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; and HOOD RIVER MEDICAL GROUP, PC,
Defendants.

Court of Appeals Opinion Filed on April 8, 2015
Before Devore, J., Ortega, P.J., and Garrett, J.
Court of Appeals No. A155336

On Appeal from Multnomah County Circuit Court
Case No. 1302-02067
The Honorable Judith H. Matarazzo
Supreme Court No. S063358

DEFENDANTS-RESPONDENTS' JOINT RESPONSE BRIEF ON MERITS

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LEGAL QUESTIONS PRESENTED ON REVIEW

1. Does Oregon causation law require pleading and proof that a defendant's conduct probably caused the personal injury for which the plaintiff claims damages?

2. Is Oregon causation law irreconcilable with a loss of chance theory of recovery in a claim for medical negligence?

3. Aside from plaintiff's failure to preserve the argument below, is a 33 percent statistical chance that a patient might have experienced a better outcome a cognizable harm for which plaintiff may recover damages?

PROPOSED RULES OF LAW

1. In a claim for medical negligence, a plaintiff must plead and prove that the defendant's conduct probably caused the harm for which the plaintiff seeks recovery.

2. Because Oregon law requires proof of causation to a reasonable probability in a claim for negligence, Oregon does not recognize a loss of chance theory of recovery.

3. The loss of a statistical possibility that a plaintiff might have experienced a different or better outcome is not a cognizable harm for which Oregon allows recovery in negligence.

NATURE OF THE ACTION AND RELIEF SOUGHT

Plaintiff brings medical negligence claims against defendants seeking recovery for personal injuries. He alleges that defendants were negligent in their treatment of plaintiff, who suffered a stroke. There is no allegation that any defendant caused plaintiff's stroke or resulting physical injuries. Rather, plaintiff seeks recovery for his physical injuries based on the allegation that he "lost a chance for treatment which, 33 percent of the time, provides a much better outcome, with reduced or no stroke symptoms." ER 4, ¶¶ 13, 15. Plaintiff seeks damages of $3.6 million for his stroke-related physical injuries based on a statistical loss of a chance of different outcome. ER 3, ¶ 11; ER 4, ¶¶ 16-18.

The trial court granted defendants' motion to dismiss plaintiff's second amended complaint on the ground that Oregon does not recognize any claim for recovery in negligence for the "loss of chance" of a better outcome. Plaintiff was given 10 days to re-plead his complaint; he chose not to do so. Order on Mtn to Dismiss (entered Aug. 7, 2013). The court entered a general judgment of dismissal on its order and plaintiff appealed. The Court of Appeals affirmed the judgment.

SUPPLEMENTAL STATEMENT OF FACTS

Defendants accept the statement of facts set forth in the Court of Appeals' opinion as an accurate representation of the facts as alleged, with the following additions:

Plaintiff seeks recovery for stroke-related physical injuries. ER 4-5, ¶¶ 16-18. He alleges $100,000 in medical and other care costs as a result of his stroke-related injuries, and that he is unable to work, claiming $500,000 for lost wages. ER 4-5, ¶¶ 16-17. Plaintiff seeks $3 million in non-economic damages in connection with his "serious and permanent injuries, including limitations in speech, his mental capacities, his ability to work, drive a car, [and] recreate and perform activities of daily living." ER 5, ¶ 18. Plaintiff does not allege emotional distress as a result of a lost chance itself or damages for an inherent value of a lost chance.

SUMMARY OF ARGUMENT

The starting point in any analysis of loss of chance as a new theory of recovery, or even as a cognizable harm, is the recognition that plaintiff cannot satisfy the traditional causation analysis, so he is asking the court to create a different path to recovery. If he could prove that defendants caused his injury, the lawsuit would be a straightforward claim for medical negligence. That is not the case on review. Instead, plaintiff is seeking recovery based on the mere possibility that he suffered a physical injury as a result of defendants' conduct.

Plaintiff does not contend that he can prove to a reasonable probability that defendants caused his stroke or its sequelae, but only that there is a statistical possibility that he might have experienced a better outcome had he received certain treatment. That theory is contrary to Oregon law and must be rejected.

The trial court properly dismissed plaintiff's claim. An allegation that a plaintiff suffered a lost chance of a better outcome fails to state a claim. To recover for negligence, including medical negligence, a plaintiff must allege and prove a probable causal connection between the defendant's conduct and the harm for which the plaintiff seeks recovery. The court cannot accept plaintiff's theory of recovery when the casual link of the alleged claim is based on a mere possibility (here a 33 percent chance that some people experience a better outcome) and there is no allegation that defendants' conduct actually caused plaintiff harm. This plaintiff, for example, effectively alleges by his complaint that there is a 67 percent chance that defendants did not cause him harm. Plaintiff's theory of recovery cannot be accepted without abandoning this court's decision in *Joshi v. Providence Health System of Oregon Corp.*, 342 Or 152, 149 P3d 1164 (2006), and the decisions on which it is based. The court cannot permit recovery in this case for physical injury-related damages without fundamentally altering the law of causation. Defendants should not be held liable to plaintiff for injuries that they probably *did not cause*.

The court should also reject plaintiff's unpreserved invitation to create a theory of recovery for emotional injury, stated as follows: "[t]he destruction of that fighting chance is a cognizable emotional injury." OTLA's Brief on Merits, p 7. This court has already rejected the loss of chance theory in wrongful death and legal malpractice cases – and for good reason. Allowing loss of chance claims where the "lost chance" is less than 50 percent has significant and far-reaching consequences, even beyond destruction of the law of causation. A loss of chance theory places excessive reliance on naked statistics that lack particularized proof and cannot be related to any particular individual, potentially leading to recovery for increasingly speculative claims and allowing damages even when a plaintiff recovers from the underlying illness.

This court should affirm more than a century of Oregon precedent and hold that to prevail in a medical malpractice action, the plaintiff must plead and prove that the defendant more likely than not caused the physical injuries for which plaintiff seeks damages.

ARGUMENT

I. Plaintiff's loss of chance theory is contrary to Oregon law on causation.

This court should affirm judgment for defendants because plaintiff has not alleged, and cannot prove, that defendants' negligence caused his physical

injuries. In other words, plaintiff has not alleged that, had defendants provided plaintiff the treatment he claims they should have, it would have prevented plaintiff's stroke or lessened the physical injuries he claims he sustained as a result of stroke.

Plaintiff alleges that "33 percent of the time [the treatment] provides a much better outcome, with reduced or no stroke symptoms." ER 4, ¶¶ 13, 15. Plaintiff does not relate the statistical percentage to him individually or allege that he is within the 33 percent of people who statistically might benefit from the treatment. Plaintiff also does not identify the varying ages or health conditions of the people who have responded to treatment. Plaintiff only alleges that 33 percent of the time people experience better outcomes with different treatment than what he received. Thus, plaintiff seeks to recover not because anything defendants did or did not do caused him to suffer a stroke or its sequelae, but because, statistically, others have experienced outcomes better than his and he *might have been* one of them. In other words, plaintiff seeks to recover $3.6 million for his physical injuries based on the possibility that he might have had a better outcome when, based on his allegations, there is a 67 percent chance that the alleged treatment would have made no difference. The trial court and Court of Appeals squarely rejected plaintiff's theory, and this court should do the same.

A. Oregon's causation standard is correct, having endured for more than a century.

To prevail in a negligence action, a plaintiff must satisfy the reasonable probability standard of causation. *Sims v. Dixon*, 224 Or 45, 48, 355 P2d 478 (1960). Under that standard, a plaintiff must plead and prove that the defendant's alleged negligence more likely than not caused the injury for which recovery is sought. *Joshi v. Providence Health Sys. of Or. Corp.*, 342 Or 152, 158-59, 149 P3d 1164 (2006). Oregon's standard is not new or novel having endured steadfast for more than 100 years. *Id.* (citing *Horn v. National Hospital Association*, 169 Or 654, 679, 131 P2d 455 (1942) (relying on cases dating to 1915)). When causation involves a complex medical question, a plaintiff must prove through expert testimony that the defendant's negligent conduct, to a reasonable degree of medical probability, caused his injury. *Cleland v. Wilcox*, 273 Or 883, 887-88, 543 P2d 1032 (1975); *Uris v. State Compensation Dept*, 247 Or 420, 424-25, 427 P2d 753 (1967); *Austin v. Sisters of Charity of Providence*, 256 Or 179, 185-86, 470 P2d 939 (1970); *Howerton v. Pfaff*, 246 Or 341, 346-48, 425 P2d 533 (1967).

In explaining the standard, this court has stated that "the causal connection between [the] defendant's acts or omissions and the plaintiff's injuries must not be left to surmise or conjecture." *Sims*, 224 Or at 48. Rather, proof of causation "must have the quality of reasonable probability, and a mere

possibility that the alleged negligence was the * * * cause of [the] plaintiff's injuries is not sufficient." *Id*.

Lippold v. Kidd, 126 Or 160, 269 P 210 (1928), is an early application of the reasonable probability standard. In *Lippold*, the court considered whether the plaintiff could recover damages based on a possibility that an eye injury could have been avoided or lessened had the defendant physician not been negligent in failing to discover and attempt to remove a piece of steel from the plaintiff's eye. 126 Or at 172-73. The plaintiff sought a second opinion seven months after the defendant told the plaintiff that there was no foreign object in his eye. *Id*. at 172. The second doctor located the steel, but was unable to extract it with a magnet. *Id.* at 172-73. The eye was later surgically removed by the second doctor. *Id*. at 173.

In deciding whether the defendant's failure to attempt to remove the steel caused the loss of the eye, the court noted that the evidence did not show that use of the magnet would have been beneficial. *Id.* at 173-74. That is, the plaintiff failed to present proof that his eye could have been rehabilitated had the defendant done what plaintiff claimed he should have before the plaintiff sought the second opinion. *Id*. at 174, 176. Because the plaintiff did not demonstrate a reasonable probability that the damage to his eye would have been avoided or lessened had the defendant attempted treatment promptly, the

trial court erred in failing to enter a directed verdict for the defendant. *Id*. at 176-77.

Similarly, in *Horn*, the plaintiff sought damages for a variety of ailments she allegedly suffered as a result of the defendant's failure to diagnose a gall bladder condition and the resulting delay in surgery. 169 Or at 659, 668, 670-71. The court held that the plaintiff failed to meet her burden as to causation because she failed to show a reasonable probability that the ailments would have been less severe had the surgery occurred sooner. *Id*. at 676, 679. The court stated:

> "Where the alleged negligence of the defendant consisted of physical non-feasance, that is, where the defendant did no physical act which affected [the] plaintiff's condition, and the negligence, if any, was the failure to diagnose and advise, it is not sufficient for a plaintiff to show subsequent ailments and rest his case upon the specious doctrine of *post hoc ergo propter hoc*. One must go further and show that competent action would have been substituted for negligent inaction, and that there was a reasonable probability that the subsequent ailment would have been less if the substitution had been made.
>
> "Uncertainty as to the amount of damages will not always prevent recovery, but where the causal connection between the negligent failure of a defendant and subsequent ailments of a plaintiff is left to mere speculation, a nonsuit is required."

Id. at 679.

In *Howerton*, the court held that the plaintiff failed to prove causation because the expert testimony established only a possibility that the plaintiff's

hernia was caused by the accident at issue. 246 Or at 342-43, 346-48. In explaining its decision, the court noted:

> "It is settled law in this state that medical testimony in a case of this kind is not sufficient if it fails to show with reasonable certainty that there was a causal connection between an accident and the injury[.] * * * Possibilities are not enough."

Id. at 346 (internal citations omitted); *accord Sims*, 224 Or at 48-49 (trial court erred in failing to grant motion for directed verdict where expert testimony established only a possibility that near collision caused the plaintiff's angina attack).

This court affirmed the reasonable probability standard in *Joshi*. In *Joshi*, the plaintiff brought a wrongful death action against medical providers alleging negligent failure to diagnose and treat the decedent's stroke. 342 Or at 155. At trial, the plaintiff's expert testified that, had defendants properly diagnosed and treated the stroke, the decedent's chance of survival would have improved by, at most, 30 percent. *Id*. at 156.

Applying the common law causation standard to the statutory wrongful death claim, the court held that the plaintiff could not recover because she failed to prove that the defendant's negligence more likely than not caused the decedent's death. *Id*. at 158-59, 164. The court rejected the plaintiff's invitation to adopt a loss of chance theory. *Id*. at 162-64. The court held that the plaintiff could not satisfy her causation burden by showing that the

defendant's negligence merely increased the risk of death. *Id*. at 163-64. The court stated: "[O]ur prior cases make clear that [a] plaintiff cannot discharge her obligation by showing only a 'substantial possibility' that [the] defendants' actions caused [the] decedent's death." *Id*. at 164 (citations omitted). A reduced standard of causation *cannot* be reconciled with decades of Oregon law, in both personal injury and wrongful death cases. *Id.* at 158-59, 163-64 (holding that, under the common law definition of "cause," "[a]ny showing of causation less than a reasonable probability would be merely a possibility and, therefore, insufficient under [the court's precedent]").

As the law makes clear, a plaintiff cannot recover in negligence for physical injuries without proof that the defendant's actions caused the injury. A plaintiff must prove to a reasonable medical probability that his or her injuries were caused by the defendant. Here, plaintiff alleges 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.'" *Smith v. Providence Health & Services – Or.*, 270 Or App 325, 332, 347 P3d 820 (2015) (citation omitted). The court should decline plaintiff's invitation to allow recovery for his alleged lost chance

because to do so would upend, or undeniably ignore, decades of existing Oregon law and relax the causation standard to allow for recovery of mere possibilities without any causal link to a defendant's conduct.

B. This court has rejected loss of chance in other professional negligence actions and should do the same here.

Within the last 10 years, the court has twice been asked to permit recovery under a loss of chance theory – first in a wrongful death claim arising from medical negligence in *Joshi*, and also in the legal malpractice context in *Drollinger v. Mallon*, 350 Or 652, 260 P3d 482 (2011). In each instance, the court refused to allow the theory, stating to do so would reduce the plaintiff's causation burden below the reasonable probability standard, making it irreconcilable with established law. *See Joshi*, 342 Or at 158-59, 163-64; *Drollinger*, 350 Or at 669 (application of the loss of chance theory "would simply reduce the plaintiff's burden *vis-à-vis* the traditional 'case within a case' methodology"). The same reasoning applies to this case.

There is no principled way to support allowing recovery for loss of chance in this case while rejecting it in other professional negligence cases, as the court has already done. This court should follow the sound reasoning of *Joshi* and *Drollinger* and the common law causation principles that form the basis of those decisions. Plaintiff and OTLA make no attempt to distinguish *Drollinger* or to even attempt to distinguish the common law negligence cases

that undergird *Joshi* and *Drollinger*. Such omissions are telling. The observations OTLA offers about the nature of the physician-patient relationship apply equally to the lawyer-client relationship. *See Conway v. Pacific Univ.*, 324 Or 231, 239-40, 924 P2d 818 (1996) (lawyers and physicians owe a duty of due care because the client or patient is placed in a position of reliance and has a right to rely on the lawyer or physician). Because there is no reason to treat the two groups of professionals differently, or to treat medical negligence that results in death differently than that which does not, the court should reject plaintiff's proposed theory of recovery.

II. Plaintiff's arguments on review are a significant departure from the complaint and how the issues were presented to the trial court.

Plaintiff and OTLA's arguments bear little resemblance to the arguments made to the trial court or the Court of Appeals. The Court of Appeals correctly applied existing law to hold that plaintiff's complaint was properly dismissed for failing to allege causation. Perhaps as an acknowledgement of the well-established causation barrier to plaintiff's theory, the briefs on review abandon the argument below and advocate a new approach, contending the injury at issue is an emotional harm that is discrete and particular to the loss of chance theory. For all the reasons below, the court should reject plaintiff's new line of arguments.

Oregon's preservation rule requires an issue to be presented to the trial court before it can be raised and considered on appeal. *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008) (preservation rule is subject only to exception for plain error). The preservation rule serves three main purposes: (1) ensuring the trial court has the chance to rule on an issue so that it may avoid the claimed error, (2) ensuring fairness to the opposing party by providing an opportunity to respond to the issue and not be taken by surprise, and (3) fostering full development of the record to aid decisions by the trial and appellate courts. *Id.* at 219-20.

In deciding whether an issue has been adequately preserved for review, the court considers the individual circumstances of the case to determine whether the purposes of the rule have been satisfied. *State v. Haynes*, 352 Or 321, 335, 284 P3d 473 (2012) (citation omitted). This court has held that the purposes of the rule may be satisfied by a short-hand reference to an issue if the trial court and the parties would understand that the reference refers to a particular legal or factual argument and would understand the essential contours of the full argument from the reference. *Id.*

On review, plaintiff and OTLA frame the question as whether the loss of a 50 percent or less chance for medical recovery is a discrete, compensable harm. They argue that the lost chance for medical recovery should be recognized as a compensable injury because it has inherent value and can cause

a patient emotional distress. Pet for Review, p 6; Pltf's Brief on Merits, p 5; OTLA's Brief on Merits, pp 2, 6-7. This characterization of the claim, the injury, and the case is contrary to what was understood before the trial court.

The complaint frames the issues. Plaintiff alleges that he has "substantial brain damage from a stroke" and "significant slurred speech, significant cognitive impairments, and now cannot keep a job." ER 3, ¶ 11. He claims "serious and permanent injuries, including limitations in his speech, his mental capacities, his ability to work, drive a car, [and] recreate and perform activities of daily living." ER 5, ¶ 18. The complaint contains *no* allegation of damage flowing directly from a lost chance itself and no indication plaintiff is seeking recovery for such harm. The question of whether loss of chance should be recognized as a discrete, compensable harm separate from the ultimate physical injury was not before the trial court. *See* ER 3-5. If plaintiff's intent below was, in fact, to argue that the loss of chance is a compensable emotional injury distinct from the physical injuries he alleged, as he is arguing now, the issue was lost on the trial court and defendants below. Further, the trial court allowed plaintiff an opportunity to re-plead and he chose not to. Order on Mtn to Dismiss (entered Aug. 7, 2013).

It was only after defendants pointed out in a footnote to their Court of Appeals brief that this case does not involve a claim for damages for a non-physical or metaphysical loss of chance, that plaintiff suggested outright that

the trial court erred because emotional distress from knowing about a lost chance itself transforms the lost chance into a compensable injury. Defendants' Joint Answering Brief, p 22 n 4; Plaintiff's Reply Brief, p 1.

On reply in the Court of Appeals, plaintiff, for the first time, stated:

> "[Plaintiff] sits at home, disabled, wondering whether his life could have been better. [Plaintiff's] worry, his emotional distress is 'harm'; that is the separate, cognizable injury identified by the Minnesota court in *Dickhoff v. Green*, 836 NW2d 321 (2013)."

Plaintiff's Reply Brief, p 1. The Court of Appeals rejected plaintiff's unpreserved invitation that it acknowledge loss of chance as the injury as a way to avoid the causation barrier, citing *Lowe v. Phillip Morris USA, Inc.*, 344 Or 403, 183 P3d 181 (2008), and *Howerton* as its basis for doing so. *Smith*, 270 Or App at 329 n. 3.

The only claim that was presented to the trial court was a claim for physical injury damages. Allowing plaintiff to proceed in this court on a theory that was not pleaded or developed below would subvert the purposes of preservation. Indeed, had plaintiff argued below that the loss of chance itself has some compensable value as an emotional harm separate from the physical injuries claimed, the complaint would have been subject to dismissal under the court's line of cases precluding recovery for emotional harm without physical injury. *See e.g.*, *Curtis v. MRI Imaging Services, II*, 327 Or 9, 13-16, 956 P2d 960 (1998). Because plaintiff did not adequately raise the issue of whether loss

of chance is a discrete, compensable injury below, the court should not reach the issue here.

III. The court should reject plaintiff's invitation to recognize a new claim for loss of chance as a discrete emotional injury.

A. Recognizing a new claim for negligently inflicted emotional injury that is a "loss of chance of a better outcome" would require overruling precedent.

It is notable what plaintiff's brief does not argue. Plaintiff does not ask this court to overturn *Joshi*, *Horn*, or any of the long-standing common law precedents holding that, to recover in negligence, a plaintiff must prove that but for the defendant's conduct the injury would not have occurred. Plaintiff's brief contains no attempt to reconcile his proposed theory of recovery with existing law.

Indeed, plaintiff's theory cannot be reconciled with the existing body of Oregon case law on causation because plaintiff's theory would permit recovery where, as pleaded in this case, it is acknowledged there is a 67 percent chance that defendants' conduct did *not cause* plaintiff's physical injury. The reason why plaintiff's claim fails is explained in this court's discussion of the *Joshi* decision in *Lowe*:

> "There was no question in *Joshi* that the patient had suffered a physical injury: The patient had died. The only question was whether the evidence was sufficient, for purposes of the wrongful death act, to permit a jury to find the necessary causal connection between the defendant's negligence and the patient's death. Interpreting the word 'cause' in the wrongful death act, the court

> held that the evidence was not sufficient. The court held out the possibility, however, that 'deprivation of a 30 percent chance of survival may constitute an injury' outside the context of the wrongful death statute. Considered in context, the court's statement left open the question whether 'deprivation of a 30 percent chance of survival' would be sufficient proof of causation if the plaintiff suffered an injury that did not lead to death. *That statement goes to the causal connection necessary to prove negligence, not the type of injury necessary to state a negligence claim*."

Lowe, 344 Or at 413 (internal citations omitted; emphasis added). Thus, any argument that *Joshi* opens the door to a claim for a separate injury for lost chance is wrong. The causal connection requires more than a 30 percent possibility that, regardless of defendants' conduct, some people have better outcomes.

Should the court be tempted to overturn decades of precedent and the well-settled standard for causation in negligence cases, its decisions require plaintiff to first persuade the court that the cases that have applied the reasonable probability standard for decades were wrongly decided. As this court recently explained in connection with overturning the *Stubblefield* rule in *Brownstone Homes Condo Assn v. Brownstone Forest Hts,* 358 Or 223, ___ P3d ___ (November 19, 2015):

> "[T]his court's obligation when formulating the common law is to reach what we determine to be the correct result in each case. If a party can demonstrate that we failed in that obligation and erred in deciding a case, because we were not presented with an important argument or failed to apply our usual framework for decision or

> adequately analyze the controlling issue, we are willing to reconsider the earlier case."

358 Or at 236 (*quoting Farmers Ins. Co. v. Mowry*, 350 Or 686, 261 P3d 1 (2011)).

Plaintiff cannot and does not make any attempt to argue that this court's precedent with respect to the law of causation was incorrectly decided. It is precisely because the standard of causation in Oregon was correctly decided and has been consistently and correctly applied for over 100 years that it must be applied here, as it was by the Court of Appeals, to affirm the dismissal of plaintiff's claims.

This court has repeatedly refused to reconsider existing law to allow recovery for new common law claims or injuries and should do so here. *See, e.g. Hammond v Central Lane Communications Center*, 312 Or 17, 24-27, 816 P2d 593 (1991) (refusing to reconsider impact rule to recognize emotional distress as legally cognizable injury in absence of physical injury or impact because the plaintiff did not show that any of the justifications for reconsideration were met); *Lowe*, 344 Or at 414-15. For example, in *Lowe*, the court refused to reconsider the economic loss rule to recognize a new medical monitoring claim. 344 Or at 414-15. In declining the invitation to reconsider the rule, the court noted that the plaintiff had not shown that any of the premises noted in *G.L. v. Kaiser Foundation Hospitals, Inc.* ("*G.L. v. Kaiser*"), 306 Or

54, 757 P2d 1347 (1988), were satisfied. *Lowe*, 344 Or at 414-15; *see* also *G.L. v. Kaiser*, 306 Or at 59 ("(1) that an earlier case was inadequately considered or wrong when it was decided; (2) that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case; or (3) that the earlier rule was grounded in and tailored to specific factual conditions, and that some essential factual assumptions of the rule have changed.") (internal citations omitted). Absent one of those premises, "the court has no grounds to reverse a well-established rule besides judicial fashion or personal policy preference, which are not sufficient grounds for such a change." *G.L. v. Kaiser*, 306 Or at 59 (citation omitted).

In *Lowe*, the plaintiff merely pointed out that there was a division of authority on the issue of medical monitoring and asked the court to adopt the reasoning of those courts that allow monitoring claims. 344 Or at 414. The court held:

> "Our precedents control this issue, and the differing decisions from the other jurisdictions do not provide a basis for overruling Oregon's well-established negligence requirements."

Id. at 415. Plaintiff has provided no basis for reconsideration of correctly decided precedents, and the court should decline any invitation to do so based on plaintiff's unpreserved arguments.

B. A claim for emotional injury for lost chance would be subject to dismissal without accompanying physical injury caused by defendants.

The "harm" complained of in plaintiff's complaint is the stroke and related physical injuries. There is no allegation that the loss of chance has some inherent value or that plaintiff suffered any emotional distress from knowing of the lost chance itself. Indeed, had plaintiff suggested to the trial court that the metaphysical loss of chance is a legally cognizable injury because the chance has some inherent value, the claim would have been subject to dismissal on additional bases. *See Lowe*, 344 Or at 410 (increased risk of future harm, by itself, is insufficient as an allegation of damage in the context of a negligence claim); *Paul v. Providence Health System-Or.*, 351 Or 587, 593-94, 273 P3d 106 (2012) (threat of future harm of identity theft is insufficient "because plaintiffs do not allege actual, present injury caused by defendant's conduct."). Recovery is not allowed in Oregon for intangible or speculative harms unrelated to a physical or emotional injury caused by the defendant. *Lowe v. Philip Morris USA, Inc.*, 207 Or App 532, 142 P3d 1079 (2006), *aff'd*, 344 Or 403 (2008) (with minor exception for certain psychic or emotional injuries, negligence law requires proof of a current physical harm caused by the defendant).

Had plaintiff suggested to the trial court that the claim should be allowed because emotional distress associated with the loss of chance itself transforms the loss of chance into a legally cognizable harm, defendants would have moved to dismiss under *Curtis*. Plaintiff's claim fails under *Curtis* because (1) plaintiff has not alleged that defendants operated under a specific duty of care to protect potential stroke victims against emotional harm from loss of chance for a better outcome associated with the failure to provide the alleged treatment, (2) plaintiff has not alleged that he suffered any emotional harm as a result of the loss of chance itself, and (3) plaintiff seeks to recover only unrelated physical injury damages in this case (i.e., he is not seeking damages for emotional distress associated with knowledge of the lost chance).

OTLA cites *Curtis* for the proposition that a medical provider may "be held accountable for some types of harms that other tort defendants are not." OTLA's Brief on Merits, p 12. On the contrary, *Curtis* affirmed that medical professionals do not operate under a general duty to avoid emotional harm that is greater than the population at large. 327 Or at 15. *Curtis* held that where the standard of care in a particular medical profession recognizes the possibility of adverse psychological reactions or consequences and dictates that certain precautions be taken to avoid or minimize those reactions, the law will not insulate persons from liability for purely psychological harm if they fail in those duties. *Id*. at 15-16. *Curtis* requires a plaintiff who seeks to recover for purely

emotional harm to allege a specific, heightened duty to protect against the emotional harm, and resulting emotional harm that was caused by the physician's failure to meet the standard of care. 327 Or at 15-16; *Rathgeber v. James Hemenway, Inc.*, 335 Or 404, 418, 69 P3d 710 (2003). There are no such allegations in this case. *Curtis* is distinguishable and does not support the new theory of liability plaintiff asks the court to embrace.

The court should also reject OTLA's argument that plaintiff should be permitted to recover under a loss of chance theory because the damages sought are comparable to damages for uncertain future losses in a standard personal injury case. In support of its proposition, OTLA cites two cases: *Feist v. Sears, Roebuck & Co.*, 267 Or 402, 517 P2d 675 (1973) and *Conachan v. Williams*, 266 Or 45, 511 P2d 392 (1973). Neither case helps plaintiff here.

In *Feist*, the plaintiff suffered a skull fracture when a cash register at the defendant's store fell on her head. 267 Or at 403. There was no issue of causation for the fracture. At trial, the plaintiff offered testimony that established that, to a reasonable degree of medical probability, the child was susceptible to meningitis as a result of the skull fracture. *Id*. at 413.

Feist does not support recovery of the damages alleged in this case for several reasons. First, there was a physical injury in *Feist*; here, there is no physical injury that was caused by the defendant. Under his current theory, plaintiff argues that he is entitled to recover damages for physical injuries

defendants probably did not cause because he lost hope of a better outcome. Second, the injuries alleged in this case have already occurred; there is no issue of possible future complications comparable to *Feist.* That a jury may consider potential future complications in awarding non-economic damages in a case in which the plaintiff has proven that the underlying physical injury was caused by the defendant's negligence has no bearing on whether plaintiff in this case should be allowed to recover for current injuries that he cannot prove were probably caused by defendants. *See* 267 Or at 413 (trial court did not err in allowing testimony regarding susceptibility to meningitis because, although jury cannot award permanent injury damages for susceptibility, susceptibility can be considered in non-economic damages award).

Conachan appears to be an incorrect citation. The case does not contain the quote set forth by OTLA, and it is unclear to defendants how OTLA believes the decision advances plaintiff's position in this case. Indeed, on the page cited by OTLA, the court confirmed the rule that proof and the "calculation of * * * [impaired earning capacity] must rest upon factors which can be employed only in terms of probabilities." 266 Or 55-56 (quoting *Baxter v. Baker*, 253 Or 376, 391-92, 451 P2d 456 (1969) (O'Connell, J., dissenting). *Conachan* does not support the position that it would be appropriate to allow plaintiff to recover personal injury damages in this case.

IV. Adoption of the loss of chance theory would create significant and unique challenges for Oregon trial courts.

The court should reject loss of chance as a compensable injury because it would present several unworkable and unnecessary challenges for Oregon trial courts. Challenges, discussed below, relate to the truth-seeking function of the jury and practical issues that would arise regarding the scope of such claims.

A. Allowing recovery under a loss of chance theory would undermine the truth-seeking function of the jury by allowing awards based on speculative statistical and epidemiological evidence that cannot be tested fully at trial.

Recognition of a claim for loss of chance would require an unprecedented and inappropriate amount of reliance by jurors on speculative testimony. The South Carolina Supreme Court, evaluating these issues in *Fennell v. Southern Maryland Hospital Center, Inc.*, 320 Md 776, 580 A2d 206 (1990), noted the practical difficulties weighing against adopting loss of chance. Particularly problematic is that probabilities and statistical evidence comprise a substantial portion of the evidence submitted to the trier of fact in loss of chance actions:

> "The use of statistics in trials is subject to criticism as being unreliable, misleading, easily manipulated, and confusing to a jury. When large damage awards will be based on the statistical chance of survival before the negligent treatment, minus the statistical chance of survival after the negligent treatment, times the value of the lost life, we can imagine the bewildering sets of numbers with which the jury will be confronted, as well as the difficulties juries will have in assessing the comparative reliability of the divergent statistical evidence offered by each side."

580 A2d at 213-14; *see also* Alice Ferot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 FIU L Rev 591, 600 (2013) ("The loss of chance, as an injury, is often criticized for being no more than a speculative harm").

Even though statistical evidence is "easily manipulated," jurors often find it persuasive. *Fennell*, 580 A2d at 213; *State v. O'Key*, 321 Or 285, 291, 899 P2d 663 (1995) ("Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power."). The potential for misuse of statistical evidence has prompted courts to carefully limit its use in proving medical causation. *See, e.g., King v. Burlington N. Santa Fe Ry. Co.*, 277 Neb 203, 762 NW2d 24 (2009) (discussing admissibility and sufficiency of statistical and epidemiologic evidence to prove "specific causation," *viz.*, whether an drug or other agent actually caused plaintiff's injury); *Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 308, 14 P3d 596 (2000) (physician also relied on differential diagnoses and clinical observation to establish specific causation). Statistical evidence alone is usually insufficient to prove that a particular drug or device caused the plaintiff's injury in the products liability context. "Specific causation" must be proved with medical evidence, which may include differential diagnosis and clinical observation. *See* Michael D. Green, D. Mical Freedman, and Leon Gordis, *Reference Guide on*

Epidemiology, 381-386, Federal Judicial Center Reference Manual on Scientific Evidence (2nd ed 2000) ("Reference Guide on Epidemiology"); *King*, 762 NW2d at 50-51.

Unlike a physical injury, a loss of chance injury would exist only because of a statistical association between an omitted therapy and a "better outcome." The injury would have to be proved with the type of speculative statistical and epidemiologic evidence that many courts find insufficient to prove causation in personal injury cases. That evidence is even less reliable in proving a loss of chance because it is not capable of validation with other medical evidence. For example, a large-scale cohort study might show that 20 percent of patients who received a particular therapy at the time of a stroke experienced a "better outcome," but there is no way to validate that study with the type of medical evidence ordinarily offered to prove causation in a personal injury case such as clinical observation or "differential diagnosis."

Thus, in a loss of chance case, the usual battle between the experts concerning the existence of an injury would become particularly abstract. The jury is not presented with conflicting opinions based on admissible medical evidence like medical records, lab-tests or x-rays and an expert's opinion regarding what they show. Rather, the jury is presented with conflicting expert opinions based on inadmissible epidemiologic studies usually performed by people in other states or countries utterly unrelated to the plaintiff. *See* OEC

806; Reference Guide on Epidemiology at 335 n. 3 (epidemiologic studies are "hearsay"). The jury has no way to gauge the reliability of the underlying studies – or even learn of the details of those studies on direct examination. Even more significant, without expert discovery, the validity and reliability of an opponent's study cannot be determined before trial, and it cannot be effectively challenged at trial.

As Judge Lagesen recently noted in *Hinchman v. UC Market, LLC,* 270 Or App 561, 348 P3d 328 (2015), "[t]he Oregon Rules of Civil Procedure authorize what is colloquially referred to as 'trial by ambush,' and protect from pretrial disclosure the identities of experts and the substance of their testimony." 270 Or App at 569 (citing *Stevens v. Czerniak*, 336 Or 392, 404-05, 84 P3d 140 (2004)). There is no way for a defendant to discover the studies relied on by plaintiff's expert, and no way for a defendant and its expert to perform the type of careful analysis necessary to either confirm or disprove the validity of those studies. *See, e.g., Hall v. Baxter Healthcare Corp.*, 947 F Supp 1387 (D Or 1996) (illustrating the rigorous examination and exclusion of epidemiologic evidence in a breast implant case). In fact, it is unclear whether a plaintiff would be required to plead the exact percentage of his or her loss of chance – an allegation which, if provided, might give some indication, but no certainty, of the study upon which the plaintiff's expert intends to rely at trial.

A claim for loss of chance would necessarily require jurors to make high-dollar decisions based on speculation. The plaintiff's experts could simply opine that a plaintiff "lost a chance" based on a particular epidemiologic study – a study that is hearsay and inadmissible on direct examination and as substantive evidence. OEC 706; 802; *see also Eckleberry v. Kaiser Found. N. Hospitals*, 226 Or 616, 620, 359 P2d 1090 (1961). Defense counsel is then left with the choice of cross-examining the expert concerning the previously undisclosed study or doing nothing. Either way, the jury is left with insufficient information on which to determine the validity of the study or the resulting opinion. A jury's truth-finding function is reduced to nothing more than choosing the expert who made the best appearance. Oregon law requires more certainty from its civil juries determining liability than a loss of chance claim that is based on possibilities and speculation can provide.

B. Trial judges would need significant direction from this court to ensure juries receive appropriate instructions.

The second issue that would arise relates to practical questions regarding the scope and administration of loss of chance claims that trial judges would need answered to properly conduct trial and instruct juries. For example, is there any limit on the percentage chance that must be lost to state a claim? In other words, is *any* loss of chance recoverable or must the lost chance be greater than three percent, five percent, 25 percent, or some other percentage? Courts

that allow recovery under a loss of chance theory disagree on this point. *See, e.g., Delaney v. Cade*, 255 Kan 199, 215-16, 873 P2d 175 (1994) (loss must be "substantial" to be recoverable); *Jorgenson v. Vener*, 2000 SD 87, 616 NW2d 366 (2000), abrogated by statute SDCL §20-9-1.1 (suggesting that any loss of chance is compensable, no matter how small).

Plaintiff and OTLA disagree on this point as well. Although they have failed to explain what a loss of chance claim would actually look like under the rule they ask this court to adopt, plaintiff seems to suggest that any loss is cognizable, whereas OTLA would limit claims to those in which an undefined "significant" chance is lost. Pltf's Brief on Merits, p 1; OTLA's Brief on Merits, p 3.

Trial courts would also need significant direction regarding the damages recoverable under a loss of chance claim in order to instruct juries. For example, if the court recognizes a loss of chance injury, are physical injury damages recoverable or is the inherent value of the metaphysical loss of chance itself the measure of damages? If physical injury damages are recoverable, is a plaintiff entitled to recover the full value of physical injury damages or a percentage of the damages? Trial courts also would need to know if damages are recoverable for injuries the defendant did not cause but plaintiff nonetheless experienced, even when the plaintiff has beaten the odds and recovered fully.

Additionally, the only area where Oregon law currently allows for a proportional recovery in personal injury cases is established by statute – the comparative fault and several liability statutes. ORS 31.600. Imposing liability on a defendant for a mere possibility or slight percentage of fault is at odds with several liability and the statutory comparative fault scheme. Multiple problems would arise: will juries be asked to apportion fault among joint tortfeasors and at the same time consider that one or more of the defendants was only responsible for a lost chance? To further confound the issue, where the defendant alleges plaintiff contributed to the injury, how would the jury compare fault among plaintiff and the defendants where the claim is for a loss of chance of a better outcome?

Finally, trial courts would need to know what jury instructions to give to reconcile loss of chance claims with the standard instructions on the burden of proof. Otherwise error and confusion are unavoidable. For example, juries in a medical malpractice action would be told that "the plaintiff must prove [his] claim by a preponderance of the evidence," meaning they must believe the claim is more likely true than not. UCJI 14.01; 14.02. Yet, the jury would be asked to award damages when the preponderance of the evidence is that defendants probably did *not* cause the injury. Without clear guidance regarding specific jury instructions and the general scope of loss of chance claims, trial courts would be in no position to adequately administer loss of chance cases.

V. Other courts, expressing views on causation that are similar to Oregon's reasonable probability standard, have rejected lost chance theories like those proposed by plaintiff.

Distilled to its essence, the loss of chance injury approach is the same claim that was rejected in *Joshi* and has been rejected by many courts around the country. *See* Ferot, 8 FIU L Rev at 591 n. 3 ("A majority of states reject the theory of loss of chance."). These jurisdictions have recognized that a claim for loss of chance amounts to nothing more than an ordinary negligence claim with a relaxed causation standard and proportional damages. *Hurley v. U.S.*, 923 F2d 1091, 1095-96 (4th Cir 1991) ("Thus, the net effect of adopting this * * * [loss of chance injury approach] is to relax proof of causation requirements in medical malpractice cases."); *Dumas v. Cooney*, 235 Cal App 3d 1593, 1610, 1 Cal Rptr 2d 584 (1991) ("Redefining lost chance as a new form of injury simply does not diminish that the theory radically alters the meaning of causation."); *Jones v. Owings*, 318 SC 72, 77, 456 SE2d 371, 374 (1995); *Fennell*, 580 A2d at 213; *Crosby v. U.S.*, 48 F Supp 2d 924, 931 (D Alaska 1999) (noting that loss of chance "relaxes" the preponderance of the evidence causation standard). The Supreme Court of South Carolina in *Jones* summed it up as follows:

> "After a thorough review of the loss of chance doctrine, we decline to adopt the doctrine and maintain our traditional approach. We are persuaded that the loss of chance doctrine is fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician. Legal responsibility in this approach is in reality assigned based on the mere possibility that a

> tortfeasor's negligence was a cause of the ultimate harm. This formula is contrary to the most basic standards of proof which undergird the tort system."

456 SE2d at 374 (internal quotations, citations, and emphasis in original). Likewise, in *Kemper v. Gordon*, 272 SW3d 146 (Ky 2008), the Kentucky Supreme Court stated:

> "We are fully appreciative of the [plaintiffs'] point that the standard of proof in the lost or diminished chance doctrine would still be anchored in the requirement of probabilities. It is argued that a plaintiff would still be required to show, within a reasonable probability, that the negligence caused the loss of the chance of survival. However, a close look at the semantics of this argument makes it clear that this amounts to a concept chasing its own tail. When the dew leaves the rose, it is still a rose. The reasonable probability of a chance of survival is still just a possibility."

272 SW3d at 151-52.

Courts that have allowed recovery for lost chance have primarily employed two approaches: (1) relaxing causation and (2) loss of chance as a separate injury. Regardless of the approach, the result is the same: the causation standard is diminished to allow plaintiff to recover damages that probably were not caused by the defendant. That is contrary to Oregon law.

Under the relaxed causation approach, the ultimate physical injury is the compensable harm, but the plaintiff is relieved of his or her burden of proving that the defendant's negligence probably caused the injury. *Dumas*, 235 Cal App 3d at 1604; *Herskovits v. Group Health Coop. of Puget Sound*, 99 Wn2d 609, 664 P2d 474 (1983). Instead, the plaintiff need only introduce evidence

from which a jury could find that the negligence reduced the chance of avoiding the injury. *Herskovits*, 664 P2d at 477-79. Courts adopting the relaxed causation approach generally allow the plaintiff to recover the full value of all physical injury damages, regardless of the percentage loss of chance the defendant is proved to have caused. *Dumas*, 235 Cal App 3d at 1604. Thus, "[t]he result is that relaxing the rules of causation merely improves the plaintiff's odds of receiving all [of the physical injury damages] rather than nothing." *Id*. This is the recovery sought in plaintiff's complaint in this case.

Herskovits is an example of a relaxed causation approach employed in a wrongful death claim based on proof that the defendant's alleged failure to diagnose and treat the decedent's cancer decreased his chance of survival from 39 percent to 25 percent. 664 P2d at 474, 479. A plurality of the divided court held that a jury could find the negligence caused the death as long as the plaintiff offered medical testimony of a reduction in the chance of survival. *Id.* at 479. The court relied on the *Restatement (Second) of Torts* § 323 (1965), providing:

> "One who undertakes to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise such care increases the risk of harm[.]"

664 P2d at 476 (quoting *Restatement* at § 323).

Notably, the drafters of the *Restatement (Third) of Torts* have clarified that the *Restatement (Second) Torts* § 323 does not support recovery under a loss of chance theory. *Restatement (Third) Torts* § 26, *comment* n ("For courts adopting lost opportunity, however, *Restatement (Second) Torts* § 323 does not supply support for such a reform.").

The Washington Supreme Court did not consider the issue again with respect to medical malpractice until 2011. In *Mohr v. Grantham*, 172 Wash2d 844, 262 P3d 490 (2011), Washington expanded loss of chance to medical malpractice cases where the ultimate harm is something short of death. 262 P3d at 496. Washington, however, limits loss of chance to medical malpractice and has declined to extend the claim to other negligence actions, including legal malpractice. *Id*. at 495 ("Washington courts have, however, generally declined to extend *Herskovits* to other negligence claims."). The *Mohr* decision drew scathing dissents pointing out the underlying fiction this court should refuse to embrace:

> "The 'deterrence' justification identified by the majority is in fact unrelated to preventing harm-causing negligence. As Benjamin Cardozo famously explained long ago, 'negligence in the air' is not actionable. Physicians and indeed individuals in thousands of actions, are negligent every day without legal consequences because, despite the involvement or presence of others, their acts *do not actually cause harm* to the other persons."

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> "By rejecting the traditional causation in favor of the possible deterrent effect of the lost chance doctrine, the majority imposes liability for damages based on negligence alone –'negligence in the air.'"

262 P3d at 500-501 (footnotes omitted) (Madsen, C.J., dissenting). In a second dissent, Justice Johnson criticized the majority's misconstruction of Washington's standard of care statute and explained the implication for physicians: "Our legislature has simply not required the impossible of medical caregivers: to guarantee the best possible outcome for patients they help." *Id.* at 506 (J.M. Johnson, J., dissenting).

Under the second approach, loss of chance as a separate injury, the reasonable probability standard of causation is nominally maintained, but the relevant harm for purposes of the causation analysis is the loss of chance itself and not the ultimate physical injury. *Dumas*, 235 Cal App 3d at 1605; *Dickhoff v. Green*, 836 NW2d 321, 334, 337 (Minn 2013). Under this approach, a plaintiff may maintain a claim upon proof that the defendant's negligence probably caused the plaintiff to lose a chance at recovery. *Dickhoff*, 836 NW2d at 337.

For example, if a plaintiff with an acute stroke proves that he had a five percent chance of a full recovery with the best medical treatment, and negligent medical treatment probably reduced that chance to two percent, the plaintiff

could recover for his three percent loss of chance without having to show that the defendant probably caused the ultimate stroke-related physical injuries. Defining loss of chance as the injury means that a plaintiff could recover damages even if he or she suffered *no* physical injury and was among the fortunate two percent of patients who "beat the odds" and made a full recovery notwithstanding the allegedly negligent medical treatment. *See, e.g., Kramer v. Lewisville Mem'l Hosp.*, 858 SW2d 397, 405 (Tex 1993). Allowing recovery under such circumstances harkens Justice Cardozo's comment that "negligence in the air" is not actionable.

Conceptualizing loss of chance as a separate compensable harm may be an interesting intellectual exercise, but, in practice, it is simply an end-run around the usual rules of causation in medical negligence cases because it allows the plaintiff to recover damages for his physical injuries, or some portion thereof, without proof that his injuries were probably caused by the defendant's negligence. Significantly, courts that have adopted the independent injury approach typically allow recovery of physical injury related damages under the so-called "proportional approach." *See Dickhoff*, 836 NW2d at 335; *see also* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale LJ 1353, 1382 (1981) (advocating for use of the proportional approach).

Under the proportional approach, a plaintiff is not compensated for his or her metaphysical loss of chance or for emotional distress, but instead receives a portion of his *physical injury-related damages* based on the statistical possibility that the defendant actually caused *the physical injuries*. *See Delaney*, 873 P2d at 187; *Dickhoff*, 836 NW2d at 335; King, 90 Yale L J at 1382. Applying the proportional approach to the previous example, the plaintiff who lost a three percent chance of recovery would be entitled to recover three percent of the stroke-related physical injury damages even though it is *almost certain* that the defendant did not cause the physical injuries.

Allowing recovery of damages that probably were not caused by the defendant's alleged negligence would radically alter the rules of causation in medical malpractice cases – rules this court has consistently applied since at least the early 1900s. *See Sanford v. Chev. Div. of Gen. Motors*, 292 Or 590, 606, 642 P2d 624 (1982) (rejecting "comparative causation" as basis for allocating personal injury damages). Oregon law does not permit recovery for an increased risk of future harm and should not recognize it by another name, lost chance. *See Lowe*, 344 Or at 410. The court should reject plaintiff's invitation to create a fiction and re-conceptualize the injury for which recovery is sought as the loss of chance itself.

VI. Allowing recovery under a loss of chance theory has far reaching, negative consequences.

The court should refuse to recognize loss of chance because allowing recovery under the theory has significant, negative ramifications even beyond turning the reasonable probability causation standard on its head. Given the significant consequences associated with departing from the existing standard of causation and radically expanding physician liability, it is appropriate to leave common law rules in place and allow the legislature to address loss of chance. *See Crosby*, 48 F Supp 2d at 931; *Smith v. Parrott*, 175 Vt 375, 381-82, 833 A2d 843, 848-49 (2003).

A. There is no rational way to limit the doctrine.

One negative consequence of this doctrine is when the court starts down the path of allowing recovery for unrealized opportunities and chances that defendants probably did not cause, there is no limiting principle to apply. The inherent limiting principle in negligence claims, causation, will be obliterated. One scholar summarized the problem as follows:

> "[A]dopting the lost-chance doctrine is like stepping onto a conceptual slippery slope. Doing so risks sliding all the way down to a system of proportional liability, with the only way to fashion a stopping point being to draw doctrinal lines that logic does not necessarily support."

Kenneth S. Abraham, *Stable Divisions of Authority*, 44 Wake Forest L Rev 963, 977 (2009).

Another significant issue posed by the loss of chance injury theory is that there is no rational justification for limiting its application to cases in which the plaintiff had a 50 percent or less chance of medical recovery. Tory A. Weigland, *Lost Chances, Felt Necessities, and The Tale of Two Cities*, 43 Suffolk U Law Rev 327, 374 (2010). That is to say, there is no principled basis for applying a system of proportionate recovery to a case in which the plaintiff had a 30 percent chance of recovery, while allowing full damages in a case in which the plaintiff had a 51 percent chance of recovery. If a plaintiff who lost a 30 percent chance of recovery is limited to 30 percent of the value of the injury, then a plaintiff had a 51 percent chance of recovery should be limited to 51 percent of the value of the injury. In fact, Professor Joseph King, the scholar who is credited with developing the loss of chance injury theory, suggests that courts should abandon the "all-or-nothing" theory of compensation and apply proportional recovery to all claims involving a lost chance. King, 90 Yale L J at 1387.

Another problem is that, if the loss of chance has value itself as plaintiff and OTLA suggest, there could be recovery regardless of whether the patient succumbs to the pre-existing medical condition or recovers. *Fennell*, 580 A2d at 213; Weigland, 43 Suffolk U L Rev at 384. That would put Oregon courts in

the precarious position of awarding damages for a loss of chance for an improved recovery without a bad outcome. This is negligence in the air and nothing more.

There is also no principled way to limit application to medical malpractice actions. *Kramer*, 858 SW2d at 406; *see also* David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 Wake Forest L Rev 605, 611-13 (2001). Courts and scholars have developed the following non-exhaustive list of other types of claims in which loss of chance could arise: legal malpractice, employment discrimination, education malpractice, cases involving a failure to warn or provide safety devices, contractual disputes involving lost profits, and cases in which the defendant creates a risk of harm by, for example, exposing the plaintiff to a hazardous substance. *Kramer*, 858 SW2d at 406; *Dumas*, 265 Cal App 3d at 1609; Weigland, 43 Suffolk U L Rev at 353-54; Fischer, 36 Wake Forest L Rev at 611-13. The lack of any principled way to limit the loss of chance doctrine to medical malpractice claims presents a very real problem for this court, particularly since the theory has already been rejected in the legal malpractice and wrongful death contexts.

B. Allowing recovery under a loss of chance theory would result in overreliance on naked statistics.

Defendants have already identified the problem with overreliance on statistics lacking particularized proof relating to the specific plaintiff and case

before the court. Weigland, 43 Suffolk L Rev at 372-73; *see* section IV(A) above. The allegations in this case demonstrate the problem. All plaintiff has alleged is that 33 percent of the time people, not necessarily plaintiff, experience a better outcome. ER 4, ¶¶13, 15.

There is valid concern about overreliance on statistics in loss of chance claims:

> "[I]t is not often that the statistical proffer constitutes both the harm and the measure of harm and it remains a reasonable principle that liability should not be imposed based on naked statistics alone absent particularized proof. * * * The individualized adjudicatory function of the court as to the specific individuals before the court is transformed to permitting awards based on statistical chances lost by a similar group not before the court. The result allows an award for something to the majority of claimants who are entitled to nothing, to ensure that the minority of the claimants receive compensation to which they are entitled This is a fundamental policy decision, and arguable the province of the legislature."

Weigland, 43 Suffolk U L Rev at 372-73 (footnotes omitted).

C. <u>Recognition of a loss of chance injury is not necessary to ensure that physicians aim to meet the standard of care.</u>

Finally, there is no support for plaintiff's argument that failure to recognize the loss of chance theory will allow "Oregon medical providers to freely violate safety rules of care without accountability as long as the violation only causes a 50% or less chance of injury." OTLA's Brief on Merits, p 11. This argument is offensive to the practitioners who work diligently to provide quality medical care to Oregonians. It suggests that, in the absence of potential

tort liability, doctors would *choose* to act negligently based on a *prediction* that proper care would have little or no effect on patient outcome. According to OTLA, absent the recognition of a new loss of chance injury, physicians would devote *less* attention to critically sick or injured patients because those patients have little chance of full recovery. *See Fennell*, 580 A2d at 215 ("There is also no reason to believe that health care providers are systematically failing to treat or are improperly treating the critically ill.").

Even if that were a remote possibility, which it is not, ample deterrent factors to deficient medical care already exist, including a medical provider's commitment to patient care, the potential negative effect on employability, insurability, and the ability to receive and maintain hospital privileges, and, discipline by the Oregon Medical Board for gross or repeated negligence regardless of whether it causes injury to a patient (*see e.g.*, ORS 677.190(13) (grounds for discipline)). Rewriting Oregon law to create a loss of chance claim is unnecessary to ensure that doctors follow "safety rules" that have no foundation in the actual art of practicing medicine.

In fact, scholars have concluded that allowing recovery against a doctor under a loss of chance injury theory "actually generates more errors affecting deterrence" than the traditional reasonable probability standard of medical causation. Fischer, 36 Wake Forest L Rev at 631-32. Because of the wide variety of patients, ailments, and chances of cure a physician encounters in his

or her practice, the reasonable probability standard of causation "fairly allocates" the mistakes between the patient and the physician and achieves an adequate deterrent effect. *Id*. at 631-32. As one judge noted: "Fairness and the tailoring of liability to those that have actually directly caused harm is also important;" "if deterrence were the sole value to be served by tort law, we could dispense with the notion of causation altogether and award damages on the basis of negligence alone." *Dickhoff*, 836 NW2d at 348 (Dietzen, J, dissenting) (citation omitted; brackets in original omitted).

Indeed, many courts have recognized that the loss of chance theory unfairly punishes physicians while simultaneously over-compensating or under-compensating plaintiffs. *See, e.g. Fennell*, 580 A2d at 213. Consider the following example:

> "[A]ssume a hypothetical group of 99 cancer patients, each of whom would have had a 33 1/3% chance of survival. Each received negligent medical care, and all 99 died. Traditional tort law would deny recovery in all 99 cases because each patient had less than a 50 percent chance of recovery and the probable cause of death was the pre-existing cancer [and] not the negligence. Statistically, had all 99 received proper treatment, 33 would have lived and 66 would have died; so the traditional rule would have statistically produced 33 errors by denying recovery to all 99.
>
> "The loss of chance rule would allow all 99 patients to recover, but each would recover 33 1/3% of the normal value of the case. Again, with proper care 33 patients would have survived. Thus, the 33 patients who statistically would have survived with proper care would receive only one-third of the appropriate recovery, while the 66 patients who died as a result of the pre-existing condition, not the negligence, would be overcompensated by one-

> third. The loss of chance rule would have produced errors in all 99 cases."

Id.

D. Decisions about the loss of chance doctrine are more appropriate for the legislature.

Adoption of the loss of chance doctrine has far reaching consequences that will negatively affect health care in Oregon. Given the significance and breadth of the ramifications that recognizing a new claim would have, it is appropriate to maintain existing law and leave the issue of loss of chance to the legislature. Many courts have taken that approach, recognizing that the legislature may be a more appropriate forum to address the issue due to the ability to conduct in-depth hearings, collect data, and analyze competing policy concerns in detail. *See, e.g.*, *Crosby*, 48 F Supp 2d at 931; *Smith*, 833 A2d at 848-49.

CONCLUSION

The Court should affirm the judgment of the trial court and the Court of Appeals. Oregon law is well settled that in claims based on medical negligence, causation must be shown to a medical probability. The proper inquiry is not whether the defendants were negligent in a manner that *might* have caused plaintiff harm, but whether defendants were negligent in a manner that *probably did* cause the harm for which recovery is sought. Here, the harm for which

recovery is sought is plaintiff's physical injuries as a result of stroke and plaintiff has failed to allege causation.

Respectfully submitted this 3rd day of December 2015.

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Certificate of Compliance

I certify that this brief complies with the word count limitation pursuant to ORAP 5.05(2)(b); the word count is 12,446 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(4)(6).

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CERTIFICATE OF FILING AND SERVICE

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DATED this 3rd day of December 2015.

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