IN THE SUPREME COURT OF THE STATE OF OREGON

JOSEPH L. SMITH, Plaintiff-Appellant, Petitioner on Review, v. PROVIDENCE HEALTH & SERVICES-OREGON, dba Providence Hood River Memorial Hospital, dba Providence Medical Group; LINDA L. DESITTER, MD; MICHAEL R. HARRIS, MD; HOOD RIVER EMERGENCY PHYSICIANS, LLC; and HOOD RIVER MEDICAL GROUP, PC, Defendants-Respondents, Respondents on Review, and PROVIDENCE MEDICAL GROUP, fka Hood River Medical Group, PC; Hood River Medical Group, PC, Defendants.	Multnomah County Circuit Court No. 1302-02067 Court of Appeals No. A155336 Supreme Court No. S063358

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL

On Review of the Decision of the Court of Appeals
April 8, 2015
Before Devore, J.
Ortega, P.J., and Garret, J
In an Appeal from the Judgment of the Circuit Court
for Multnomah County, Honorable Nan Waller, Judge

December 2015

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MERITS BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL

I) Introduction and Interest of Amicus Curiae

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of defendants' positions in this case. Specifically, OADC appears in order to answer the question whether Oregon should recognize a theory of recovery for "loss of chance" or "lost chance." The jurisdictions are divided, but the Oregon rule remains clear; plaintiffs are not entitled to recovery unless they can demonstrate that the defendant's conduct was the probable cause of their harm. A possibility that defendant's conduct might have resulted in injury, which is all plaintiff has pleaded in this case, is insufficient. The court should not depart from that rule.

II) Summary of Brief

For the reasons set forth in Defendants-Respondents' Joint Response Brief on the Merits, the decision of the Oregon Court of Appeals in this matter should be affirmed. In addition to the argument set forth in that brief, a decision of this Court adopting plaintiff's or OTLA's position in this matter could have a substantial effect on other professionals in Oregon, and on Oregon tort law in general.

III) Argument

This matter involves a medical malpractice claim by plaintiff against defendants. Plaintiff's Complaint alleges that, as a result of defendants'

negligence, "on a more probable than not basis, Joe Smith has lost a chance for treatment which, 33 percent of the time, provides a much better outcome, with reduced or no stroke symptoms." Plaintiff's Second Amended Complaint, paragraph 15; ER-4. Plaintiff argues that his "injury" is the "loss of chance," and that he can recover for that "injury" by showing that the "loss of chance" of a better outcome was "more probably than not" caused by the negligence of the defendants. Plaintiff's Supreme Court Brief on the Merits, page 3.

As stated by the Oregon Court of Appeals in its' decision in this matter, Oregon law does not recognize a claim for, or injury in the form of, "loss of chance." *Smith v. Providence Health & Services-Oregon,* 270 Or App 325, 329, 347 P3d 820 (2015). Thus, what plaintiff asks the court to do here is create a new cause of action, or form of injury, or standard of causation, to allow a plaintiff to recover for a "loss of chance" on a medical malpractice claim.

For the reasons set forth in Defendants-Respondents' Joint Response Brief on the Merits, plaintiff's, and OTLA's, arguments in this regard must be rejected. In addition to the arguments made therein, as will be set forth below, a ruling adopting plaintiff's or OTLA's position in this matter could have ramifications far beyond the limits of this case and/or medical malpractice law.

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A) The connection between a tortious act and a plaintiff's claimed damage has historically been required to be proven on a more probable than not basis.

An essential element of any tort cause of action is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. Prosser and Keeton on Torts, section 41, p. 263 (5th ed. 1984). This connection is dealt with by courts in terms of what is called "proximate cause" or "legal cause." *Id.*

Causation in a tort claim has historically been required to be proven by a "more probable than not" standard (preponderance of the evidence), not on possibilities. Prosser and Keeton explain the reasoning behind this standard.

> "'Proximate cause' . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.' As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy."

Id., section 41, page 264. In light of these concerns, it has long been held that, in proving causation,

> "plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility

> of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."

Id., section 41, p. 269. Plaintiff

> "is not, however, required to . . . negative entirely the possibility that the defendant's conduct was not a cause, and it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred if the defendant had acted otherwise."

Id., section 41, p. 269-70.[1]

Thus, courts in this country have long held that, to establish liability of a defendant on a tort claim, plaintiff must prove that it is more probable than not that defendant's tortious conduct caused plaintiff's injury. This was a compromise between not having people subject to endless liability for their torts, and not requiring plaintiff to prove with absolute certainty that defendant caused his/her injury.

B) No matter what it is labeled, liability for "loss of chance" would change the standard required to prove causation.

Where recognized, "loss of chance" is viewed as either a relaxation of the causation standard or as a compensable harm. *See, e.g., Scalfidi v. Seiler,* 574

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[1] The "more probable than not" standard is also known as the preponderance standard. *See* John Henry Wigmore, 9 Wigmore's Evidence, section 2498, at 420 n. 1 (ed. 1987).

A.2d 398, 406 (N.J. 1990); *Hamil v. Bashline,* 392 A.2d 1280, 1286 (Pa. 1978); *DeBurkarte v. Louvar,* 393 N.W.2d 131, 137 (Iowa 1986).

As shown in Defendants-Respondents' Joint Response Brief on the Merits, loss of chance subverts the longstanding, and already lenient, burden of proof of "more probable than not" in medical malpractice cases. It allows for recovery based on "possibilities" instead of "probabilities." Further, labeling "loss of chance" as a new form of injury does not diminish the fact that the theory radically alters the meaning of causation. *See Dumas v. Cooney,* 235 Cal. App.3d 1593, 1610 (1991) ("[r]edefining lost chance as a new form of injury simply does not diminish that the theory radically alters the meaning of causation."); *Kemper v. Gordon,* 272 SW.3d 146 (Ky. 2008).

Thus, allowing a claim based on the theory of "loss of chance" in this case, whether as part of determining causation or as a theory of recoverable damages, will effectively allow recovery on a medical negligence claim based on something less than the long held "more probable than not" standard of proof.

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C) If the Court allows "loss of chance" in medical malpractice claims, the result could lead to "loss of chance" liability on other claims and could ultimately have a significant effect on Oregon tort law in general.

As stated above and in Defendants-Respondents' Joint Response Brief on the Merits, allowance of recovery for "loss of chance" in this case will be inconsistent with long-held principles of proving damages on a medical malpractice claim in the state of Oregon.

Both courts and commentators project that once the loss of chance doctrine is adopted as part of a state's common law, there is no principled way to prevent application of the lost chance doctrine outside the medical malpractice arena. *See Kramer v. Lewisville Mem. Hosp.,* 858 SW2d 397, 404-06 (Texas 1993)(Court considered whether Texas should adopt the loss of chance doctrine as part of its common law, and noted a significant concern that there would be no principled way to prevent application of the lost chance doctrine outside the medical malpractice arena); Tory A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution,* 87 Mass. L. Rev. 3, 16 (2002)("if adopted, there is no logical reason not to apply loss of chance to other claims or to other professionals . . . ."); Steven R. Koch, *Whose Loss is it Anyway? Effects of the "Lost Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance,* 88 N.C.L. Rev. 595, 631 (2010) (there are no

logical impediments prohibiting a court from allowing the expansion of the doctrine into other areas.).

While application of the loss of chance doctrine thus far appears to be limited to medical malpractice cases, much of the apprehension concerning the lost chance doctrine is that a court's acceptance of the concept in medical malpractice cases will inevitably lead to its adoption in other types of cases, whether it be legal malpractice, personal injury tort claims or breach of contract cases. Koch, 88 N.C.L. Rev. at 631.

Thus, whether loss of chance is viewed as a claim, relaxation of the normal rule of causation, or as an item of damage or injury, its recognition in this case could ultimately result in unwarranted liability expansion. Accordingly, implicated in any decision to recognize such a claim must be its potential effect on other professions, other actions, and its effect on the fundamental interests of uniformity and predictability underlying tort law.

Expansion of "Loss of Chance" to Claims Against Other Professionals

If "loss of chance" is held applicable to medical malpractice claims, it is doubtful that there is any principled way to prevent its application to similar actions involving other professions. *Kramer,* 585 S.W.2d at 406; *Weigand,* 87 Mass. L. Rev. at 16. Professionals such as lawyers, architects, accountants, educators and others could face liability for claims that negligent conduct

reduced the chances of a better outcome even where that outcome was, more likely than not, going to happen regardless of the alleged negligence. *See Smith v. Parrott,* 833 A.2d 843, 848 (Vt. 2003).

In fact, if "loss of chance" were allowed on a medical malpractice claim but not on malpractice claims against other professionals, such would constitute unequal treatment of professionals under Oregon law. Indeed, it has been recognized that if loss of chance is adopted in regard to medical negligence claims, unless the doctrine were expanded to include others such as lawyers, real estate brokers, engineers, etc., it would create an anomaly placing health care providers at a disadvantage when compared to other professionals. *Crosby v. U.S.,* 48 F. Supp.2d 924, 928 (D. Alaska 1999).

In particular regard to legal malpractice actions, rather than having to demonstrate causation via the "but for" test, the plaintiff under a "loss of chance" doctrine could initiate a cause of action any time the offending attorney appeared to have reduced the client's chances of recovering a favorable verdict or obtaining a better result in the underlying matter. George S. Mahaffey Jr., *Cause-In-Fact and the Plaintiff's Burden of Proof With Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal,* 37 Suffolk U.L. Rev. 393, 432 (2004). For example, could a lawyer who missed a statute of limitations on a case with a 30

percent chance of success be liable under the loss of chance doctrine for the client's 30 percent lost chance? *See* Sarah E. Bushnell, *Loss of Chance: New Medical Malpractice Risk in Minnesota,* 70-NOV Bench & B. Minn. 18, 21 (2013). More troublesome still is the fact that the "loss of chance" theory would increase the level of speculation in the already problematic cause-in-fact analysis on such claims. Mahaffey Jr., 36 Suffolk U.L. Rev. at 432.[2]

Thus, the allowance of "loss of chance" recovery in a medical malpractice case could potentially lead to allowance of that theory in claims against other professionals

Potential Impact on Oregon Tort Law in General

As a general matter, tort law is designed to provide remedies for those who have suffered realized injuries at the hands of a tortfeasor. *See* John C.P. Goldberg, *What Clients Are Owed: Cautionary Observations on Lawyers and Loss of a Chance,* 52 Emory L.J. 1201, 1208 (2003). In those jurisdictions where "loss of chance" has been permitted in a medical malpractice action, such is essentially an exception to general tort law in that jurisdiction. *Id.*

As stated above, loss of chance subverts the longstanding, and already lenient, burden of proof of "more probable than not." It allows for recovery

[2] It is important to note that the Oregon Supreme Court has already held "loss of chance" not applicable on legal malpractice claims. *See Drollinger v. Mallon,* 350 Or 652, 669, 260 P3d 482 (2011). In *Drollinger,* the court stated that to allow such a claim would be to "simply reduce the plaintiff's burden vis-à-vis the traditional 'case within a case' methodology." *Id.* at 669.

based on "possibilities" instead of "probabilities." Thus, any adoption of the loss of chance doctrine marks a significant erosion of traditional causation and burden of proof principles. Weigand, 87 Mass. L. Rev. at 16.

One court has stated that "'[l]ost chance of survival theory does more than merely lower the threshold of proof of causation: it fundamentally alters the meaning of causation.'" *Id.* (citing *Falcon v. Memorial Hosp.*, 462 NW2d 44, 65 (Mich. 1990)).

Further, recognition of "loss of chance" as a compensable harm could ultimately result in a reconceptualization of harm transforming the tort scheme from one of harm-based to risk-based. The ramifications of such a theory are enormous and go far beyond this case. All cases of causal uncertainty could be potentially converted into a loss of chance claim by such a redefinition of factual cause and/or harm.

One commentator contemplated what the world would look like if risk of injury, rather than realized injuries, provided for the basis for a negligence action.

> "A shopping mall owner fails to provide adequate lighting for the mall's parking lot. No one is attacked. But still a shopper – indeed all shoppers – could sue because the failure to provide lighting likely increased the risk of her or their being attacked. A car drives by you as you stand on the sidewalk. You notice the driver fumbling with his cell phone, not looking at the road. He passes by without incident, and you note his license plate number. If increased risk is a cognizable harm, you may bring suit against him for his carelessness. Your neighbor, busy barbecuing, douses his

> already – lit fire with lighter fluid. Flames leap up, but nothing else happens. His conduct momentarily increased the risk that your house would burn down, thus permitting an action by you against him if exposure to heightened risk counts as harm."
>
> Goldberg, 52 Emory L.J. at 1207.

Along these lines, it is easy to imagine a host of claims arising in the food service and grocery industries by patrons exposed to e-coli or other viruses or food-borne pathogens. A lost chance theory could expand liability beyond those who could prove they developed an illness caused by the defendant's conduct to those who did not contract the illness but could have, given their exposure. More particularly, if the court were to adopt the theory urged by plaintiff on review, plaintiffs who escaped the illness or any adverse consequence of consuming the tainted food could seek recovery based on the emotional distress attendant to the worry or fear that they had a chance of becoming ill. Oregon courts have consistently rejected claims premised on fear of an outcome that never happens, in the medical context and otherwise. *Rustvold v. Taylor,* 171 Or App 128, 14 P3d 675 (2000)(fear of contracting hepatitis); *Paul v. Providence Health System-Oregon,* 351 Or 587, 593-94, 273 P3d 106 (2012)(threat of future harm of identity theft). The court should refuse plaintiff's invitation to transform Oregon law into risk-based recoveries that have previously been rejected.

Further, as noted above regarding claims against other professionals, the "loss of chance" theory would increase the level of speculation in the already problematic cause-in-fact analysis. Mahaffey, 37 Suffolk U. L. Rev. at 432. The theory would allow recovery no matter what the statistical reduction and even where the claimant has suffered no actual harm (i.e., when a medical malpractice plaintiff fully recovers). Indeed, the theory is potentially applicable to a wide breadth of tortious conduct as it could apply whenever there is a claim of loss of a chance or possibility of a better outcome.

Potential Impact on Other Areas of Law

One commentator has stated: "In theory, loss of chance is applicable to any type of case in which the chances of a better outcome have been diminished." Tory A. Weigand, *Loss of Chance in Medical Malpractice: A Look at Recent Developments,* 70 Def. Couns. J. 301, 301 (2003).

Other areas of law that have been specifically identified as areas that loss of chance could expand to are employment discrimination, product liability and breach of contract cases. *See* Jennifer C. Parker, *Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims,* 36 U. Mem. L. Rev. 373 (2006); Koch, 88 N.C. L. Rev. at 631.

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IV. CONCLUSION

Allowing a medical malpractice plaintiff to recover on a theory of loss of chance will effectively relax the causation requirement to prove such claims. While relaxing the causation requirement might correct a perceived unfairness to plaintiffs who could prove the possibility that the medical malpractice caused an injury, but could not prove the probability of causation, at the same time it could create an injustice to defendants in medical malpractice cases. Further, as stated above, this relaxed standard to prove a medical malpractice claim could lead to a reduced standard to prove causation on other tort claims, eliminating much of the fairness that the "more probable than not" standard was designed to avoid. The Court should not approve the substitution of such an obvious inequity for a perceived one.

DATED this 10th day of December, 2015.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORCP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,434 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed electronically with the Oregon Supreme Court the foregoing **BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL** on the date stated below.

I hereby certify that I served the foregoing **BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL** on the following attorneys on the date stated below by electronic delivery from the Supreme Court e-filing system:

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