanent injuries or would have had a better outcome if the standard of care had been met. *Id.* at 140-141. Dr. Adams's testified if the

hospital employees had not breached the standard of care, Grove would have had a better chance of avoiding injury or would have suffered less severe injury. *Id.* at 142. Although the primary issue decided by the court was whether the trial court properly granted defendants motion for judgment as a matter of law, *Id.* at 138, the experts' testimony as to loss of chance absent percentages strongly supports the Volk's argument in the present case.

Other jurisdictions do not require percentage evidence. *Borgren v. United States*, 723 F. Supp. 581 (D. Kan. 1989). (Statistical percentage evidence in a loss of chance case is not required). *Kardos v. Harrison*, 980 A.2d 1014, 1017 (2009). (It is sufficient for the plaintiff to show the chance of survival was reduced as a consequence of the defendant's negligence). *See also, Pesses v. Angelica*, 214 La. App. Lexis 2841 (2014) (Louisiana does not require percentage or range of percentage evidence of loss of chance); *Thompson v. Sun City Community Hosp.*, 141 Ariz. 597, 688 P.2d 605 (1984) (modified by statute) (percentage evidence not required with respect to causation in loss of chance case); *Holton v. Mem'l Hosp.*, 176 Ill.2d 95, 679 NE2d 1202 (1997) (no percentage evidence required in loss of chance case with respect to causation); *James v. United States*, 483 F. Supp. 581 (N. Dist. Cal. 1980) (no percentage evidence required with respect to damages calculation); *Hicks v. United States*, 368 F.2d 626 (4<sup>th</sup> Cir. 1966) (no percentage evidence required with respect to causation).

In Washington *Herskovits* and *Mohr* are the seminal cases regarding loss of chance. *Herskovits* allowed loss of chance claims in death cases (loss of chance of survival). *Mohr* allowed for loss of chance claims in non-mortality cases (loss of chance of a better outcome). As *Herskovits* was a split decision in which the lead opinion was written by Justice Dore, and joined by one justice, and a concurring opinion was written by Justice Pearson, and joined by three justices, *Mohr* squarely adopted the Pearson plurality opinion as good law.

Justice Pearson's plurality *Herskovits* opinion states, in part:

“Having concluded this somewhat detailed survey of the cases cited by plaintiff, what conclusions can we draw? **First, the critical element in each of the cases is that the defendant's negligence either deprived a decedent of a chance of surviving a potentially fatal condition or reduced that chance.** To summarize, in *Hicks v. United States* the decedent was deprived of a probability of survival; in *Jeanes v. Milner* the decedent's chance of survival was reduced from 35 percent to 24 percent; in *O'Brien v. Stover*, **the decedent's 30 percent chance of survival was reduced by an indeterminate amount**; in *McBride v. United States* the decedent was deprived of the probability of survival; in *Kallenberg v. Beth Israel Hosp.* the decedent was deprived of a 20 percent to 40 percent chance of survival; **in *Hamil v. Bashline* the decedent was deprived of a 75 percent chance of survival**; and in *James v. United States* the decedent **was deprived of an indeterminate chance of survival, no matter how small.**

**The three cases where the *chance of survival was greater than 50 percent* (*Hicks*, *McBride*, and *Hamil*) are unexceptional in that they focus on the death of the decedent as the injury, and they require proximate cause to be shown beyond the balance of probabilities. Such a**

result is consistent with existing principles in this state, and with cases from other jurisdictions cited by defendant.

**The remaining four cases allowed recovery despite the plaintiffs' failure to prove a probability of survival.** Three of these cases (*Jeanes, O'Brien, and James*) differ significantly from the *Hicks, McBride, and Hamil* group in that **they view the reduction in or loss of the chance of survival, rather than the death itself, as the injury.** Under these cases, the defendant is liable, not for all damages arising from the death, but only for damages to the extent of the diminished or lost chance of survival. *The fourth of these cases, Kallenberg, differs from the other three in that it focuses on the death as the compensable injury.* This is clearly a distortion of traditional principles of proximate causation. In effect, *Kallenberg* held that a 40 percent possibility of causation (rather than the 51 percent required by a probability standard) was sufficient to establish liability for the death. **Under this loosened standard of proof of causation, the defendant would be liable for all damages resulting from the death for which he was at most 40 percent responsible.**

My review of these cases persuades me that **the preferable approach to the problem before us is that taken (at least implicitly) in *Jeanes, O'Brien, and James.***”

*Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 631-632, 664 P.2d 474 (1983)

In *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (Wash.2011), this court extended loss of chance claims to include loss of chance of a better outcome. In *Mohr*, this court summarized facts pertinent to this instant matter as follows:

“The testimony included expert opinions that the treatment Mrs. Mohr received violated standards of care and that, **had Mrs. Mohr received nonnegligent treatment at various points between August 31 and September 1, 2004, she**

**would have had a 50 to 60 percent chance of a better outcome.** The better outcome would have been no disability or, at least, significantly less disability.”

*Mohr v. Grantham*, 172 Wn.2d 844, 849, 262 P.3d 490, 492 (Wash. 2011) (emphasis added)

*Mohr* dispels any theory that any case where loss of chance greater than 50% is claimed reverts to a standard tort case. Unfortunately, the *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 313 P.3d 431 (Wash. Ct. App. 2013), misconstrued *Herskovits* and *Mohr*, stating:

“We conclude the *Herskovits* plurality and *Mohr* court intended the lost chance doctrine to reconceptualize the decedent's injury and aid the plaintiff in proving wrongful death causation solely where the plaintiff cannot do so under traditional tort principles, that is, where the defendant's negligence reduced the decedent's chance of survival by less than or equal to 50 percent. Logic compels our conclusion because where the loss is greater than 50 percent, no “separate and distinguishable harm” exists. *Daugert v. Pappas*, 104 Wn.2d 254, 261, 704 P.2d 600 (1985). As a matter of law, a greater than 50 percent reduction in the decedent's chance of survival is the same as proximate cause of the decedent's death under traditional tort principles. *See Herskovits*, 99 Wn.2d at 631 (Pearson, J., concurring).”

*Dormaier*, 177 Wn. App. at 850 (emphasis added)

This is an inconsistent and unsupportable conclusion, as the separate nature of a loss of chance claim presumes no finding of proximate causation of the ultimate harm (a traditional tort claim). *Herskovits* and *Mohr* stand for the proposition that any loss of chance claim for any value (presumably less than 100%) is actionable if there is competent testimony that, more probably

than not (reasonable probability), a breach of the standard of care caused a loss of chance. *Mohr*, 172 Wn.2d 844, 857.

The Division III court recently rejected this 50% argument. Unfortunately, the court misconstrued *Herskovits* and *Mohr* as requiring statistical testimony in every loss of chance case:

“We further dismiss the lost chance claim in its entirety because the Schierings presented no expert testimony of percentage of lost chance. *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 334 P.3d 1154 (2014). Every Washington decision that permits recovery for a lost chance contains testimony from an expert health care provider that includes an opinion as to the percentage or range of percentage reduction in the chance of survival. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wn.2d 609, 611, 664 P.2d 474 (1983) (14 percent reduction in chance of survival); *Mohr v. Grantham*, 172 Wn.2d 844, 849, 262 P.3d 490 (2011) (50 to 60 percent chance of loss of better outcome); *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348, 3 P.3d 211 (2000) (20 percent chance that the disease's progress would have been slowed). Without that percentage, the court would not be able to determine the amount of damages to award the plaintiff since the award is based on the percentage of loss. See *Smith v. State*, 95-0038 (La. 6/25/96); 676 So. 2d 543, 548. Discounting damages by that percentage responds to a concern of awarding damages when the negligence was not the proximate cause or likely cause of the death. *Mohr*, 172 Wn.2d at 858; *Matsuyama v. Birnbaum*, 452 Mass. 1, 17, 890 N.E.2d 819 (2008). Otherwise the defendant would be held responsible for harm beyond that which it caused.”

*Volk v. DeMeerleer*, 184 Wn. App. 389, 429-430, 337 P.3d 372, 391-392, (Wash. Ct. App. 2014)

Volk's expert Dr. Knoll, a highly qualified and nationally recognized forensic psychiatrist, provides the only expert testimony in this matter. His

resume and CV are CP. 093 through CP 119. However, the Div. III Court (Justice Fearing) references *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 334 P.3d 1154 (2014). *Rash* is a case similar to this in requiring statistical testimony for any loss of chance case. There, Ms. Rash's expert, cardiologist Wayne Rogers, M.D., testified in a discovery deposition, providing the only expert testimony for purposes of Summary Judgment. The matter came to appeal on a convoluted procedural history that is not at issue now, but trial is being deferred until a time at which this matter regarding statistical loss of chance testimony should be resolved by this court. In *Rash*, a case of admitted medical negligence but denial of causation, the Div. III Court references some of Dr. Wayne Rogers' discovery deposition testimony (which was acknowledged by him to be on a more probable or likely than not basis). During questioning by defense counsel at Dr. Rogers' deposition, Rogers testified:

**“Q. Doctor, just a couple follow-ups. Your bottom-line opinion is that because of the events in Sacred Heart in March of 2008, Ms. Zachow's deterioration was accelerated? Is that what you're basically saying?”**

**A. Or promoted. She eventually would have died anyway, as we all do, but she had a promotion of her disease process.**

**Q. And you can't state, as we sit here today, how much her disease was promoted or accelerated; is that correct?**

**A. I can't give you a mathematical figure, but I would say it was significant and led to her death.**

Q. Other **than** being significant and ultimately, in your opinion, resulting to her death, you can't go any farther than that?

A. No, I don't think I can.”

Rash v. Providence Health & Servs., 183 Wn. App. 612, 620, 334 P.3d 1154, 1159 (Wash. Ct. App. 2014)(Emphasis added)

When taken in the context of this deposition, this testimony essentially states that the admitted negligence caused Ms. Zachow's life to be shortened and led (was causal) of her early demise. This and other deposition testimony is similar to Dr. Knoll's testimony in this matter. They both provide testimony of causation of the ultimate outcome or harm and a loss of chance. Both theories can be plead and argued, in the alternative. They are alternative and mutually exclusive theories of recovery.

In this instant matter, Ms. Volk's expert psychiatrist, Dr. Knoll, has provided competent testimony to support causation of loss of chance and, alternatively, of the ultimate harms (deaths of Rebecca Schiering, and one twin son, Phillip; assault, battery, and attempted murder of and emotional distress to another son, Brian Winkler; and assault on and emotional distress to the other twin son, Jack Schiering). (CP 082 – 091).

In Washington, loss of chance is a separate harm, and not an adjunct to the ultimate harm (death or bad outcome) complained of. Further, liability rests on a claimant's traditional burden of proving breach of duty as a

proximate cause of the loss of chance, *while apparently leaving the trial court some room to adjust the “but for” standard in occasional (if perhaps not rare) cases, where, in the interests of justice, reasonable probability of causation could be determined by a jury from competent evidence and testimony of sufficient weight and credibility:*

“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.

*Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011)  
(italicized emphasis in original, bold and underlined emphasis added).

Under the *Herskovits* plurality and *Mohr* opinions, statistical probability values are not required to bring a loss of chance action to a jury. Justice Pearson established this in *Herskovits* by his treatment of and reliance on the *Jeanes*, *O'Brien*, and *James* cases (and reference to the “death as injury” *Kallenberg* case), where in each, the plaintiffs could not prove a probability of survival. Justice Pearson addresses the role statistical probability (if available) may play in loss of chance cases in a footnote, in

which statistical data is referred to as a consideration in establishing damages, but it is not a requirement:

*“(footnote)2. In effect, this approach conforms to the suggestion of Justice Brachtenbach in his dissent at page 640, footnote 3. **The statistical data relating to the extent of the decedent’s chance of survival are considered to show the amount of damages, rather than to establish proximate cause.”***

*Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 634-635, 664 P.2d 474 (1983) (emphasis added)

Testimony that a breach of duty as a proximate cause of loss of chance, is not comparable to any testimony that a breach was a proximate cause of the ultimate outcome. This can be gleaned from the *Herskovits* plurality opinion when, discussing that where death was the harm, and loss of chance was only 40% , the *Kallenberg* court created full liability for the death.

As discussed in earlier briefing, a truly valid, researched, and repeatable study that yields a statistical inference is not conclusive to an individual or discrete occurrence. A 60% loss of chance is a relative inference to a specific sample of a population of similar cases and reported results. It does not provide any inference as to whether any individual is actually within the 60% of those expected to have survived or had a better outcome from inadequate health care, or the 40% which suffered no real or significant loss of chance.

Moreover, to strictly require a jury to hypothetically value the ultimate harm of death or a bad outcome and discount the value by directly applying

the loss of chance value, is in direct opposition to the concept that loss of chance is a separate, compensable harm, apart from the ultimate harm. Doing so, automatically, and without assessment of the many variables and particulars of any case, makes loss of chance a derivative, not separate harm from the ultimate harm of death or bad outcome.

In better outcome cases, variables of general damages may be incongruent with the status of the claimant. Subjective perceptions of pain, suffering, and emotional distress, may or may not ratably relate to a value assigned to a loss of chance, as established by a jury from specific or generalized testimony, or one or more expert witnesses providing statistical probabilities or inferences.

Consider a case where the ultimate harm is a disabling injury which requires permanent pain control. A lesser injury (better outcome) could be one in which pain levels would be as high or higher than that suffered when more fully disabled. The person may be ambulatory enough to be engaged in work and activities of daily living that may generate higher levels of pain, or require lower levels of pain control due to the need to avoid sedation. Damages would be understated if the loss of chance of a better outcome assessed value was reduced to a percentage and multiplied against a more sedated, non-ambulatory person's ultimate harm of damages.

*Mohr* also confirms *Herskovits'* plurality opinion that statistical

probability testimony or evidence as to the extent of loss of chance is not a prerequisite to bringing a case of loss of chance to a jury.

“Treating the loss of a chance as the cognizable injury “permits plaintiffs to recover for the loss of an opportunity for a better outcome, an interest that we agree should be compensable, while providing for the proper valuation of such an interest.” *Lord v. Lovett*, 146 N.H. 232, 236, 770 A.2d 1103 (2001). In particular, the *Herskovits* plurality adopted a proportional damages approach, holding that, if the loss was a 40 percent chance of survival, the plaintiff could recover only 40 percent of what would be compensable under the ultimate harm of death or disability (i.e., 40 percent of traditional tort recovery), such as lost earnings. *Herskovits*, 99 Wn.2d at 635 (Pearson, J., plurality opinion) (citing *King supra*, 90 Yale L.J. at 1382). **This percentage of loss is a question of fact for the jury and will relate to the scientific measures available, likely as presented through experts.** Where appropriate, it may otherwise be discounted for margins of error to further reflect the uncertainty of outcome even with a nonnegligent standard of care. *See King, supra*, 28 U. Mem. L. Rev. at 554-57 (“conjunction principle”).”

*Mohr v. Grantham, supra* , 172 Wn.2d, at 858, (emphasis added)

Where probability testimony is insufficient or lacking, a jury would go about determining elements of damages and assigning relative values and allocations which are, effectively, ratios or percentages, as it does in most other tort cases (i.e.: general damages, comparative fault, and contribution, to name a few). Query: even if there is testimony from opposing experts as to a specific percentage of loss of chance, isn't a jury entitled to assess and assign weight and credibility, and interpolate or extrapolate on such testimony?

In *Mohr*, this court then discussed the import of *Herskovits*:

*“Herskovits* involved a survival action following an allegedly negligent failure to diagnose lung cancer. Over the course of a year, Leslie Herskovits repeatedly sought treatment for persistent chest pains and a cough, for which he was prescribed only cough medicine. *Id.* at 611 (Dore, J., lead opinion). When he finally sought another medical opinion, Herskovits was diagnosed with lung cancer within three weeks. *Id.* His diagnosing physician testified that the delay in diagnosis likely diminished Herskovits's chance of long-term survival from 39 percent to 25 percent. *Id.* at 612. Less than two years after his diagnosis, then 60 years old, Herskovits died. *Id.* at 611. The trial court dismissed the case on summary judgment on the basis that Herskovits's estate, which brought suit, failed to establish a prima facie case of proximate cause: it could not show that but for his doctor's negligence he would have survived because he “probably would have died from lung cancer even if the diagnosis had been made earlier.” *Id.* Though divided by different reasoning, this court reversed the trial court, finding that Herskovits's lost chance was actionable.

The lead opinion, signed by two justices, and the concurring opinion, which garnered a plurality, agreed on the fundamental bases for recognizing a cause of action for the loss of a chance. The lead opinion explained:

To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.”

*Id.* at 614.

“The plurality similarly noted that traditional all-or-nothing causation in lost chance cases “subverts the deterrence objectives of tort law.” *Id.* at 634 (Pearson, J., plurality opinion) (quoting Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353,

1377 (1981)). Both opinions found that “the loss of a less than even chance is a loss worthy of redress.” *Id.* With emphasis, the lead opinion agreed, stating that “[n]o matter how small that chance may have been—and its magnitude cannot be ascertained—no one can say that the chance of prolonging one’s life or decreasing suffering is valueless.” *Id.* at 618 (Dore, J., lead opinion) (quoting *James v. United States*, 483 F. Supp. 581, 587 (N.D. Cal. 1980))”

*Mohr v. Grantham*, 172 Wn.2d 844, 851-852, 262 P.3d 490, 493-494 (2011) (italicized emphasis in original, bold emphasis added)

**C. Washington Does Not Require Opinion Evidence As To Percentage Or Range Of Percentages In Similar Contexts.**

The jury’s function in apportioning causation and damages with respect to a preexisting symptomatic condition is similar to apportioning damages in loss of chance.

“If your verdict is in favor of the plaintiff, and if you find that:

(1) before this occurrence the [plaintiff] [defendant] had a preexisting [bodily] [mental] condition that was causing pain or disability, and

(2) because of this occurrence the condition or the pain or the disability was aggravated, then you should consider the degree to which the condition or the pain or disability was aggravated by this occurrence. However, you should not consider any condition or disability that may have existed prior to this occurrence, or from which the [plaintiff] [defendant] may now be suffering, that was not caused or contributed to by this occurrence.”

WPI 30.17

In a preexisting symptomatic condition case, the goal is to separate the preexisting symptomatic condition from the injury caused by the negligent defendant and apportion damages accordingly. *Id.* There is no requirement the jury consider percentage or range of percentage opinion evidence. *Id.* The same can be said for a jury's decision apportioning fault, deciding issues of contribution and indemnity, and determining the amount of general damages. The loss of chance is no different. Percentage or range of percentage evidence of the kind required by the court of appeals is unnecessary.

Additionally, such a requirement encroaches upon the jury's rightful determination of damages.

"The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

Washington Constitution, Article 1, Section 21.

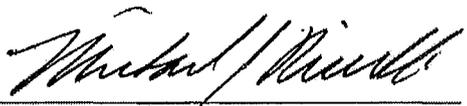
The measure of damages is a question of fact within the jury's province. *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989). To require expert testimony as to the percentage or range of percentage reduction in the loss of chance case, as a prerequisite to the jury's determination of damages, impermissibly encroaches upon the jury's proper function.

### III. CONCLUSION

For the reasons set forth above, the Court is requested to reject WDTL's arguments and affirm the court of appeals with respect to a physician's duty of care and no applicable immunity; and reverse the court of appeals with respect to its opinion as to loss of a chance.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November, 2015.

MICHAEL J. RICCELLI, PS

By: 

Michael J. Riccelli, WSBA #7492  
Bruce E. Cox, WSBA #26856  
400 South Jefferson Street, Suite 112  
Spokane, WA 99204-3144  
Phone: 509-323-1120  
Fax: 509-323-1122  
E-mail: [mjrps@mjrps.net](mailto:mjrps@mjrps.net)

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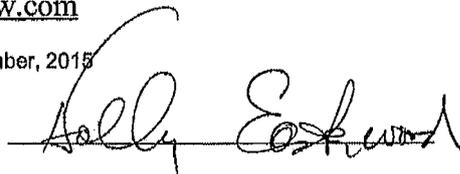
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Spokane, WA 99201	_____	

Paul A. Bastine	_____	Overnight Mail
Attorney at Law	_____	U.S. Mail
806 South Raymond Road	_____	Hand-Delivered
Spokane Valley, WA 99206	<u>  x  </u>	E-Mail

And the following by e-mail:

Andrew Benjamin [gahb54@u.washington.edu](mailto:gahb54@u.washington.edu)  
Stewart Estes [sestes@kbmlawyers.com](mailto:sestes@kbmlawyers.com)  
Andrew Benjamin [andy\\_benjamin@comcast.net](mailto:andy_benjamin@comcast.net) and  
[gahb54@u.washington.edu](mailto:gahb54@u.washington.edu)  
Mark Leemon [lemon@leeroylaw.com](mailto:lemon@leeroylaw.com)  
Stewart Estes [sestes@kbmlawyers.com](mailto:sestes@kbmlawyers.com)  
Ryan Beaudoin [rmb@witherspoonkelley.com](mailto:rmb@witherspoonkelley.com)  
Matt Daley [mwd@witherspoonkelley.com](mailto:mwd@witherspoonkelley.com)  
Samuel Thilo [sct@witherspoonkelley.com](mailto:sct@witherspoonkelley.com)  
Gregory Miller [miller@carneylaw.com](mailto:miller@carneylaw.com)  
Justin Wade [wade@carneylaw.com](mailto:wade@carneylaw.com)

Dated this 5 day of November, 2015



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Please see attached Volk's Answer to the Amicus Curiae Brief of Washington Defense Trial Lawyers for filing.

Thank you.

Holly Easterwood  
Legal Assistant  
Michael J Riccelli PS  
400 S. Jefferson St., Suite 112  
Spokane, WA 99204  
509-323-1120  
FAX 509-323-1122