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. S063358 Court of Appeals No. A155336 Multnomah County Circuit Court No. 1302-02067

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER ON REVIEW

Brief on the Merits in Support of the Petitioner on 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

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STATEMENT OF THE CASE

INTRODUCTION

The Court of Appeals in *Smith v. Providence Health & Services-Oregon*, 270 Or App 325, 347 P 3d 820 (2015), erroneously held that a patient cannot bring a claim for damages when a medical provider violates a critical standard of care that deprives the patient of an opportunity for medical recovery if the opportunity for recovery has a 50% or less success rate. Amicus Curiae OTLA urges this Court to reverse that decision.

SUMMARY OF ARGUMENT

The Court of Appeals decision below is erroneous. In this case, plaintiff suffered a stroke. A stroke can cause severe brain injury, in essence destroying parts of a person's mind. However, medical professionals have determined that the provision of specific medication within the initial hours following a stroke can reverse or minimize such brain damage in one-third of stroke patients. That opportunity to save one's mind is undeniably precious. It is therefore unsurprising that the timely provision of such medication to stroke victims is a recognized safety rule, *i.e.*, standard of care, in the medical community.

In this case, plaintiff (a patient) brought claims against defendants (medical providers) for breaking the above safety rule and causing him to lose a one-in-three chance to recover from his brain injuries. The Court of Appeals determined that

those claims were not cognizable. It first explained that a loss of a chance is itself not a cognizable injury. *Smith*, 270 Or App at 329 n 3. Second, the court held that a loss of a chance is not a cognizable form of causation, explaining 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 [brain] injury." *Id* at 332 (quoting *Myers v. Dunscombe*, 64 Or App 722, 723, 669 P2d 388, *rev den*, 296 Or 236, 675 P2d 490 (1983)). In other words, the Court of Appeals determined that the common law does not permit any recovery for the tortious deprivation of a significant, but less than 50%, chance to save a patient from a serious health threat.

The decision is wrong for multiple reasons. First, patients, the medical community, society, and the marketplace readily recognize that the opportunity for a positive medical outcome has inherent value. It follows that deprivation of that value is a cognizable harm. 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, a recovery for this type of injury is consistent with persuasive case law from other jurisdictions and this Court's prior case law. Third, recognizing a lost

opportunity for recovery as an actionable harm is also consistent with the heightened duty of care that medical providers owe their patients.

Lastly, 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 injury to the patient. The decision thereby subverts the deterrence and accountability objectives of tort law. 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 reverse the Court of Appeals, and hold that tortious deprivation of an opportunity for medical recovery is a cognizable injury no matter that the success rate of such an opportunity is 50% or less.

PROPOSED RULE OF LAW

The loss of a significant but 50% or less 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 of 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 for 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 saved, cured, or otherwise 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"); *Dickoff 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 holds the opposite: a patient suffers no injury when he or she loses a significant, but less than (or equal to) 50%, chance to avoid a catastrophic outcome. That holding defies common sense and reality.

First, and most obvious, the loss of such opportunity is a cognizable harm, because of the very real statistical chance of success. For example, the treatment in this case would avert serious brain injury in 33 out of every 100 stroke patients. When a medical provider tortiously deprives that treatment to those 33 patients, an injury obviously occurs. Defendants here, however, try 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 had followed the rules of care and 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. Likewise, if the treatment gave a patient 50-50 odds of recovery, defendants' position also requires that the medical providers get a pass.

The Fourth Circuit appropriately described such an argument as a 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 equitable because "[b]ut for the defendant's tortious conduct, it would not have been necessary to grapple with the imponderables of chance.").

The economic value that the marketplace places on a significant opportunity for medical recovery also shows 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 50% or less, 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) (noting that "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 watched a loved one struggle with the fluctuating statistics of cancer treatment knows that such treatment even when providing a 50% or lower rate of success, can provide hope in the face of

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, or death) 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 Oregon common law to create a fiction that a lost medical opportunity is harmless. On the contrary, such a loss represents a cognizable injury.

II. <u>These Kind of Damages Are Appropriate Under Oregon Law</u>

In *Feist v. Sears, Roebuck & Co.*, 267 Or 402, 412-13, 517 P2d 675, 680 (1973), this Court held that a jury could award damages when a defendant caused a significant, but less than 50% possibility of future injury. In that case, the defendant fractured a child's skull. The fracture caused a possibility, but not probability, that the child would suffer meningitis. *Id.* 405-06. The defendant objected to evidence of the possible injury and to any damages awarded for that possible injury. *Id.* 407-11. This Court held that the damages were recoverable and to the extent that the possibility was low, that was something to be "weighed by the jury." *Id.* at 410 (quoting with approval *Schwegel v. Goldberg*, 209 Pa Super, 280, 228 A2d 405, 409 (Pa 1967). There is no floor of statistical probability that a potential injury must

meet to be cognizable, rather such probabilities are just evidence that the jury considers when determining the amount of damages, if any, to assess for the injury.

Also, in *Conachan v. Williams*, 266 Or 45, 56, 511 P2d 392 (1973) this Court allowed for damages based on lost chances that were far from certain. In that case, the Court discussed whether a plaintiff could recover for impairment of future earning capacity no matter whether the plaintiff was employed at the time of the injury. The Court explained that "[domestic spouses] or students who, prior to injury, have not earned as much as they could in the marketplace, are entitled to recover damages for loss of full time earning capacity." *Id.* (quoting with approval *Espana v. United States*, 616 F2d 41, 43 n 2 (2d Cir 1980). Futures and outcomes are always uncertain. But that does not turn the deprivation of an opportunity into mere speculation. Opportunities have non-speculative value and juries possess sufficient intelligence to assess that value upon the adversarial presentation of evidence by the parties.

As the Supreme Court of Minnesota recently explained when rejecting an argument that loss of chance damages in the medical negligence context were too speculative:

> "Indeed, in light of modern medical science, allowing a patient to recover damages for a lost chance of recovery or survival is no more abstract, speculative, or hypothetical than allowing the jury to determine damages for the loss of a victim's earning capacity throughout his or her lifetime—an inquiry that courts and juries routinely undertake, and that our court has long endorsed."

Dickhoff, 836 NW 2d at 335 (citing *DePass v. United States*, 721 F2d 203, 207 (7th Cir.1983) (Posner, J., dissenting) (explaining that probabilities that are derived from statistical studies are just as reliable as other categories of evidence in personal injury cases).

III. Prior Case Law: *Joshi v. Providence*

In *Joshi v. Providence Health Sys. of Oregon Corp.*, 342 Or 152, 149 P3d 1164 (2006), this Court confronted similar facts of negligence in which the medical provider defendant tortiously deprived a stroke patient of similar medication. However, in that case the patient died as opposed to suffered a brain injury. Similar to the one in three chance here that the medication would prevent brain injury, the medication in *Joshi* created a 30% chance that the patient would survive the stroke. Because of that difference in injury type, this Court's decision in *Joshi* was constrained by the text of the wrongful death statute, ORS 30.020.

This Court emphasized in its analysis that ORS 30.020 requires that to bring a wrongful death claims, "the death of a person [must be] caused by * * * another." *Id.* at 155 (quoting ORS 30.020). This Court ultimately held that because the text of ORS 30.020 requires that a defendant's act *cause* the decedent's death, a "showing that defendants' negligent act or omission merely increased the risk of death" is insufficient to support a wrongful death claim. *Id.* at 164. The Court particularly

explained that when a claim does not depend on death being caused by the negligence a different result may follow:

> "Although deprivation of a 30 percent chance of survival may constitute an injury, the injury that is compensable under ORS 30.020 is death. Therefore, plaintiff has failed to prove the elements of the wrongful death action as set forth in the statute. The trial court therefore correctly directed a verdict for defendants."

Id.

In this case, plaintiff need not show that defendants' negligence caused death for the claim to survive. Plaintiff need only show that the negligence caused an injury. As explained above, the negligence caused the cognizable injury of a lost opportunity for medical recovery. *Joshi* is distinguished and it simply does not answer the question before the Court in this case.

IV. Failure to Recognize Lost Opportunity Damages Subverts Common Law Principles of Deterrence and Accountability

As this Court recently reaffirmed in in *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 551-52, 340 P3d 27, 33, (2014), the:

> "'[C]ommon,' or public, interest is embodied, in part, in the principles of tort law. As a leading treatise explains: 'It is sometimes said that compensation for losses is the primary function of tort law * * * [but it] is perhaps more accurate to describe the primary function as one of determining when compensation is to be required. * * * * *
>
> "'[Additionally, t]he 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer.' A related function of the tort system is to distribute the risk of injury to or among responsible parties."

(Bracket and ellipses in original) (citations omitted) (quoting and citing W. Page Keeton, Prosser and Keeton on the Law of Torts § 4, 20–25 (5th ed 1984). However, a far-reaching effect of the Court of Appeals decision is that it rejects "compensation for losses" and it fails to prevent future harm through "admonition of the wrongdoer."

The Court of Appeals decision allows 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. *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 Bagley, supra*; *see also* Restatement (Second) of Torts § 901 (1979) (describing the policy purposes behind tort law).

Indeed, the decision below not only fails to deter others from breaking similar safety rules, but potentially affirmatively deprioritizes adherence to those rules. By informing medical providers that treatments with 50% or lower success rates have no civil accountability, medical providers may very well allocate funds away from ensuring that such treatments are properly administered. Also, 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 from the negligence of their medical providers.

V. The Nature of the Relationship Requires These Damages

The reasoning above applies to loss-of-chance claims generally. However, this Court need not rest its decision in this case on that broad basis. That is because the heightened duty that flows from the special relationship between medical providers and patients further justifies recognizing loss of a chance as a cognizable injury.

In *Curtis v. MRI Imaging Servs. II*, 327 Or 9, 15-16, 956 P2d 960, 963 (1998), this Court recognized that a medical practitioner defendant may be held accountable for some types of harms that other tort defendants are not. Specifically, this Court explained that when the standard in the particular medical profession:

> "recognizes the possibility of [such harm] and dictates that certain precautions be taken to avoid or minimize it, the law will not insulate persons in that profession from liability if they fail in those duties, thereby causing the contemplated harm."

Id. (allowing emotional distress damages in a medical negligence case in the absence of a physical injury, despite the general bar to recovering such damages in tort cases when there is no an associated physical injury).

That is certainly the case here. The medical profession "recognizes the possibility" that a stroke patient will lose a significant opportunity for recovery if appropriate medication is not provided. Accordingly, the rules of care "dictate[] that certain precautions be taken to avoid" failures in providing that medication to ensure that the patient has that opportunity for recovery. Because standards of care for medical professionals require that they avoid depriving a patient of significant and critical opportunities for recovery, this Court, like in *Curtis*, should allow for a jury to assess damages when a medical provider tortuously deprives a patient of such an opportunity for recovery.

The availability of this additional type of damages is also particularly appropriate because of the unique reliance that a patient has on a medical provider. This Court's case law has long recognized that such positions of reliance create responsibility for harms beyond the standard common law duty.

> "This is so because the party who is owed the duty effectively has authorized the party who owes the duty to exercise independent judgment in the former party's behalf and in the former party's interests. In doing so, the party who is owed the duty is placed in a position of reliance upon the party who owes the duty; that is, because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely upon the latter to achieve a desired outcome or resolution."

Conway v. Pacific University, 324 Or 231, 239-40, 924 P2d 818 (1996).

The Court of Appeals decision comes to the opposite conclusion. Its result is that even though a stroke patient is "placed in a position of reliance upon the [the

medical provider and] has given responsibility and control over [preserving opportunities for medical recovery in] the situation at issue to the" the medical provider, the patient now has ***no*** "right to rely upon the [medical provider] to achieve [that] desired outcome or resolution." When the nature of the reliance relationship is to preserve those recovery opportunities, the patient should not have to suffer indifference to the loss of that opportunity.

CONCLUSION

For all the reasons stated in this amicus memorandum, OTLA urges the court to reverse the Court of Appeals.

DATED this 29th day of October, 2015.

Respectfully submitted,

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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 3,405 words.

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CERTIFICATE OF SERVICE AND FILING

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