No. 84712-6

J.M. JOHNSON, J. (dissenting)—The majority improperly extends *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn. 2d 609, 664 P.2d 474 (1983) to create a cause of action for Mrs. Linda Mohr and her husband against the emergency professionals and hospital that provided for her care after she crashed her own car. These medical professionals did not proximately cause the ultimate, sad injury Mrs. Mohr suffered–namely, a distal dissection of her right internal carotid artery and loss of brain tissue. Proximate cause is a required element under Washington's liability law (RCW 7.70.040). Because the majority creates a speculative cause of action that is beyond the express legislative mandate of RCW 7.70.040, I dissent.

Facts

Mrs. Mohr crashed her car into a utility pole at approximately 45 miles per hour after running into four other vehicles during an accident in which she was

driving alone. The Richland Fire Department responded. Mrs. Mohr was treated by emergency medical personnel (EMPs) and brought by ambulance[1] to the emergency room at Kadlec Medical Center (KMC) at 3:44 p.m. on August 31, 2004.

Mrs. Mohr was seen in the emergency room by Dr. Dale Grantham. Dr. Grantham and nursing staff noted that Mrs. Mohr had suffered injuries to her head, face, mouth, right forearm, and left leg due to the accident. Dr. Grantham and nursing staff also noted that Mrs. Mohr suffered from diabetes, that her blood sugar was low upon rescue by the EMPs at the crash site, and that she had not been ambulatory at the scene of the accident.

Dr. Grantham performed a physical exam. During the exam, Mrs. Mohr did not report or demonstrate any acute distress, swelling of the head, numbness, or neck pain. She did not exhibit any motor or sensory deficits. Dr. Grantham ordered blood samples, a finger stick glucose sample, and had Mrs. Mohr taken for x-rays. He also ordered a computerized tomography (CT) scan of her head. The x-rays and CT scan came back normal; they did not show any broken bones, fractures, dislocations, or intracranial injury.

Mrs. Mohr suffered lacerations to her right eyelid and right hand as a result of

[1] Mrs. Mohr has not sued the Richland Fire Department, ambulance, or the EMPs.

her accident. Dr. Grantham sutured these lacerations at 6:36 p.m. He also fed her at this time and noted that she was alert and able to walk to the bathroom, albeit "slightly wobbly on foot." Clerk's Papers (CP) at 91, 94. Another finger stick glucose sample was taken, and a nurse applied antibacterial ointment and dressed Mrs. Mohr's leg wound.

Dr. Grantham returned at 7:56 p.m. to speak with Mrs. Mohr and her husband. She reported a pain level of "7" on a scale of 1 to 10. Dr. Grantham prescribed Darvocet, a pain medication, and warned Mr. and Mrs. Mohr about its sedative effect. Dr. Grantham noted that Mrs. Mohr was in "good condition, stable condition and improved condition." *Id.* at 94. The doctor proceeded to give Mrs. Mohr and her husband discharge instructions, telling them to return or contact their physician immediately if her condition worsened or changed unexpectedly, if she did not improve, or if other problems arose. The Mohrs left for their home at 8:20 p.m.

At 6:32 a.m. the following morning, Mr. Mohr called the Richland Fire Department. Mrs. Mohr was experiencing weakness, a lack of coordination, and nausea. The fire department transported Mrs. Mohr to the emergency room at the same hospital (KMC). She was admitted at 7:11 a.m.

Mrs. Mohr was seen by Dr. Brian Dawson at 7:16 a.m. She reported

weakness and difficulty walking, but no numbness or tingling.[2] Dr. Dawson was aware of Mrs. Mohr's history and performed a physical exam. Dr. Dawson noted that she was somnolent (drowsy), had normal speech, and had weakness on her left side. He ordered a CT scan, which was performed between 8:10 a.m. and 8:19 a.m.

The results of this CT scan, which came back before 9:30 a.m., were not normal. Instead, it revealed findings that the radiologist thought "may be secondary to evolving infarct which is in the right middle cerebral artery territory."[3] The radiologist recommended a magnetic reasoning imaging (MRI) examination. Mrs. Mohr was transported to receive the MRI at 9:30 a.m.

The results of the MRI, which came in by 10:32 a.m., led to the discovery of a dissected right internal carotid artery. Dr. Dawson discussed the situation with Dr. Brooks Watson II, and they agreed upon a treatment plan. Mrs. Mohr was transferred to the intermediate care unit at 11:46 a.m., and Dr. Watson prescribed aspirin around 2:00 p.m.

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[2] Mrs. Mohr did not report numbness in her left hand to a medical professional until she was seen by Dr. Brooks Watson II, the third doctor to attend her, at approximately 2:00 p.m. on September 1, 2004. CP at 122.

[3] CP at 119. An "infarct" is an area of coagulation necrosis in tissue resulting from obstruction of the local circulation by a thrombus (blood clot) or embolus (foreign particle circulating in the blood). Webster's Third New International Dictionary 1157 (2002). An infarct is not, however, the medical equivalent of a "stroke." It is thus inaccurate to state that Mrs. Mohr was diagnosed as having a stroke at that point in time. *Cf.* majority at 3.

An urgent ultrasound was performed to rule out carotid dissection in the common carotids, but that procedure could not assess the distal internal carotid artery. For this, a CT angiogram was ordered. The CT angiogram was performed at 2:30 p.m. and confirmed that Mrs. Mohr had a distal dissection of the right internal carotid artery. The findings were discussed with Dr. Watson at 4:50 p.m.

Dr. Watson discussed the situation with Harborview Medical Center after trying to attempt "neurosurgical input locally."[4] He connected with Dr. Jerry Jurkovitz of Harborview, who agreed to accept Mrs. Mohr and to assume care. It was arranged for Mrs. Mohr to be "life-flighted" to Harborview Medical Center. Dr. Watson ordered intravenous heparin (an anticoagulant) for stabilization. However, he did not administer that drug because her physician sons and the neurosurgeons at Harborview requested that medication be withheld. The doctors at Harborview were not, however, opposed to Dr. Watson's providing aspirin therapy. Aspirin was administered to Mrs. Mohr that evening by a nurse, at the direction of Mrs. Mohr's sons. Some time afterward, Mrs. Mohr was transported to Harborview, where various doctors provided her care.[5]

[4] CP at 329.

[5] Mrs. Mohr has not sued Harborview or the doctors at Harborview.

One of Mrs. Mohr's sons, a fifth-year resident in diagnostic radiology at the University of Washington, testified at deposition that Mrs. Mohr had lost between one-quarter and one-third of her brain tissue in the period following the accident on August 31, 2004.[6] The record does not indicate the numerous patients Drs. Grantham, Dawson and Watson cared for in the emergency room during the time period in question, nor does it detail events after Mrs. Mohr was taken to Harborview.

Analysis

This case boils down to statutory interpretation. Because RCW 7.70.040 does not provide the cause of action the majority creates, its analysis and result are incorrect. Our legislature has simply not required the impossible of medical caregivers: to guarantee the best possible outcome for patients they help.

A. Standard of Review

Statutory interpretation is a question of law that this court reviews de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 104-05, 26 P.3d 257 (2001); *cf.* majority at 6 (citing *Berger*, 144 Wn.2d at 103). If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. *Berger*, 144 Wn.2d

[6] *See* CP at 183.

at 105. Plain words do not require construction. *Id.* Instead, courts assume the legislature means exactly what it says. *Id.* Courts should not force a given construction by imagining a variety of alternative interpretations. *See id.* (quoting *W. Telepage, Inc. v. Dep't of Financing*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000)).

B. Respondents Are Entitled to Judgment as a Matter of Law: the Mohrs Have Not Established the Statutorily Required Element of Proximate Cause

The language of RCW 7.70.040 is plain and unambiguous. With respect to the issue raised in this motion for summary judgment, the health care provider's alleged failure to exercise the acceptable standard of care must be a "proximate cause of the injury complained of" before that health care provider may be subject to liability under chapter 7.70 RCW. Proximate cause is a necessary element of proof. RCW 7.70.040.

A "proximate cause" of an injury is defined as a cause that, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred. *Stoneman v. Wick Constr. Co.*, 55 Wn.2d 639, 643, 349 P.2d 215 (1960). To establish proximate cause, the plaintiff must show both "cause in fact" (that the injury would not have

occurred but for the act in question) and "legal causation." *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). "Legal causation" depends on considerations of "'logic, common sense, justice, policy, and precedent.'" *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974) (quoting 1 Thomas Atkins Street, The Foundation of Legal Liability 110 (1906)). It involves the "determination of whether liability *should* attach as a matter of law given the existence of cause in fact." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

The injury complained of in this case is the distal dissection of Mrs. Mohr's right internal carotid artery, which led to a loss of brain tissue. The appellants offer no evidence or testimony, however, that Drs. Grantham, Dawson or Watson caused this injury. They have not established cause in fact. Consequently, the appellants have not made a showing sufficient to establish the existence of an element essential to their case, and on which they will bear the burden of proof at trial: proximate cause. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Thus, there can be no "genuine issue as to any material fact," and the respondents are entitled to a "judgment as a matter of law." CR 56(c); *Celotex*, 477

U.S. at 322.

Conclusion

We should affirm the trial court and answer the question certified to us in the negative. The nonbinding plurality opinion in *Herskovits* should not be extended to rewrite the medical malpractice statutory scheme adopted by the legislature. Our application of the separation of powers doctrine is not a one-way street.

Recovery on the basis of "a lost chance of a better outcome" from these targeted medical care providers is highly speculative and places an impossible burden on doctors and hospitals.[7] Order of Certification at 1. This is not a compensable injury under Washington law. I dissent.

[7] As noted above, neither the Richland Fire Department, the ambulance, the EMPs, Harborview, nor the doctors at Harborview were sued in this case.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Gerry L. Alexander