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;
Defendant-Respondents
Respondents on Review,

and

PROVIDENCE MEDICAL GROUP, fka Hood River Medical Group, PC and HOOD RIVER MEDICAL GROUP, PC
Defendants.

Multnomah County Circuit Court
Trial Court No. 130202067

CA No. A155336
SC No. S063358

PETITIONER ON REVIEW'S BRIEF ON THE MERITS AND EXCERPT OF RECORD

PETITIONER ON REVIEW'S BRIEF ON THE MERITS AND EXCERPT OF RECORD

On Review of the Decision of the of the Court of Appeals, April 8, 2015

Before Ortega, Presiding Judge, DeVore, Judge, and Garrett, Judge

In an Appeal from the Judgment of Dismissal of the Circuit Court
For Multnomah County;
Entered September 24, 2013
Honorable Nan G. Waller

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October/2015

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QUESTIONS PRESENTED ON REVIEW

1. Does Oregon recognize recovery for "loss of chance" in personal injury cases?

Rule of Law Sought

Loss of chance is a discrete harm. This court should allow the claim to be plead and proved, and allow the fact finder to determine the value of any such claim.

NATURE OF THE ACTION

Plaintiff Joe Smith sought compensation when he presented to a hospital emergency room, and then followed up with a general practice doctor, because he had signs and symptoms of a stroke. It is alleged that if he had received competent medical care, treatment would have been started which had a 33.33% chance of avoiding the brain damage and other stroke symptoms that he currently suffers. The case was dismissed on a Rule 21 Motion; the trial court ruled that Oregon did not recognize the "loss of chance" tort theory. The Court of Appeals agreed, stating that Oregon does not recognize a "loss of chance" tort theory.

STATEMENT OF MATERIAL FACTS

Plaintiffs accept the statement of facts set forth in the Court of Appeals opinion.

SUMMARY OF ARGUMENT

Loss of chance of a better outcome from a negligent health care provider is a discrete harm. Under Oregon common law and its constitution, this court should recognize this legal theory and allow the claim to go forward.

ARGUMENT

The Court of Appeals decision in *Smith v Providence, et al*, 270 Or App 325 (2015) basically held that the "loss of chance" theory failed because it did not meet Oregon's requirement to prove causation.

> "As pleaded in this case, alleging a 33 percent loss of chance results in the same causation gap as the one in Josh." *Id* at 332.

The court concluded:

> Rather, plaintiff only alleged that the treatment he received did not afford him a 33 percent chance of an improved outcome. Such allegations do not assert that it is more likely than not that plaintiff would have had a better outcome with prompt and proper

> treatment for stroke. The allegations rely on speculation that plaintiff would have fallen within the fortunate minority of individuals who, with proper treatment, would have "reduced or no stroke symptoms." *Id*

Respectfully, the court missed the mark. The "loss of chance" is the injury. As the Massachusetts Supreme Court held:

> "When a physician's negligence diminishes or destroys a patient's chance of survival, the patient has suffered real injury. The patient has lost something of great value: a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome." *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 832 (Mass. 2008).

Accepting the loss of chance theory does not violate Oregon's requirement to prove cause in fact. See eg *Lasley v Combined Transport et al*, 351 Or 1 (2011). Under the loss of chance theory, plaintiff still has to prove cause in fact; plaintiff's burden of causation is to prove, more probably than not, that the defendant's negligence caused him to lose a chance of a better outcome. Plaintiff's complaint alleges exactly that:

> As a result of the negligence of Providence and Desitter, on a more probable than not basis, Joe Smith lost a chance for treatment which, 33 percent of the time, provides a much better outcome, with reduced or no stroke symptoms. (ER 1-5, paragraph 13).

Once plaintiff proves that he lost a chance at a better outcome, it is up to the jury or other fact finder to determine the value of that loss.

Loss of chance is recognized as a common law claim in many states. See eg Matsuyama v. Birnbaum, **supra,** *Dickhoff v Green*, 836 N.W.2d 321 (Minn. 2013); *Herskovits v. Group Health Cooperative*, 664 P.2d 474 (Wash. 1983) (en banc); *Wendland v. Sparks*, 574 N.W.2d 327, 331 (Iowa 1998); *Falcon v. Memorial Hosp.*, 462 N.W.2d 44, 57 (Mich.1990); *Wollen v.DePaul Health Ctr.*, 828 S.W.2d 681,684 (Mo. 1992); *Hicks v United States*, 368 F.2d 626, 632 (4th Cir. 1966).

See also *King, Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Injuries and Future Consequences*, 90 Yale L.J. 1353, 1355 n.7 (1981).

The Court of Appeals decision in this case puts Oregon in the "all or nothing" camp of "loss of chance" decisions. Unless the plaintiff can prove

that a provider error more probably than not caused all of his harm, no claim is recognized. This approach undermines several important goals of tort law. It basically gives negligent providers a free pass for any treatment which does not have greater than 50% success rate; it does not hold such providers accountable, at all. It fails to recognize that in many cases, to a patient, hope even if less than 50% is a real value; loss of that hope or chance is a real harm. It further fails to recognize that many health care providers make a lot of money doing diagnosis and treatment for health issues that have a less than 50% chance of succeeding; yet that treatment is the standard of care.

CONCLUSION

This court should recognize the loss of chance legal theory, reverse the Rule 21 dismissal, and remand for further proceedings.

Dated this 22nd day of October, 2015

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CERTIFICATE OF FILING AND SERVICE

On this 22nd day of October I filed the original of **PETITIONER ON REVIEW'S BRIEF ON THE MERITS**, with the Supreme Court by using the Appellate eFile and Serve. I further certify that I served two (2) true and correct copies of the document on this date by: mailing two (2) true copies to the attorneys for **RESPONDENT ON REVIEW**, addressed to:

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

1. I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 898 words.

2. 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).

DATED: October 22, 2015

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