No. 312771

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**COURT OF APPEALS, DIVISION III**

**OF THE STATE OF WASHINGTON**

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**ROBIN RASH, et al.,** ***Appellant,***

***v.***

**PROVIDENCE HEALTH & SERVICES, et al.,** ***Respondent.***

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# APPELLANT'S APPEAL BRIEF

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## I. INTRODUCTION

This matter arises from the treatment of an elderly Spokane resident, Betty L. Zachow (hereinafter "Ms. Zachow"), by Sacred Heart Medical Center (hereinafter "SHMC") in which, in the process of a routine orthopedic surgery, the hospital lost the list of medications to be taken by Ms. Zachow while at the hospital. Ms. Zachow suffered from a genetic condition of the heart known as hypertrophic cardiomyopathy. This is an enlargement of the heart. Ms. Zachow was on a beta blocker medication to control the rate of her heart beat. However, after the surgery, she did not receive her beta blocker medication and it is claimed that she suffered heart damage and resulting decline in health and disability. In the original complaint filed against SHMC it was claimed, among other things, that SHMC's negligence caused permanent physical injury, disability, and reduction in life expectancy for Ms. Zachow. Unfortunately, Ms. Zachow passed on prior to completion of the litigation. Ms. Zachow's counsel notified counsel for SHMC that Ms. Zachow had passed on and that a Personal Representative would be appointed to bring the Estate's claims and the claims on behalf of her three adult children, as statutory beneficiaries. Subsequent to her death, Ms. Zachow's daughter, Robin Rash, was appointed as Personal Representative of the Estate (hereinafter "PR") and the captions of the pleadings were changed appropriately. However, through an administrative

error, the complaint was never amended to reflect this. Subsequent to her death, the PR's medical expert testified, on a more probably than not basis, that SHMC's negligence caused Ms. Zachow physical injury and physical and mental decline, disability, and led to and was a significant factor in her premature death. At time of trial, SHMC admitted negligence, but denied causation and damages. The PR claimed that, among other things, damages were recoverable for loss of chance of a better outcome and/or loss of chance of survival. Newly substituted counsel for SHMC claimed surprise and moved to strike any loss of chance claims and any wrongful death claims on behalf of the statutory beneficiaries. The PR moved to amend the complaint accordingly. SHMC also claimed lack of evidence for loss of chance claims. The trial court denied the PR's motion to amend the complaint and granted SHMC's motions to strike loss of chance claims and wrongful death claims of Ms. Zachow's statutory beneficiaries. The PR then filed a separate action bringing the statutory beneficiaries' wrongful death claims and loss of chance claims; moved to consolidate the matters and moved to continue the litigation. This was ordered by the court, and the trial date was moved from April 23, 2012 to June 3, 2013. However, on October 19, 2012, based on SHMC's motion to certify as judgment under CR 54(b) the court certified as judgment the elements of the April 13, 2012 order striking loss of chance claims, apparently for both of the consolidated matters, subsequent to

consolidation. This was done of the PR's objection, argued for discovery, testimony from experts, and other offers of proof. It is from these two orders that this matter is appealed.

## II. ASSIGNMENTS OF ERROR

*No. 1*

The court erred in its April 13, 2012 order denying the PR's motion to amend complaint, and granting SHMC's motion to strike the PR's loss of chance claims.

*No. 2*

The court erred in entry of judgment pursuant to CR 54(b) striking the PR's loss of chance claims without allowing for a CR56 summary judgment hearing.

***Issues Pertaining to Assignments of Error***

***No.1***

Where:

It was plead in the original complaint during Ms. Zachow's life that negligence in healthcare caused Ms. Zachow, among other things, serious physical injury, permanent disability, and reduced life expectancy; and after her death, the PR's medical expert testified in discovery that, more probably than not, that among other things, SHMC's negligence: caused acceleration of the deterioration of decedent's physical and mental health condition;

damage to her heart such that it was more likely to generate emboli which could cause the decedent to suffer from stroke; and, therefore, that the negligence led to and was a significant factor in causing Ms. Zachow's death from stroke.

A. Does the foregoing constitute sufficient notice to SHMC and its attorneys of a viable claim for loss of chance in order to defeat SHMC's motion to strike any claims of loss of chance, when based on claims of surprise and lack of evidence?

B. Does the foregoing provide the basis for an *inter vivos* survival loss of chance client *vis-a-vis Mohr v. Grantham,* 172 Wn.2d 844, 262 P.3d 490 (2011); and a post mortem wrongful death loss of chance claim *visa-a-vis Herskovits v. Group Health Cooperative of Puget Sound,* 99 Wn.2d 609, 664 P.2d 474 (1983)?

***No. 2***

Does the consolidation and continuance of the trial for more than a year, from April 23, 2012, to June 3, 2013, remove, as a basis of the trial court's prior order denying the PR's motion to amend the complaint SHMC's claim of surprise as to the PR's claims of loss of chance?

***No. 3***

Does the "substantial factor" test of proximate cause apply in loss of chance cases?

*No. 4*

Where the order of April 23, 2012 was not pursuant to CR 56 notice, hearing protocol, and submission of testimony by affidavit, does the continuance of trial for more than a year from April 23, 2012 to June 3, 2013, require that any partial judgment entered in this matter, on the basis of lack of evidence, be subject to CR56 notice, hearing, and submission of additional testimony by affidavit or declaration, especially when under the then consolidated case schedule order, plaintiffs' disclosure of lay and expert witnesses were not yet due, nor was the discovery cut-off to occur until April 1, 2013.

## III. STATEMENT OF THE CASE

In the original complaint, Ms. Zachow claimed damages for, among other things, physical injury and disability and reduced life expectancy. (CP 6). Unfortunately, prior to trial, and during the time of discovery, Ms. Zachow passed away from causes which it is claimed arose from, were related to, and were the natural sequelae of injuries suffered by Ms. Zachow as a result of the negligence in healthcare by SHMC. (CP 94-98, 106-107). Subsequent to Ms. Zachow's death, the undersigned advised original defense counsel, Brian Rekofke of Witherspoon, Kelley, Davenport & Toole, in writing that it was the intent of Ms. Zachow's surviving children that the matter continue; that a Personal Representative ("PR) would be appointed;

that claims would be brought by the Personal Representative on behalf of the Estate and on behalf of Ms. Zachow's surviving adult children; and that an amended complaint would be filed to reflect that. (CP 94-95, 99). Robin Rash, one of Ms. Zachow's surviving adult children, was appointed PR. (CP 95). Unfortunately, due to administrative error in communication between the undersigned and his office staff, revision of the complaint was not properly calendared on the undersigned's calendar, but the caption of the matter was amended appropriately to reference Robin Rash, an adult daughter of Ms. Zachow, as PR as a substitute plaintiff on behalf of the Estate and on behalf of all "statutory beneficiaries." The caption appeared as follows: Robin Rash, as Personal Representative of the Estate of Betty L. Zachow, deceased, and on behalf of all statutory claimants and beneficiaries: Robin R. Rash, Keith R. Zachow and Craig L. Zachow, Plaintiff, v. Providence Health & Services, a Washington business entity and health care provider; Providence Health & Services-Washington, a Washington business entity and health care provider; Providence-Sacred Heart Medical Center & Children's Hospital, a Washington business entity and health care provider, and Does 1, Defendants.

During discovery subsequent to Ms. Zachow's death, a deposition was taken by Mr. Rekofke in which the Zachow's medical expert, Wayne Rogers, a cardiologist, testified more probably than not, and with reasonable medical

certainty, that Ms. Zachow had a pre-existing heart condition which was controlled by medication. That after routine surgery Ms. Zachow suffered an adverse condition, but due to SHMC's failing to provide her required heart medication. Further, that SHMC's error in providing healthcare services: weakened and enlarged her heart; made it more likely to create emboli which could cause her stroke; reduced Ms. Zachow's life expectancy; caused her changes in life patterns; and was a significant factor in causing and led to her death by stroke due to emboli created by her weakened and enlarged heart. (CP 106-08, 112-116). At the time of filing pre-trial briefing and motions, approximately one month prior to trial, trial matters were delegated by Mr. Rekofke to Mr. Beaudoin of Witherspoon, Kelley, Davenport & Toole, and Mr. Beaudoin then moved to strike (dismiss) the surviving children's wrongful death claims on the basis that the complaint was never amended to include these claims and moved to strike any claim that Ms. Zachow suffered a loss of chance of better outcome and/or survival (collectively, loss of chance) or in the alternative, continue the trial date (CP32-33). SHMC claimed it was a "surprise" and lack of evidence. (CP 117-129) Alternatively, SHMC moved for a continuance of the trial date to allow for additional discovery into the wrongful death claims of the surviving children and the issue of any loss of chance claim. (CP 127-129). In response, the PR moved to shorten time, amend the complaint according to: the facts and

circumstances of the case to date; a lack of prejudice to SHMC based on prior written disclosures to Mr. Rekofke by the undersigned; the fact that the caption was changed to name a PR on behalf of the Estate, and on behalf of the statutory beneficiaries; and according to the testimony provided by Dr. Rodgers on March 8, 2011, more than a year before SHMC's motions and trial date of April 23, 2012, which clearly provided the basis for loss of chance claims. (CP 82-92, 94-116). Further, the PR argued that a loss of chance was not a surprise to SHMC as a reduced life expectancy was pled in the original complaint, and that Washington case law equated reduced life expectancy with a loss of chance claim. (CP 86-88). Admittedly, the undersigned did have some confusion as to the effect of the holding of *Mohr v. Grantham,* 172 Wn.2d 844, 262 P.3d 490 (2011), as to its notice of a claim or as evidence of other claims. (CP 86l-88). This did not take away from the intent to make a loss of chance of a better outcome claim, substantively. (CP 86-88). Finally, the PR noted that there was consensus between the parties that a continuance of the trial date would resolve any concerns, as SHMC could have discovery upon the children with respect to the wrongful death claims, and could further explore and have discovery on the loss of chance claims with their own experts and with the PR's experts. (CP 43, 85-86). This whole matter came before the court not on a summary judgment motion, with the opportunity of adequate notice and to provide additional testimony,

but on pre-trial motions under shortened time, filed within three weeks of trial, on April 4, 2012, and heard on April 12, 2012, 11 days before trial, with the order dated the next day. (CP 32-33, 82, 139-142). Under the conditions, it was apparent to the court that counsel for both parties believed the court would continue the trial date, as the court subsequently ruled in a manner in which the court thought would displease both counsel, in that there would be no continuance of the trial date (RP 4/12/2012 p. 20-21, 29). The wrongful death claims of the children, as statutory beneficiaries were stricken, as were any loss of chance claims. (CP 139-142). Striking the loss of chance claims was based on lack of evidence, and no justification to deviate from the "but for" causation standard for medical malpractice cases. (CP 141). This effectively dismissed the children as real parties in interest. This left the PR to immediately file a separate, new wrongful death lawsuit on behalf of the statutory beneficiaries; move to stay the pending trial; and move to consolidate both matters into one with a new trial date. (CP 190-192). This was granted by the court, and a new trial date of June 3, 2013 was eventually established. (CP 188-192). Subsequent to that, SHMC requested the trial court to certify that portion of the order striking the loss of chance claims. (CP 139-142). The trial court did so on October 14, 2012 from which this appeal arises. (CP 139-142).

## IV. STANDARD OF REVIEW

Although there was never a formal CR 56 summary judgment proceeding in the trial court, certification of the April 13, 2012 pre-trial order constitutes a summary judgment. Review of the April 13 substantive order, and the October 19, 2013 procedural, certifying order is, therefore, *de novo*. *Mohr, supra,* at p. 859. Evidence is viewed in the light most favorable to the non-moving party, who, with specific facts, may show a genuine issue of fact existed. *Mohr*, *supra*, at p. 59; CR 56(e).

## V. SUMMARY OF ARGUMENT

A. Where complaints are to be liberally construed; amendment of a complaint to reflect discovery, and even proof of fact at trial is allowed; and where SHMC was not prejudiced by any surprise, the court erred by denying the PR's motion to amend, and granting SHMC motion to strike all loss of chance claims on the grounds of surprise, alternatively, the interest of justice should have allowed continuation of the April 23, 2012 trial, as of the April 13, 2012 order.

Further, the Washington Supreme Court has recognized recovery in tort for loss of opportunity of survival/reduction in life expectancy as a post mortem wrongful death claim, and loss of chance to a better outcome in *inter vivos* actions and post mortem survival actions, in cases of harm less than

death, such as disability. Loss of chance is a distinct type of claim.

In loss of a chance claims, the trier of fact should be allowed to determine damages based on the totality of the evidence. This approach, referred to as the "jury valuation" approach, is in keeping with the traditional manner of assessing damages and is the proper role of the jury. Technical and statistical information, if available, may help the jury through expert testimony, but it is not required.

Because loss of chance claims are distinct types of injuries related primarily to claims of healthcare negligence, the "substantial factor" test of proximate cause is applied, as warranted by the particular facts of a given case. Washington recognizes the substantial factor test as a valid alternative test of proximate cause.

As of April 13, 2012, the facts and circumstances of the case known to the parties and argued to the trial court supported both an *inter vivos* survival loss of chance claim and a post mortem wrongful death loss of chance claim. Thus, the trial court erred in striking any loss of chance claims.

As there could be no surprise, claimed after the filing of the second lawsuit, and continuance of the trial date for more than a year, the only basis remaining to substantiate the April 13, 2012 order striking the loss of chance claims was lack of evidence. After the continuance of trial, the court erred by

not requiring or allowing for a CR 56 summary judgment motion and hearing, especially since the PR could have replaced or supplemented any perceived lacking testimony, as the PR, on the consolidated actions, had time to find or develop additional expert testimony. The disclosure date was not until January 14, 2013, approximately two months after the court certified the April 13, 2012 order.

## VI. ARGUMENT

### A. DENYING AMENDMENT OF THE COMPLAINT WAS ERROR

#### 1. Allowing Amendment is Favored

In civil litigation, amendment of complaints is governed by CR 15 and related case law. About this, the commentators have comprehensively commented as follows:

> ... pleadings may be amended only by leave of court, or with the written consent of the adverse party. CR 15(a). The rule specifies that "leave shall be freely granted when justice so requires." The rules gives considerable discretion to the trial court judge, though a few generalized notions emerge from the case law. It is often said that the test as to whether the trial court should grant leave to amend is whether the opposing party is prepared to meet the new issue. *Quackenbush v. State*, 72 Wn.2d 670, 434 P.2d 736 (1967). Amendments should be freely granted unless the opposing party would be prejudiced. *Olson v. Roberts & Schaeffer Co.*, 25 Wn.App. 225, 607 P.2d 319 (1980). If no prejudice is evident, an amendment may be granted even after substantial delay. *Caruso v. Local Union No. 690*, Intern. Broth. of Teamsters, 100 Wn.2d 343, 670 P.2d 240 (1983).

> The complaint must, of course, name the defendant in order for the court to acquire personal jurisdiction over the defendant. However, if the complaint misidentifies the defendant, the error is not necessarily fatal. A dismissal for lack of jurisdiction is not the automatic remedy, and the court will normally allow the complaint to be corrected by amendment if the amendment would not prejudice the defendant. *Professional Marine Co. v. Underwriters at Lloyd's*, 118 Wn.App. 694, 77 P.3d 658 (2003) (amendment allowed).
>
> To successfully oppose a motion to amend, the adverse party must demonstrate actual prejudice that would result from the amendment. Boilerplate allegations about difficulties in preparing for trial are insufficient. Walla v. Johnson, 50 Wn.App. 879, 751 P.2d 334 (1988).
>
> 3A Wash. Prac., Rules Practice CR 15 (5th ed.)

CR 15(b) allows for amendment to conform to the evidence and CR 15(c) allows for relation back of amendments where the amendment arises from the basis of the original complaint, and the parties haven't changed. It has also been held that:

> "[A]mendment of complaint is appropriate where a new cause of action accrues that had not accrued at the time the action was commenced.
>
> *White v. Million*, 175 Wash. 189, 27 P.2d 320 (1933).

The amendment of the complaint, as proposed by the PR as of April 13, 2012, only addressed those issues and claims which defendants knew of or should have known of, which were reasonably consistent with and as a result of Ms. Zachow's medical treatment as discussed in the original complaint,

and the fact of her subsequent death. Further, the subsequent appointment of one of Ms. Zachow's adult children as PR of her estate and the resulting change in the caption of the litigation, confirms what was otherwise known to defendants and their counsel.

Finally, as all counsel were prepared to continue the April 23, 2012, trial date to remedy any perceived prejudice to SHMC, the court should have done so in the interests of justice, especially when the same result would have been and was accomplished by filing a second action and consolidating the actions and continuing the trial date.

2. There Was no Surprise to SHMC re: Loss of Chance Claims Reduced Life Expectancy and Loss of Chance of Survival are Synonymous

Plaintiffs are also aware that defendants object to plaintiffs referencing loss of chance of survival, even though in the original complaint, the claim for reduced life expectancy is made. Claims for "loss of chance of survival" and "reduced life expectancy" are flip sides of the same coin. That loss of chance of survival is synonymous to reduction of life expectancy, has previously been addressed by the Washington appellate court:

> Here, Shellenbarger argues not that he lost a chance of survival, but that he lost a 20% chance of slowing the disease. We find no meaningful difference between this and Herskovits' lost chance of survival. If the disease had been slowed, Shellenbarger could expect additional years of life. Similarly, in Herskovits, if the disease had been cured,

> Herskovits could have expected additional years of life. Presumably the number of additional years could be measured by Herskovits' statistical life expectancy. Similarly, Shellenbarger's additional years of life could either be measured statistically or by the expert testimony of his physicians. But, whether afforded by a cure or by a slowing of the disease, the loss in each case is in length of life.
>
> *Shellenbarger v. Brigman*, 101 Wash. App. 339, 348-49, 3 P.3d 211, 216 (2000) (emphasis added)

*Shellenbarger* involved a living plaintiff who claimed damages due to an alleged delay in the diagnosis of his asbestosis. Here, Ms. Zachow claimed harm, and disability while alive, including reduction of life expectancy, loss of chance of survival, and upon death, the PR's medical expert confirmed as much, and that the negligence of SHMC led to Ms. Zachow's death, and was a significant (potential) factor in her death. The elimination of both the survival and wrongful death loss of chance claims were apparent to SHMC.

B. STRIKING THE PR'S LOSS OF CHANCE CLAIMS WAS ERROR

This Court first recognized a claim for loss of a chance in *Herskovits*, where six justices concluded that the plaintiff had established a prima facie claim based upon a decrease in the statistical chance of survival. See 99 Wn.2d at 614 (Dore, J., lead opinion); *id.* at 634 (Pearson, J., concurring). *Herskovits* involved a wrongful death and survival action based on a healthcare provider's failure to diagnose and treat. See *id.* at 611 (lead opinion). There, the plaintiffs claimed the decedent had a loss of chance of

survival. The defendants moved for summary judgment, and the plaintiff responded with evidence that the alleged negligence left the decedent with a decreased five year survival probability, from 39% to 25%. See *id.* at 610-11. There was no dispute that the decedent's five-year survivability never exceeded 50%. The decedent passed on approximately three years after the alleged negligence. See id. at 611. The trial court granted summary judgment based upon the estate's failure to produce evidence that the alleged negligence more likely than not caused the decedent's death. See *id.* at 611-12.

The Supreme Court reversed and remanded the matter for trial. The lead opinion by Justice Dore, representing two justices, and the concurring opinion by Justice Pearson, representing four justices, conclude that, as a matter of public policy, negligent healthcare providers should be at risk if they caused a loss of chance, which has put recovery of health beyond the possibility of realization. [1]

In the concurrence, Justice Pearson justifies this policy choice, explaining that failure to recognize loss of chance

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1 See Herskovits at 614 (Dore, J., lead opinion, stating "[t]he underlying reason is that 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, l, concurring, 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"); see also id. at 642-43 (Dolliver, l, dissenting, recognizing "the court is called upon to make a policy decision"); see generally Joseph H. King, Causation, Valuation, and Chance in Personal Injury Torts Involving Pre.existing Conditions and Future Consequences, 90 Yale L. l 1353, 1378 (1981) (explaining that"[ d]estruction of a chance should also be compensated for reasons

> subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses .... A failure to allocate the cost of these losses to their tortious sources ... strikes at the integrity of the torts system of loss allocation.

Id. at 634 (quoting King, supra at 1377; ellipses in original). Justice Dore notes, in the lead opinion, that "[t]o decide otherwise would be a blanket release from liability for doctors and hospitals anytime there was less than a 50 percent chance of survival, regardless of how flagrant the negligence." Id. at 614.

In *Herskovits,* the concurring opinions propose implementing this policy choice in different ways. The lead opinion addresses adjustment in causation to accommodate loss of a chance, qualitatively, while the concurring opinion addresses the degree of injury attributable to the negligence, resulting in an adjusted calculation of damages, quantitatively.

Arguably, neither opinion standing alone is precedential or binding in areas of discord. See *Spain v. Employment Dec. Dep't*, 164 Wn.2d 252, 260 n.8, 185 P.3d 1188 (2008) (where "a plurality of the court may be persuasive to some but has little precedential value"). The Court of Appeals has, variously, referenced *Herskovits'* lead and concurring opinions. See *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 421-22, 161 P .3d 406 (2007) (loss of chance determined by the substantial factor test of proximate

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of fairness").

cause, citing the lead opinion in *Herskovits*); *Shellenbarger v. Brigman*, 101 Wn.App. 339, 348-49, 3 P.3d 211 (2000) (loss of chance described as "a compensable interest", relying on the concurrence in *Herskovits*); *Zueger v. Public Hosp. Dist. No.2*, 57 Wn.App. 584, 789 P.2d 326 (1990) ("if *Herskovits* stands for anything beyond its result, we believe the plurality represents the law on loss of the chance of survival").

Subsequently, in *Daugert v. Pappas,* 104 Wn.2d 254, 704 P.2d 600 (1985), a legal malpractice case in which the court found loss of chance inapplicable, the Supreme Court noted that loss of a chance is a distinct type of injury:

> The primary thrust of *Herskovits* was that a doctor's misdiagnosis of cancer either deprives a decedent of a chance of surviving a potentially fatal condition or reduces that chance. A **reduction in one's opportunity to recover (loss of chance) is a very real injury which requires compensation.**

See *id.* at 261 (emphasis added); see also *id.* at 261-62 (stating "a doctor's misdiagnosis of cancer causes a separate and distinguishable harm, *i. e.* , diminished chance of survival").

In *Mohr v. Grantham,* 172 Wn.2d 844, 853-54; 262 P.3d 490 (2011), then, the Supreme Court confirmed the *Herskovits* loss of chance of survival as a post mortem action related to an alleged reduction in longevity (i.e. life expectancy), in the context of a wrongful death action. However, *Mohr*

expanded on *Herskovits*, by allowing for a loss of chance claim for harm which is less than death, including, but not limited to, disability. Such claims may be made in the context of an *inter vivos* action, or by a PR's action on behalf of an Estate. In all cases, a substantial (significant) factor test may be applied as an exception to the "but for" test of causation.

> Though this court has not reconsidered or clarified the rule of *Herskovits* in the survival action context or, until now, considered whether the rule extends to medical malpractice cases where the ultimate harm is something short of death, the *Herskovits* majority's recognition of a cause of action in a survival action has remained intact since its adoption. "Washington recognizes loss of chance as a compensable interest." *Shellenbarger v. Brigman,* 101 Wn. App. 339, 348, 3 P.3d 211 (2000); *see Zueger v. Pub. Hosp. Dist. No. 2 of Snohomish County,* 57 Wn. App. 584, 591, 789 P.2d 326 (1990) (finding that the *Herskovits* "plurality represents the law on a loss of the chance of survival");16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 4.10, at 155-56, § 15.32, at 488 (3d ed. 2006) *("Washington courts recognize the doctrine of 'loss of a chance' as an exception to a strict application of the but-for causation test in medical malpractice cases.").* In *Shellenbarger*, the Court of Appeals reversed summary judgment of a medical malpractice claim of negligent failure to diagnose and treat lung disease from asbestos exposure in its early stages. *101 Wn. App. at 342.* Expert witnesses testified that had Shellenbarger received non-negligent testing and early diagnosis, which would have led to treatment, he would have "had a 20 percent chance that the disease's progress would have been slowed and, accordingly, he would have had a longer life expectancy." *Id. at 348.* The court concluded, "We find no meaningful difference between this and *Herskovits*' lost chance of survival." *Id. at 349.*
>
> Under the facts and circumstances pled by Ms. Zachow in the original

complaint claiming injury, disability, and loss of life expectancy, and given Dr. Rogers' testimony confirming same, and that SHMC's admitted negligence was a significant (substantial) factor in and led to the death of Ms. Zachow, the PR met its factual burden under the recognized exception to the "but for" rule of proximate cause.

C. CERTIFYING THE APRIL 13, 2012, ORDER RE: DENYING THE PR'S LOSS OF CHANCE CLAIMS WAS ERROR, WITHOUT AN UNDERLYING CR 56 HEARING.

Simply put, the original order of April 13, 2012, apparently did not afford the PR time to provide the trial court adequate briefing or testimony to address the trial court's perceived issues with accepting a substantial factor test in loss of chance cases. A CR 56 hearing would have allowed this, and it was error to certify the order on a judgment, procedurally. The PR requests a ruling to that effect. However, the parties are in agreement that this matter should not leave the court of appeals without guidance as to application of the "but for" test or the "substantial factor" test in loss of chance claims.

## VII. CONCLUSION

Wherefore, Robin Rash, as Personal Representative of the Estate of Ms. Zachow, and on behalf of herself and her two brothers, as statutory

complaint claiming injury, disability, and loss of life expectancy, and given Dr. Rogers' testimony confirming same, and that SHMC's admitted negligence was a significant (substantial) factor in and led to the death of Ms. Zachow, the PR met its factual burden under the recognized exception to the "but for" rule of proximate cause.

C. CERTIFYING THE APRIL 13, 2012, ORDER RE: DENYING THE PR'S LOSS OF CHANCE CLAIMS WAS ERROR, WITHOUT AN UNDERLYING CR 56 HEARING.

Simply put, the original order of April 13, 2012, apparently did not afford the PR time to provide the trial court adequate briefing or testimony to address the trial court's perceived issues with accepting the sufficiency of Dr. Rogers' testimony, or a substantial factor test in loss of chance cases. A CR 56 hearing would have allowed this, and it was error to certify the April 13, 2012 order as a judgment, procedurally, when based on a shortened time pre-trial hearing. The PR requests a ruling to that effect. However, the parties are in agreement that this matter should not leave the court of appeals without guidance as to application of the "but for" test or the "substantial factor" test in loss of chance claims.

## VII. CONCLUSION

Wherefore, Robin Rash, as Personal Representative of the Estate of Ms. Zachow, and on behalf of herself and her two brothers, as statutory

beneficiaries, request this court remove this issue to the trial court, overturning its judgment denying loss of chance claims, and otherwise, allowing for a CR56 hearing to be had, if factual clarification is appropriate.

RESPECTFULLY SUBMITTED this 8th day of April, 2013.

MICHAEL J RICCELLI PS

By: _____
Michael J. Riccelli, WSBA #7492
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2013, I caused a true and correct copy of the Brief of Appellant to be served on the following in the manner indicated below:

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