IN THE SUPREME COURT OF THE STATE OF OREGON

JOSEPH L. SMITH, Plaintiff-Appellant, Petitioner on Review, v. PROVIDENCE HEALTH & SERVICES-OREGON, dba Providence Hood River Memorial Hospital, dba Providence Medical Group; Linda L. Desitter, MD; Michael R. Harris, MD; Hood River Emergency Physicians, LLC; and Hood River Medical Group, PC, Defendants-Respondents, Respondents on Review, and PROVIDENCE MEDICAL GROUP, fka Hood River Medical Group, PC; Hood River Medical Group, PC, Defendants.	Supreme Court No. S 063358 Court of Appeals No. A155336 Multnomah County Circuit Court No. 1302-02067

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

Brief in Support of the Petition for Review
of the Decision of the Court of Appeals
April 8, 2015
Opinion before Devore, J.,
Ortega, P.J., and Garret, J
In an Appeal from the Judgment of the Circuit Court
for Multnomah County, Honorable Nan Waller, Judge

[counsel information on inside cover] July 2015

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PRAYER FOR REVIEW

The Oregon Trial Lawyers Association ("OTLA") urges the court to grant review in *Smith v. Providence Health & Services-Oregon*, 270 Or App 325, 347 P 3d 820 (2015). OTLA intends to file a brief on the merits if review is granted.

SUMMARY OF ARGUMENT

The Court of Appeals decision in *Smith*, 270 Or App at 332, is erroneous and warrants review. In this case, plaintiff suffered a stroke. A stroke can cause severe brain injury, in essence destroy parts of a person's mind. However, medical professionals have determined that if a specific medication is given within the initial hours following the stroke, they can reverse or minimize the damage to the mind in 33% of stroke patients. It goes without saying that that opportunity to save the mind of 1/3 of stroke patients is profoundly valuable. In line with that value, it is of little surprise that the provision of such timely medication to stroke victims is a fundamental safety rule governing stroke treatment in the medical community.

In this case, plaintiff (a patient) brought claims against defendants (medical providers) for breaking the above safety rule of care and causing him to lose a one in three chance to recover from his brain injuries. The Court of Appeals determined that the injury was not cognizable. It explained that because "the allegations did not assert that it is more likely than not that plaintiff would have had a better outcome with * * * proper treatment[,] there was no evidence on

which the jury could do more than speculate that * * * negligence *caused* plaintiff's injury". *Smith*, 270 Or App at 332. In other words, the Court of Appeals ultimately determined that the common law does not recognize any harm in the loss of a significant, but less than 50%, opportunity to save a patient from a serious health threat.

The decision is wrong for two fundamental reasons. First, society, the marketplace, the medical community, and patients readily recognize that the opportunity for a positive medical outcome has inherent economic and non-economic value. It follows that a deprivation of that value is a cognizable harm. However, the Court of Appeals decision incorrectly focuses on the lost outcome from the medical treatment as the only available harm and fails to recognize that the loss of a significant chance to save a patient from medical catastrophe in itself is a harm.

Second, the decision below allows Oregon medical providers to freely violate safety rules of care without consequence as long as the rule violation only causes a 50% or less chance of medical injury to the patient. Such a decision subverts the deterrence and accountability objectives of tort law. It fails to deter others from breaking similar safety rules. And, it assigns the economic and non-economic costs of the lost opportunity to the innocent patient rather than the culpable rule-breaker that caused the loss.

This Court should accept review, reverse the Court of Appeals, and hold that tortious deprivation of an opportunity for medical recovery is a cognizable injury.

PROPOSED RULE OF LAW

The loss of a significant, but less than 50%, chance for medical recovery is a cognizable injury.

ARGUMENT IN SUPPORT OF PROPOSED RULE OF LAW

I. Recognizing the harm of a lost chance for medical recovery does not conflict with principles of causation.

The Court of Appeals rejected plaintiff's claim, because it determined that an award damages for a lost outcome that was not "more likely than not" to occur would conflict with principles of causation. *Smith*, 270 Or App at 332. Respectfully, that analysis misses the mark, because it incorrectly focuses on the lost outcome of the treatment as the only injury without adequately considering that the loss of the chance at recovery is also an injury. By doing so, the court incorrectly conflated the lost chance injury with its causation analysis.

The better-reasoned approach is to "recognize loss of chance not as a theory of causation, but as a theory of injury." *Matsuyama v. Birnbaum*, 452 Mass 1, 26-28, 890 NE 2d 819, 839-41 (2008); *See also Alexander v. Scheid*, 726 NE 2d 272, 279 (Ind 2000) ("loss of chance is better understood as a description of the injury than as either a term for a separate cause of action or a surrogate for the causation element of a negligence claim"); *Jorgenson v. Vener*, 616 NW 2d 366, 371 (SD

2000) ("The key to a successful application of this doctrine is recognizing and valuing the lost chance as the compensable injury[.]"). When a medical provider's negligence diminishes or destroys a patient's chance of recovery, the patient has suffered real injury, not the chance of an injury. Indeed, the patient has lost something of great value: a chance to be cured, or otherwise to achieve a more favorable medical outcome. *See Herskovits v. Group Health Coop. of Puget Sound*, 99 Wash 2d 609, 618, 664 P2d 474 (1983) (quoting *James v. United States*, 483 F Supp 581, 587 (ND Cal 1980) ("no one can say that the chance of * * * decreasing suffering is valueless"); *Dickhoff v. Green*, 836 NW 2d 321, 329 (Minn 2013) ("It should be beyond dispute that a patient regards a chance to * * * receive a more favorable medical outcome as something of value."); *Murrey v. U.S.*, 73 F3d 1448 (1996); Dan B. Dobbs et al., *The Law of Torts* § 196, 664 (2d ed 2011).

The Court of Appeals decision implicitly holds the opposite: a patient suffers no injury when he or she loses a significant, but less than 50%, chance to be medical saved from a catastrophic outcome. That holding does not track reality that every single medical patient would beg to differ. It fails to appreciate all of the economic and non-economic value that society, the marketplace, the medical community, and patients already recognize in a significant, but less than 50%, chance at medical recovery.

First, and the most obvious, the loss of such opportunity for recovery is a cognizable harm, because of the very real statistical chance of success. For example, the treatment in this case would reverse serious brain injury in 33 out of every 100 stroke patients. When a medical provider tortiously deprives that treatment to those patients *who would recover* obviously injury occurs. Defendants here however fly an argument that tries to take advantage of their own tortious deprivation of the treatment and argue that the harm is speculative since the only way to prove a patient *would* recover is if defendants provided the treatment in the first place. Therefore, the argument follows, defendants get a pass on the profound harms they caused those 33 human beings. The Fourth Circuit appropriately described such an argument as a fundamentally backwards approach to the problem:

> "When a defendant's negligent action or inaction has effectively terminated a person's [medical] chance of [recovery], it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of [recovery] and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass."

Hicks v. United States, 368 F2d 626, 632 (4th Cir 1966); *see also* King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale LJ 1353, 1378 (1981) (Allowing recovery for the lost opportunity is the most equitable approach because "[b]ut for the

defendant's tortious conduct, it would not have been necessary to grapple with the imponderables of chance.").

Second, the patent economic value that the marketplace places on a significant opportunity for medical recovery also supports that the deprivation of such opportunity is an injury. Every day, Oregon patients pay enormous amounts of money for surgeries, cancer care, heart treatment, and other medical treatments that have significant, but less than 50%, likelihood of medical success. It defies logic to suggest that the tortious loss of something with such easily translatable economic value causes no injury. A. Epstein, *Torts* 252 (1999) ("no patient would be indifferent to that loss of opportunity [of medical success], which is why good physicians command high fees for" medical services).

Third, the loss of a significant, but less than 50%, opportunity of medical recovery creates non-economic harm. Anyone who has seen a loved one address the fluctuating statistics of cancer treatment knows that such treatment even when providing less than a 50% rate of success often can provide a source of hope, emotional sanctuary, and even placebo benefits, by giving a fighting chance against an otherwise assured outcome. Indeed, when the odds are stacked against a person, the solace of a fighting chance against medical catastrophe (brain damage, limb amputation, organ removal, paralysis) is often just what they need to carry

through the trials of their condition. The destruction of that fighting chance is a cognizable emotional injury.

There is no good policy reason for the Oregon common law to create a fiction that a lost medical opportunity is harmless. On the contrary, such loss represents a cognizable injury. This Court should grant review, reverse the court of appeals, and allow an Oregon jury to evaluate that injury suffered by plaintiff.

II. The Court of Appeals decision subverts common law principles of deterrence and accountability.

A far-reaching impact of the Court of Appeals decision is that implicitly allows Oregon medical providers to freely violate safety rules of care without accountability as long as the rule violation only causes a 50% or less chance of medical injury. *See Herskovits*, 99 Wash 2d at 614 (Such an approach provides 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."). That result subverts the common law principles of deterrence and accountability. *See* Restatement (Second) of Torts § 901 (1979) (describing the policy purposes behind tort law).

Indeed, the holding of the appellate court not only fails to deter others from breaking similar safety rules, but potentially affirmatively deprioritizes the following of such rules. By informing medical providers that treatments with less than 50% success rates have no civil accountability, medical providers may very

well allocate funds away from ensuring that such treatments are properly administered.

Second, the decision assigns the economic and non-economic costs of the lost opportunity for recovery to the innocent patient rather than the culpable rule-breaker that caused the loss. This "distorts the loss-assigning role" of tort law and "strikes at the integrity of the torts system of loss allocation." King, , 90 Yale LJ at1377.

The decision below simply fails the principles of deterrence and accountability that are necessary to protect Oregon citizens.

CONCLUSION

For all the reasons stated in this amicus memorandum, and in the original petition for review, OTLA urges the court to grant review and reverse the court of appeals.

DATED this 15th day of July, 2015.

Respectfully submitted,

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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1806 words.

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CERTIFICATE OF SERVICE AND FILING

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