IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARIA PEREZ GUARDADO, individually and as Personal Representative of the Estate of DIEGO ESTEBAN CAMPOS PEREZ, and CAIN RAFAEL CAMPOS,	)	No. 66294-5-I
	)	DIVISION ONE
Appellants,	)	UNPUBLISHED OPINION
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.	)	FILED: April 30, 2012

Schindler, J. — Maria Perez Guardado, individually and as the personal representative of the Estate of Diego Esteban Campos Perez, and her spouse Cain Rafael Campos filed a medical negligence lawsuit against Dr. Kerri R. Fitzgerald and Valley Medical Center (VMC). Guardado alleged medical negligence and that the refusal to attempt to resuscitate the baby resulted in the loss of a chance for a better outcome. Because there are genuine issues of material fact as to whether there was a

breach of the standard of care and the loss of chance for a better outcome, we reverse and remand for trial.

FACTS

In 2001, Maria Perez Guardado and Cain Rafael Campos moved from Mexico to Tukwila. Neither Maria nor Campos are fluent in English.[1] Approximately five years after moving to Tukwila, the couple's first child was born.

In February 2008, Maria was approximately 23 weeks pregnant with their second child. Maria began experiencing cramping on February 18 and went to VMC with Campos. The admitting obstetrician unsuccessfully tried to stop Maria from going into premature labor. Through an interpreter, the obstetrician told Maria and Campos that "they were going to do everything they could to save the baby when it was born."

Early the next morning, an interpreter arrived to provide translation for Maria. Labor nurse Yvonne Duncan talked to Maria through the interpreter about whether to resuscitate the baby after birth. According to Duncan, Maria was "very adamant" that she wanted resuscitation. Duncan's chart note states, "[Patient] states that she DOES want resuscitative measures taken when birth occurs."

Duncan arranged a consultation with neonatologist and pediatrician Dr. Kerri Fitzgerald. During the consultation with Maria, Dr. Fitzgerald said that she recommended against resuscitation. Dr. Fitzgerald's chart note states, in pertinent part:

> 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

[1] We use Maria Guardado's first name for purposes of clarity.

> [(intraventricular hemorrhage)] or ROP [(retinopathy of prematurity)] 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 care measures only.

Campos was with Maria when she gave birth to baby Diego at approximately 11:45 a.m. Baby Diego initially had an Apgar score of "1" with a heart rate of 80 beats per minute (bpm) and "no respiratory effort, tone or spontaneous movement." Dr. Fitzgerald wrapped the baby in a blanket and gave him to Maria to hold.

After ten minutes, Diego's heart rate was 40 bpm and he had taken a few breaths. Over the course of the next few hours, Maria and Campos repeatedly asked Duncan to check the baby's heart rate. Duncan's chart note states that "each time HR [(heart rate)] noted @ < 40 bpm."

Dr. Fitzgerald made no efforts to resuscitate the baby. The baby was pronounced dead at 2:15 p.m. A pathology report later showed that cultures from the fetal side of the placenta tested positive for E. coli.

On January 20, 2009, Maria Guardado, in her individual capacity and as personal representative of the estate of baby Diego Esteban Campos Perez, and Campos (collectively Guardado) filed a "Complaint for Damages for Medical Negligence" against Dr. Fitzgerald and VMC. The complaint alleged breach of the standard of care by refusing to provide "resuscitative and survival measures" as requested, resulting in wrongful death and loss of a chance for a better outcome.

During her deposition, Maria testified that she was never aware of a plan to not perform resuscitation. Maria said that she had agreed that "they would do anything

possible to save him," and that after the baby was born, "I wanted them to take him . . . to do something." Maria also said that she told Dr. Fitzgerald "that the baby was breathing and to take him," but Dr. Fitzgerald said, "No, I can't take the baby."

Campos testified that "[a]s soon as the baby was born, [the doctor] said that the baby was going to die. And I told her to help him, to put him in an incubator, and they said no, they didn't want to do it." Campos said that "I was talking to the nurses and with the other doctor that was there, and I was telling them to help my son because he was alive, . . . and they always refused to help him." Campos also said that "I asked many times for them to do something for the baby, to put him in an incubator, but they refused to do anything."

The interpreter testified that the family asked her "how come they weren't given what they were requesting" and "how come they won't intervene, who can they call, what can they do."

In June 2010, Guardado and VMC entered into a stipulation and order of dismissal of the independent claims against VMC, and stipulated that the claims against VMC were limited to "claims of vicarious liability for the actions of defendant Kerri R. Fitzgerald M.D."

Dr. Fitzgerald and VMC filed summary judgment motions to dismiss the lawsuit. Dr. Fitzgerald and VMC argued that Guardado did not present any expert testimony establishing causation, and that even if Dr. Fitzgerald had attempted resuscitation, the baby would not have survived. Dr. Fitzgerald and VMC also argued Guardado did not present expert testimony that the fetus was viable.

In opposition, Guardado relied on Herskovits v. Group Health Coop. of Puget Sound, 99 Wn.2d 609, 664 P.2d 474 (1983), to argue that she did not have the burden of establishing the baby's death was caused by the refusal to resuscitate the baby to obtain recovery under the loss of chance doctrine. Guardado submitted the testimony of neonatologist Dr. Marcus C. Hermansen and Dr. Michael Hussey, an obstetrician and maternal/fetal medicine specialist, in support of her cause of action for loss of chance.

Dr. Hermansen testified that Dr. Fitzgerald breached the standard of care by not attempting to resuscitate the 23-week-old premature baby, and that if resuscitation had been performed, the baby would have had a 30 to 40 percent chance of survival. Dr. Hermansen also stated that one third of 23-week gestational-age infants who survive after resuscitation do not have significant disability. Dr. Hussey testified that the standard of care requires resuscitation of a 23-week-old fetus if requested by the parents.

In reply, Dr. Fitzgerald and VMC argued that the decision in Herskovits was "essentially limited to its facts" because the court was "hopelessly split." For the first time in the reply brief, Dr. Fitzgerald and VMC also claimed that Dr. Hermansen did not take into account the condition of the baby or the cultures of the fetal side of the placenta that tested positive for E. coli in reaching his conclusions.

Guardado filed a surreply and attached excerpts from Dr. Fitzgerald's deposition showing that Dr. Fitzgerald conceded that the baby could have been treated successfully for an E. coli infection.[2]

[2] Dr. Fitzgerald filed a motion to strike the surreply. The record is not clear whether the court did

> Q. Do you know what the findings were with regard to this placenta?
> . . . .
> A. . . . The findings were that E. coli was cultured on the fetal side of the placenta.
> Q. And what significance does that have?
> A. It makes the likelihood of infection in the baby very high.
> Q. Was there evidence of infection, based upon your examination of [Diego]?
> A. There's no findings on exam with sepsis.
> . . . .
> Q. Is there a chance that he would have survived, assuming that he had sepsis --
> A. Yes.
> Q. -- and treated, is there a chance that he would have survived?
> A. A small chance.

The trial court granted Dr. Fitzgerald's and VMC's motions for summary judgment. The court ruled that Guardado could not show the baby would have survived even if resuscitation efforts had been attempted.

> I have reviewed all of the materials and, although certainly this is a very sad situation I daresay, however, I do not believe that the plaintiffs can prove more probable than not that the infant would have survived even if resuscitation efforts were made by the doctor, therefore, as a result, I am granting defendant's motion.

ANALYSIS

Guardado contends the trial court erred in granting judgment dismissing her cause of action under Herskovits for the loss of chance of a better outcome. Guardado asserts that the evidence shows that Dr. Fitzgerald's decision to not attempt to resuscitate resulted in the loss of a 30 to 40 percent chance that the baby would have survived. Dr. Fitzgerald and VMC argue in the briefs on appeal that Herskovits does not apply and that the record establishes that even if resuscitation efforts had been

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or did not strike the surreply.

made, the baby would have died. Dr. Fitzgerald also asserts that Dr. Hermansen's testimony is speculative because he did not take into account the E. coli infection or the condition of the baby as reflected in the medical records.

We review summary judgment de novo and consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Bulman v. Safeway, Inc., 144 Wn.2d 335, 351, 27 P.3d 1172 (2001). But, where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. Johnson v. UBAR, LLC, 150 Wn. App. 533, 537, 210 P.3d 1021 (2009).

The moving party has the burden of showing the absence of a genuine issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The court must view the facts and all reasonable inferences in the light most favorable to the nonmoving party. Miller v. Jacoby, 145 Wn.2d 65, 71, 33 P.3d 68 (2001). Questions of credibility are for the trier of fact. Hudesman v. Foley, 73 Wn.2d 880, 886-87, 441 P.2d 532 (1968).

Chapter 7.70 RCW governs actions for injuries resulting from health care. Former RCW 7.70.040 (1983) provides that a plaintiff seeking to recover damages in a medical negligence action must prove the following:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
> (2) Such failure was a proximate cause of the injury complained

of.

To establish proximate cause, the plaintiff generally must show "that the breach of duty was a cause in fact of the injury" and "that as a matter of law[,] liability should attach." Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 475-76, 656 P.2d 483 (1983).

Expert testimony is generally required to establish proximate cause in a medical malpractice suit. Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Expert opinions must be based on facts in the case, not speculation. Melville v. State, 115 Wn.2d 34, 41, 793 P.2d 952 (1990).

In a recent decision, Mohr v. Grantham, 172 Wn.2d 844, 262 P.3d 490 (2011), our supreme court adopted the reasoning of the plurality in Herskovits and held that a loss of chance claim applies not only to loss of a better outcome in a wrongful death action, but also where the result of the harm is short of death. Mohr, 172 Wn.2d at 846-47.

In Herskovits, a plurality of the court recognized a cause of action for the lost chance of a better outcome. Herskovits, 99 Wn.2d at 611. In Herskovits, the estate sued the hospital for negligence in failing to make an early diagnosis of the decedent's lung cancer. Herskovits, 99 Wn.2d at 611. In opposition to summary judgment, the estate presented evidence showing that if the lung cancer had been timely diagnosed, the possibility of a 5-year survival was 39 percent, but by the time the decedent was diagnosed, the possibility dropped to 25 percent. Herskovits, 99 Wn.2d at 612. The estate did not present expert testimony that the delay in diagnosis " 'probably' " or " 'more likely than not' " caused the decedent's death. Herskovits, 99 Wn.2d at 611-12.

The trial court granted summary judgment on the grounds that even if the diagnosis had been made earlier, the decedent probably would have died. Herskovits, 99 Wn.2d at 611.

The supreme court held in a plurality opinion that the decedent's lost chance for a better outcome was actionable and reversed. Herskovits, 99 Wn.2d at 634. In the lead opinion and concurring opinion, the justices recognized a cause of action for the loss of chance of a better outcome, that "the loss of a less than even chance is a loss worthy of redress." Herskovits, 99 Wn.2d at 634. As the lead opinion explains:

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

Herskovits, 99 Wn.2d at 614. The lead opinion states:

> "No matter how small that chance may have been—and its magnitude cannot be ascertained—no one can say that the chance of prolonging one's life or decreasing suffering is valueless."

Herskovits, 99 Wn.2d at 618[3] (quoting James v. United States, 483 F. Supp. 581, 587 (N.D. Cal. 1980)).

The plurality noted that using a traditional all-or-nothing approach to causation in lost chance cases " 'subverts the deterrence objectives of tort law.' " Herskovits, 99 Wn.2d at 634 (quoting Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353, 1377 (1981)).

Consequently, the court rejected the argument that the estate in Herskovits had to show the decedent had a 51 percent chance of survival absent negligence.

[3] (Italics omitted.)

Herskovits, 99 Wn.2d at 619. The "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." Herskovits, 99 Wn.2d at 619.

In Mohr, the plaintiff alleged that medical negligence caused permanent brain damage and disability. The plaintiff presented expert testimony that absent negligence, "she would have had a 50 to 60 percent chance of a better outcome [of] no disability or, at least, significantly less disability." Mohr, 172 Wn.2d at 849. The trial court dismissed the lawsuit on summary judgment because the plaintiff did not show " 'but for' causation and the hesitancy of the court to expand Herskovits to the facts of this case." Mohr, 172 Wn.2d at 849-50.

Our supreme court reversed. The court "formally adopt[ed] the rationale of the [Herskovits] plurality opinion that the injury is the lost chance" and held that a loss of chance cause of action is not limited to cases that result in death, but also applies to medical malpractice claims where the ultimate harm is short of death. Mohr, 172 Wn.2d at 859. Viewing the evidence in the light most favorable to the plaintiff, the court concluded the evidence supported "a prima facie case under the lost chance doctrine," and that the healthcare providers breached the standard of care resulting in "a diminished chance of a better outcome." Mohr, 172 Wn.2d at 859.

Here, as in Mohr, there are genuine issues of material fact as to whether the failure to attempt to resuscitate the baby resulted in a diminished chance for a better outcome. Viewing the evidence in the light most favorable to Guardado, if Dr. Fitzgerald attempted to resuscitate, the baby had a 30 to 40 percent chance of survival.

Dr. Hermansen testified, in pertinent part:

> A 23 week fetus born prematurely is viable. The standard of care required that Dr. Fitzgerald attempt to resuscitate the baby, if the mother wanted resuscitation for her 23 week premature baby. Dr. Fitzgerald should have attempted to stabilize the baby, and prepared to transfer him to a facility equipped to care for a 23-weeker if that was the mother's desires.
>
> On a more probable than not basis, had Dr. Fitzgerald attempted to resuscitate Baby Diego, he had a 30 to 40% chance of long term survival. In addition, of those 30 to 40% that survive with resuscitation at 23 weeks gestation, one third of them will live without significant disability or injury.

Dr. Fitzgerald's and VMC's assertion that Dr. Hermansen did not take into account baby Diego's condition at birth or the pathology report showing E. coli is not supported by the record. We also reject VMC's claim that the record shows Dr. Hermansen's testimony did not rely on published studies.

Dr. Hermansen expressly states that he reviewed the medical records in reaching the conclusion that baby Diego had a 30 to 40 percent chance of survival with resuscitation. Dr. Hermansen states, in pertinent part:

> The opinions contained in this Declaration are based [on] my review of the mother's and the newborn's medical records, the deposition transcripts of [Fitzgerald, Guardado, Campos, the interpreter, and Duncan], as well as my training and experience.

Dr. Hermansen's testimony also shows that he took into account the baby's condition.

> Q. . . . What I am trying to do, pick your brain a little bit about whether it is possible based on your knowledge of the medical literature to put a more precise figure on the likelihood or the likely result of resuscitation in <u>this case</u> . . . ?
> A. Yes.
> Q. And do you have those numbers in mind?
> A. Yes.
> Q. What is the likelihood -- why don't you tell them to me, please, what is your opinion in that regard?

> A. I think if you try to save this baby, your chances of survival would be 30 to 40 percent.
>
> . . . .
>
> Q. . . . You are saying with resuscitation, there was, in your opinion, a 30 to 40 percent chance that this child would have survived?
>
> A. Yes.[4]

VMC's assertion that Dr. Hermansen did not rely on published studies mischaracterizes his deposition testimony. Dr. Hermansen does not state that he did not rely on published studies in forming his opinion but, rather, that he did not rely on a particular study.

> No one piece of literature stands out. . . . [T]here are too many studies out there. . . .
>
> I have looked at a hundred that talk about survival at 23 weeks. That is the impression I get is that if you try, you can get 30 to 40 percent survival.

Viewing the facts and all reasonable inferences in the light most favorable to Guardado, Dr. Hermansen's opinion that had Dr. Fitzgerald provided resuscitation, Diego would have had a 30 to 40 percent chance of long term survival supports Guardado's cause of action for the lost chance of a better outcome.

We reverse summary judgment dismissal and remand for trial.

WE CONCUR:

[4] (Emphases added.)