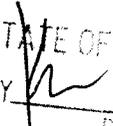


No. 40560-1

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STATE OF WASHINGTON  
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**IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON**

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MICHAEL SMITH as Personal Representative of the Estate of  
TATIYANIA M. HARRIS; TIMIKA SANFORD;  
and JEFFREY HARRIS  
Appellants,

vs.

RONALD R. LOUIE, M.D. and JANE DOE LOUIE and the Marital  
Community composed thereof,  
Respondents.

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OPENING BRIEF

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## **A. Introduction**

This appeal concerns the issue of proximate cause for injury when a doctor provided an admitted overdose of the chemotherapy drug methotrexate to a child, Tatiyania Harris, who suffered from Leukemia, and whether the lower court erred when it dismissed plaintiffs' claims on summary judgment despite plaintiffs having produced evidence showing that the overdose of methotrexate both caused Tatiyania's untimely passing and caused unnecessary suffering prior to Tatiyania's death.

On March 23, 2006, seven-year-old Tatiyania Harris was healthy and showed no signs or symptoms of the leukemia that she had been fighting and that had gone into complete remission. On March 24, 2006, defendant Dr. Ronald Louie administered an overdose of the chemotherapy drug methotrexate directly into Tatiyania's brain. The dose that Dr. Louie gave to Tatiyania was six times her prescribed dose – a dose that should not be injected into a child's brain, a dosage that Dr. Louie had never administered to a human being using this method before. Immediately after the overdose Tatiyania's medical condition rapidly deteriorated, ultimately leading to her death. Dr. Louie has admitted that he breached the standard of care by administering the overdose of methotrexate. The evidence presented by plaintiffs shows that this breach of the standard of care proximately caused injury and damages to

Tatiana Harris. Defendant's motion for summary judgment should have been denied by the lower court.

**B. Assignment of Error and Issues Pertaining Thereto**

The lower court erred in granting defendant's motion for summary judgment pursuant to CR 56.

The lower court erred by dismissing plaintiffs' claims on summary judgment when plaintiffs provided sufficient evidence to show that the overdose of methotrexate caused injury and damages to Tatiana Harris, including pain and suffering and, ultimately, her death.

**C. Statement of the Case**

This is an appeal from the lower court's order of March 26, 2010, CP 358-359, granting Defendant Louie's Motion for Summary Judgment.

**D. Statement of Facts**

**1. Tatiana was treated for Leukemia for four years and as of March 23, 2006 all indications were that her Leukemia was in remission.**

Tatiana was diagnosed with ALL, which stands for Acute Lymphoblastic Leukemia. This form of leukemia is a cancer of the blood and bone marrow which can spread to many parts of the body. CP 94 at ¶ 3. Tatiana's primary care physician was Dr. Robert Irwin, a pediatric hematologist and oncologist who started treating Tatiana at Mary Bridge Children's Hospital on July 6, 2004. CP 180 at p. 4:13-18. Based on the

records, Tatiyania first began treatment at Mary Bridge Hospital in December of 2002 and was initially diagnosed with ALL on December 3, 2002. CP 95 at ¶ 5. Prior to Dr. Irwin, Tatiyania's primary care physician was Dr. Daniel Niebrugge from December of 2002 until June 28, 2004 when he left Mary Bridge Hospital. *Id.* In the approximate 18 months that Dr. Niebrugge was Tatiyania's primary care physician he saw her at approximately 73 consecutive visits in a row. *Id.* at ¶ 6. When Dr. Niebrugge left Mary Bridge Children's Hospital, he was replaced by Dr. Robert Irwin, who became Tatiyania's primary care physician starting on July 6, 2004. *Id.* Like Dr. Niebrugge, Dr. Irwin saw Tatiyania for clinical visits on 66 consecutive times managing her ALL, including regularly administering her chemotherapy. From December 2002 to March 24, 2006, Tatiyania was seen for clinic visits by Dr. Niebrugge and then by Dr. Irwin on 130 occasions. *Id.*

Dr. Niebrugge saw Tatiyania for Pediatric Hematology/Oncology visits on the following dates on a consecutive basis:

12/13/02; 12/16/02; 12/23/02; 12/24/02; 12/30/02; 1/6/03;  
1/7/03; 1/10/03; 1/13/03; 1/27/03; 2/3/03; 2/7/03; 2/14/03;  
2/21/03; 2/28/03; 3/7/03; 4/7/03; 4/21/03; 4/28/03; 5/5/03;  
5/12/03; 5/19/03; 5/28/03; 6/6/03; 6/13/03; 6/16/03;  
6/20/03; 6/27/03; 7/3/03; 7/7/03; 7/14/03; 7/25/03; 8/4/03;  
8/15/03; 8/25/03; 9/2/03; 9/8/03; 9/22/03; 10/6/03;  
10/13/03; 11/3/03; 12/1/03; 12/3/03; 12/8/03; 12/9/03;  
12/12/03; 12/15/03; 12/19/03; 12/26/03; 12/29/03; 1/2/04;  
1/5/04; 1/16/04; 1/23/04; 1/26/04; 1/29/04; 2/6/04; 3/8/04;

3/15/04; 3/25/04; 3/29/04;4/7/04; 4/9/04; 4/12/04; 4/21/04;  
4/30/04; 5/11/04; 5/19/04; 5/25/04; 6/3/04; 6/11/04;  
6/21/04 and 6/28/04.

CP 95 at ¶ 7.

After Dr. Niebrugge left Mary Bridge Children's Hospital, Tatiyania's care was transferred to Dr. Irwin. CP 96 at ¶ 8. In over 70 visits with Dr. Niebrugge, Tatiyania had no issues with her Head, Eyes, Ears Nose and Throat (HEENT) except for ear pain on 6/6/03 and pink eye on 8/25/03 (which was resolved by the next visit on 9/23/03). Otherwise, Tatiyania's HEENT during these 70-plus visits were determined to be unremarkable. *Id.*

Dr. Irwin saw Tatiyania on a consecutive basis until she was seen by Dr. Louie on the date of the overdose on the following occasions:

7/6/04; 7/9/04; 7/13/04; 8/2/04; 8/13/04; 8/16/04; 8/23/04;  
9/20/04; 9/21/04; 10/12/04; 10/22/04; 11/12/04; 11/18/04;  
12/8/04; 1/18/05; 2/3/05; 3/24/05; 4/7/05; 4/22/05; 5/6/05;  
5/19/05; 5/26/05; 6/9/05; 6/22/05; 7/7/05; 7/21/05; 7/27/05;  
8/2/05; 8/18/05; 8/22/05; 8/25/05; 9/21/05; 9/26/05;  
10/6/05; 10/10/05; 10/13/05; 10/27/05; 10/28/05; 11/14/05;  
11/28/05; 12/5/05; 12/12/05; 12/19/05; 12/28/05; 1/6/06;  
1/13/06; 1/16/06; 1/17/06; 1/18/06; 1/25/06; 1/26/06;  
1/27/06; 2/6/06; 2/7/06; 2/8/06; 2/15/06; 2/16/06; 2/17/06;  
2/27/06; 2/28/06; 3/1/06; 3/8/06; 3/9/06; 3/10/06; 3/22/06  
and 3/23/06.

CP 96 at ¶ 9.

In over 66 visits with Dr. Irwin prior to March 24, 2006, Tatiyania's systems were assessed as being normal or unremarkable, with

the exception of one visit where she complained about itchy eyes and a few occasions where she complained of headaches or cold symptoms. *Id.* at ¶ 10. On the last date of treatment with Dr. Irwin before the overdose, Tatiyania reported to Dr. Irwin for her normal Ommaya tap chemotherapy treatment. *Id.* Her review of systems was normal or unremarkable and her Leukemia prior to the March 24, 2006 overdose was in complete remission. *Id.* Her head, eyes, ears, nose and throat were unremarkable on March 23, 2006. *Id.* The Ommaya tap was completed by Dr. Irwin on March 23, 2006, and a 2mg dose of intraventricular Methotrexate was administered to Tatiyania via Ommaya tap. *Id.*

**2. On March 24, 2006 Dr. Louie administered an overdose of Methotrexate directly into Tatiyania's brain.**

On March 24, 2006, Dr. Irwin was not going to be in the clinic for several days and Dr. Louie treated Tatiyania on this day and administered her chemotherapy. CP 96 at ¶ 11. According to the record,

“Tatiyania is accompanied by her father to receive daily intraventricular chemotherapy, the 3<sup>rd</sup> of 3 days. Review of systems is normal. Head, eyes, ears, nose and throat are unremarkable. Tatiyania was sedated, and clear spinal fluid was obtained and intraventricular Methotrexate was given. After the procedure was done, Dr. Louie began cleaning the lumbar puncture tray and noticed Tatiyania's Methotrexate dose on another countertop. Dr. Louie double checked the dose given to Tatiyania, and she

did in fact receive 12mg of Methotrexate instead of the 2 mg that she was scheduled to have. The 12mg of Methotrexate syringe was left over from a patient who was previously in the room and had her procedure cancelled. There was no problem with labeling. Tatiyania's father left for coffee, and Dr. Louie was unable to talk to him. Dr. Louie called Tatiyania's mother and explained the situation of the wrong dosage, and took responsibility and apologized. He told her that since Tatiyania had the 12mg dosage given to her many times during previous lumbar puncture procedures, he did not think there would be any unusual toxicity, but could not be sure. Dr. Louie discussed with Tatiyania's mother the risk of leukoencephalopathy (**white matter changes first described in children with leukemia, associated with radiation and chemotherapy injury, often associated with Methotrexate**) given her recent chemotherapy, her current CNS relapses, and her radiation therapy. Tatiyania's father returned so Dr. Louie could tell him about the incident, but he left before he could finish the conversation.

Impression: acute lymphoblastic leukemia (ALL) being treated for central nervous system (CNS) relapse with a wrong dosage given today."

CP 96 at ¶ 11; CP 103-107; CP 109-111.

Tatiyania returned the same day as the overdose on March 24, 2006 and was diagnosed with optical relapse/conjunctivitis which she had

previously had in her right eye for the first time since her treatment began in 2002. CP 97 at ¶ 12.

Prior to March 24, 2006, Tatiyana was in full remission from her Leukemia while under the consistent care of Dr. Niebrugge and Dr. Irwin. CP 98 at ¶ 13. While under the care of Dr. Niebrugge and Dr. Irwin, Tatiyana was never given any improper medications. *Id.*

By way of background, Dr. Irwin testified that Tatiyana's clinic visits "would be essentially a complete head-to-toes examination because leukemia can show up and the side effects of treatment can show up in so many places." CP 181 at p. 6:9-15. Dr. Irwin routinely conducted blood counts and blood chemistries, including the collection of spinal fluid. *Id.* at p. 6:18-7:3. The spinal fluid was collected for two main purposes, (1) to check for leukemia cells and (2) to take out spinal fluid and replace the fluid with chemotherapy medicine injected into the spine (it was required to take fluid out before replacing it with medication so that the overall fluid level remained the same). *Id.* Chemotherapy dosages kill the cancer cells, but often weaken the immune system as well. CP 184-185 at p. 21:6-22:7.

At the time of the overdose, Tatiyana was undergoing a regular course of intraventricular chemotherapy, which is a way of delivering chemotherapy into the spinal fluid by "placing a tube under the scalp that

goes through the skull into the ventricle, which is a fluid space in the brain.” CP 183 at p. 14:24-15:4. As Dr. Irwin explained in his deposition:

The spinal column is connected to the fluid spaces in the brain, and the fluid flows from the brain up and down the spinal column and back.

You can see a small bulge in the scalp, and you can feel a small piece of rubber that's easily compressible. The process is the area is cleaned sterilely, a needle is inserted into the plastic reservoir, and fluid is drawn out, spinal fluid, and then medication is injected into the space. Then the reservoir is pumped to help make sure the chemotherapy gets into the spinal fluid space.

*Id.* at p. 15:6-8; 16:22-17:4.

In accordance with Dr. Irwin's testimony, one cannot test the recurrence of leukemia in the spinal fluid by testing bloodwork and one cannot tell if leukemia has recurred in the blood or in the blood marrow space by looking at spinal fluid. CP 181 at p. 7:15-24. This is important because Dr. Irwin's declaration in support of the defendant's Motion for summary judgment is misleading because in Paragraph 5 of his declaration he states:

The Methotrexate blood levels measured after the March 24, 2006 dose by Dr. Louie, showed a level of 0.38. This is a low level of Methotrexate. There were no meaningful abnormalities in her lab studies following the dose that could have been attributable to

the Methotrexate dose on March 24, 2006.

CP 173 at ¶ 5.

As Dr. Irwin testified, you cannot test the Methotrexate levels in the spine and brain through testing bloodwork. In fact, Dr. Irwin testified to this effect in his deposition:

Q. Can you tell what the toxicity effect on the brain and spine is as a result of receiving too much Methotrexate by testing blood levels?

A. No.

Q. And the lab studies that you're referring to in Paragraph 5, that's blood work; correct?

A. Yes.

Q. And that's not a test of spinal fluid; is that correct?

A. There were no -- that is correct.

CP 188 at p. 36:4-20.

Dr. Irwin's statement in paragraph 5 is misleading, and testing bloodwork after the overdose of March 24, 2006 instead of the spinal fluid after the overdose, is of no consequence and is essentially irrelevant to determine the effects of the overdose.

As Dr. Irwin testified, chemotherapy has two purposes, one of which is curative and the other is for palliative or pain relief purposes. CP 181 at p. 8:8-12. Prior to the March 24, 2006 overdose, Tatiyania was "on

chemotherapy for curative purposes,” meaning that her Leukemia was in remission and under control and there was still a probability of her being cured. *Id.* at p. 8:19-22.

**3. Tatiyania’s health deteriorated immediately following the overdose of Methotrexate, causing her great suffering.**

Immediately after the March 24, 2006 overdose, Tatiyania’s health began to deteriorate and her treatment went from curative to palliative until chemotherapy was stopped altogether. CP 181 at p. 8:2-7.

Tatiyania’s medical history is very telling of her immediate demise after the March 24, 2006 overdose. Tatiyania received the overdose of Methotrexate on the morning of March 24, 2006 and by that afternoon she reported back to Mary Bridge Hospital with what was later found to be a relapse of a tumor determined to be Leukemia. CP 97 at ¶ 12. After Tatiyania was initially diagnosed with Leukemia she was under the care of oncologist Dr. Niebrugge, who was her primary care physician for the care of her cancer, until Dr. Irwin took over as Tatiyania’s primary care physician in 2004. CP 95 at ¶ 5. This occurred after Dr. Niebrugge left Mary Bridge Children’s Hospital. CP 181 at p. 9:13-19. Dr. Irwin took over the treatment of Tatiyania on or about July 6, 2004. CP 182 at p. 10:11-15. While Tatiyania was under Dr. Irwin’s treatment, Dr. Irwin

would see Tatiyania in clinic for chemotherapy treatments and scheduled follow-ups. *Id.* at p. 10:17-21.

Dr. Irwin treated Tatiyania's Leukemia as her primary oncology physician continuously from July 6, 2004 to March 23, 2006 (the day before the overdose). CP 182 at p. 12:24-13:1. From July 6, 2004 to March 23, 2006, Dr. Irwin treated Tatiyania as her primary care physician on approximately 66 consecutive occasions. *Id.* at p. 12:18-13:1. On March 24, 2006, this all changed. For some unexplainable reason, Dr. Irwin did not treat Tatiyania on March 24, 2006, even though he had treated her for the previous 66 treatment appointments. *Id.* at p. 13:11-13. For the first time in over three years, Tatiyania saw a different doctor for her clinic visit on this date. On March 24, 2006, Dr. Louie treated Tatiyania. Dr. Irwin returned to clinic at Mary Bridge on March 27, 2006 and that is when he learned that Dr. Louie gave the March 24, 2006 overdose. CP 182-183 at p. 13:14-14:10. On March 24, 2006, instead of the prescribed 2 milligrams of Methotrexate, Dr. Louie gave Tatiyania 12 milligrams of Methotrexate, a dose that was never given through the brain before and in fact both Dr. Irwin and Dr. Louie testified that they had never given such a dose to a human being before through an Ommaya tap. CP 202-203 at p. 25:24-26:3; CP 185 at p. 25:6-7. Prior to the March 24, 2006 overdose, Tatiyania had never received 12 milligrams of

Methotrexate through her brain. CP 186 at p. 26:3-9. Dr. Irwin never gave such a dose because he knew such a dosage in the brain would be toxic. CP 173 at ¶ 3. Dr. Irwin was upset when he learned of Dr. Louie's overdose. CP 183 at p. 14:11-19.

On March 24, 2006, the same day that Tatiyana received the overdose by Dr. Louie, she came back to Mary Bridge Children's Hospital and reported redness around her right eye which was painful. CP 186 at p. 27:3-8. This was diagnosed as conjunctivitis (inflammation of the lining in the eyelid and around the eye that can be from any cause) and as Dr. Irwin testified in his declaration "the conjunctivitis that she complained of at the time turned out to be a recurrence of a tumor from Leukemia." CP 173 at ¶ 6. Dr. Louie confirmed this:

Q. Was the leukemia relapse found in the same eye and the same area that Tatiyana Harris complained about after the medication error on March 24th, 2006?

A. Yes.

CP 203 at p. 28:7-10.

As Dr. Louie testified:

Q. Now, on the same day of your Methotrexate administration error on Tatiyana Harris, she came back later that day with objective symptoms of conjunctivitis in her right eye, correct?

A. Correct.

Q. And on May 19th, 2006, she was diagnosed with leukemic relapse in her right eye, correct?

A. Correct.

CP 201-202 at p. 21:19-22:1.

Prior to the March 24, 2006 overdose Tatiyana had never been diagnosed with conjunctivitis while under treatment for Luekemia. CP 186 at p. 27:9-16. Tatiyana did not have any conjunctivitis prior to the March 24, 2006 overdose and this conjunctivitis was later diagnosed as cancer infiltration. CP 188 at p. 37:13-18. As Dr. Irwin testified:

The conjunctivitis that we saw come and go in March and April turned out to be a recurrence of her Leukemia.

Q. And was it accurate that that conjunctivitis which later was determined to be a recurrence of her cancer was only visual and made known to medical personnel after she -- on the same day and after she received the March 24th, 2006 injection by Dr. Louie?

A. Yes.

CP 189 at p. 38:4-5; p. 38:6-39:8

Q. Is it accurate that there was no notice of any recurrence of Tatiyana's leukemia immediately prior to March 24th, 2006?

A. Immediately prior to March 24th, 2006, there was no evidence of recurrent leukemia.

Q. After March 24th, 2006, Tatiyania's leukemia did, in fact, reoccur; correct?

A. Yes. She recurred after -- or on March 24th.

Q. And we also know that by late May of 2006, it was pretty well concluded that the leukemia was back; correct?

A. In late May is when she was diagnosed with recurrent leukemia.

Q. The conjunctivitis turned out to be a leukemia-caused tumor on or near her right eye; is that correct?

A. Yes.

Q. And there were no signs of a cancerous tumor near her right eye prior to March 24th, 2006; correct?

A. Correct.

Q. After March -- on or after March 24th, 2006, after she received a dosage by Dr. Louie, that is the first time that we have visual evidence of the conjunctivitis; is that correct?

A. Yes.

Q. And that conjunctivitis is what we now know to have been caused by the leukemia tumor?

A. Yes.

Q. [W]as the conjunctivitis that you saw after March 24th, 2006, a sign of the return of the leukemia?

A. The conjunctivitis was the first finding of the leukemia relapse.

CP 189 at p. 39:9-41:11; CP 190 at p. 43:13-19.

From the medical record, Tatiyania's demise after the March 24, 2006 overdose is quite apparent:

- **3/27/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Tatiyania presents for clinic visit. She has a persistent red eye for 3 days despite gentamicin drops. Her right eye is injected, but has no visual acuity changes. Her right eye is irritated, itchy, and she has a sense of a foreign body in her right eye. She has mild photophobia, and her conjunctivae is injected. She is diagnosed with conjunctivitis, viral vs. bacterial. CP 113-115.
- **4/6/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Her "pink eye" is better, but she will see Dr. Shelley for further evaluation. Her right eye is injected intermittently. Her left eye is normal. CP 120.

- **4/7/06 - Hematology/Oncology Clinic, Robert Irwin, MD-**  
Tatiyania presents for Ommaya tap. Tatiyania complains of a stomach ache and decreased appetite. CP 122-123.
- **4/19/06 - Hematology/Oncology Clinic, Robert Irwin, MD-**  
Tatiyania presents for Ommaya tap. Tatiyania complains of headaches. *History of seizures is checked “yes” on the sedation form.* CP 125-126.
- **4/21/06 - Hematology/Oncology Clinic, Robert Irwin, MD-**  
Tatiyania presents for Ommaya tap. Tatiyania complains of stomach pain with palpation. CP 128-130.
- **5/4/06 - Hematology/Oncology Clinic, Robert Irwin, MD-**  
Tatiyania presents for Ommaya tap. Tatiyania complains of headaches and mild nausea. CP 245-252. *See Ex. S to Martin Decl.*
- **5/5/06 - Hematology/Oncology Clinic, Ronald Louie, MD-**  
Tatiyania presents for Ommaya tap. Tatiyania has decreased appetite and mild nausea, and she complains of waves of abdominal pain. CP 254-258.
- **5/18/06 - Hematology/Oncology Clinic, Ronald Louie, MD-**  
Tatiyania presents for Ommaya tap. Tatiyania has bleeding problems- chemotherapy induced neutropenia (a condition of an

abnormally low number of neutrophils (white blood cells). CP 260-261. *See* Ex. U to Martin Decl.

- **5/19/06 – Pediatric Hematology/Oncology Clinic Ronald Louie, MD-** Tatiyania presents to see Dr. Louie for sudden blindness in her right eye and intraventricular chemotherapy. Tatiyania's mother noted that after the chemotherapy Tatiyania's eye became red, and disappeared the next day. The same thing happened last night, but this time in the morning she complained of visual loss in the right eye. An urgent referral to Dr. Peter Shelley, pediatric ophthalmology, and MRI exam was arranged. Dr. Shelley found that Tatiyania's vision was 20/25 in her right eye, but she did have significant thickening of her iris with infiltration consistent with leukemia. Her left eye was fine. Impression: Leukemic relapse in the right eye despite chemotherapy and radiation therapy. CP 136-137.
- **5/26/06 - Hematology-Oncology Clinic, Ronald Louie, MD-** Tatiyania presented with her parents for leukemia relapse in her eye, and bone marrow aspiration to complete the staging of her ocular relapse diagnosed 5/19/06. Dr. Louie spoke with Tatiyania's parents, and told them that her latest cerebrospinal fluid was suspicious for CNS (central nervous system) relapse, and

a bone marrow aspiration needed to be done to check the status of that site for possible disease. CP 142-143.

- **5/31/06 -Hematology-Oncology Clinic, Ronald Louie, MD-** Tatiyania presents with her father for intraventricular procedure and therapy discussion. Review of systems is normal with the exception of bilateral scleral injection and teeth pain. Tatiyania had a severe visual disturbance 2 weeks ago, but has responded to dexamethasone and oral Methotrexate. Dr. Louie performed a marrow aspiration which was negative for marrow relapse. Her last cerebrospinal fluid (CSF) was suspicious. Tatiyania's mother reported that her eye seemed better after intraventricular Methotrexate, but her father thought her eye worsened after intraventricular Methotrexate. The intraventricular Methotrexate was put on hold for now after Tatiyania's mother concurred. Ommaya tap done. Impression: Ocular relapse of leukemia with cerebrospinal fluid (CSF) status pending but marrow in continued remission. CP 145-148.
- **6/14/06 – Referral Letter-** Dr. Irwin writes a referral letter to Dr. John Rieke for radiation therapy for relapsed acute lymphoblastic leukemia (ALL). Dr. Irwin states that Tatiyania had been doing well until 2 weeks prior when she developed sudden blindness in

her right eye, and was found to have thickening of her iris consistent with leukemic infiltration and white cells in her anterior chamber. Dr. Irwin discussed with Tatiyania's parents the likelihood of continued relapses of her leukemia. Dr. Irwin hopes to achieve as lengthy a remission as possible with the minimal amount of side effects and toxicity. He would like Dr. Reike to consider treating Tatiyania with 18 Gy to the cranium without an eye shield. CP 263-264.

- **6/29/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Tatiyania presents for Ommaya tap. Tatiyania's systems are normal with the exception of blood flecked sputum secondary to upper respiratory infection and nosebleeds. She is otherwise happy, playful, and eating. Her acute lymphoblastic leukemia (ALL) is currently stable. Ommaya tap done, and 2mg intraventricular Methotrexate by Ommaya administered. CP 266-274.
- **6/30/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Tatiyania presents for Ommaya tap. Tatiyania's systems are normal with the exception of upper respiratory infection and nosebleeds which are resolving. Her eye was slightly red last night, but got better. Ommaya tap done, and 2mg intraventricular Methotrexate by Ommaya administered. CP 276-280.

- **7/7/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Tatiyania presents for clinic visit. She is still coughing up bright red blood a few times/day. The rest of her systems are normal. She has no headaches, no eye symptoms and no acute lymphoblastic leukemia (ALL) symptoms. There is concern regarding another relapse based on cerebrospinal fluid (CSF). Follow-up after radiation therapy. CP 282-286.
- **7/12/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Tatiyania presents for clinic visit. Tatiyania's systems are normal with the exception of headaches when watching television. CP 288-292.
- **7/20/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Tatiyania presents for Ommaya tap. Tatiyania has blurry vision out of her right eye. She has an injected sclera in right eye-leukemic infiltrate. She has no headaches, no nausea/vomiting, no bleeding, no fever, and no bone pain. Ommaya tap done, and 2mg intraventricular Methotrexate by Ommaya administered. CP 294-302.
- **7/27/06 - Radiation Oncology, John Rieke, MD-** Tatiyania presents with her father for a consultation for recurrent acute lymphoblastic leukemia (ALL) in the central nervous system, now

in the eyes and spinal fluid. She was last seen by radiation oncology in 2005 when she underwent whole brain radiation therapy, including the optic nerves and retinal regions, for ALL with isolated cerebrospinal fluid failure one year after her initial diagnosis. Dr. Irwin and Dr. Louie have been communicating with Dr. Rieke regarding Tatiyania's status since May. Dr. Gallucci was called about blurred vision in her right eye, and the pediatric ophthalmologist saw a white cell infiltrate in the iris. Dr. Louie used high-dose corticosteroids and her vision began to clear. A recent MRI scan shows no obvious masses along the optic nerve in the eyes, but there is some thickening of the meninges in the occipital region. She continues to have a positive cerebrospinal fluid in spite of intrathecal therapy. Dr. Louie consulted with Dr. Jay Douglas at the Univ. of WA, and he suggested a lumbar puncture for spinal irradiation. After presenting Tatiyania's case to the tumor board it was decided that her care would be palliative (focusing on treating symptoms to prevent pain and have a better quality of life), and Tatiyania's parents would like to proceed with radiation therapy to the whole brain attempting to delay spinal radiation therapy. Tatiyania's review of systems are normal. Her visual acuity in both eyes is normal, her vision is not cloudy, and

extra ocular movements are intact. Impression: Multiple central nervous system (CNS) relapses, bow including the intraocular structures, in spite of intrathecal drug therapy and prior whole brain and spinal axis radiotherapy. CP 304-310.

- **8/9/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Dr. Irwin met with Tatiyania's father to review radiation therapy and treatment plans. Toxicity discussed. CP 312-317.
- **9/13/06 - Pediatric Hematology-Oncology Clinic, Robert Irwin, MD-** Tatiyania presents to pediatric hematology-oncology clinic with a fever of 102.8. She was initially diagnosed in December 2002 with acute lymphoblastic leukemia (ALL). She has had at least 3 isolated central nervous system relapses of her ALL. She underwent craniospinal radiation in April 2005, and then cranial radiation therapy in August 2006. She has had a hiatus from chemotherapy since then. She has had no evidence of disease on her last bone marrow. She has mild intermittent ear pain. According to her father she has good liquid intake, but her solid intake has been variable. She has less energy than usual for the past 3-5 days. Her last blood count revealed pancytopenia. Assessment: Fever and some upper respiratory tract infection symptoms. She has hypophosphatemia (low level of phosphorus in

the blood) and mild renal insufficiency (kidneys no longer have enough kidney function to maintain a normal state of health). CP 319-320.

- **9/29/06 - Hematology/Oncology Clinic, Robert Irwin, MD-** Tatiyania presents for bone marrow aspiration. She has anemia with fatigue, lower extremity peripheral neuropathy, low grade fever, unsteady gait, leg pain with walking, depression, and diabetes which is better off steroids. CP 322.
- **10/10/06 – History and Physical Exam, Robert Irwin, MD-** Tatiyania presented to clinic with a fever of 103 degrees Fahrenheit, and diarrhea. Her energy is low, and she has leg pain and gait abnormality associated with vincristine. She is at the end of re-induction for her first bone marrow relapse. She has had multiple isolated relapses of her acute lymphoblastic leukemia. She is status post radiation therapy from late August 2006. Review of systems is negative. Physical exam is normal with the exception of Tatiyania having a pale appearance. Assessment: Tatiyania is in re-induction therapy for relapsed acute lymphoblastic leukemia. She presents with severe pancytopenia and high fever. She has no focus of infection on examination. CP 324-327.

- **11/22/06- Hematology/Oncology Clinic, Robert Irwin, MD-**  
Tatiyania presents for clinic visit. Tatiyania presents with mild fatigue, and occasional headaches. She has no acute lymphoblastic leukemia (ALL) symptoms. She has pancytopenia without blasts. She is attending school. Continue transition to hospice care. CP 329-330.
- **12/15/06- Hematology/Oncology Clinic, Robert Irwin, MD-**  
Tatiyania presents for clinic visit for supportive care. Tatiyania presents with a fever, shoulder pain, worsening fatigue, petechiae, easy bruising, pain in her ribs and chest wall, and swollen eyes. She has blasts present, and low platelets. Palliative chemotherapy administered: Ceftriaxone 2 grams IV. Platelets transfused. CP 332-339.

From the testimony, Tatiyania's demise after the March 24, 2006 overdose is quite apparent:

- On March 27, 2006, Tatiyania came to see Dr. Irwin with complaints of persistent red eye for three days with the sense of a foreign body in her right eye and photophobia (sensitivity to light). CP 186 at p. 28:10-29:4.

- On April 6, 2006, Tatiyania reported to Dr. Irwin that she still had “pink eye,” (later to be determined leukemia). *Id.* at p. 29:5-9.
- On April 7, 2006, Tatiyania reported to Dr. Irwin stomach pain and decreased appetite. *Id.* at p. 29:10-12.
- On April 19, 2006, Tatiyania reported to Dr. Irwin headaches and for the first time seizures are reported. CP 186-187 at p. 29:13-30:3.
- On May 4, 2006 Tatiyania reported to Dr. Irwin headaches and nausea. CP 187 at p. 30:20-22.
- In fact, on May 4, 2006, Dr. Irwin affirmatively diagnosed Tatiyania with “**Chemotherapy toxicity.**” *Id.* at p. 31:3-10.
- On May 5, 2006, Tatiyania reported to Dr. Irwin waves of abdominal pain, decreased appetite and nausea. *Id.* at p. 31:15-20.
- On May 19, 2006, Tatiyania reported to Dr. Irwin sudden blindness in her right eye, thickening of her iris and infiltration consistent with leukemia. *Id.* at p. 31:25-32:15.

Tatiana's demise is also readily apparent from the observations of her mother, Timika Sanford. Timika Sanford testified to the dramatic decline and demise after Dr. Louie's overdose:

- “After the incident of Dr. Louie giving her somebody else's chemotherapy, I seen a drastic change in everything that was going on with her. Immediately when she went home, she had redness in her eye. Two weeks later, she had leukemia cells on that same eye. She ended up doing face radiation less than a month later. In September she became very ill. In November we signed up for hospice. She passed away in December.”

CP 213 at p. 26:7-15.

- Ms. Sanford also testified that from the time of the overdose and for at least three months thereafter, Tatiana's right eye was consistently red. *Id.* at p. 27:3-19.
- According to Ms. Sanford, once Tatiana received the overdose and obtained the red eye, her vision was affected and the red eye (later determined to be leukemia) never went away. *Id.* at p. 28:7-10.

- From the day of the overdose, Tatiyania’s vision was affected and “constantly had mucousy stuff coming out of it.” *Id.* at p. 28:14-25.
- As reported by Tatiyania’s mother, from the date of the overdose and for several months thereafter, Tatiyania’s mother repeatedly reported consistent blindness from March 24, 2006 onward. CP 214 at p. 29:21-30:5.
- “What I’m saying is is that there was a drastic change in her eye after that happened on the same side that the Ommaya is located, which is the same side that they put that leukemia in, which is in her spinal fluid, which is connected to her brain. It was in her organs. It was in her blood stream. It was in her bone marrow. The only place it wasn’t in – it was in her eye. After that took place, there was an immediate change in that same eye that she was diagnosed with leukemia cells on it. As a mother, I just go by what I see.” *Id.* at p. 31:1-11
- Timika Sanford testified that she complained to Mary Bridge medical personnel about Tatiyania’s eye before they finally sent her to a specialist for the leukemia diagnosis. *Id.* at p. 31:14-20.

- According to the mother, Tatiyana was admitted and hospitalized on the same day of the overdose:

Q. What did Dr. Irwin tell you?

A. He just told us what mistake was made and what we needed to do to detox her.

Q. And what was that? What did he recommend?

A. I'm not too sure of the name of the medications and stuff, but she took some oral medication and we did admit her into Mary Bridge for fluid flushes. I'm not too sure what kind of medications and stuff she was on, but she was admitted at that time.

Q. And how long was she in?

A. 15 days.

Q. 15 days?

A. Uh-huh.

Q. So that would have began on –

A. It was like the 23<sup>rd</sup> [24<sup>th</sup>] of March. (The overdose was March 24<sup>th</sup>, but Ms. Sanford mistakenly referred to the 23<sup>rd</sup> in her deposition).

Q. Okay. March 23, which is '06, for 15 days. And did you have regular contact with her during that 15 days?

A. Yeah.

Q. How was she doing?

A. Not the same.

Q. How was she doing?

A. She wasn't doing well.

Q. How was she doing? What problems did you observe in that 15 days that she was in the hospital?

A. She was sick.

Q. Sick in what way? I need you to be more specific.

A. Her body was exhausted. Her mind was exhausted. She wanted to be at school, so I think she was emotionally exhausted. Her face was puffy. Her eyes were red. Her skin was yellow. She didn't want to eat. She would urinate on herself because she didn't have enough energy to get up to use the bathroom.

Q. And was this her condition throughout that 15 days?

A. Yes.

CP 215-216 at p. 36:13-37:22.

Q. And were they different than the sores that she had traditionally developed in the previous two years or year?

A. They weren't different, but the only thing that was different was her appetite. Normally after a certain amount of time, she'll start to eat, but this time she didn't eat for quite some time.

Q. How long did she not eat?

A. I would say about three weeks.

Q. Okay. How much weight did she lose?

A. I'm not too sure.

Q. Did she lose a significant amount of weight as a result of not eating for that three weeks?

A. Yeah.

CP 216 at p. 39:1-14.

Q. How long did the visible weight loss last?

A. Well, she didn't eat for about three weeks. I would say it was visible that she was skinny until she passed away.

Q. So she never regained that weight?

A. No.

Q. Never regained her appetite?

A. No.

Q. So from March 23, 2006, through her passing, she never had a good appetite?

A. No.

Q. And did she ever regain the weight that she had lost?

A. No.

*Id.* at p. 40:4-15.

Q. I thought you told me that your daughter was seen by Dr. Shelley in 2006 and he told you that there was evidence of leukemia in the eye. Was that a relapse?

A. I wouldn't consider it a relapse. [m]y definition of "relapse" is there's leukemia cells present in the blood stream or either in the spinal fluid or whatever is being treated at that time. It being on her eye, I'm not too sure

where that falls in that category because that was my first time with that. So I don't know if I would call that a relapse or not.

CP 221 at p. 60:1-14.

Q. Did your daughter have any problems with her eyes being red before March of 2006?

A. She would get like pinkeye and stuff like that when her counts and stuff were low, but not like a red eye in one eye like she had after the incident. She would get like, you know, where it looked like you had like pinkeye or something, but it would be like in both of her eyes. But it was more like a pink and not a red. There's a difference between the two.

CP 235 at p. 113:18-114:1.

Q. Did you talk to Dr. Irwin and basically say, "Is Tatiyania going to be okay"?

A. We had more of a conversation of, you know, "Look at her. What's wrong with her eye? What are we supposed to do? How long is she going to be here?" And, you know, "Is this going to make her sicker later," you know. Those type of concerned questions. We trusted Dr. Irwin, so whatever I'm sure his answers were, we were open to.

CP 236 at p. 120:3-10.

Q. Ms. Sanford, after Dr. Louie administered the overdose of Methotrexate to Tatiyania, did Tatiyania experience any mental dysfunction?

A. Mental, yes.

Q. And what sort of mental dysfunction did you observe?

A. She had a lot of issues with starting to like remember stuff. She kind of would like -- I don't know. She just wasn't really herself, really spacy. She mentally just was not there. You could see the transition and how she was kind of losing herself in the understanding of things. Even with like her sight and her balance, her communication with others kind of was just all off track.

Q. Now, you mentioned memory, balance, sight. Are these things that you had observed in her prior to the overdose of Methotrexate?

A. No. This was stuff that happened after, all things that happened after.

Q. Did she experience any difficulty swallowing after the overdose of Methotrexate?

A. Yes.

Q. Had she experienced that prior to the dose -- overdose of Methotrexate?

A. Not with swallowing. Normally with the Methotrexate, she would have big, huge sores in her mouth. So she wouldn't want to eat because they hurt. But for quite some time after, she wouldn't want to eat because she couldn't swallow. They had gotten down into her esophagus, which had not happened before.

Q. And following the overdose of Methotrexate, did Tatiyana experience any seizures?

A. She did have some seizures. I believe there was -- I want to say there was one incident I know for sure, for sure, for sure. They came into the room, and she was supposed to be going to the restroom or something, and she was down on the floor. And so they had moved her up into the bed and put these barriers, kind of like

bumpers, in the bed and kind of watched her for a little bit. And she did have seizure activity.

CP 241-242 at p. 138:25-141:4.

Although the information of this hospitalization is not in the medical record, the accuracy of the medical records is suspicious due to the fact that Dr. Irwin testified in his declaration about a hospitalization that there are also no records for. CP 172-174; CP 132-140. Also, Ms. Sanford testified that she repeatedly requested the medical records for two years and was not given a copy of the records and was only given limited records after these two years. CP 216-217 at p. 40:23-41:19.

Based on Dr. Irwin's sworn declaration and some medical records Tatiyania was hospitalized from May 19, 2006 through May, 22, 2006. CP 173 at ¶ 6. What is very alarming is that there is no record of the hospitalization for these four days (no admittance records, medical records or discharge notes, etc). His late-filed declaration that Tatiyania was not admitted to the hospital during this time only creates an issue of fact.

**4. Dr. Irwin diagnosed Tatiyania with Chemotherapy Toxicity.**

On May 4, 2006, just over a month after the overdose and continued administration of Methotrexate, Dr. Irwin affirmatively diagnosed Tatiyania with "Chemotherapy toxicity."

Q So on May 4th, 2006, you made a note that Tatiyania

Harris had chemotherapy toxicity; correct?

...

A I have May -- yeah, May 4th.

Q (By Mr. Martin) Is that a correct statement that I just made?

A ***Chemotherapy toxicity, yes.***

Q You made a note of that on May 4th?

A Well, my note says May 5th.

Q Was that related to a May 4th visit?

A Yes.

Q On May 5th, ***Tatiana was reporting a decreased appetite and nausea again***; correct?

A Yes.

Q She was also complaining of ***waves of abdominal pain*** on May 5th, 2006; correct?

A That is correct.

CP 187 at p. 31:3-20 (emphasis added). The symptoms of chemotherapy toxicity are painful and debilitating:

Q (By Mr. Martin) Yeah. I mean, what would be your concerns as a doctor or potential dangers if you were giving this intraventricular chemotherapy and you removed one milligram to 2 milligrams of spinal fluid and inserted 12 milligrams of chemotherapy or other medication? What would be those potential dangers?

...

spinal A So the side effects of methotrexate given into the fluid space would include things like *fever, headache, neck pain*. There can be *other neurologic symptoms* associated with methotrexate toxicity: *nausea and vomiting*.

Q (By Mr. Martin) What about long term?

A Anytime a child receives methotrexate into the spinal fluid space, there's a risk of a *learning disability*.

Q What do you mean by that?

academic A They might have problems in school with certain functions.

Q Does it cause brain damage?

...  
A I wouldn't tell a parent that it -- their child is brain damaged. That's -- I wouldn't say they had brain damage.

Q (By Mr. Martin) How would you explain it?

A I would tell them that now they have learning differences, and they have some challenges and hurdles they would have to overcome.

...  
Q (By Mr. Martin) *Would those problems increase with higher dosages?*

...  
A *Yes*.

CP 183-184 at p. 17:22-19:14 (emphasis added).

5. **Dr. Louie has admitted that he breached the standard of care when he administered the overdose of Methotrexate into Tatiyania's brain.**

Dr. Louie admits that he breached the standard of care when he overdosed Tatiyania on March 24, 2006, with no excuse for his actions:

Q. Do you have to verify that the medication is for that particular patient?

A. Yes.

Q. Do you have to read the labeling?

A. Yes.

Q. Is that all part of the standard of care?

A. Yes.

Q. Did you read the medication labeling on March 24th, 2006, prior to giving Tatiyania Harris the 12-milligram dosage of Methotrexate through the Ommaya reservoir?

A. No, I did not.

Q. Is it the standard of care for medical doctors to read or review the medication that they're giving to a patient before giving that patient that medication?

A. Yes.

Q. And you did not do that for Tatiyania Harris on March 24th, 2006, prior to giving her the 12 milligrams of Methotrexate through the Ommaya reservoir, correct?

A. Correct.

Q. So in that regard, did you breach the standard of care in failing to read the medication or labeling prior to administering

the medication to Tatiyana Harris on March 24th, 2006?

A. On that date, I did make the mistake of not reading the label.

Q. Do you believe that there's an expectation placed upon you, as a licensed and board- certified medical doctor, that you would check medication and verify that the medication is for a particular patient before you administer that medication?

A. I am responsible for that, and I was responsible for this wrong dosage.

CP 198 at p. 6:2-12, 18-25; p. 7:1-6.

**6. Plaintiffs' complaint seeks damages not only for Tatiyana's death but also for the pain and suffering Tatiyana experienced as a result of the overdose of Methotrexate and the damage this caused to the parent/child relationship.**

Plaintiffs alleged in their complaint for damages:

6.4 As a direct and proximate result of Dr. Louie's negligent over-dosage of intraventricular methotrexate, Tatiyana Harris suffered physical and emotional harm.

6.5 As a direct and proximate result of Dr. Louie's negligent over-dosage of intraventricular methotrexate and Tatiyana Harris' resultant physical and emotional harm, plaintiffs Timika Sanford and Jeffrey Harris suffered a loss of love and companionship of Tatiyana Harris and for injury to or destruction of the parent-child relationship.

...

7.2 Dr. Louie's negligent over-dosage of intraventricular methotrexate and Tatiyana Harris'

resultant physical and emotional harm caused plaintiffs Timika Sanford and Jeffrey Harris to suffer medical, hospital, medication expenses, and loss of services and support, grief, mental anguish, and a loss of love and companionship of Tatiyana Harris and to suffer injury to or destruction of the parent-child relationship.

CP 343.

**7. Dr. Gale, an expert in Leukemia, has testified that the overdose of Methotrexate probably caused the adverse effects that Tatiyana experienced starting immediately following the overdose.**

The negligence in this case, the breach of the standard of care, by Dr. Louie (in administering 12 milligrams of Methotrexate to Tatiyana on March 24, 2006, instead of 2 milligrams,) is admitted. Tatiyana died as a result of her Leukemia that was in remission and under control prior to the March 24, 2006 overdose and her medical treatment was for curative purposes. After the overdose, Tatiyana's Leukemia was no longer in remission and relapsed as a result of chemotherapy toxicity that was the result of the March 24, 2006 overdose; after the overdose, her medical treatment was no longer curative, but palliative. This relapse, proximately caused by the March 24, 2006 overdose, caused Tatiyana's Leukemia to no longer remain dormant or in remission and this relapse ultimately led to her demise and death in December of 2006. This relapse caused by the March 24, 2006 overdose also caused Tatiyana pain, suffering, and discomfort prior to her death.

Dr. Robert Gale, M.D., Ph.D., D.Sc. (hon), FACP, is a medical doctor with 40 years of experience in oncology. CP 345-350. Leukemia has been a central theme of Dr. Gale's research for over 35 years. CP 347 at ¶ 5. Dr. Gale reviewed Tatiyania's medical records and the depositions of Dr. Louie and Dr. Irwin. CP 350 at ¶ 9. Dr. Gale's review of the records and deposition testimony led him to reach the following conclusion on a *more probable than not standard of medical certainty*:

I give the opinion in this declaration on a more probable than not standard of medical certainty.

Tatiyania Harris had acute lymphoblastic leukemia, a cancer of the blood and bone marrow which can spread throughout the body including to the central nervous system. On March 24, 2006, plaintiff received a 6-fold higher intrathecal dose of methotrexate (12 mg rather than 2 mg) than that prescribed by her physicians. This higher dose is sometimes *associated with adverse signs and symptoms*. Because the higher than prescribed intrathecal dose of methotrexate was given synchronous with a central nervous system relapse of acute lymphoblastic leukemia in the plaintiff, *it is probable the higher dose could cause adverse effects indistinguishable from those of central nervous system relapse of acute lymphoblastic leukemia in the plaintiff*.

CP 350 at ¶ 10 (emphasis added).

## **E. Argument**

### **1. Standard of Review on Motion for Summary Judgment – De Novo**

The Court of Appeals reviews a summary judgment order *de novo*. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008) (citing *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)). In ruling upon a summary judgment motion, pursuant to CR 56(c), the trial court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party, *George D. Poe & Co. v. Stadium Way Properties*, 7 Wn. App. 46, 498 P.2d 324 (1972), and grant the motion only “if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law,” (citations omitted), *McKee v. American Home Products*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

Courts may not resolve questions of fact on summary judgment unless, considering all evidence and reasonable inferences in the light most favorable to the nonmoving party, reasonable minds could reach but one conclusion from the evidence presented. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993).

“Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper.” *Money Savers Pharmacy, Inc. v. Koffler Stores*, 37 Wn. App. 602, 608, 682 P.2d 960 (1984); *Weisert v. University Hospital*, 44

Wn. App. 167, 172, 721 P.2d 553 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). “Where different inferences may be drawn from evidentiary facts as to ultimate facts such as knowledge, summary judgment is not warranted.” *Aduddell v. Johns-Manville Corp.*, 42 Wn. App. 204, 207, 709 P.2d 822 (1985).

If there is an issue of credibility, the motion for summary judgment should be denied. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138, 95 A.L.R.3d 225 (1977). An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached. *Dunlap v. Wayne*, 105 Wn.2d 529, 536, 716 P.2d 842 (1986); *Amend*, 89 Wn.2d at 129, 570 P.2d 138 (citing *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963)).

**2. Dr. Louie’s failure to follow the accepted standard of care proximately caused injury to Tatiyana Harris.**

RCW 7.70.040 provides:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

The burden of proof in a medical negligence action is the preponderance of the evidence standard. RCW 7.70.030.

The issues of negligence and proximate cause are generally not susceptible to summary judgment. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975); *see also Ferrin v. Donnellefeld*, 74 Wn.2d 283, 444 P.2d 701 (1968); *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 751 P.2d 854 (1988). The question of proximate cause is a mixed question of law and fact. *Bell v. McMurray*, 5 Wn. App. 207, 213, 486 P.2d 1105 (1971). Proximate cause has two elements. The first, cause in fact, requires some actual connection between the act and the injury. *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 862-63, 5 P.3d 49 (2000). The second element of proximate cause involves legal causation, which is a policy consideration for the court, whether the ultimate result and the defendant's acts are substantially connected, and not too remote to impose liability. *Meneely* at 862-3. This is a legal question involving "logic, common sense, justice, policy, and precedent". *Id.* Washington has long recognized there can be more than one proximate cause. *See, e.g., Johnson v. Milwaukee Railroad Co.*, 24 Wn. App. 377, 601 P.2d 951 (1979); WPI 15.01; WPI 15.04.

Dr. Louie has admitted that he failed to meet the standard of care when he administered a 12 milligram dose of Methotrexate to Tatiyania after he did not read the labeling on the bottle. CP 198 at p. 6:2-12, 18-25; p. 7:1-6. The evidence shows that this failure to meet the standard of care proximately caused injury to Tatiyania.

Dr. Gale testified in his declaration, on a more probable than not basis, that, “it is probable the higher dose could cause adverse effects indistinguishable from those of central nervous system relapse of acute lymphoblastic leukemia in the plaintiff.” CP 350 at ¶ 10. The medical evidence and the testimony of Dr. Louie, Dr. Irwin, and Ms. Sanford clearly illustrates that the day of the overdose was a turning point in Tatiyania’s young life that led to a painful and pronounced deterioration of her health. Tatiyania died as a result of her Leukemia that was in remission and under control prior to the March 24, 2006 overdose and her medical treatment was for curative purposes. After the overdose, Tatiyania’s Leukemia was no longer in remission and relapsed as a result of chemotherapy toxicity that was the result of the March 24, 2006 overdose; after the overdose, her medical treatment was no longer curative, but palliative. This relapse, proximately caused by the March 24, 2006 overdose, caused Tatiyania’s Leukemia to no longer remain dormant or in remission and this relapse ultimately led to her demise and death in

December of 2006. This relapse caused by the March 24, 2006 overdose also caused Tatiyania pain, suffering, and discomfort prior to her death.

On the very day of the overdose Tatiyania experienced conjunctivitis in her eye on the same side of her head as where the methotrexate overdose was administered. She was later diagnosed with a relapse of leukemia in that eye. From the time of the overdose and for at least three months thereafter, Tatiyania's right eye was consistently red. Tatiyania's vision was affected in that eye and the red eye never went away. Tatiyania was admitted and hospitalized on the same day of the overdose. She became sick after the overdose. Her body was exhausted. Her mind was exhausted. She was emotionally exhausted. Her face was puffy. Her eyes were red. Her skin was yellow. She didn't want to eat. She would urinate on herself because she didn't have enough energy to get up to use the bathroom. She did not eat for three weeks and lost weight that she never regained. She never regained her appetite. She had difficulty swallowing. She suffered memory problems. She wasn't herself and seemed spacey. She suffered a seizure after the overdose. She had not experienced these symptoms prior to the overdose. She was even diagnosed with chemotherapy toxicity. Defendant would have the Court believe that the timing of the overdose and Tatiyania's immediate decline are simply an amazing coincidence. However, Dr. Gale testified that

Tatiana's decline and demise is precisely the type of adverse effect that one can have to an overdose of methotrexate. Given the evidence that plaintiffs have presented regarding breach of the standard of care, causation, and damages, this is a case that should go to a jury.

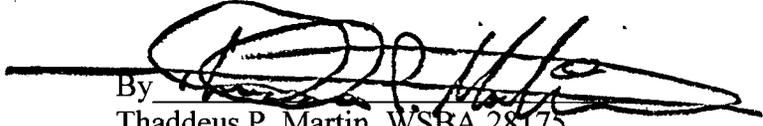
Assuming, *arguendo*, that plaintiffs are unable to prove that the overdose of Methotrexate caused Tatiana Harris' death or decreased her life span, that is not fatal to plaintiffs' case. Plaintiffs have alleged injury or destruction of the parent/child relationship based upon the pain and suffering that Tatiana endured as a result of the overdose. Plaintiffs have presented sufficient evidence to show that the overdose of Methotrexate administered to Tatiana caused her pain and suffering during the months following the overdose and injured and ultimately destroyed the parent/child relationship.

#### **F. Conclusion**

The lower court erred when it dismissed plaintiffs' cause of action for medical malpractice. The evidence presented, when viewed in the light most favorable to the plaintiffs, demonstrates that a genuine issue of material fact exists making summary judgment improper with respect to causation. Plaintiffs respectfully request that the Court of Appeals reverse the lower court's order dismissing this case and remand this matter for a jury trial.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of October, 2010.

THADDEUS P. MARTIN & ASSOCIATES

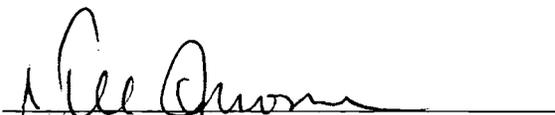
By   
Thaddeus P. Martin, WSBA 28175  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that I am not a party to this action and that I placed for service on counsel of record the foregoing document via legal messenger on the 8<sup>th</sup> day of October, 2010.

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