Oregon Supreme Court to decide whether "loss of chance" for better outcome is a legitimate cause of action in medical malpractice claim

By Michael H. Weier ■ February 22, 2016

The Oregon Supreme Court has elected to consider whether a claim of "loss of chance" is a legitimate and proper cause of action in a personal injury action in the matter of *Joseph L. Smith v. Providence Health & Services.*[1]

The salient facts as depicted in the briefs of the parties and articulated in the decisions of the lower courts are essentially undisputed. Joseph L. Smith presented to Providence Hood River Memorial Hospital within two hours of what he believed to have been symptoms of the early onset of a stroke. A CT scan did not reveal bleeding or a clot in his brain. The emergency department physician, Linda Desitter, MD, did not diagnose a stroke or recommend Mr. Smith take aspirin. Rather, Dr. Desitter concluded Mr. Smith's symptoms were due to his use of sleeping aids in the hours preceding onset of the symptoms and discharged him from the emergency department to return home. A few hours later, Mr. Smith returned to the hospital emergency department with increased head pain and visual problems. Dr. Desitter again examined Mr. Smith, diagnosed a headache and prescribed Vicodin. Dr. Desitter neither obtained a brain MRI nor prescribed aspirin.

Three days later, Mr. Smith had a follow-up appointment with his family practitioner, Michael Harris, MD. Dr. Harris ordered a brain MRI, but did not prescribe aspirin. Mr. Smith's symptoms worsened as he waited for the results of the MRI, which ultimately revealed "substantial brain damage from a stroke."

Mr. Smith filed a medical negligence claim against the hospital and the physicians in Multnomah County Circuit Court. In his complaint, Mr. Smith alleged collective failure to obtain a timely diagnostic MRI and prescribe aspirin resulted in a 33 percent chance for a better outcome of no or reduced damage. The hospital and physicians filed a motion to dismiss the complaint. The trial court granted the motion and dismissed the lawsuit, declaring "loss of chance" is not a cause of action for personal injury, including medical malpractice, in Oregon. Mr. Smith appealed and the Court of Appeals affirmed the trial court. Mr. Smith appealed further and filed a Petition for Review by the Oregon Supreme Court.

Should the high court allow the "loss of chance" cause of action, then such a decision may have an impact upon the administration of workers' compensation claims

The Oregon Supreme Court has accepted Mr. Smith's appeal to consider whether and to what extent "loss of chance" is a legitimate cause of action for

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Loss of chance (continued)

personal injury, including medical negligence. The Supreme Court granted amici curiae ("friend of the court") status to the American Medical Association (AMA) and the Oregon Medical Association (OMA), which filed a joint brief. The AMA and OMA joined the hospital and physicians and have encouraged the Oregon Supreme Court to affirm the Court of Appeals and deny the request to recognize "loss of chance" as a legitimate cause of action in a medical malpractice claim.

Common law typically demands a plaintiff to establish the alleged negligence of the defendant(s) caused damage by proof of likelihood of greater than fifty percent.[2] In this particular matter, Mr. Smith asks Oregon's high court to allow for a cause of action based upon substantially less than the fifty-percent-likelihood threshold.[3]

Should the high court allow the "loss of chance" cause of action, then such a decision may have an impact upon the administration of workers' compensation claims. Workers' compensation systems generally recognize conditions that arise as a consequence of an industrial injury or occupational disease. Thus, if a physician commits medical negligence or malpractice while treating a workers' compensation claimant, the condition and disability that may arise from such medical negligence will likely be covered under the workers' compensation claim.

The Oregon Supreme Court previously denied "loss of chance" as a proper cause of action in a claim of legal malpractice[4] and in an action for wrongful death.[5] In the coming months, the Supreme Court will decide whether and to what extent to recognize "loss of chance" as a legitimate cause of action in a personal injury claim of medical negligence. ■

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[1] *Joseph L. Smith v. Providence Health & Services - Oregon, Linda Desitter, MD, Michael Harris, MD, Hood River Emergency Physicians, LLC*, A155336; SC S063358.

[2] *See, e.g., Joshi v. Providence Health Sys. Of Or. Corp*., 342 Or 152, 158-59, 149 P3d 1164 (2006).

[3] As reflected above, Mr. Smith alleges a statistical likelihood of a 33 percent chance of a better outcome had the hospital or physicians obtained a timely brain MRI or prescribed aspirin. This figure implies double the likelihood of no improvement with a timely diagnostic MRI or administration and use of aspirin (67% chance of no improvement versus 33% chance of improvement).

[4] *Drollinger v. Mallon,* 350 Or 652, 260 P3d 482 (2011).

[5] *Joshi v. Providence Health Sys. Of Or. Corp., supra.*