

**RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE**

Apr 11, 2016, 10:23 am

RECEIVED ELECTRONICALLY

SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 92837-1

COA No. III-325784

DIANE CHRISTIAN and CASEY CHRISTIAN, wife and husband,
Plaintiffs/Respondents

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
Defendants/Petitioners

**DEFENDANTS'/RESPONDENTS' ANSWER TO
PLAINTIFFS'/APPELLANTS' PETITION FOR REVIEW**

James B. King, WSBA #8723
Christopher J. Kerley WSBA #16489
Markus W. Louvier WSBA #39319
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200
ATTORNEYS FOR PETITIONERS

 ORIGINAL

TABLE OF CONTENTS

I. COUNTER STATEMENT OF THE CASE 1

 A. General Nature of Case and Claims and Identity
 of Parties 1

 B. Nature of Cauda Equina Syndrome (CES) 4

 C. Surgery, Post-Surgical Complaints and
 Treatment 4

II. ARGUMENT AND AUTHORITIES 7

 A. Standard of Review..... 7

 B. Ms. Christian’s Claims Based Upon The Tort Of
 Outrage And Intentional Infliction Of Emotional
 Distress Were Properly Dismissed..... 8

III. CONCLUSION..... 12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989).....	7, 8
<i>Grimsby v. Samson</i> , 85 Wn.2d 52, 530 P.2d 291 (1975).....	7, 9
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 p.2d 321 (1998)	7
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	7
<i>Seybold v. Neu</i> , 105 Wn. App. 666, 19 P.3d 1068 (2001).....	7
<i>Sutton v. Tacoma School District No. 10</i> , 180 Wn. App. 859, 324 P.3d 763 (2014).....	7
Other Authorities	
<i>Restatement (Second) of Torts</i> , §46, Comment D (1965)	7, 8

I. COUNTER STATEMENT OF THE CASE

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

This is a medical malpractice case. The Petitioners, and Plaintiffs and Appellants 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).

The case arises from a low back surgery (laminectomy) on Ms. Christian performed by Dr. Tohmeh on December 5, 2005. (CP 103.) The purpose of the surgery was to address lumbar spinal stenosis to rectify a long history of bilateral leg pain and thigh numbness, with associated limitations on standing and other activities of daily living. *Id.*

The surgery resolved Ms. Christian's bilateral leg pain and thigh numbness. (CP 522.) However, after the surgery she complained of other symptoms such as left buttock, rectal and vaginal numbness, left leg numbness, right foot numbness, problems with her bladder not emptying completely, and constipation. *Id.*

As a result of Ms. Christian's post-operative complaints, Dr. Tohmeh referred her to multiple specialists, including a urologist, a physiatrist, and a colorectal surgeon. (CP 521, 558.) None diagnosed nerve

injury as the source of Ms. Christian's varied subjective complaints. (CP 554-56, CP 654-56.)

On March 16, 2006, Ms. Christian, after extensive internet research, developed the conviction that she suffered from cauda equina syndrome (CES), and hand-delivered a lengthy letter to Dr. Tohmeh, stating her internet self-diagnosis and also criticizing the care provided by him and his staff. (CP 117.) After reviewing Ms. Christian's letter, as well as several articles regarding cauda equina syndrome Ms. Christian brought with her. Dr. Tohmeh reassured Ms. Christian that she did not have cauda equina syndrome, as her preoperative bilateral leg weakness and numbness had improved significantly. (CP 517.) Dr. Tohmeh told Ms. Christiansen that, in his opinion, her urinary retention was related to her having been very static and recumbent for several days following surgery, in combination with anesthesia and pain medications. *Id.* Dr. Tohmeh also explained that bladder retention is a known side effect of surgery in general and noted that, in addition, while Ms. Christian exhibited urinary retention, she did not exhibit overflowing incontinence, either bowel or bladder. *Id.*

The confrontational visit of March 16, 2006 was Dr. Tohmeh's last with Ms. Christian. Eventually, in April 2006, Dr. Vivian Moise, a physical medicine and rehabilitation specialist, agreed with Ms. Christian and diagnosed CES. (CP 544.)

Ms. Christian brought suit against Dr. Tohmeh, claiming that, while in the hospital following surgery, and after discharge, she developed signs and symptoms consistent with 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 her injury. (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 alleged Dr. Tohmeh's post-surgical conduct constituted the tort of outrage. Dr. Tohmeh also denied this 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 Ms. Christian appealed. (CP 218-20.)

On December 15, 2015, Division III of the Court of Appeals, in an Unpublished Opinion, reversed the summary judgment dismissal of Ms. Christian's medical malpractice claim, but affirmed the summary judgment dismissal of her intentional infliction of emotion distress/outrage

claim. Ms. Christian now asks for review of the Court of Appeals' decision on her intentional infliction of emotional distress/outrage claim.¹

For the reasons set forth below, Ms. Christian's Petition for Review should be denied.

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.)

¹ Dr. Tohmeh has filed a Petition for Discretionary Review of the Court of Appeals' decision relative to Ms. Christian's medical malpractice claim, and that Petition is pending.

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.)

Over the next four days, while still in the hospital, Ms. Christian, 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.*

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, a colorectal surgeon and a physiatrist. (CP 558, 521.) None of these specialists diagnosed nerve injury or damage as the cause of Ms. Christian's symptoms, and none 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.) However, 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)

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).

In an outrage case, where the defendant moves for summary judgment dismissal, the trial court must make a threshold determination as to whether the conduct alleged may reasonably be regarded as so “extreme and outrageous” to warrant submission to a jury. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989); *Sutton v. Tacoma School District No. 10*, 180 Wn. App. 859, 869, 324 P.3d 763 (2014).

Mere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability. *Dicomes, supra*, at 630, citing *Restatement (Second) of Torts*, §46, Comment D (1965), and *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Even if a plaintiff’s

allegations amount to a showing of bad faith or malice, that is insufficient to support a claim of outrage. *Dicomes, supra*, at 631, citing *Restatement (Second) of Torts*, §46, Comment D (1965).

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

Ms. Christian alleged Dr. Tohmeh acted intentionally or in outrageous fashion by attempting to "obfuscate" or to hide from her facts and circumstances dealing with the alleged diagnosis of cauda equina syndrome. However, the summary judgment record 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. Partol, 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. (CP 130.)
- 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. (CP 130.)
- Dr. Moise believed Dr. Tohmeh was "angry" and attempted to influence her diagnosis. *Moise depo.* pg. 72, line 24. (CP 129.)

There was no evidence in the summary judgment record that any of Dr. 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).

The cornerstone of Ms. Christian's outrage claim is her allegation that, in a March 2, 2006 letter to her, Dr. Tohmeh misrepresented Dr. Olefin's findings. That is simply incorrect.

By the time Dr. Tohmeh wrote his March 2, 2006 letter, Dr. Olefin had seen Ms. Christian three times: on December 13, 2005, December 14, 2005 and January 4, 2006. (CP 195, 196, 197.) Dr. Olefin's diagnostic impression on December 13, 2005 was:

IMPRESSION:

- 1) Urinary retention status post laminectomy.
- 2) Intact bladder sensation and motor activity.
- 3) Grade 1 cystocele.
- 4) Constipation.

(CP 196.)

The next day, on December 14, 2005, Dr. Olefin saw Ms. Christian after she underwent a urine voiding trial. This was after she had been provided Flomax. (CP 196.) According to Dr. Olefin's chart note for that visit "The patient was provided with Flomax for which she has had no significant side effects. She feels well and is doing well overall." *Id.* Dr. Olefin's diagnostic impression on the visit of December 14, 2005 was:

IMPRESSION:

- 1) Mild to moderate postvoid residual.
- 2) Microhematuria status post cath removal.
- 3) Multilevel laminectomy.

(CP 196.)

Finally, Dr. Olefin's diagnostic impression following the visit of January 4, 2006 was:

IMPRESSION:

- 1) Urinary retention status post laminectomy, resolved.
- 2) Intact bladder sensation and motor activity.
- 3) Mild cystocele.
- 4) Lower urinary tract symptoms and polydipsia.

(CP 197.)

In his March 2, 2006 letter to Ms. Christian, Dr. Tohmeh wrote, in part:

I'm writing you to explain your medical situation as I understand you have had several concerns and have been discussing this with my medical assistant, Laurie. The nerve conduction study and EMG done by Dr. Lamb included your gastrocnemius muscle group. In addition, it has included the tibialis anterior muscles. As such, it would cover nerves inclusive of L4, L5, S1 and S2. The test is essentially non-revealing and certainly does not explain your current symptoms consisting of left buttock, peri-rectal and vaginal numbness as well as your lack of feeling a tampon inside your vagina. Further urologic consult obtained in January of 2006 revealed that you have normal sensory and motor function of the bladder. The bladder is supplied by S2, S3, and S4. Thus, from the diagnostic point of view, there is no evidence of any objective nerve dysfunction from L4 down to S4. (emphasis added).

(CP 116.)

A comparison of Dr. Olefin's chart notes with Dr. Tohmeh's March 2, 2006 letter demonstrates that Dr. Tohmeh did not in any way misrepresent Dr. Olefin's findings. *Petition for Review*, pg. 8-9.

In addition, Ms. Christian, in her Petition, claims Dr. Olefin "diagnosed a neurogenic bladder." (Petition for Review, pg. 9.) That is a misleading representation of the record. Dr. Olefin's January 4, 2006 chart note begins with the statement, "Follow up neurogenic bladder with urinary retentionary status post multilevel lumbar laminectomy 12/5/05." (CP 197.) However, as indicated above, his diagnostic impression was not neurogenic bladder. Rather, it was "intact bladder sensation and motor activity," which is precisely what Dr. Tohmeh relayed to Ms. Christian in his March 2, 2006 letter.

As the trial court and the Court of Appeals concluded, the evidence in the record did not meet the threshold for an outrage claim, and summary judgment was thus appropriate.

III. CONCLUSION

For the reasons set forth above, Dr. Tohmeh respectfully requests

that the Petition for Review be denied.

DATED this 11 day of April, 2016.

EVANS, CRAVEN & LACKIE, P.S.

By 

JAMES B. KING, #8723

CHRISTOPHER J. KERLEY, WSBA#16489

MARKUS W. LOUVIER, WSBA #39319

Attorneys for Respondents

818 W. Riverside, Suite 250

Spokane, WA 99201

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 11 day of April, 2016, the foregoing Answer to Plaintiffs'/Appellants' Petition for Review was delivered to the following persons in the manner indicated:

Bruce E. Cox
Michael J. Riccelli
Michael J. Riccelli, P.S.
400 S. Jefferson St., Ste. 112
Spokane, WA 99201
Bruce@mjrps.net
mjrps@mjrps.net

VIA REGULAR MAIL []
VIA CERTIFIED MAIL []
VIA FACSIMILE []
HAND DELIVERED [✓]
VIA EMAIL [✓]

4-11-2016 /Spokane, WA Carol R. Meyer
(Date/Place)

OFFICE RECEPTIONIST, CLERK

To: Carol Myers
Cc: Christopher Kerley; mjrpc@mjrps.net; Bruce@mjrps.net
Subject: RE: Christian v. Tohmeh, et al. - No. 92837-1

Received 4/11/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Carol Myers [mailto:CMyers@ecl-law.com]
Sent: Monday, April 11, 2016 10:22 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Christopher Kerley <CKerley@ecl-law.com>; mjrpc@mjrps.net; Bruce@mjrps.net
Subject: Christian v. Tohmeh, et al. - No. 92837-1

Dear Clerk,

Attached for filing in .pdf format is **Defendants'/Respondents' Answer to Plaintiffs'/Appellants' Petition for review**, In *Christian v. Tohmeh, et al.*, Supreme Court No. 92837-1. The attorney filing this document is Christopher J. Kerley, WSBA 16489, email address: ckerley@ecl-law.com.

Carol L. Myers
Legal Assistant to Christopher J. Kerley
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Ste. 250
Spokane, WA 99201
Ph: (509) 455-5200, Fax: (509) 455-3632

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.