

COURT OF APPEALS  
DIVISION TWO

No. 405601-II

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STATE OF WASHINGTON

BY J. W. Johnson  
**COURT OF APPEALS, DIVISION TWO,  
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,

v.

RONALD R. LOUIE, M.D., and "JANE DOE"  
LOUIE, and the marital community composed  
thereof,

Respondents.

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**BRIEF OF RESPONDENTS**

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ORIGINAL

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## **I. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Did the trial court properly grant summary judgment to Appellee Louie where Appellants provided no medical opinion showing that a single increased dose of Methotrexate caused harm to Tatiyania Harris?

## **II. RE-STATEMENT OF THE CASE**

### **A. Factual Background.**

#### **1. Tatiyania Harris's Illness.**

This case arises out of care provided to leukemia patient Tatiyania Harris in March 2006. Tatiyania was first diagnosed with leukemia in 2002. After 2002, Tatiyania experienced several recurrences of her leukemia. CP 30 ¶ 2. Methotrexate, an antimetabolite and antifolate drug used in treatment of cancer, was a regular part of her treatment, both before and after the incident at issue in March 2006. CP 31 ¶ 3-4. In January 2006, Tatiyania's parents were told by her physicians that she had only six more months to live. CP 38.

On March 24, 2006, Appellee Dr. Ronald Louie ("Dr. Louie"), one of Tatiyania's health care providers, administered a higher dose of Methotrexate to Tatiyania than was intended. CP 31 ¶ 4. Specifically, Dr. Louie administered 12mg instead of 2mg. However, no harm was caused to Tatiyania as a result of the higher dosage of Methotrexate. CP 30-35.

Sadly, in July 2006, Tatiyania had another recurrence of leukemia around her brain. CP 32 ¶ 10. She previously had a similar recurrence in April 2005. *Id.* On both of those recurrences, she was treated with radiation. She was referred for a consultation at Fred Hutchison Cancer Center to see if she was a candidate for bone marrow transplant. *Id.* However, because of her relapse she was not a candidate for transplant. *Id.* She died in December 2006 from complications of her leukemia. *Id.*

Dr. Robert G. Irwin, Tatiyania's primary oncologist, provided un rebutted testimony that:

1. Tatiyania continued her chemotherapy treatments as normal after the March Methotrexate dose (CP 31 ¶ 4);
2. While conjunctivitis did occur, Tatiyania had regularly experienced this symptom before and after the March Methotrexate dose, and it was not caused by Methotrexate (CP 31 ¶ 6);
3. Tatiyania was not harmed by the additional Methotrexate, and lab results did not show any harmful effect (CP 31 ¶ 5);
4. The March Methotrexate dose did not cause any issues with balance, memory issues, or seizures (CP 32 ¶ 9);
5. The March Methotrexate dose did not cause a recurrence of leukemia – the leukemia pre-existed the treatment in March

2006 and was not caused by the increased dose (CP 31 ¶ 6);

6. The Methotrexate did not cause Tatiyania to be subjected to any lengthy hospital stays, and Tatiyania was first briefly hospitalized two months after the March Methotrexate dose (CP 31 ¶ 7).

In sum, Dr. Irwin provided the opinion that Tatiyania's illness and overall health was not affected by the increased dose of chemotherapy medicine.

Because there was no adverse effect from the admitted medication error, Appellee Louie moved for summary judgment. Appellants were granted two continuances which allowed them additional time to find an expert witness to provide a medical opinion to support the lawsuit. CP 363-368; CP 369-370. Summary judgment was granted to Dr. Louie on March 26, 2010. CP 358-59.

**2. Appellants Have Provided No Evidence that the March Methotrexate Dose Harmed Tatiyania Harris.**

Appellants provided the opinion of Dr. Robert Gale in opposition to Dr. Louie's motion for summary judgment. Dr. Gale is a highly qualified oncologist. CP 345-50. The totality of the opinion on the record is as follows:

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.

*Id.* at 350 ¶ 10. Importantly, Dr. Gale did not say that the increased dose actually did cause, on a more probable than not basis, any harm to Tatiyania. Instead, Dr. Gale states that such a dose “is sometimes associated” with “adverse signs and symptoms.” *Id.* Dr. Gale did not say the dose actually caused any signs and symptoms. He admitted that if the Methotrexate did cause any symptoms that they would be indistinguishable from those caused by the relapse of cancer. Most importantly, Dr. Gale does not state that the Methotrexate dose caused Tatiyania’s death.

In concordance with Dr. Gale’s and Dr. Irwin’s opinions, Appellant Timika Sanford admitted at her deposition that no doctor had

ever told her that the 12mg dosage of Methotrexate caused any harm to Tatiyania. CP 36-37. This statement is consistent with Dr. Irwin's and Dr. Gale's assessment of Tatiyania's illness.

**3. Appellants' Brief Contains Statements of Fact Which Are Unsupported by the Record.**

Appellants' Brief contains numerous claims that are unsupported by the medical opinion of any medical expert or health care provider. For example, Appellants claim that "[p]rior to March 24, 2006, Tatiyania was in full remission from her Leukemia..." Appellants' Brief at 7 ¶ 1. For support for this statement, Appellants cite to attorney Thaddeus Martin's declaration of facts. CP 98 ¶ 13. This statement is not supported by medical opinion, and is contradicted by the fact that Tatiyania had previously been given a diagnosis of terminal cancer in January 2006. CP 38.

Appellants provide the claim that because Tatiyania was receiving chemotherapy for curative purposes, "there was still a probability of her being cured." Appellants' Brief at 9 ¶ 3. Again, Appellants provide no medical testimony stating that Tatiyania's cancer had a probability of being cured. The section of Dr. Irwin's deposition Appellants cite for this claim states only that "[i]nitially, she was on chemotherapy for curative purposes, but as her disease kept recurring, we gave chemotherapy for palliative purposes." CP 181 at p. 8:20-22. This statement does not

indicate that a cure was probable.

Appellants also assert that Tatiyania's demise was "immediate" after the increased dose of Methotrexate. Appellants' Brief at 10 ¶ 1-2. However, Appellants' own brief, and the medical record, shows that Tatiyania died nine months after the Methotrexate dose in March 2006.

Appellants also state,

the 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.

Appellants' Brief at 43 ¶ 2. This statement is not confirmed by any medical expert or health care provider.

### **III. SUMMARY OF ARGUMENT**

The trial court properly dismissed Appellants' claims because Appellants did not provide any evidence showing that the March 2006 Methotrexate dose proximately caused harm to Tatiyania Harris.

### **IV. ARGUMENT**

#### **A. Standard of Review.**

A trial court's decisions related to a motion for summary judgment are reviewed *de novo*. Folsom v. Burger King, 135 Wn.2d 658, 663, 958

P.2d 301 (1998).

**B. Appellants Did Not Provide Sufficient Evidence to Withstand a Summary Judgment Motion.**

RCW 7.70.040 sets forth the necessary elements of proof in a medical malpractice action:

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 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.*

In a medical malpractice case, expert testimony is generally required to establish the standard of care and to prove causation. Harris v. Robert C. Groth, M.D., Inc., 99 Wash.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 Wash.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. *Id.* at 226-27, 770 P.2d 182. FN5. CR 56(e) provides, in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Here, it has been admitted that the standard of care was breached when the March 2006 Methotrexate dose was given. However, Appellants failed to provide evidence sufficient to create a genuine issue for trial regarding causation.

**1. Dr. Gale's Opinion Was Not Sufficient to Create an Issue of Material Fact in Relation to Causation.**

The causal relationship of an accident or injury to a resulting physical condition must be established by medical testimony beyond speculation and conjecture. The evidence must be more than that the accident 'might have,' 'may have,' 'could have,' or 'possibly did,' cause the physical condition. It must rise to the degree of proof that the resulting condition was probably caused by the accident, or that the resulting condition more likely than not resulted from the accident, to establish a causal relation. Miller v. Staton, 58 Wn.2d 879, 886, 365 P.2d 333 (1961).

Moreover, “[t]he need for positive expert testimony to establish a causal link between the defendant's negligent act and the plaintiff's injury depends on the nature of the injury.” Riggins v. Bechtel Power Corp., 44 Wn.App. 244, 254, 722 P.2d 819 (1986). When more than one event may cause the claimed injury, “medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom.” O'Donoghue v. Riggs, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). “Expert testimony is required to establish causation when an injury involves obscure medical factors that would require an ordinary lay person to speculate or conjecture in making a finding.” Bruns v. PACCAR, Inc., 77 Wn.App. 201, 214, 890 P.2d 469 (1995) (citing Riggins, 44 Wn.App. at 254).

Furthermore, a breach of duty is not a proximate cause of an injury if the event which produced the injury would have occurred regardless of the defendant's conduct. Lunt v. Mt. Spokane Skiing Corp., 62 Wn.App. 353, 362, 814 P.2d 1189, rev. den. 118 Wn.2d 1007, 822 P.2d 288 (1991).

Here, Dr. Gale was highly qualified to address the causation issue in this case. His brief opinion does not provide evidence contrary to that provided by Dr. Irwin, which showed that the March 2006 Methotrexate

dose did not cause harm to Tatiyania Harris.<sup>1</sup> Instead, his opinion merely states that such a dose “*could* cause” adverse “signs and symptoms,” CP 350 ¶ 10. [emphasis added]. This opinion is not sufficient to allow Appellants’ claims to go forward under Washington law. It is well-settled that statements that a negligent act “could,” or “might” cause injury or death to a plaintiff are insufficient to create a genuine issue for trial. Dr. Gale’s statement falls into the category of opinion that simply cannot support a claim of injury.

Dr. Gale’s opinion does not say that the relapse of leukemia was related to Dr. Louie’s care, as alleged by Appellants. Appellants’ Brief at 43 ¶ 2. Dr. Gale does not say that Tatiyania’s death was caused by Dr. Louie’s care as claimed by Appellants. *Id.* at ¶ 2. Dr. Gale’s opinion also does not say that Dr. Louie’s care caused pain, suffering, or discomfort, as claimed by Appellants. *Id.* at ¶ 2. Indeed, Dr. Gale did not say that **any symptom** was actually caused by the increased dose. What he does say is that a higher dose of Methotrexate is “sometimes associated” with “adverse signs and symptoms.” CP 350 ¶ 10. This indicates that such symptoms may also **not** be associated with an increased Methotrexate dose. Such an opinion does not set forth specific facts sufficient to create

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<sup>1</sup> It should be noted that defendants were not required to produce the opinion of Dr. Irwin under CR 56(e), but did so to explain Tatiyania Harris’s treatment to the court.

a genuine issue of fact for trial.

Dr. Gale admits even if Methotrexate causes symptoms, such symptoms would have been indistinguishable from the symptoms related to her relapse of leukemia, which Tatiyania was already experiencing on March 24, 2006. CP 350 ¶ 10. Dr. Gale cannot say that the increased Methotrexate dose caused any adverse effects because they can all be explained by the unrelated relapse of Tatiyania's leukemia.

**2. The Lay Testimony Provided By Appellants was Insufficient to Create a Genuine Issue of Fact for Trial.**

Appellants' brief contains numerous claims that the increased dose caused adverse symptoms, the recurrence of leukemia, and ultimately, Tatiyania's death. Several of these claims are based on assertions drafted by Appellants' counsel. See, e.g., Appellants' Brief at 9 ¶ 3. Many of these claims are supported only by lay testimony from Tatiyania's mother, Appellant Timika Sanford. See, e.g., Appellants' Brief at 26-33. None of these claims are supported by medical testimony, and are not addressed by Dr. Gale's opinion. Because expert testimony is required to show proximate cause in this case, the statements described above do not provide evidence sufficient to withstand summary judgment.

**V. CONCLUSION**

Ultimately, Appellants' argument relies on a logical fallacy: *post*

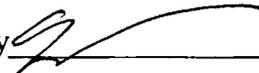
*hoc, ergo propter hoc* or “after this, therefore because of this.” Anica v. Wal-Mart Stores, Inc., 120 Wash.App. 481, 489, 84 P.3d 1231 (2004). Appellants argue that because a recurrence of leukemia was diagnosed after the Methotrexate dose, the recurrence was caused by the Methotrexate dose. Without more, a coincidence in time between damage and the alleged cause may be judged insufficient. See Loesch v. United States, 645 F.2d 905 (1981). While Tatiyania’s death, caused by her leukemia, was tragic, there is no reason why her providers should be subject to legal claims without sufficient factual basis. Because Appellants were unable to provide expert medical evidence showing a link between the March 2006 Methotrexate treatment and injury to Tatiyania Harris, the trial court correctly dismissed Appellants’ claims.

For the reasons stated above, the appeal should be denied in its entirety.

Dated this 8 day of November, 2010.

Respectfully submitted,

JOHNSON, GRAFFE, KEAY,  
MONIZ & WICK, LLP

By   
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**CERTIFICATE OF SERVICE**

I hereby certify that I am over 18 years old and not a party to this action and that served the foregoing document on the below-named counsel of record by electronic email on the 8 day of November, 2010.

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