COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

NO. III-325784

DIANE CHRISTIAN and CASEY CHRISTIAN, wife and husband,
Appellants

v.

ANTOINE TOHMEH, M.D., and MIRNA TOHMEH, husband and wife, and the marital community composed thereof; and ORTHOPAEDIC SPECIALTY CLINIC OF SPOKANE, a Washington business entity and health care provider; and DOES 1-5
Respondents

CORRECTED BRIEF OF RESPONDENTS

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I. COUNTER STATEMENT OF THE CASE

A. General Nature of Case and Claims and Identity of Parties

This is a medical malpractice case. The Appellants, and Plaintiffs below, are Diane Christian and Casey Christian (hereinafter referred to collectively as Ms. Christian). The Respondents, and Defendants below, are orthopedic surgeon Antoine Tohmeh, M.D., et ux, and Orthopaedic Specialty Clinic of Spokane, P.L.L.C., (hereinafter referred to collectively as Dr. Tohmeh).[1]

The case arises from a low back surgery on Ms. Christian performed by Dr. Tohmeh on December 5, 2005. Generally, Ms. Christian claimed that, while still in the hospital following the surgery, and after discharge, she developed signs and symptoms consistent with a diagnosis of cauda equina syndrome (CES). Ms. Christian alleged Dr. Tohmeh violated the standard of care by not timely diagnosing CES and intervening surgically, and that this violation proximately caused injury to Ms. Christian. (CP 1-8.) Dr. Tohmeh denied Ms. Christian ever had CES, denied he violated the standard of care, and denied that any alleged violation of the standard of care proximately caused injury or damage to Ms. Christian. (CP 9-13.) Ms. Christian further

[1] Providence Health Care, Providence Health & Services, and Holy Family Hospital, were also defendants below. They were dismissed via stipulated order on March 31, 2014.

alleged Dr. Tohmeh's post-surgical conduct constituted the tort of outrage. Dr. Tohmeh also denied that claim. (CP 1-8, CP 9-13.)

Dr. Tohmeh moved for summary judgment, asserting Ms. Christian lacked the requisite expert testimony to raise a material issue of fact on standard of care and causation. (CP 14-37.) Dr. Tohmeh also contended his post-surgical conduct did not meet the threshold for an outrage claim. *Id.* The trial court granted summary judgment in favor of Dr. Tohmeh, and this appeal followed. (CP 218-20.)

B. Nature of Cauda Equina Syndrome (CES)

Cauda equina syndrome (CES) "signifies an injury of multiple lumbo-sacral nerve roots within the spinal canal." (CP 340-341.) Diagnostic indications of the condition are low back pain, weakness and lack of reflexes in the legs, lack of sensation in the saddle area, and loss of bladder function. *Id.* "CES is commonly due to a ruptured lumbosacral intervertebral disc, lumbosacral spine fracture, hematoma within the spinal canal, compressive tumor, or other mass lesion." *Id.*

C. Surgery, Post-Surgical Complaints and Treatment

The lumbar surgery at issue—a laminectomy—took place at Holy Family Hospital on December 5, 2005. (CP 344.) The surgery itself was

uneventful, save for a small dural puncture,[2] which Dr. Tohmeh repaired intraoperatively. (CP 471.)

Over the next four days, while Ms. Christian was still in the hospital, she, at various times, voiced subjective complaints of numbness and/or tingling in her feet, as well as vaginal and perianal numbness. (CP 395, 396, 397, 398.) Postoperative vaginal and perianal numbness are not unusual following spinal surgery. (CP 668-69.) However, neurologic and strength assessments performed on multiple occasions by the nursing staff, including the day of discharge, were all normal. (CP 391, 395, 396, 397, 398, 418.) Dr. Tohmeh rounded on Ms. Christian on each postoperative day and, each day, found her to be neurologically intact with respect to both strength and sensation. (CP 378-381; CP 679-681.)

The day before discharge, Ms. Christian complained of inability to void urine (CP 397) which is also normal following a laminectomy. (CP 668.) Dr. Tohmeh ordered a bladder scan, which showed residual urine. (CP 398-99.) He also ordered reinstallation of a Foley catheter, if necessary, and Ms. Christian subsequently was able to void. *Id.*

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[2] Ms. Christian's standard of care expert, Dr. Stanley Bigos, had no criticism of Dr. Tohmeh's performance of the surgery itself, including the dural puncture. (CP 709.)

On December 9, Ms. Christian was discharged to her home. (CP 399.) During her hospitalization, she never complained of significant back pain (CP 391, 394-399), never developed any discernible motor weakness (*Id.*) (CP 418), and had the ability to ambulate. *Id.* On serial checking by the nursing staff and Dr. Tohmeh, Ms. Christian had intact reflexes and motor strength, as well as sensation in the lower extremities, except for the perianal area. *Id.* (CP 378-81; CP 679-681.) She also participated in physical therapy. *Id.*

At post-discharge follow-up visits with Dr. Tohmeh, Ms. Christian complained of urinary retention, ongoing vaginal numbness, and difficulty with bowel movements. (CP 558, 520-21.) Dr. Tohmeh referred Ms. Christian to multiple specialists, including a urologist and a colorectal surgeon. (CP 558, 521.) Neither specialist diagnosed nerve injury or damage as the cause of Ms. Christian's symptoms, and neither diagnosed CES. (CP 554-56; CP 654-56.)

Because of her complaints of perianal numbness, Dr. Tohmeh also offered to refer Ms. Christian to a gynecologist, Dr. Linda Partol. (CP 517-19.) Ms. Christian, however, rejected the referral. *Id.*

Ultimately, Ms. Christian terminated her physician/patient relationship with Dr. Tohmeh in favor of Dr. Vivian Moise, a physical medicine and rehabilitation physician. Ms. Christian did see Dr. Partol on

referral from Dr. Moise. (CP 703.) Dr. Partol never diagnosed CES, (CP 706) and never concluded on the basis of urodynamic testing done at Sacred Heart Medical Center under orders from Dr. Moise that the patient had a neurogenic bladder. (CP 708.) Eventually, Dr. Moise diagnosed Ms. Christian with CES. (CP 544.)

D. Testimony of Jeffrey Larson, M.D.

In support of his motion for summary judgment, Dr. Tohmeh offered the testimony of Jeffrey Larson, M.D., a board certified neurosurgeon. Dr. Larson testified that Ms. Christian never had CES, particularly because she never had muscle or motor weakness, particularly in the lower extremities, which are the hallmark signs of CES. (CP 671; CP 676-681.)

E. Testimony of Stanley Bigos, M.D.

Ms. Christian offered the testimony of Stanley Bigos, M.D., in opposition to Dr. Tohmeh's motion for summary judgment. Dr. Bigos has not performed spine surgery since 2001. (CP 684.) After first stating only that he had a "suspicion" Ms. Christian had CES (CP 687), Dr. Bigos testified that, based on the workups done by two urologists, Dr. Oefelien and Dr. Whiting, particularly their electrodiagnostic studies, he was of the opinion Ms. Christian did in fact have CES. (CP 687-88.) Dr. Bigos reached this opinion even though neither Dr. Oefelien nor Dr. Whiting themselves

diagnosed CES, and the electrodiagnostic tests Dr. Bigos relied on were performed after Ms. Christian was discharged from the hospital.

Dr. Bigos did not opine that Dr. Tohmeh's surgery on Ms. Christian was not indicated (CP 689) or that the surgery itself was carried out improperly. *Id.* Dr. Bigos testified he had no opinion regarding the cause of Ms. Christian's alleged CES. (CP 691.) Dr. Bigos acknowledged that the generally recognized causes of CES are acute or continuous pressure on nerve roots, neurologic disease, or intrinsic problems with the nerves themselves. *Id.*

While Dr. Bigos testified that possible causes of CES include acute or continuous pressure in the spinal canal as a result of postoperative bleeding (CP 692), he was unable to say whether Ms. Christian in fact sustained any significant postoperative bleeding capable of causing CES. *Id.* Likewise, Dr. Bigos testified there was no evidence of nerve root manipulation during surgery in combination with an intraoperative bleed that would be sufficient to cause CES. *Id.*

Regarding the treatment of CES, Dr. Bigos testified that, based on an article published in 1974, 40% of "cauda equina cases" are improved by decompression surgery after the onset of the syndrome. (CP 693.) But according to Dr. Bigos, in the study cited, some of the patients who reported

improvement following decompression surgery were found not to have a space-occupying or compressive lesion at all. (CP 693.) According to the study, the "improvement" following decompression surgery ranged from total recovery to partial recovery to none at all. (CP 693-94.) Dr. Bigos further testified there was no way he could determine whether Ms. Christian, if no surgery had been done, would fall within the 40% who achieved some improvement, or the 60% who did not achieve any improvement. (CP 694.)

Dr. Bigos conceded that even if Dr. Tohmeh had taken Ms. Christian back to surgery to decompress or explore, surgery may have done nothing, it may have improved her slightly, or it may have totally alleviated her symptoms. (CP 697.) Indeed, Dr. Bigos conceded that, if Dr. Tohmeh had taken Ms. Christian back to surgery, more likely than not there would have been no change in her neurologic status or symptoms because 60% of the time surgery does not do any good. *Id.* Thus, according to Dr. Bigos, the results of a repeat surgery by Dr. Tohmeh would simply be speculation. *Id.*

F. Summary Judgment Procedure

Dr. Tohmeh moved for summary judgment on February 11, 2014, arguing that Ms. Christian lacked competent supporting expert testimony to support her claim.[3] (CP 14-37.) On May 6, 2014, the trial court granted the

[3]Dr. Tohmeh's motion for summary judgment, when filed, was styled as a motion for

motion and dismissed Ms. Christian's claims. (CP 218-20.) On June 3, 2014, the trial court denied Ms. Christian's motion for reconsideration. (CP 323-24.)

II. ARGUMENT AND AUTHORITIES

A. Standard of Review

Summary judgment rulings are reviewed *de novo*. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). An appellate court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the non-moving party. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 p.2d 321 (1998). Summary judgment is appropriate if the record before the court shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

B. Applicable Law for Summary Judgment in Medical Malpractice Cases

All claims alleging injury resulting from a failure of a health care provider to follow the accepted standard of care are controlled by RCW 7.70 et. seq. Summary judgment in medical malpractice cases may be brought in

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partial summary judgment. However, based on the evidence submitted by the parties, it was appropriate for the court to treat the motion as such and dismiss all of plaintiffs' claims. *See, Health Ins. Pool v. Health Care Authority*, 129 Wn.2d 504, 507, 919 P.2d 62 (1996).

one of two ways. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 851 P.2d 689 (1993). In *Guile*, the Court of Appeals noted:

> A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. *Hash v. Children's Orthopedic Hosp & Med. Cntr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988). Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lack sufficient evidence to support its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986)). In this latter situation, the moving party is not required to support its summary judgment motion with affidavits. *Young*, at 226. However, the moving party must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. *White v. Kent Med. Cntr., Inc., P.S.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. at 323; *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

Guile at 21-22.

The Court further stated as to the standard for the motions for summary judgment as follows at page 25:

> In a medical malpractice case, expert testimony is generally required to establish the standard of care and to prove causation. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Thus, a defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to produce an affidavit from

> a qualified expert witness that alleges specific facts establishing a cause of action. *Young* at 226-27.

Guile at 25.

CR 56 requires that the judgment shall be "rendered forthwith" if the supporting materials and affidavits show that there is no genuine issue as to pertinent material fact.

C. Based On The Evidence Presented To The Trial Court, No Reasonable Person Could Conclude That Ms. Christian Had CES And That Dr. Tohmeh Thus Violated The Standard Of Care By Not Diagnosing The Condition.

On summary judgment, a "genuine issue" of material fact is one upon which reasonable people may disagree. *Youker v. Douglas County*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). In the instant case, based on the evidence presented to the trial court, no reasonable person could conclude that Ms. Christian had CES and that Dr. Tohmeh violated the standard of care by not diagnosing the condition.

Ms. Christian's own expert, Dr. Bigos, testified that Dr. Tohmeh's surgery was carried out properly. No expert witness testified on behalf of Ms. Christian that the alleged CES was caused by postoperative hematoma, by a dural graft, or by anything that Dr. Tohmeh did during the surgery. After first stating he had a "suspicion" Ms. Christian had CES, Dr. Bigos eventually testified that, in his opinion, Ms. Christian did have the condition.

But Ms. Christian did not exhibit any of the cardinal signs or symptoms of CES while she was in the hospital. Post-discharge, none of the specialists to whom Dr. Tohmeh referred Ms. Christian diagnosed CES. Because, on this record, no reasonable person could conclude that Ms. Christian had CES and that Dr. Tohmeh thus violated the standard of care by failing to diagnose it. It was appropriate for the court to grant summary judgment on standard of care.

D. Dr. Bigos' Testimony On Loss Of Chance Was Insufficient To Create A Material Issue Of Fact On Proximate Cause and Damages.

Loss of chance is recognized as an actionable injury in a medical malpractice case. See, *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011); *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983); *Estate of Durmaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 313 P.3d 431 (2013); *Rash v. Providence Health & Services*, 183 Wn. App. 612, 334 P.3d 1154 (2014). The cause of action exists even where the ultimate harm is something short of death. *Mohr, supra*; see also, *Shellenbarger v. Brigman*, 101 Wn. App. 339, 3 P.2d 211 (2000); *Rash,* 183 Wash.App. at 630, 334 P.3d 431 ("Loss of chance claims can be divided into two categories: lost chance of survival and lost chance of a better outcome").

The calculation of a loss of chance for a better outcome must be based on expert testimony, which in turn is "based on significant practical experience and 'on data obtained and analyzed scientifically ... as part of the repertoire of diagnosis and treatment, as applied to the specific facts of the plaintiff's case.'" *Mohr*, at 857-58, *quoting, Matsuyama v. Birnbaum*, 452 Mass. 1, 18, 890 NE2d 819 (2008).

In a loss of chance case, after the specific loss of chance is identified by expert testimony, the jury, in calculating damages, applies the identified percentage of lost chance to the damages that would have been sustained by the plaintiff (or decedent) had the negligence not occurred and the plaintiff is awarded that percentage of plaintiff's "total" damages. *See*, *Herskovits* at 635; *Mohr* at 858.

In the instant case, Ms. Christian's expert, Dr. Bigos, testified that, had surgery been performed, Ms. Christian had a 40% chance of a better outcome. However, Dr. Bigos did not specify in any way what the better outcome would have been. To the contrary, he testified it would be pure speculation to say what the "better outcome" might have been. Thus, the jury would have no way of applying the *Herskovitz* and *Mohr* formula to calculate damages.

Because Ms. Christian failed to provide any testimony at all as to what the better outcome would have been had surgery been performed, Ms. Christian's loss of chance theory was entirely speculative and conjectural, and summary judgment on proximate cause was appropriate.

E. Ms. Christian's Claims Based Upon The Tort Of Outrage And Intentional Inflection Of Emotional Distress Were Properly Dismissed.

A cause of action for "outrage" exists only where conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wash.2d 52, 59, 530 P.2d 291 (1975). Mere insults, indignities, embarrassment, or humiliation will not support a claim of outrage. *Id.* Outrage is the same claim as intentional infliction of emotional distress. *See*, *Kloepfel v. Bokor*, 149 Wash.2d 192, 194, 66 P.3d 630 (2003). Such a claim may only proceed if "[t]he court determines initially if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Banks v. Nordstrom, Inc.*, 57 Wash.App. 251, 263, 787 P.2d 953 (1990), *citing Phillips v. Hardwick*, 29 Wash.App. 382, 387, 628 P.2d 506 (1981).

Ms. Christian alleged that Dr. Tohmeh acted intentionally or in outrageous fashion by attempting to "obfuscate" or to hide from Ms. Christian

facts and circumstances dealing with the alleged diagnosis of cauda equina syndrome. However, the summary judgment record clearly demonstrated that Dr. Tohmeh listened carefully to Ms. Christian's symptomatic complaints and made consecutive referrals to a board-certified urologist for her urinary complaints, a board certified colorectal surgeon for her bowel complaints and issues, and to a board certified gynecologist for her sexual complaints. The results of the urology and colorectal surgery referrals were provided to Ms. Christian. Ms. Christian refused to follow up on the referral to the gynecologist, Dr. Portal, at least when the record came from Dr. Tohmeh.

Much of Ms. Christian's outrage claim is based on the assumption she had CES. But Dr. Tohmeh did not diagnose CES, nor did any other of the multiple physicians who saw Ms. Christian after Dr. Tohmeh's surgery, until Dr. Moise.

Ms. Christian claimed the following evidence established a *prima facie* outrage claim:

- Dr. Moise testified that during a telephone call with Dr. Tohmeh, he "seemed to be trying very hard to convince me there was no nerve damage." *Moise depo.*, pg. 73, lines 13-17.

- Dr. Tohmeh further indicated to Dr. Moise that he thought Ms. Christian had "some significant emotional or psychologic[al] issues..." *Moise depo.*, pg. 73, lines 1-3.
- Dr. Moise believed Dr. Tohmeh was "angry" and attempted to influence her diagnosis. *Moise depo.*

No one has testified that any of D. Tohmeh's documentation or correspondence violated the standard of care, much less, that it satisfied the high burden of an outrage claim to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wash.2d 52, 59, 530 P.2d 291 (1975). Even insults, embarrassment, or humiliation is insufficient to rise to the level of outrage. *Kloepfel v. Bokor*, 149 Wash.2d 192, 194, 66 P.3d 630 (2003).

None of the foregoing rises to the level of "outside the bounds of all human decency." Because reasonable minds could not differ, summary judgment dismissal of the outrage claim was appropriate.

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III. CONCLUSION

Based on the foregoing argument and authorities, Dr. Tohmeh respectfully requests that summary judgment in his favor be affirmed.

DATED this 21st day of April, 2015.

EVANS, CRAVEN & LACKIE, P.S.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 21st day of April, 2015, the foregoing was delivered to the following persons in the manner indicated:

Michael J. Riccelli, P.S.
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VIA REGULAR MAIL [X]
VIA CERTIFIED MAIL [ ]
VIA FACSIMILE [ ]
HAND DELIVERED [ ]

4-21-15 /Spokane, WA
(Date/Place)

_____
Amy S. Calkins