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COURT OF APPEALS

STATE OF NEW YORK

MARCIA A. WILD, ET AL.,

Respondents,

-against-

No. 97

CATHOLIC HEALTH SYSTEMS, ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
April 24, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 97, Wild v. Catholic
2 Health.

3 Counselor, wait one second.

4 (Pause)

5 Counselor, would you like any rebuttal time?

6 MR. WILLETT: Your Honor, we would request two
7 minutes for rebuttal.

8 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go
9 ahead.

10 MR. WILLETT: Good afternoon, Your Honors. May
11 it please the court. My name is Michael Willett. I
12 represent Dr. Martin and Buffalo Emergency Associates. We
13 are asking the Court to grant a new trial to Dr. Martin
14 because of an erroneous charge on the issue of proximate
15 cause.

16 CHIEF JUDGE LIPPMAN: What's - - - what's
17 inconsistent about charging a - - - a proximate cause and
18 then loss of chance? What's - - - why can't the two blend
19 together appropriately in a charge?

20 MR. WILLETT: Your Honor, I -- I would contend
21 that the charge that was given in this case and the - - -
22 and the loss of chance theory entirely is inconsistent
23 with what this Court has held since, I think - - -

24 CHIEF JUDGE LIPPMAN: How so?

25 MR. WILLETT: - - - the 1800s.

1 CHIEF JUDGE LIPPMAN: How so?

2 MR. WILLETT: That the - - - the standard has
3 always been probability. It goes back to the 1800s. As
4 recently as three weeks ago in the Oakes case, this Court
5 cited to Mortensen which establishes the standard for
6 proximate cause is more probable than not.

7 JUDGE PIGOTT: But in this case, it was the
8 defense that wanted the general charge, not the - - - not
9 the two-question charge which may have solved this
10 problem. But more imp - - -

11 MR. WILLETT: Your Honor, that's - - -

12 JUDGE PIGOTT: But more importantly than that,
13 if you look at - - - it seems to me when you - - - when
14 everyone else gets no-caused on this thing, it was - - -
15 it was Dr. Dean, I think, who what was one of the experts
16 who said that the subsequent surgeries would have been
17 there no matter what. You know, once - - - once the
18 esophageal - - - you know, once there had been that - - -
19 that thing, and so did Downing. And so everybody gets out
20 except the one person who allegedly did the - - - the - -
21 - committed the negligence with respect to the
22 endotracheal tube, and therefore, wouldn't this issue go
23 away?

24 MR. WILLETT: It would not, Your Honor. And the
25 - - - and the reason why that is is because the theories

1 against Dr. Martin were not restricted to the - - - the
2 way that the intubation was conducted. There were five
3 different theories against Dr. Martin. It's not - - -

4 JUDGE SMITH: But - - - but it was your
5 objection to the special verdict that prevented us from
6 knowing which theory the jury found on.

7 MR. WILLETT: Your Honor, there's no support in
8 the record for that, that there's an objection on the part
9 of Dr. Martin in the verdict sheet.

10 JUDGE SMITH: Well, as I - - - as I read it,
11 it's - - - the plaintiff's lawyer at the charge conference
12 says I was going to - - - we were going to have a special
13 verdict but the defendant's lawyer is objecting, so I'll
14 drop it. Is that a fair summary?

15 MR. WILLETT: He did, Your Honor. And I would -
16 - - I would urge the court to review the proposed verdict
17 sheets that are in the record. There is a verdict sheet
18 from the plaintiff which outlines - - - which divides the
19 allegations against Dr. Martin into two categories: the
20 intubation and the post-intubation. And if you read it
21 carefully, the jury could actually have found Dr. Martin
22 liable without finding negligence, because it asks the
23 jurors to answer the negligence questions and then goes on
24 to a causation question that says, was any action or
25 omission of Dr. Martin a substantial factor in causing

1 injury to Mrs. Horn?

2 JUDGE PIGOTT: But you could have - - - you
3 could have whittled it down and still gotten what you now
4 say was unclear.

5 MR. WILLETT: But again - - - again, Your Honor,
6 there's five different theories here. There was no
7 request by anyone to charge each and every one of those
8 theories.

9 JUDGE PIGOTT: Let's assume all that's true.
10 You said, let's do a general charge, and you got a general
11 charge and you got a general verdict.

12 MR. WILLETT: Correct, Your Honor. And - - -
13 and again, there's - - - this is not the Suria case; this
14 is not Davis against Caldwell. The reason why you have to
15 request the separate theories as a defendant is if you
16 were in the situation where you're saying that there's
17 insufficiency with regard to one or more of the theories
18 of liability. That's not what we have here. There wasn't
19 any claim of insufficiency. Dr. Sixsmith came out as an
20 expert and testified as to each one of those five
21 different theories. There isn't a claim by the defense
22 that there's insufficiency here.

23 JUDGE SMITH: So you're - - - so you're saying
24 that if - - - where there's an error in the charge and a
25 special verdict form might have rendered the error

1 harmless, you can't - - - we can't affirm for that just
2 because you oppose the special verdict form. You're
3 saying you don't have an obligation to get a special
4 verdict form just - - - just for a harmless error record.

5 MR. WILLETT: Correct, Your Honor, because
6 remember, our position for the defense was that this
7 charge was erroneous for any theory. There wasn't any
8 reason to differentiate among the different theories, and
9 that's why this case is different from Suria.

10 JUDGE SMITH: Well, wait a minute. How - - -

11 JUDGE GRAFFEO: You - - - you want us to say
12 that there can never be recovery under a loss of chance
13 theory?

14 MR. WILLETT: I'm saying that the only time you
15 can recover under a loss of chance theory is if it meets
16 the standard that this court has set forth for the last
17 hundred-odd years of probability.

18 CHIEF JUDGE LIPPMAN: But why - - - why doesn't
19 one go to the - - -

20 MR. WILLETT: - - - more probable than not.

21 CHIEF JUDGE LIPPMAN: Counselor - - -

22 JUDGE GRAFFEO: I thought you - - -

23 CHIEF JUDGE LIPPMAN: - - - why doesn't - - -

24 JUDGE GRAFFEO: You - - - you want more than
25 fifty percent?

1 MR. WILLETT: Whatever the - - - the sta - - -

2 JUDGE GRAFFEO: I - - - I mean, looking - - -

3 looking at the rules that have been articulated around the
4 country, there appears to be about three different ways
5 that - - -

6 MR. WILLETT: There are - - -

7 JUDGE GRAFFEO: - - - state courts have gone on
8 this loss of chance.

9 MR. WILLETT: Yes, there - - -

10 JUDGE GRAFFEO: I'm trying to figure out what
11 you're proposing we do or not do.

12 MR. WILLETT: Your Honor, we're proposing this -
13 - - this court stick with the standard that it has been
14 applied - - -

15 CHIEF JUDGE LIPPMAN: But why can't that - - -

16 MR. WILLETT: - - - that you have to show
17 probability - - -

18 CHIEF JUDGE LIPPMAN: Counselor, why can't that
19 go to the element of - - - of plaintiff's injury and not
20 causation? Why can't you have loss of chance? What's - -
21 -

22 MR. WILLETT: Because I think - - - I think that
23 it's - - -

24 CHIEF JUDGE LIPPMAN: Why should we say, in
25 effect, I think that's what you're saying, that - - -

1 MR. WILLETT: What the Court - - -

2 CHIEF JUDGE LIPPMAN: - - - what Judge Graffeo
3 asked you that we can never have a loss of chance charge.

4 MR. WILLETT: You - - - there are jurisdictions,
5 Your Honors, that find that the loss of opportunity is
6 itself an injury, and then you have to meet a proximate
7 cause standard in order to find that.

8 JUDGE PIGOTT: But those - - - those cases - - -
9 you know, you look at the - - - the kidney case, I think,
10 out of the Fourth Department, then there's one in
11 downstate with respect to childbirth. I mean, there's - -
12 - there's clear issues there, you know, with respect to
13 the loss of chance. Here, there's only two questions:
14 was she negligent and they said yes, and was her
15 negligence the proximate cause of the injuries and they
16 said yes. The loss of chance never got in there.

17 MR. WILLETT: It did, Your Honor, because it was
18 in the charge - - -

19 JUDGE PIGOTT: Well, yeah, but I mean, that - -
20 -

21 MR. WILLETT: - - - because the judge said you
22 can meet - - -

23 JUDGE PIGOTT: There's a lot of things in the
24 charge, though, Mr. Willett. I mean, you can't say, well,
25 I lost, therefore they must have done something wrong with

1 this charge because the judge said, you know, the burden
2 is on the plaintiff and - - - and we kind of think that
3 she was soft on that.

4 MR. WILLETT: But it's important in this case
5 because the judge said that as long as there was more than
6 a slight chance of a connection between the injury and the
7 defendant's conduct, that would be enough - - -

8 CHIEF JUDGE LIPPMAN: So you're saying - - -

9 MR. WILLETT: - - - to meet the standard of
10 proximate cause.

11 CHIEF JUDGE LIPPMAN: - - - we know that it
12 changed the result because of that?

13 MR. WILLETT: Would it change the result? Yes.
14 There are several ways - - -

15 CHIEF JUDGE LIPPMAN: How do - - -

16 MR. WILLETT: - - - you could get to that.

17 CHIEF JUDGE LIPPMAN: How do we know that?

18 MR. WILLETT: Remember, the - - - the testimony
19 was - - - and before I even get to that, and - - - and
20 it's still a response to Judge Piggott's question, the
21 case wasn't tried on a loss of chance theory. The experts
22 for the plaintiff - - -

23 CHIEF JUDGE LIPPMAN: But - - - but say it's
24 error that - - - how do you - - - how do you - - -

25 MR. WILLETT: It is error.

1 CHIEF JUDGE LIPPMAN: Say it's error.

2 MR. WILLETT: How does it affect it?

3 CHIEF JUDGE LIPPMAN: How does it change the
4 result?

5 MR. WILLETT: It would change the result in
6 several possible ways, Your Honor. Remember, one of the
7 theories of - - - against Dr. Martin was that she allowed
8 subsequent attempts at intubation.

9 JUDGE SMITH: Well, now I think we all
10 understand that it could have changed the result - - -

11 MR. WILLETT: Yes.

12 JUDGE SMITH: - - - but on the other hand, if the
13 jury found, as very likely they did, it seems to me, that
14 it was Dr. Martin who negligently - - - negligently injured
15 the esophagus, then loss of chance becomes meaningless;
16 it's logically irrelevant, right?

17 MR. WILLETT: Except for we don't know that,
18 Your Honor.

19 JUDGE SMITH: I understand, but - - -

20 MR. WILLETT: Remember - - -

21 JUDGE SMITH: I understand, but we would if you
22 - - - we might if you had a special verdict saying did she
23 hurt the esophagus.

24 MR. WILLETT: But there was no claim of - - - of
25 insufficiency here. I mean, remember, the other thing - -

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JUDGE SMITH: Well, you're raising it.

MR. WILLETT: - - - on that partic - - -

JUDGE PIGOTT: You're - - - you're raising something the plaintiff was not raising. They - - - when they - - - when they went after Downing, you didn't - - - there was no allegation by Martin saying, I - - - all right, if I was negligent in the - - - in the intubation, some of that - - - some of the damages were not caused by me but were caused by Dr. Downing when he didn't properly diagnosis the fact that there had been this rupture of the esophagus, but the doctors never cross-claimed, they never - - - they never sought indemnification from each other. So it was a straight shot, either Martin or no, and it turned out to be Martin.

MR. WILLETT: But there - - - but the other part that you have to remember is that every single doctor who testified in the case conceded that without negligence, it is possible to inadvertently perforate the esophagus by placing the tube in the esophagus rather than in the trachea.

JUDGE PIGOTT: Right.

MR. WILLETT: Every single doctor - - -

JUDGE PIGOTT: Right.

MR. WILLETT: - - - conceded that - - -

1 JUDGE PIGOTT: Right.

2 MR. WILLETT: - - - that it was a complication -

3 - -

4 JUDGE PIGOTT: Every single doctor can concede

5 that it's possible to take off the wrong leg, too. I

6 mean, it doesn't make any difference - - -

7 MR. WILLETT: Yes.

8 JUDGE PIGOTT: - - - what they concede.

9 MR. WILLETT: But if they concede that, you

10 can't - - - you can't assume from this record that the

11 finding of negligence on the part of Martin was because

12 she negligently intubated the patient - - -

13 JUDGE PIGOTT: What else would it have been?

14 JUDGE GRAFFEO: Maybe - - -

15 MR. WILLETT: - - - because there were - - -

16 JUDGE GRAFFEO: Maybe the jury - - -

17 MR. WILLETT: - - - four other theories.

18 JUDGE GRAFFEO: Maybe the jury was - - - was

19 convinced because she failed to follow up at that

20 juncture.

21 MR. WILLETT: Exactly, Your Honor.

22 JUDGE GRAFFEO: She left - - - she left - - -

23 MR. WILLETT: Exactly, Your Honor.

24 JUDGE GRAFFEO: - - - and assumed that the next

25 physician was going to do something about it - - -

1 MR. WILLETT: Yes, they - - -

2 JUDGE GRAFFEO: - - - and maybe they considered
3 that to be negligence.

4 MR. WILLETT: Yes, they could have, and that
5 raises a major issue on proximate cause.

6 JUDGE SMITH: Did - - - at that point you say
7 the loss of chance becomes relevant.

8 MR. WILLETT: It - - - the charge then becomes
9 relevant at that point because the damage - - - the
10 perforation, we know, occurred from the intubation, but we
11 don't know that there's a causal connection between
12 negligent intubation because it could have been an
13 inadvertent non-negligent intubation.

14 JUDGE PIGOTT: Yeah, but - - - but I - - - then
15 what do you do with Downing and, I think, Dean, both of
16 whom said it makes no difference when - - - when there's
17 going to be a diagnosis of - - - of this - - -

18 MR. WILLETT: And this is - - -

19 JUDGE PIGOTT: - - - because all of this is - -
20 - is a sequela of the - - - of the rupture of the - - - of
21 the esophagus that was done as - - - at the intubation.

22 MR. WILLETT: You then have Dr. Shoag, you have
23 the plaintiff's expert who says that it - - - if the
24 diagnosis had been made on the 22nd that a lot of these
25 consequential damages would have been avoided and that she

1 wouldn't have needed the permanent feeding tube - - -

2 JUDGE PIGOTT: But that - - -

3 MR. WILLETT: - - - and that raises a
4 substantial proximate cause.

5 JUDGE PIGOTT: Doesn't that go back to my point
6 that Martin wasn't saying that - - - that Dean - - - was
7 it Dean? I'm getting - - - I'm going to get all these
8 doctors mixed up - - - that they - - - the ones that were
9 also charged with negligence who were found not - - - were
10 found not liable, she didn't make any accusations as to
11 them.

12 MR. WILLETT: She did not, but the plaintiff
13 did. And the jury could have found, based on the
14 plaintiff's testimony, that Dr. Martin was not negligent
15 in intubating the patient but should have charted or done
16 something to get the consultation from - - - from Dr.
17 Downing immediately and that by not doing that, she was
18 negligent. Then it's a substantial question as to whether
19 all of the consequential damages are due to the initial
20 intubation or whether the delay made a difference. And
21 when you change the standard of proof on proximate cause,
22 that could - - - that could tip the - - - the scale as far
23 as - - -

24 JUDGE SMITH: But isn't it - - -

25 MR. WILLETT: - - - that issue is concerned.

1 JUDGE SMITH: And as a general proposition,
2 going back to the - - - just the merits for a minute, I
3 mean, is it really fair, let's say, that you have a - - -
4 you have a woman who has a thirty percent chance of giving
5 birth and a doctor negligently eliminates that chance. Is
6 it fair for her to recover nothing?

7 MR. WILLETT: It may or may not be fair, Your
8 Honor, because you don't know that the defendant - - -

9 JUDGE SMITH: Well, whether it's fair - - -

10 MR. WILLETT: - - - caused that.

11 JUDGE SMITH: - - - or not, is that the law of
12 New York, in your view, that she recover something?

13 MR. WILLETT: It is the law of New York, and it
14 goes back to a - - - a statement that this court made in
15 the case of Matott against Ward, that the question is, is
16 the - - - do the tort and the injury bear a close enough
17 relationship that it's equitable to place financial
18 responsibility on the defendant.

19 JUDGE SMITH: Well, the case I put, what's so -
20 - - what's so inequitable about making the doctor pay
21 thirty - - - thirty cents of what he would have otherwise
22 paid, thirty cents on the dollar?

23 MR. WILLETT: Your Honor, there - - - there are
24 - - - your - - - there are courts that have decided that.
25 That is not what occurred in this case, however. In this

1 case, the thirty percent or anything more than slight,
2 that could be ten, fifteen percent, would get the
3 plaintiff the entire gamut.

4 JUDGE SMITH: Well, you didn't - - - you didn't
5 ask for a better loss of chance charge; you said there
6 shouldn't be any.

7 MR. WILLETT: Because the charge is inconsistent
8 with the law in the state of New York which - - -

9 JUDGE GRAFFEO: Well, why - - -

10 MR. WILLETT: - - - goes on probability.

11 JUDGE GRAFFEO: Why shouldn't - - - why
12 shouldn't we reconsider and think about the analysis in
13 the Birnbaum case in Massachusetts? What's wrong with
14 that analysis?

15 MR. WILLETT: I think that analysis is wrong
16 because you have - - - because it goes back to the policy
17 that this Court - - - that it sets when it finds that
18 you're only going to impose liability on the basis of
19 probability.

20 JUDGE PIGOTT: Well, it seems to me though, I -
21 - - I get your point, but this is the problem with medical
22 malpractice cases, too. I mean, you got a - - - however
23 old this lady was who goes in and this happens. All
24 right. Now, she knows that there was - - - and everybody
25 seems to know that there was a - - - there was improper

1 intubation; you want to say, well, that's negligence or
2 not. And then everything else happens, but all the
3 doctors lined up. Nobody - - - no one said, you know,
4 doctor - - - Dr. Martin didn't say that somebody else
5 should have diagnosed this sooner or anything.

6 And all of the testimony seemed to be that no
7 matter what happened, once the esophagus was torn, this -
8 - - all of this follows, and I don't know how you then
9 say, well, gee, we had the automobile accident, yeah, we
10 ran the red light but nobody brought out the fact that the
11 - - - that the brakes that were put on by Midas weren't
12 quite as good as they should have been and therefore, you
13 know, we don't know what the probability of this accident
14 being - - - having happened because Midas wasn't in the
15 case. I mean, I'm just - - -

16 MR. WILLETT: I -- Your Honor, I see my time's
17 up. May I answer?

18 CHIEF JUDGE LIPPMAN: Finish answering the
19 question, sure.

20 MR. WILLETT: I'll answer it in two ways.

21 JUDGE PIGOTT: How's that for apples and
22 oranges?

23 MR. WILLETT: I'll answer it in two ways. First
24 of all, there's a substantial dispute in the testimony in
25 this case as to whether those consequential damages would

1 have occurred if the diagnosis had been made on the 22nd.
2 And the second analogy - - - the second way that I would
3 answer is a broader thing. In the world of tort law, you
4 don't impose responsibility unless the defendant caused
5 damages. Talk about a legal malpractice case.

6 You know, a - - - a lawyer who misses the
7 statute of limitations shouldn't be in a position to
8 complain that the plaintiff shouldn't recover something,
9 but yet we require the case within the case. We require
10 to show that the plaintiff would have prevailed in that
11 case where the statute of limitations was lost. Same
12 thing, products cases. A maker of a defective product
13 perhaps shouldn't be in a position to say this plaintiff
14 shouldn't recover, but you still have to prove that it
15 made a difference, whether it's a cigarette manufacturer -
16 - -

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MR. WILLETT: - - - et cetera.

19 CHIEF JUDGE LIPPMAN: Okay, counselor. Thank
20 you.

21 MR. WILLETT: Thank you, Your Honor.

22 CHIEF JUDGE LIPPMAN: Appreciate it. You'll
23 have rebuttal.

24 Counselor.

25 MS. NORTON: May it please the Court, Debra

1 Norton on behalf of the respondents, Wild and Horn.

2 CHIEF JUDGE LIPPMAN: Counselor, what - - - what
3 should the law of New York be in relation to loss of
4 chance and what is it, in your view?

5 MS. NORTON: Well, Your Honor, I think the law
6 should be what the law is, with all due respect.

7 CHIEF JUDGE LIPPMAN: Yes, which is?

8 MS. NORTON: And that is, namely, that if an ill
9 person goes in for medical care, it's expected that the
10 medical providers will use reasonable care to treat things
11 that can be treated.

12 CHIEF JUDGE LIPPMAN: Is it inconsistent with
13 proximate cause?

14 MS. NORTON: Not at all, Your Honor.

15 CHIEF JUDGE LIPPMAN: Why not?

16 MS. NORTON: The reason being that, as was
17 pointed out in the questioning, both things apply. In
18 fact, on this very verdict sheet was the question, did the
19 negligence of the defendant - - - was that a substantial
20 factor in bringing about injury?

21 JUDGE SMITH: But - - - but injury as - - - as
22 defined in the charge included a loss of chance.

23 MS. NORTON: Injury certainly can include a loss
24 of chance, the loss of - - -

25 JUDGE SMITH: So there - - - I mean, so it

1 depends on how you're using the words, but it's certainly
2 po - - - you know, if - - - if, in fact - - - if what I
3 think is most - - - if - - - if the juror thinks that it's
4 most likely, more likely than not, that the defendant's
5 actions did not affect her at all but there's a forty
6 percent chance that they did affect her, should she get
7 forty percent of the money or a hundred percent of the
8 money or no money?

9 MS. NORTON: Well, Your Honor, I'm glad you
10 asked that question. Mr. Willett brought up the Oakes v.
11 Patel case, and I think Your Honors have just, a couple of
12 weeks ago, addressed that very idea in pointing out within
13 that case that where there is something else going on
14 other than the negligence of the defendants, the
15 defendants are always free to argue what would be fair
16 compensation based on what it is that those defendants
17 did. That's exactly - - -

18 JUDGE SMITH: You say we adopted loss of chance
19 in Oakes?

20 MS. NORTON: No.

21 JUDGE SMITH: If - - - if we did, I - - - I - -
22 - if we did, I - - - I was dozing through that opinion.

23 MS. NORTON: No, but I was very excited to see
24 that you cited the McCahill case which was one of the ones
25 that I relied on.

1 JUDGE SMITH: Oh, well, wait - - - wait a
2 minute. McCahill, as I remember, everyone agrees that if
3 somebody died six weeks after the operation, and in fact,
4 you thi - - - you can prove he would have died ten weeks
5 after - - - after the operation, that's not loss of
6 chance; that's damages, right?

7 MS. NORTON: Well, it's hastening a death, and
8 Mr. Willett - - -

9 JUDGE SMITH: Ha - - - I mean, hastening a death
10 is all we can do. I mean, all deaths are - - - are going
11 to happen sooner or later. Every wrongful death case is a
12 death-hastening case.

13 JUDGE PIGOTT: (Indiscernible).

14 MS. NORTON: Fair enough. Mr. Willett tried to
15 make some distinction between cases where we have
16 hastening a death by, we don't do something for a very
17 sick person and they die quicker, and cases - - - the Mc -
18 - - that - - -

19 JUDGE SMITH: But that's not really loss of
20 chance, is it?

21 MS. NORTON: It - - - it is a - - -

22 JUDGE SMITH: That's loss of life, loss of - - -
23 loss of time on the planet.

24 MS. NORTON: It's a similar concept, Your Honor.
25 And this court in 1980, in the Collins case, the Collins

1 case is the exact perfect case for the subject case in
2 that, in the Collins case, we had a little boy who also
3 had a kidney issue. He did not get a test that he needed
4 to have while he still had good enough kidney functioning
5 that, had that test been done, he could have been a
6 candidate for surgery. This court in 1980 said that the
7 verdict was going to be sustained, and the reason was that
8 the negligence contributed to the loss of kidney function
9 and also deprived the child of an opportunity to have the
10 condition surgically corrected.

11 JUDGE READ: So you say we - - -

12 MS. NORTON: That is the law of New York that
13 this court - - -

14 JUDGE READ: So you say we've already adopted
15 loss of chance?

16 MS. NORTON: You have, Your Honor.

17 JUDGE READ: As a separate theory or just as to
18 damages?

19 MS. NORTON: Well, you have adopted it as a
20 basis of finding liability, is how I would answer that
21 question.

22 JUDGE PIGOTT: But you walked a - - - walk - - -

23 JUDGE GRAFFEO: Why shouldn't - - - why
24 shouldn't we require specific verdicts so that the
25 commission and omission, the jury can make a determination

1 on this?

2 MS. NORTON: Well, I - - -

3 JUDGE GRAFFEO: Wouldn't it - - - wouldn't it
4 help the appellate courts to know - - -

5 MS. NORTON: Well, it - - -

6 JUDGE GRAFFEO: - - - how they interpreted the
7 evidence?

8 MS. NORTON: It would have certainly helped in
9 this case, Your Honor, and it's a little like the child
10 who has killed his parent caught crying orphan, because we
11 would have had a verdict sheet that would have given us an
12 answer in this case, and it - - -

13 JUDGE SMITH: But you didn't - - - you didn't -
14 - - as I read the record, the defense objected, but you
15 didn't fight them. You said, okay, you want a general
16 verdict, you get a general verdict. Plaintiffs usually
17 like general verdicts.

18 MS. NORTON: At Mr. - - - the trial attorney in
19 this case accepted what the trial court had already ruled.
20 She had already said she wasn't going to give the two
21 questions. He said, okay; then I accept you're going to
22 give the one question. However, to then come back a year
23 later after that and then try to use that as saying, oh,
24 gosh, we don't know what this story - - -

25 JUDGE SMITH: Okay, but as I - - - I see your

1 point, but is it - - - what's the law? If there's an
2 error - - - an error that might have been harmless and
3 you'll never know whether it's harmless because there was
4 a general verdict instead of a special verdict, does the
5 party complaining of the error have to ask for a special
6 verdict to get a reversal?

7 MS. NORTON: I'm not even saying that he needed
8 to ask for one. I'm simply saying that that when one was
9 presented - - -

10 JUDGE SMITH: Then don't fight it?

11 MS. NORTON: - - - and asked by the other side
12 and objected to by that party, too bad, so sad for them;
13 game over. That's just not fair to them.

14 JUDGE SMITH: Okay. Let me - - - let me ask you
15 a completely different question. Suppose - - - I mean,
16 you're arguing essentially that - - - in the case I put a
17 few minutes ago, that if a woman lost a thirty percent
18 chance of bearing a child she should get at least thirty
19 percent of her damages. Maybe you - - - maybe you'd say
20 more, but you'd say at least thirty percent.

21 MS. NORTON: Well, Your Honor, how I would say
22 that is she should be compensated for what she lost, and
23 the def- - -

24 JUDGE SMITH: How much - - - how much is fair
25 compensation?

1 MS. NORTON: The defense is free to argue what
2 the value is of that - - -

3 JUDGE SMITH: Okay. Suppose - - -

4 MS. NORTON: - - - and everybody is argue what -
5 - -

6 JUDGE SMITH: Okay.

7 MS. NORTON: - - - what that should be.

8 JUDGE SMITH: Suppose it's seventy percent;
9 suppose she had a seventy percent chance and lost it, does
10 she get seventy percent dam - - - are - - - are they free
11 to argue that the damages are only seventy percent?

12 MS. NORTON: I think what they're free to argue
13 is that it's an even worse wrong that was done to her and
14 that her - - -

15 JUDGE SMITH: No, no, what the defendant is free
16 to argue.

17 MS. NORTON: I think they're both free to argue
18 - - -

19 JUDGE SMITH: I mean - - - wait a minute. Is it
20 really the law - - - I - - - I'd never heard of that
21 argument. Can - - - are defendants really allowed to
22 argue, well, okay, I committed malpractice but there's a
23 ten percent chance that the patient would have survived
24 anyway, so knock ten percent off the damages?

25 MS. NORTON: Again, going back to that - - -

1 JUDGE SMITH: Well, what's the answer to that?
2 Is that - - - is that the law? Can you do that?

3 MS. NORTON: The - - - the - - - what the
4 defendant and the plaintiff can do is to - - -

5 JUDGE SMITH: Well - - - well, can they do what
6 I just said? That's a yes or no question. Can they - - -
7 can they argue for ten percent off the damages because
8 there's only a ninety percent chance that they're guilty?

9 MS. NORTON: They can argue for anything they
10 want, Your Honor. Is - - - is there - - -

11 JUDGE PIGOTT: Well, you look at it in terms of
12 - - -

13 MS. NORTON: Is there a charging - - -

14 JUDGE PIGOTT: Look at it in terms of mortality
15 tables. I mean, we always say, you know, the plaintiff's
16 - - -

17 MS. NORTON: Sure.

18 JUDGE PIGOTT: - - - going to live X number of
19 years and then the judge says you're free to argue both
20 sides of that. I mean, he may die tomorrow and he may
21 live long before that but you, the jury, are stuck with
22 making that determination.

23 MS. NORTON: Correct.

24 JUDGE PIGOTT: Isn't that what we're discussing
25 here on the damages side?

1 MS. NORTON: Yes.

2 JUDGE READ: Wouldn't you agree that the
3 standard in New York has always been that you have to
4 prove by a preponderance of the evidence that it's more
5 probable than not that the defendant's negligence or act
6 caused the injury? You don't - - -

7 MS. NORTON: I absolutely agree that that
8 preponderance - - -

9 JUDGE READ: You don't think that's incons - - -
10 you don't think that's inconsistent with loss of chance?

11 MS. NORTON: I don't, Your Honor. We actually
12 have a whole point in our brief on this, and I - - -

13 JUDGE READ: A lot of state courts do. Would
14 you concede that?

15 MS. NORTON: I concede that there are other
16 states that do things differently than New York.

17 CHIEF JUDGE LIPPMAN: So how do you put them
18 together?

19 JUDGE READ: I mean, there are - - - I'm
20 thinking of, for example, the Fennell case in Maryland, I
21 mean, that - - - it says it's absolutely inconsistent, the
22 whole concept of loss of chance is inconsistent with the
23 traditional rule of a preponderance of the evidence, more
24 probable than not.

25 MS. NORTON: This is how I put that, which I

1 think answers both of your questions - - -

2 CHIEF JUDGE LIPPMAN: How does it work together?

3 MS. NORTON: How do they work together is this:
4 the plaintiff has the burden of proving by a preponderance
5 of the evidence that indeed, the plaintiff did suffer a
6 loss of opportunity to have a successful outcome.

7 For example, in this case, there was conflicting
8 evidence. Some doctors thought there wasn't any chance to
9 do it; some thought there was a chance. It was
10 conflicting between the two of them. If the plaintiff
11 convinced the jury by a preponderance of evidence that the
12 expert who said yes, she had a chance of having a
13 successful surgery, we believe that by a preponderance of
14 evidence, your guy makes more sense, everything he's
15 saying makes more sense, it tips in favor of that one.

16 JUDGE READ: Any chance?

17 JUDGE SMITH: But why do we not - - -

18 JUDGE READ: A slight chance? A thirty percent
19 chance, forty percent chance, sixty percent chance? Any
20 chance?

21 MS. NORTON: Well, it's - - - we know it's not
22 any chance. There's case law on this that it can't be the
23 - - - it can't be slight or little, but if there is a
24 substantial opportunity to have had a better result if
25 there's a - - -

1 JUDGE SMITH: Why do we not do the same thing in
2 legal malpractice cases? As your adversary says, we don't
3 say if you had - - - you blew the statute of limitations
4 and I've got a case that's worth ten cents on the dollar,
5 I've got ten cents in damages. Why don't we do it that
6 way?

7 MS. NORTON: Your Honor, I think we're harder on
8 lawyers, and I've been around a couple medical - - - or
9 attorney malpractices. I think we have a higher standard
10 than for - - -

11 JUDGE SMITH: Harder? Now, wait a minute.
12 That's more favorable to the - - - you're saying we're
13 easier on lawyers?

14 MS. NORTON: Well, it depends on which side of
15 the malpractice case you're on. If you're - - -

16 JUDGE SMITH: You're harder - - - harder on
17 plaintiffs in - - - in lawyer cases?

18 MS. NORTON: Yes, Your Honor.

19 The one thing that I really wanted to have the
20 opportunity to express to all of you this morn - - - or
21 this afternoon, rather, is the absolute outrageous
22 unfairness of what the defense has tried to do through
23 this entire appellate process, which is this: At the
24 trial there was such a limited objection. That objection
25 was, oh, the facts of this case don't fit it. And the

1 other objection was, oh, well, it changes the pattern
2 charge too much, the pattern charge being 2:150, the med-
3 mal charge.

4 Any time that you don't have a pattern charge
5 and you need to go to the comments to supplement the
6 charge, it's going to change the words of the pattern
7 charge; it's impossible not to. So that objection was
8 meaningless. The one that it doesn't fit the facts of the
9 case was meaningless.

10 JUDGE SMITH: Are you that saying that assuming
11 - - - are you saying that assuming there was error; he led
12 the court into error?

13 MS. NORTON: I'm saying, Your Honor, that I was
14 involved in the charge con - - -

15 JUDGE SMITH: I mean, are you - - -

16 MS. NORTON: Yes, that - - - yes, that - - -

17 JUDGE SMITH: Let me - - - are you saying that a
18 more articulate objection might have - - - might have
19 resulted in this charge not being given?

20 MS. NORTON: Yes, Your Honor. The plaintiff
21 might have said, you know what, if you've got all this
22 ammunition and you've got all these things you want to
23 say, you know what, it's not worth it, we know that we've
24 got a good case going. The plaintiff was deprived of the
25 opportunity. For the plaintiff, for the Horn and Wild

1 children to now be facing all of these arguments that were
2 - - -

3 JUDGE SMITH: But aren't you - - - aren't you
4 really - - - I see your point, but aren't you really
5 arguing that a feeble objection isn't good enough to
6 preserve it, you've got to make a really good objection
7 and isn't that kind of a tough preservation rule to
8 enforce?

9 MS. NORTON: I don't think so at all, Your
10 Honor, and I just - - - I have to tell you that I - - - I
11 have - - - I lie awake at night thinking that this family
12 that's struggled so hard could have their verdict, which
13 was fair and square, overturned on things that were not
14 said to the trial court at a time when that family could
15 have made a decision as to whether they wanted to proceed
16 on something that was such a tiny little part of the - - -

17 JUDGE SMITH: Is it really - - - is it really -
18 - - I - - - and I understand your feeling for the family.
19 Is it really realistic to say that you - - - you - - - you
20 think the lawyer should have said, Your Honor, in my
21 opinion, loss of chance does not correctly reflect the law
22 of New York, that would have been a perfectly adequate
23 objection, right?

24 MS. NORTON: Your Honor, at page 13, yes, of the
25 reply brief, Mr. Willett - - -

1 JUDGE SMITH: If he - - - if he had had said
2 that, are you really saying in that case the family would
3 have said, oh, okay, I'll withdraw the charge?

4 MS. NORTON: Your Honor, if there had been any
5 kind of a vehement opposition other than this - - -

6 JUDGE SMITH: It has to be vehement?

7 MS. NORTON: - - - little lip service - - -
8 well, it has to be something of substance that puts me on
9 notice that I might actually have an issue. Those two
10 wimpy little statements didn't give me any notice that - -
11 -

12 JUDGE SMITH: And I mean, I - - -

13 MS. NORTON: - - - that there could be a
14 problem.

15 JUDGE SMITH: I see your point. We - - -
16 lawyers do that all the time. I - - - I - - - I used to
17 do it all the time. When you think the judge is going to
18 rule against you, make the wimpiest objection you can, and
19 you preserve it for appeal. That's the way the system
20 works.

21 MS. NORTON: And I would submit, Your Honor,
22 that doesn't get the job done; that doesn't preserve it.
23 It doesn't give me a chance, as the opposite side, to - -
24 - I - - - I could have - - - if it's language, we could
25 have negotiated what the language would be. Depending on

1 what it was, it could have made very substantial outcomes,
2 and to then go to the Appellate Division and say, oh, it
3 had to have all this other language that we never asked
4 for, and now to come to the Court of Appeals, and on page
5 13 of the reply, they tank all of those arguments, they
6 tank the argument about proportional damages instruction,
7 one argument left to this court and that is that the
8 instruction should not be given, as the theory as not
9 recognized in New York. That is the only thing - - - on
10 this page 13, that's the only thing he's asking you to do
11 is tank the theory. It's - - - it's so not fair, Your
12 Honor, and it's not the law. You're not writing on a
13 blank slate here. It was certainly in the Collins case
14 and letting it go on for two decades from all the
15 Appellate Divisions, to have had all of that - - -

16 CHIEF JUDGE LIPPMAN: Well, should we determine
17 this case without ruling on loss of chance?

18 MS. NORTON: Well, Your Honor, the one thing
19 that should happen is it was not preserved as to my
20 clients. I would love to see you write a nice opinion
21 that sustains loss of chance concept because it makes a
22 lot of sense that if a medical professional does the wrong
23 thing, omission, doesn't get the job done, and it makes
24 that person lose a chance that a reasonable - - -

25 CHIEF JUDGE LIPPMAN: I mean, but we can decide

1 the case without dealing with that?

2 MS. NORTON: Absolutely.

3 CHIEF JUDGE LIPPMAN: Because they didn't - - -

4 MS. NORTON: Absolutely, Your Honor, absolutely.

5 None of these things were presented to that trial court.

6 And Your Honor, the lady before me mentioned that she is

7 standing here in the Court of Appeals - - - I can't

8 believe on the wimpy objection that was made that I am

9 standing here - - -

10 CHIEF JUDGE LIPPMAN: So we should - - -

11 MS. NORTON: - - - in the Court of Appeals.

12 CHIEF JUDGE LIPPMAN: So we should - - - in your

13 view, we should deal with loss of chance if there's a good

14 argument back and forth as to that theory and what New

15 York's law should be, but in this - - - this isn't that

16 case?

17 MS. NORTON: Correct, Your Honor.

18 CHIEF JUDGE LIPPMAN: Okay.

19 JUDGE PIGOTT: This is attorney aggression day.

20 MS. NORTON: I'm sorry; I'm sorry.

21 JUDGE READ: No; aggressive attorney day.

22 Vehement - - -

23 CHIEF JUDGE LIPPMAN: Counsel, you're up, to be

24 aggressive or not. Go ahead.

25 JUDGE READ: Vehement advocacy day.

1 MR. WILLETT: Very briefly, Your Honor, I think
2 it was preserved. I mean, the - - - the argument was that
3 it - - - the case wasn't tried on that theory, and it
4 wasn't.

5 JUDGE PIGOTT: If we go back, I mean,
6 aren't you going to have to - - - what happens to
7 your codefendants who - - - who are now out doing
8 other things having been found not responsible? And
9 it seems to me that part of your argument in this
10 thing had to do with what they were doing because - -
11 - because Dean or Downing says, all goes back to
12 6/22; anything after that has nothing to do with it.
13 Don't they have to all come back in now?

14 MR. WILLETT: They do not, Your Honor, and the
15 reason for that is because the codefendants got out
16 because they were found not negligent - - -

17 JUDGE PIGOTT: Yes, on a general verdict,
18 though.

19 MR. WILLETT: Proximate cause issue was - - -
20 they didn't reach the proximate cause issue.

21 JUDGE PIGOTT: If - - - Mr. Willett, if - - - if
22 Martin had sued them and said, you know, they're all
23 saying that it was all my fault on 6/22; you're now making
24 an argument that maybe it was 6/26 and that's when Downing
25 was around, we're kind of unringing a bell with - - -

1 without everybody being in the room. It seems that - - -

2 MR. WILLETT: I don't think so, Your Honor,
3 because the - - - the jury could have found that Dr.
4 Martin was negligent because she didn't arrange for the
5 consultation by Dr. Downing; therefore, because of Dr.
6 Martin's negligence, that's the reason Dr. Downing got out
7 - - -

8 JUDGE SMITH: Is there - - - is there any way -
9 - -

10 MR. WILLETT: - - - because he wasn't called in
11 immediately.

12 JUDGE SMITH: And as I - - - and I think Judge
13 Pigott may be asking is, is there any way those other
14 doctors get back into the case if we reverse?

15 MR. WILLETT: I don't think so, Your Honor. I
16 think Dr. Martin just gets a new trial. And in terms of
17 the other - - -

18 JUDGE PIGOTT: Well, she could - - - she could
19 implead them, I assume, right?

20 MR. WILLETT: I think then they would have a res
21 judicata objection.

22 JUDGE PIGOTT: Think so?

23 MR. WILLETT: I mean, we're off the - - - where
24 we were, Your Honor.

25 JUDGE PIGOTT: Right, you're - - -

1 MR. WILLETT: We're off script. So in terms of
2 the verdict sheet, the only verdict sheet that would have
3 told us whether the error was harmless is one that
4 included all of the five theories. Nobody asked for that;
5 nobody asked for that. And again, it goes back to the
6 case - - -

7 JUDGE PIGOTT: Including Dr. Martin?

8 MR. WILLETT: For those - - - those are the
9 theories - - - those are the theories just with respect to
10 Dr. Martin.

11 JUDGE PIGOTT: You're saying you didn't ask for
12 that?

13 MR. WILLETT: Did we ask for that? No, we did
14 not ask for that, no.

15 JUDGE SMITH: Well, why do you need five
16 theories?

17 MR. WILLETT: But we were - - -

18 JUDGE SMITH: Why - - - what about one question,
19 did she damage the esophagus or not? If they say yes, we
20 can stop hyperventilating about loss of chance.

21 MR. WILLETT: They would have to find that she
22 was - - - if she damaged the - - -

23 JUDGE SMITH: Negligently.

24 MR. WILLETT: - - - esophagus due to negligence
25 - - -

1 JUDGE SMITH: Yeah, yeah.

2 MR. WILLETT: - - - that - - - that - - -

3 JUDGE SMITH: I accept that correction - - -

4 MR. WILLETT: - - - that question was answered
5 yes and the proximate cause question was answered yes,
6 then you'd have a connection that would render it
7 harmless, but we don't know that. And the Marine Midland
8 against Russo case says - - -

9 JUDGE SMITH: Yeah, but it doesn't take five
10 questions, it only takes one.

11 MR. WILLETT: But if the answer to that was no,
12 Your Honor, then you'd - - -

13 JUDGE SMITH: We're back to where we started.

14 MR. WILLETT: - - - have to know what the answer
15 was for the other four. That would be the only way to do
16 it. And the Marine Midland against Russo case says if you
17 don't know and the error in the charge affects one or more
18 of the theories where if it was changed, would get the
19 defendant found not liable, then you have to send it back.

20 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks.

21 MR. WILLETT: Thank you, Your Honors.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Wild v. Catholic Health System, No. 97 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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