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NO. 66294-5-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

MARIA PEREZ GUARDADO, individually and as Personal Representative of the Estate of DIEGO ESTEBAN CAMPOS PEREZ, and CAIN RAFAEL CAMPOS,

Appellants.

v.

VALLEY MEDICAL CENTER, a King County Public Hospital District; KERRI R. FITZGERALD, M.D., individually and the marital community with John Doe Fitzgerald, and DOES 1 through 50, inclusive,

Respondents.

BRIEF OF RESPONDENT VALLEY MEDICAL CENTER

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I. INTRODUCTION

This case arises out of a premature birth that occurred at Valley Medical Center (VMC) on February 19, 2008. Plaintiff/Appellant Maria Guardado[1] was then 23 weeks into her pregnancy. Normal gestation is 39 weeks. She had gone into spontaneous premature labor before coming to the hospital. The medical care providers were unable to stop her labor. Delivery was then unavoidable. According to the records, Ms. Guardado and Mr. Campos then accepted the recommendation of the medical care providers that, considering the early stage of her pregnancy, the infant not be resuscitated.

The Guardados now dispute this and argue that resuscitation should have been attempted. That factual issue is not part of this appeal. Rather, the sole issue is whether the Guardados have come forward with *prima facie* evidence that VMC's and/or Dr. Fitzgerald's conduct was the proximate cause of their claimed damages. The expert testimony is unanimous that resuscitation probably would not have been successful. On this record, the trial court held that the Guardados had not come forward with sufficient evidence of proximate cause, and granted

[1] Collectively, VMC will refer to all of the appellants in this matter, Ms. Maria Guardado, Mr. Cain Rafael Campos, and the Estate of Diego Esteban Campos Perez as "the Guardados" for clarity.

respondents' motions for summary judgment. This court should affirm that ruling.

II. ASSIGNMENTS OF ERROR

Assignments of Error

VMC assigns no error to the trial court's decision.

Issues Pertaining to Assignments of Error

Whether the trial court correctly dismissed a medical-malpractice action on summary judgment, where:

1. the Guardados failed to present expert testimony that the infant probably would have survived with resuscitative efforts;

2. the Guardados failed to present sufficient evidence to create a jury question under the "loss of chance" doctrine as outlined in *Herskovits*;

3. the infant was not viable and, thus, not a "minor child" as defined by the wrongful death statute;

4. the parents did not contribute to supporting the infant nor were they dependant on the infant;

5. any claim for economic damages would be entirely speculative; and

6. the Guardados failed to present any objective evidence of emotional distress.

III. STATEMENT OF THE CASE

A. Ms. Guardado presented to VMC in spontaneous pre-term labor, where she and Mr. Campos subsequently consented to comfort-care measures only for the infant.

On February 18, 2008, Ms. Guardado presented to VMC in spontaneous pre-term labor. CP 111-22. The neonatologist, defendant Dr. Kerri Fitzgerald, estimated her gestation to be 23 weeks and 0 days, based on ultrasound. CP 50.

Despite preventive measures, Ms. Guardado's labor progressed, and Dr. Fitzgerald was asked to consult with Ms. Guardado regarding resuscitation. CP 49-50. At 10:00 a.m. on February 19, Dr. Fitzgerald wrote:

> I met with Maria and discussed with her, through a Spanish interpreter, the outcome expectation and standard management of an infant born at 23 0/7 weeks GA (gestational age). I explained to her that 23 wk GA infants have < 9% chance of survival without severe IVH or ROP and given the GA of 23 0/7 wks, those chances were even less. Therefore[,] it was neither in her infant's best interest or the recommendation of Neonatology to resuscitate her infant. She expressed understanding that Neonatology will be present at delivery but will not resuscitate her infant. We will provide comfort measures only.

CP 49-50.

Approximately 45 minutes later, Ms. Guardado's partner, Cain Rafael Campos, arrived. CP 50. Ms. Guardado's obstetrician, Dr. Dorcus McLennan, advised Ms. Guardado to push with her contractions. CP 50.

She also noted that "[Ms. Guardado] and [her] husband aware of plan not to resuscitate infant." CP 50 (emphasis in original).

At approximately 11:45 AM, Ms. Guardado delivered the 23-week gestational age infant. CP 51. Dr. Fitzgerald confirmed the extreme prematurity of the infant, and confirmed plans "to not resuscitate [the] infant." CP 51. The infant's Apgar scores (a measure of the infant's condition) were one out of ten at both one and five minutes after delivery. There was no spontaneous movement, no muscle tone, no reflexes, and no breathing effort. The only sign of life was an abnormally low heart rate of 80, which then dropped to 40. This persisted for some time, after which the infant was pronounced dead. CP 321. Examination of the placenta by a pathologist revealed a bacterial infection. CP 360. Dr. McLennon testified that this was the cause of the premature delivery. CP 360-61.

B. The Guardados filed suit against VMC and Dr. Fitzgerald, but the trial court dismissed the action based on The Guardados' failure to present any evidence that VMC and/or Dr. Fitzgerald proximately caused the infant's death.

The Guardados filed suit on January 20, 2009. The complaint named Ms. Guardado, as an individual and as personal representative of the infant's estate, and Mr. Campos as plaintiffs (hereinafter collectively referred to as the Guardados). The Guardados named VMC and Dr. Fitzgerald as defendants. CP 3-8. The Guardados alleged that

Dr. Fitzgerald and/or VMC's staff breached the standard of care by not providing resuscitation. CP 5-6. The Guardados also claimed they were "pleading all theories of recovery and basis (sic) for liability available pursuant to the laws of Washington." CP 6. The Guardados alleged a range of damages, including pain and suffering, loss of enjoyment of life, loss of earnings, and emotional distress. CP 6-7.

On June 24, 2010, the parties stipulated to dismissal with prejudice of all claims of independent negligence against VMC, agreeing that the claims against VMC would be "limited to claims of vicarious liability" for Dr. Fitzgerald's actions. CP 38.

The Guardados presented two medical expert witnesses, Drs. Michael Hussey and Marcus Hermansen, each of whom VMC and Dr. Fitzgerald deposed. Both testified that, considering the degree of prematurity, the infant probably would have died even if Dr. Fitzgerald had attempted to resuscitate. CP 55, 145.

Both VMC and Dr. Fitzgerald moved for summary judgment, arguing that since resuscitation probably would have failed, the Guardados had not met their burden of coming forward with evidence that VMC's and/or Dr. Fitzgerald's conduct proximately caused the infant's death. In response, the Guardados conceded that resuscitation probably would have failed, but argued that their experts' testimony was sufficient to create an

issue of fact under a "loss of chance" theory, citing *Herskovits v. Group Health*, 99 Wn.2d 609, 664 P.2d 474 (1983). CP 161-62.

C. The Guardados' experts testified that the infant probably would have died, even if Dr. Fitzgerald had attempted resuscitation.

The Guardados' expert testimony on the "loss of chance" issue conflicted. Dr. Hussey testified that at 23 weeks gestation, resuscitation is successful in only nine to 10 percent of cases, meaning that 90 to 91 percent of infants born at that stage of pregnancy do not survive, even with resuscitation. CP 55. Dr. Hermansen disagreed; he testified that in his opinion, 30 to 40 percent would survive. CP 265. Dr. Hermansen did not rely on any reported studies or research. CP 263-64. Rather, he testified that this was his "impression," based on admittedly conflicting medical literature. CP 263-64. In Dr. Hermansen's own words, in interpreting this conflicting literature, "if you try, you can get to 30 to 40 percent survival." *Id.* Dr. Hermansen conceded that of the survivors, two thirds would be "profoundly affected" by disability or injury. CP 265-66. He also conceded that an infection would further decrease the rate of survival. CP 267.

D. The trial court granted VMC's and Dr. Fitzgerald's motions for summary judgment based on the Guardados' failure to produce evidence regarding proximate cause.

The trial court granted VMC's and Dr. Fitzgerald's motions, based on the Guardados' failure to come forward with evidence that resuscitation would more likely than not have been successful. RP 17.

IV. SUMMARY OF ARGUMENT

Although VMC sympathizes with thier loss, the Guardados do not have a colorable claim against VMC, and it is not liable for the infant's death. The Guardados failed to bring forth evidence regarding an essential element of thier claim, here, proximate cause. Specifically, the Guardados experts agree that even with resuscitative efforts, the infant probably would have died. The Guardados' attempt to avoid this fatal flaw in their claim based on the "loss of chance" doctrine also fails because they did not present sufficient statistical evidence to demonstrate any loss of chance. And any attempt to calculate damages under the "loss of chance" doctrine would be purely speculative.

Furthermore, the infant was not viable and, thus, was not a "minor child" under the wrongful death statute. Moreover, the parents did not contribute to supporting the infant, nor were they dependent on the infant and, thus, they do not have a cause of action under the wrongful death statute. Under the facts of this case, damages under the available causes

of action would be completely speculative. Finally, the Guardados have abandoned any claim of negligent infliction of emotional distress.

V. ARGUMENT

A. This court reviews the trial court's summary judgment de novo.

This court reviews a summary judgment order de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kinse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Summary judgment is appropriate if no genuine issue of material fact exists, viewing the evidence in a light most favorable to the non-moving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Ahterton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). This court may affirm a grant of summary judgment on any basis supported by the record. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061, 1064 (2003) (citing *Int'l Bhd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000)).

Summary judgment in favor of the defendant is proper if the plaintiff fails to make a *prima facie* case concerning an essential element of his or her claim. *Tinder v. Nordstrom*, Inc., 84 Wn. App. 787, 790, 929 P.2d 1209 (1997). If the defendant meets the burden of showing the plaintiff lacks sufficient evidence to support an essential element, the

burden shifts to the plaintiff to present evidence sufficient to raise a material question of fact regarding the essential elements of a claim. *Tinder*, 84 Wn. App. at 790-91.

B. Washington law requires proof of a medical-malpractice action by expert testimony.

Medical negligence elements are "duty, breach, causation, and damages." *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (2001); RCW 7.70.040. Specifically, the plaintiff must prove that "the injury resulted from the failure of the health care provider to follow the accepted standard of care ... [and] [s]uch failure was a proximate cause of the injury complained of." RCW 7.70.040.

When the Legislature enacted RCW 7.70, it modified the substantive aspects of all causes of action for damages for injuries that occur as a result of health care. *Branom v. State*, 94 Wn. App. 964, 966, 974 P.2d 335 (1999). The Legislature's policy declaration is set forth in RCW 7.70.010, which states in pertinent part:

> [t]he State of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976. [1975-76 2nd Ex.S., Ch. 56 §6].

This section modifies procedural and substantive aspects of all civil actions for damages for injury occurring as a result of health care, regardless of how the action is characterized. *Branom*, 974 P.2d at 338.

Medical expert testimony is generally required to prove causation. *Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257, 267-68 (2001). Generally, in medical negligence cases, the plaintiff is required to produce competent medical testimony establishing that the injury was proximately caused by a failure to comply with the applicable standard of care. *Id.*; RCW 7.70.040.

Here, the Guardados were required to produce expert testimony establishing whether Dr. Fitzgerald's decision not to resuscitate the infant was the proximate cause of her claimed injuries. *Morinaga v. Vue*, 85 Wn. App. 822, 831-32, 935 P.2d 637, 642 (1997). Expert testimony on the issue of proximate cause is essential to a medical malpractice plaintiff's cause of action. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) ("[t]hus, expert testimony will generally be necessary to establish the standard of care and most aspects of causation.") (citations omitted). Further, "the expert testimony must be based on facts in the case, not speculation or conjecture." *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001) (citing *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990)).

C. The Guardados admit that they have no evidence that resuscitation would "more likely than not" have been successful.

Here, the Guardados failed to present the requisite expert testimony to establish that the care rendered by VMC and/or Dr. Fitzgerald was the proximate cause of their damages. It is axiomatic that the Guardados must prove by a preponderance of the evidence, meaning a probability of more than 50 percent, that any actions of VMC and/or Dr. Fitzgerald caused their injury. The Guardados concede that they cannot meet this burden, as both of their experts, Dr. Hussey and Dr. Hermansen, testified that on a more-likely-than-not basis, the infant would have died regardless of whether Dr. Fitzgerald undertook resuscitative efforts. CP 55-56, 36; App. Br. at 18-21.

D. Even under *Herskovits*, the Guardados failed to present evidence sufficient to create a jury question.

Herskovits was a survival and wrongful-death action. The plaintiffs in *Herskovits* alleged that the defendant had negligently delayed diagnosis of decedent's lung cancer. *Herskovits*, 99 Wn.2d at 610-11. The parties stipulated that the decedent's chance of cure had been less than 50 percent, regardless of the defendant's actions, and that the defendant's delay in diagnosis resulted in a 14 percent reduction in the decedent's chance of being cured. *Id.* The question in *Herskovits* was "whether a patient, with less than a 50 percent chance of survival, has a cause of

action against [the defendants] if they are negligent in diagnosing a lung cancer which reduces his chances of survival by 14 percent." *Id.* at 611.

In addressing this question, the Washington Supreme Court was hopelessly split. Only two justices held that this was *prima facie* evidence that the defendant had caused the decedent's death, but even they would limit the damages accordingly:

> We hold that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury.
>
> Causing reduction of the opportunity to recover (loss of chance) by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death. Damages should be awarded to the injured party or his family based only on damages caused directly by premature death, such as lost earnings and additional medical expenses, etc.

Id. at 619. Again, only two justices concurred in this opinion,; even those justices would limit damages to lost earnings and medical expenses. *Id.*

Four justices concurred in the result, but offered dramatically different reasoning, and an even more stringent limitation on damages. *Herskovits*, 99 Wn. 2d at 619-36. Under this holding, the 14 percent decrease in the decedent's chance of survival is itself a compensable loss, but the justices determined that the plaintiff's recovery should be reduced to that percentage of the total amount assessed by the jury under the

survival and wrongful death statutes. *Id.* at 635. Quoting a law review article, this plurality held:

> Finally, it is necessary to consider the amount of damages recoverable in the event that a loss of chance recovery is established. Once again, King's discussion provides a useful illustration of the principles which should be applied:
>
> To illustrate, consider a patient who suffers a heart attack and dies as a result. Assume that the defendant-physician negligently misdiagnosed the patient's condition, but that the patient would have had only a 40% chance of survival even with a timely diagnosis and proper care. Regardless of whether it could be said that the defendant caused the decedent's death, he caused the loss of a chance, and that chance-interest should be completely redressed in its own right. Under the proposed rule, the plaintiff's compensation for the loss of the victim's chance of surviving the heart attack would be 40% of the compensable value of the victim's life had he survived (including what his earning capacity would otherwise have been in the years following his death). The value placed on the patient's life would reflect such factors as his age, health, and earning potential, including the fact that he had suffered the heart attack and the assumption that he had survived it. **The 40% computation would be applied to that base figure.**

Id. at 635 (quoting King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353 (1981)) (emphasis added). Under this holding, the jury would assess damages but the plaintiff would only be permitted to recover a portion of that award, reduced by the degree to which the chance of cure

or survival had been affected by defendant's conduct. *Herskovits*, 99 Wn. 2d at 635.

Because the *Herskovits* court was so divided, its holding is unclear. But in *Zueger v, Public Hosp. Dist. No. 2 of Snohomish County*, 57 Wn. App. 584, 591, 789 P.2d 326 (1990), this court held that the plurality opinion, concurred in by four justices, is the holding from *Herskovits*:

> When no rationale for a decision of an appellate court receives a clear majority[,] the holding of the court is the position taken by those concurring on the narrowest grounds. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 2148 n. 9, 100 L. Ed. 2d 771 (1988); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn.2d 413, 427-28, 780 P.2d 1282 (1989). Following this principle, if *Herskovits* stands for anything beyond its result, we believe the plurality represents the law on a loss of the chance of survival.

Zueger, 57 Wn. App. at 591.

Thus, under *Zueger* and *Herskovits*, The Guardados' claims are limited to the specific percentage of chance "lost." In *Herskovits*, the parties agreed that the specific percentage of chance "lost" by the defendant's actions was 14 percent; under the plurality opinion, the plaintiff in that case would be entitled to 14 percent of the amount awarded by the jury.

The Guardados' citations to *Herskovits* (both in the trial court and here) refer almost exclusively to the "lead" opinion. *See* App. Br. at 18-

22. They ignore both the fractured nature of the *Herskovits* decision and the explicit holding of this court in *Zueger*. If the Guardados have a case, their damages are a fraction of that value. The measure of that fraction is the percentage chance "lost."

But under *Zueger*, to create a jury question, the Guardados must come forward with expert testimony to establish a "substantial reduction in the chance of survival." *Zueger*, 57 Wn. App. at 591. A close examination of the evidence before the trial court reveals the Guardados failed to do so.

First, the Guardados' evidence was conflicting. The Guardados' expert Dr. Hussey testified that there was a 90- to 91-percent chance that the infant would die, even if resuscitated. CP 55. Having allowed him to be deposed, the Guardados cannot shield the jury from this testimony. *Mothershead v. Adams*, 32 Wn. App. 325, 647 P.2d 525 (1982). Dr. Hermansen initially testified that if born at this early stage of gestation, "virtually 100% of babies have major complications." CP 256. Only later did Dr. Hermansen testify, in an untimely declaration, to any degree of certainty to the figures the Guardados now cites. CP 416.

Dr. Hermansen also conceded that, of the survivors, two thirds would be "profoundly affected" by neurological or other disability. CP

265-66. He also conceded that an infection would further decrease the rate of survival. CP 267.

This evidence alone precludes recovery under a "loss of chance" theory. This is not a case where the two possible outcomes were either survival or death. By all accounts, the most likely outcome was death. The next most likely outcome was an infant who was "profoundly affected" by neurological or other disability. The Guardados have cited no case involving this range of outcomes in which "loss of chance" was applied.

Nor was the Guardados' evidence sufficient to establish the reduction multiplier required under *Zueger*. Cases applying "loss of chance" almost exclusively involve an alleged failure to diagnose cancer, where survival statistics are well proven, accepted and reported in the medical literature. *See, e.g.*, *Matsuyama v. Birnbaum*, 452 Mass. 1, 890 N.E.2d 819 (2008) (statistical survival rates are not guesses but, rather, estimates based on data obtained and analyzed scientifically and accepted by the relevant medical community as part of the repertoire of diagnosis and treatment); *Alberts v. Schultz*, 126 N.M. 807, 975 P.2d 1279 (1999); (plaintiff's claim for loss of chance failed because the claim was based on "incomplete medical records and unsupported assumptions"). Again, in

Herskovits, the statistical evidence was such that the parties agreed on the percentage chance lost.

Here, however, Dr. Hermansen does not rely on any such reported studies or research. His testimony regarding the chance of survival with resuscitation is his "impression," based on admittedly conflicting medical literature. CP 263-264. In his own words in interpreting this conflicting literature, "if you try, you can get to 30 to 40 percent survival." *Id.*

In the nearly thirty years since *Herskovits* was decided, courts have struggled with the analytic and evidentiary difficulties inherent in "loss of chance." *See*, *Matsuyama*, 890 N.E.2d at 828 n. 23 (summarizing state cases). Indeed, the *Matsuyama* court adopted "loss of chance" in a form very similar to the holdings in *Herskovits* and *Zueger*. But in doing so, the *Matsuyama* court recognized the importance of statistical evidence to prove the percent of chance lost:

> The key is the reliability of the evidence available to the fact finder. ... Reliable modern techniques of gathering and analyzing medical data have made it possible for fact finders to determine based on expert testimony – rather than speculate based on insufficient evidence – whether a negligent failure to diagnose a disease injured a patient ... .

Id. at 833. In that case, as in most cases involving "loss of chance," the issue was the effect of an alleged delay in diagnosing cancer. The

Matsuyama court was particularly persuaded by the reliability of cancer survival statistics. *Id.* at 826, n. 15.[2]

The Guardados presented no such evidence here. Their best expert testified that he was not relying on any particular literature, that the literature was conflicting, and that his testimony was nothing more than his "impression," apparently arrived at only with some effort.

The Guardados also ignore clinical aspects particular to this case that undermines their proof even further. The infant had Apgar scores of 1 out of 10, at both one and five minutes after birth. There was no respiratory effort or reflexes, and the infant was blue and flaccid. CP 344. There was also evidence of an infection, which Dr. McLennon testified was the cause of the premature birth. CP 359-361. Drs. McLennon and Hermansen agreed that the presence of infection decreased the likelihood of survival. *Id.*; CP 267. Dr. McLennon, who actually attended and was able to observe the infant's condition at delivery, testified that it was not viable. CP 127. Each of these factors undermines the Guardados' proof, rendering it insufficient under *Herskovits* and *Zueger*.

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[2] The necessity of reliable statistical evidence was argued in *Zueger*, but the court decided the case on different grounds, and so did not reach the question. *Zueger*, 57 Wn. App. at 591. It is also one of the reasons why the Washington Supreme Court Committee on Jury Instructions has not published a pattern instruction on "loss of chance." *See* WPI 105.09, cmt.

E. The Guardados have no cause of action under RCW 4.24.010, 4.24.020, or RCW 4.20.046.

In Washington, tort recovery for causing another's death is entirely a creature of statute. At common law, all tort remedies abated upon death. To remedy this, Washington has adopted the survival and wrongful death statutes. Specifically, RCW 4.24.010 allows parents to recover for the death of a child. But the statute does not allow recovery for the death of a non-viable fetus:

> At common law, a person killed by another's tortious act had no right to recover damages, nor did the person's survivors; the cause of action died with the plaintiff. The legislature has not indicated its intent to expand the meaning of "minor child" in RCW 4.24.010 to include a cause of action for recovery for the wrongful death of nonviable fetuses. We therefore interpret the statute narrowly to exclude recovery for nonviable fetuses.

Baum v. Burrington, 119 Wn. App. 36, 42, 79 P.3d 456 (2003).

Here, the evidence regarding "viability" is essentially the same as that regarding this infant's chance of intact survival. It is undisputed that even with resuscitation, this infant probably would have died. Under any definition, this fetus was not "viable." The Guardados therefore have no cause of action under RCW 4.24.010.

Obviously, this infant had none of the qualifying beneficiaries listed in RCW 4.20.020. The Guardados therefore have no cause of action under RCW 4.20.010 (wrongful death) or for the infant's own "pain and

suffering, anxiety, emotional distress, or humiliation" under RCW 4.20.046 (survival statute).

The Guardados' causes of action, if any, are limited to economic damages under the survival statute, RCW 4.20.046, and loss of parental consortium under RCW 4.24.010.

> A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

RCW 4.24.010.

Here, neither parent contributed to this infant's support, nor were they dependent. Thus, by the explicit terms of the statute, they have no cause of action for loss of parental consortium. "[A] liberal construction of the statute is appropriate only after the beneficiaries have been determined." *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 819, 732 P.2d 1021 (1987).

In addition, the Guardados' allowable economic damages under the survival statute would be completely speculative. Under these facts, there is no claim for medical expenses. The Guardados could conceivably claim lost wages or earning capacity, but as this was a newborn, there is no basis for the jury to determine potential earnings and consumption

rates. This is particularly true where, as here, aside from death, the most likely outcome of resuscitation was some form of profound disability.

F. The Guardados have abandoned any claim for negligent infliction of emotional distress.

The Guardados initially claimed that they were "pleading all theories of recovery and basis (*sic*) for liability available pursuant to the laws of Washington." CP 6. In moving for summary judgment, VMC anticipated that, having not supported their statutory claims, the Guardados might resort to a claim of negligent infliction of emotional distress. CP 30-31. VMC argued that the Guardados had failed to come forward with objective evidence of emotional distress, as required by Washington case law to establish negligent infliction of emotional distress. *Id.*; *see Shoemaker v. St. Joseph's Hospital*, 56 Wn. App. 575 (1990). The Guardados responded (both in the trial court and here), that objective evidence is not required under the wrongful-death statutes. CP 328-29; App. Br. at 7. This argument is, of course, wide of the mark; VMC had not made any such argument. The Guardados made no showing of the objective symptoms required to proceed under a theory of negligent infliction of emotional distress, and they cite no case law and make no argument that such proof is unnecessary to proceed under that theory. By

this response and argument, they have abandoned any opportunity to do so.

G. The Guardados raise numerous issues in their brief that are irrelevant to this appeal.

The Guardados raise several issues on appeal that are irrelevant to the trial court's grant of summary judgment, and thus to the issues on appeal. VMC moved for summary judgment on the basis that the Guardados failed to bring forth expert testimony establishing that VMC's negligence was the proximate cause of the infant's death. CP 23-32. The trial court granted VMC's motion for summary judgment on that basis. CP 473. No issue regarding standard of care or vicarious liability was raised by the motion or decided by the trial court. Thus, the Guardados' arguments on appeal regarding the standard of care, App. Br. at 16-17, and vicarious liability, App. Br. at 25-26, are entirely irrelevant to this appeal, and this court should disregard them

VI. CONCLUSION

The evidence is undisputed that even with resuscitation this infant, the product of a 23-week gestation, probably would not have survived. If he had survived, he probably would have had profound neurological or other disability. The Guardados' attempt to establish a "loss of chance" relies on expert testimony that is nothing more than an "impression," based on admittedly conflicting literature. This is insufficient. For this

and the other reasons stated above, this court should affirm the trial court's entry of summary judgment of dismissal of this action.

Respectfully submitted this 27 day of May, 2011.

LEE SMART, P.S., INC.

By: _____
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on May 27, 2011, I caused service of the foregoing pleading on each and every attorney of record herein:

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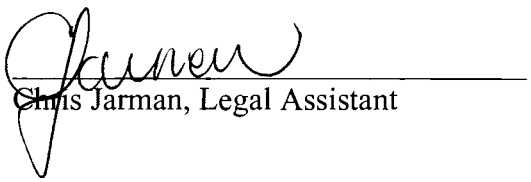

Chris Jarman, Legal Assistant

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