

No: 91374-9

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID DUNNINGTON and JANET WILSON,

Petitioners and Cross-Respondents,

v.

VIRGINIA MASON MEDICAL CENTER,

Respondent and Cross-Petitioner.

**BRIEF OF AMICUS CURIAE
WASHINGTON DEFENSE TRIAL LAWYERS**

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I. IDENTITY & INTEREST OF *AMICUS CURIAE*

The Washington Defense Trial Lawyers (“WDTL”) is a nonprofit organization of attorneys who devote a substantial portion of their practice to representing individuals, companies, or entities in defense of civil litigation. The WDTL appears in Washington’s and other Courts as *amicus curiae* to pursue its mission of fostering justice and balance in the civil courts. As *amicus curiae* in this case, the WDTL will assist the Court by critically analyzing the competing legal rules at issue.

II. SUMMARY OF ARGUMENT

This brief addresses two issues. First, whether Washington should continue to maintain fidelity with decades of authority establishing that “but for” is the appropriate standard for causation in medical negligence cases, including loss of a chance cases. And second, whether a defendant health care provider should be permitted to present evidence that claimed injury was caused, in whole or in part, by the plaintiff’s failure to comply with health care recommendations or instructions. The WDTL urges the Court to answer each question in the affirmative.

During the past three decades, Washington’s Courts have repeatedly been presented with the opportunity to lessen the causation burden from “but for” to “a substantial factor” in medical negligence cases (including loss of a chance cases). In each instance, Washington’s Courts

declined the invitation to do so and affirmed our State's fidelity to the traditional "but for" standard. This case presents another opportunity for the Court to confirm that "but for" is the necessary standard for causation, and the WDTL encourages the Court to do so.

Health care is, by its nature, a cooperative endeavor. The patient/plaintiff must play an active role in his or her own care. One of the most important parts of that active role is complying with health care recommendations and instructions. In this case, Virginia Mason Medical Center argues that Mr. Dunnington's failure to comply with reasonable recommendations and instructions was a proximate cause of the claimed injury, loss, or damage. The trial court, however, refused to permit the jury to consider Mr. Dunnington's failure to abide by those instructions as evidence of contributory negligence. That decision was in error. The Court should hold that a patient's failure to comply with reasonable health care recommendations or instructions can form the basis for a contributory negligence defense.

III. STATEMENT OF THE CASE

The WDTL relies upon the facts set forth by the briefing submitted by Virginia Mason Medical Center.

IV. ARGUMENT

A. WASHINGTON HAS CONSISTENTLY HELD THAT “BUT FOR” IS THE APPROPRIATE STANDARD FOR CAUSATION IN MEDICAL NEGLIGENCE CASES.

Washington’s Courts have continuously rejected efforts to introduce and rely upon speculation and conjecture to establish medical causation, and Washington’s Courts have repeatedly affirmed their commitment to requiring evidence that the defendant’s conduct was a “cause in fact” of the claimed injury, loss, or damage. *Jankelson v. Sisters of Charity of House of Providence in Territory of Washington*, 17 Wn. 2d 631, 643 (1943); *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wn. 59, 63 (1916). Washington’s Courts have repeatedly held that speculative evidence does not satisfy the “helpfulness” threshold for admissibility; speculative evidence leaves the jury with nothing but conjectural theories, and a jury’s decision must be based upon far more than conjecture. *Gardner v. Seymour*, 27 Wn. 2d 802, 809 (1947).

As a result, Washington’s Courts have consistently rejected efforts to rely upon experts who can only opine that the alleged negligence was “a substantial factor” in causing the alleged injury, loss, or damage. *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn. 2d 609, 634-35 (1983); *Mohr v. Grantham*, 172 Wn. 2d 844, 857 (2011); *Rash v. Providence Health and Services*, 183 Wn. App. 612, 631 (2014); *Christian*

v. Tohmeh, 191 Wn. App. 709, 730 (2015); *See also* Joseph H. King, Jr., “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L. Rev. 491, 506 (1998).

Instead, Washington’s Courts strictly require admissible evidence that shows, on a more probable than not basis, that defendant’s negligence was a cause, without which the injury would not have occurred. *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824 (1968) (holding that evidence of causation must establish that the defendant’s conduct “probably” or “more likely than not” caused the plaintiff’s damages).¹

Washington’s Courts allow claims to proceed under the “a substantial factor” standard, only in exceedingly rare circumstances. In fact, the State Supreme Court has specifically limited the “a substantial factor” standard to three narrow categories:

First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the “but for” test....
Second the test is used where a similar, but not identical, result would have followed without the defendant’s act.
Third, the test is used where one defendant has made a

¹ *See also* *Ugolini v. States Marine Lines*, 71 Wn. 2d 395, 398 (1967); *Glazer v. Adams*, 64 Wn.2d 144, 147 (1964); *Orcutt v. Spokane County*, 58 Wn.2d 846, 853 (1961); *Clevenger v. Fonseca*, 55 Wn.2d 25, 32 (1959); *Bland v. King County*, 55 Wn.2d 902, 905 (1959); *Ehman v. Department of Labor & Indus.*, 33 Wn.2d 584, 597 (1949); *Seattle-Tacoma Shipbuilding Co. v. Department of Labor & Indus.*, 26 Wn.2d 233, 241 (1946).

clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

Daugert v. Pappas, 104 Wn. 2d 254, 262, 704 P.2d 600 (1985).

None of those three categories is implicated by this case. In fact, the Dunningtons do not argue that this case fits within one of those categories – instead, the Dunningtons advocate that the “a substantial factor” standard supplant the traditional “but for” standard. However, Washington’s Courts have consistently rejected any broad application of the “a substantial factor” standard, and this case does not present any compelling reason to change that policy.

Washington’s traditional “but for” standard serves as an important bulwark against speculation and conjecture. The Court should reject the Dunningtons’ attempt to upend Washington’s historical rejection of supposition, conjecture, and speculation. The Court should reject the Dunningtons’ attempts to alter the burden of proof, thereby undermining the central balance that Washington’s tort law has established over time. The Court should reaffirm Washington’s commitment to the “but for” standard for causation.

B. SINCE INCEPTION, WASHINGTON’S LOSS OF A CHANCE DOCTRINE HAS RELIED UPON “BUT FOR” CAUSATION.

Loss of a chance was developed, as a theory of liability, to respond to perceived inequities arising in cases involving plaintiffs who, prior to the conduct at issue in the case, had a less than even chance of survival/a better outcome. In those cases, the less than even chance usually owed itself to underlying or preexisting health conditions. It was perceived that requiring the plaintiff to demonstrate that it was the defendant’s conduct – rather than the underlying or preexisting condition – that caused injury or death, was too great an evidentiary burden.

1. In 1983 Washington Recognized a Claim for Loss of a Chance, and That Claim was Recognized with “But For” as the Necessary Standard for Causation.

Washington’s State Supreme Court first recognized a cause of action for loss of a chance in *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609 (1983). While the Court was in agreement that the cause of action should exist, there was some disagreement regarding what the cause of action should look like.

One faction of the Court believed that loss of a chance should be permitted by allowing claims for wrongful death under the “a substantial factor” standard. This faction was represented by Justice Dore’s opinion. *Id.* at 610-19 (Dore, J. Opinion). The Dore faction advocated that

recovery be permitted where the defendant's negligence was "a substantial factor" in causing the plaintiff's death. *Id.*

A plurality of the Court disagreed. The plurality of the Court was represented by Justice Pearson's opinion. *Id.* at 623-24 (Pearson, J. Opinion). The plurality observed that the plaintiff need not establish that the defendant's conduct actually caused death in order to recover. *Id.* Instead, the plaintiff could recover if the defendant's conduct proximately caused the plaintiff to lose a chance of survival. *Id.*

Justice Pearson's plurality opinion captured a distinction that had previously eluded courts. By separating the inquiry into two parts [(i) what conduct caused the plaintiff's injury and (ii) what is the nature and extent of that injury], the *Herskovits* plurality established Washington's law on loss of a chance.

The plurality's approach required that the claimant demonstrate causation by the traditional "but for" standard. *Id.* at 623-24. The plurality held that the medical testimony must be sufficiently definitive to preclude the trier of facts from resorting to conjecture, supposition or speculation:

In many recent decisions of this court we have held that such determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability "might have" or "possibly did" result from the hypothesized cause.

To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of “probably” or “more likely than not” caused the subsequent disability.

Id. at 623 (quoting *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824 (1968)) (emphasis added).

Justice Pearson’s opinion also noted that other American States require evidence of “but for” causation in medical negligence cases. Specifically, Justice Pearson cited decisions from around the country that require specific medical opinions, rendered to a reasonable degree of medical probability or even certainty, that the allegedly negligent treatment caused the claimed injury. See *Herskovits*, 99 Wn.2d at 620-36 (citing *McBride v. United States*, 462 F.2d 72, 75 (9th Circuit, 1972); *Hamil v. Bashline*, 481 PA 256, 267, 392 A.2d 1280 (1978); *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242, 272 N.E.2d 97 (1971)).

In recognizing a claim for loss of a chance, Washington followed Justice Pearson’s approach. Therefore, loss of a chance claimants have – from day one – been required to present sufficiently definite medical testimony to demonstrate that the alleged injury was, in fact, caused by the defendant’s negligence. Any lesser burden (including the “a substantial factor” standard) would circumvent the long-standing requirement that the alleged negligence and the claimed injury be causally linked to a

reasonable degree of medical probability. And any lesser burden would force the trier of fact to resort to conjecture, speculation and supposition.

2. *In 1990, the Court of Appeals Confirmed That Loss of a Chance Cases Require a Showing of “But For” Causation, and in 2011, the State Supreme Court Confirmed it Again.*

In 1990, the Court of Appeals resolved any uncertainty regarding the appropriate burden of proof when it acknowledged that Justice Pearson’s plurality opinion in *Herskovits* represented Washington’s law on loss of a chance. *See Zueger v. Public Hosp. Dist. No. 2 of Snohomish County*, 57 Wn. App. 584, 589-91 (1990). In 2011, the State Supreme Court decided *Mohr v. Grantham* and formally adopted Justice Pearson’s *Herskovits* plurality. The *Mohr* Court held that a “lost chance” is a compensable injury and that the plaintiff must establish (consistent with RCW 7.70.040 and established tort principles) that the defendant’s conduct was a cause in fact of that “lost chance.” *See Mohr*, 172 Wn. 2d at 844.

In affirming the “but for” standard for causation, the *Mohr* Court characterized the “a substantial factor” standard as “an exception to the general rule of proving but for causation.” In fact, the *Mohr* court criticized the “a substantial factor” standard for upending the long-standing preponderance of the evidence standard, for altering the burden

of proof, for undermining the central principals of tort litigation, for expanding liability, and for requiring the trier of fact to engage in complicated conjecture and speculation. *See Mohr*, 172 Wn.2d at 857; *see also* Joseph H. King, Jr., “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L.Rev. 491, 506 (1998); *Matsuyama v. Birnbaum*, 452 Mass. 1, 15, 890 N.E.2d 819 (2008).

3. *Since Mohr, the Court of Appeals Has Repeatedly Confirmed That the “But For” Standard for Causation Applies to Loss of Chance Cases.*

In 2013, the Court of Appeals decided *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC* and again confirmed that “traditional tort principles . . . require[] the plaintiff to prove the defendant breached a duty owed to the patient and, thereby, proximately caused the patient to lose a chance. . . .” *Dormaier*, 177 Wn. App. 828 (2013). The *Dormaier* Court held that:

. . . a plaintiff must prove proximate cause by a “ ‘probably’ or ‘more likely than not’ “ standard, traditional tort principles would require the plaintiff to prove loss of a chance greater than 50 percent.

Id. at 846.

Moreover, the Court of Appeals cautioned that that “expert testimony is deemed based on speculation and conjecture if it does not go beyond . . .

‘might have’ or ‘possibly did’ . . .” *Id.* at 863 (citing *O’Donoghue v. Riggs*, 73 Wn. 2d 814, 824 (1968)).

In 2014, the Court of Appeals decided *Rash v. Providence Health and Services* and again rejected the “a substantial factor” standard for causation. The *Rash* Court confirmed that the *Herskovits* plurality opinion **required** “evidence that a defendant’s negligence was the ‘but for cause’ of the plaintiff’s loss of chance.” *Rash*, 183 Wn. App. 612 (2014) (citing *Herskovits*, 99 Wn. 2d at 634-35). The *Rash* Court relied upon RCW 7.70.030, which imposed the burden of “proving each fact essential to an award by a preponderance of the evidence,” and RCW 7.70.040, which required that claimants establish that the defendant medical provider’s care “was a proximate cause of the injury.” *Rash*, 183 Wn. App. 612, 635-636 (2014); *see also* RCW 7.70. *et seq.*

Christian v. Tohmeh is the Court of Appeals’ most recent decision on the issue. *Tohmeh*, 191 Wn. App. 709. And, again, the Court of Appeals confirmed that “but for” is the appropriate standard for causation in medical negligence cases, including in loss of a chance cases. *Tohmeh*, 191 Wn. App. at 730. The “but for” standard ensures compliance with RCW 7.70.040(2) and RCW 7.70.030, which require proof that the defendant health care provider “likely” caused the plaintiff’s injury – a lost chance of a better outcome. *Tohmeh*, at 28 (citing *Rash*, 183 Wn.

App. at 631). Again, as before, each time that a Washington Court has addressed the issue – straight from *Herskovits* to *Mohr* to *Tohmeh* – the Court has held that “but for” is the appropriate standard for causation in loss of a chance claims in Washington.

C. AMERICAN STATES WHO FOLLOW WASHINGTON’S MODEL FOR LOSS OF A CHANCE REQUIRE THE PLAINTIFF TO DEMONSTRATE “BUT FOR” CAUSATION.

Loss of a chance, in one variety or another, is now recognized by most American States. Matthew Wurdeman, *Loss-of-Chance Doctrine in Washington: From Herskovits to Mohr and the Need for Clarification*, 89 Wash. L. Rev. 603, 609 (2014) (noting that only 18 states and the District of Columbia have not recognized the claim). Like Washington, most states recognize that the injury in loss of a chance cases is the lost chance itself, rather than the underlying outcome.² As demonstrated above, this approach leaves undisturbed the traditional tort principles related to causation – that is, “but for” remains the standard for causation. *Mohr*, 172 Wn.2d at 634, *see also Matsuyama*, 452 Mass. At 31.

A small minority of states have allowed loss of a chance claims under the “a substantial factor” standard for causation. However, this

² This approach is recognized in Arizona, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. 89 Wash. L. Rev. at fn. 57.

approach has only been recognized by four states (Kansas, Oklahoma, Colorado, and Pennsylvania), and has been criticized by others. *United States v. Cumberbatch*, 647 A.2d 1098, 1100 (Del. 1994) (commenting that the “relaxed causation approach” is an exception to traditional causation requirements). Importantly, in those states, loss of a chance was recognized in the same manner as was envisioned by the Dore faction of the *Herskovits* Court. That is, in the States where “a substantial factor” is used, the relevant damages relate to the ultimate injury or death. See *Delaney v. Cade*, 873 P.2d 175, 204 (Kan. 1994); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 475 (Okla. 1987); *Sharp v. Kaiser Found. Health Plan*, 710 P.2d 1153, 1156 (Colo. App. 1985); *Hamil v. Bashline*, 392 A.2d 1280, 1286 (Pa. 1978) .

Loss of a chance, therefore, is either recognized by recognizing that the “lost chance” itself is a compensable injury (the majority rule) or by softening the causation burden (the minority rule). Washington was a national leader in the majority rule and has stayed true to the majority rule for decades. This case provides no warrant to change Washington’s long-standing law.

More importantly, no State does what the Dunningtons asks – that is, to allow recovery for the “lost chance” under a softer causation burden. The WDTL respectfully asks the Court to reject the Dunningtons’

invitation to such an unprecedented and improper change in Washington State law.

D. A PLAINTIFF HAS A DUTY TO ABIDE WITH PHYSICIAN RECOMMENDATIONS.

As noted in Virginia Mason Medical Center’s opening brief, Washington has recognized a patient’s general duty to follow health care instructions and directions. *See Brooks v. Herd*, 114 Wn. 173, 177 (1927). The Court should take this opportunity to specifically hold that a patient’s failure to follow reasonable health care instructions or directions may be offered as evidence of comparative fault. Courts from around the United States have held that a patient’s failure to abide by health care instructions and recommendations can form the basis for a claim of comparative fault. *Piatek v. Beale*, 994 N.E.2d 1140, 1148 (Ind. 2013) (“A patient may be contributorily negligent by failing to follow a physician’s instructions.”); *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 120 (Iowa 2011) (“We recognize a comparative fault defense to a medical malpractice action when the plaintiff fails to follow the doctor’s instructions as to follow-up care.”); *Segedy v. Cardiothoracic & Vascular Surgery of Akron, Inc.*, 182 Ohio, App.3d 768, 792 (2009); *Kassama v. Magat*, 136 Md. App. 637, 659 (Maryland Ct. App. 2001); *Parkins v. U.S.*, 834, F.Supp. 569, 575 (D. Conn. 1993) (“A patient has a duty to conform reasonably to

the necessary prescriptions and treatment and follow reasonable and proper instructions given, and failure to do so which directly and materially contributes to his injury will prevent a recovery in an action for malpractice.”). This rule recognizes the reality that medical care is a cooperative enterprise between provider and patient. A provider’s ability to provide reasonable care is contingent, in many circumstances, upon the patient – the patient must provide an accurate history of his or her symptoms, the patient must seek regular and consistent care, and the patient must comply with the provider’s instructions and directions. The WDTL, therefore, respectfully asks the Court to bring the law of this State into line with the realities of medical care and to hold that evidence of a patient’s failure to comply with reasonable health care instructions and directions can be offered to establish comparative fault.

V. CONCLUSION

The WDTL respectfully asks the Court to consider this brief in rendering judgment in this matter. The WDTL is grateful for the opportunity to assist the Court with respect to these important issues.

RESPECTFULLY SUBMITTED, this ____ day of September, 2016.

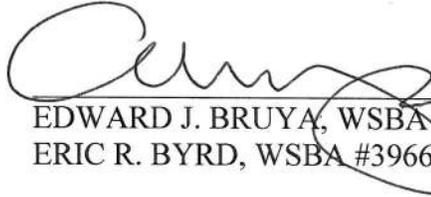
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CERTIFICATE OF SERVICE

I, Stewart A. Estes, hereby certify under the laws of the State of Washington that on the __ day of September 2016, I electronically filed a true and accurate copy of the *Brief of Amicus Curiae WDTL* with the Washington Supreme Court via email to supreme@courts.wa.gov.

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