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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

**REPLY TO PLAINTIFFS'/RESPONDENTS' ANSWER TO DR.
TOHMEH'S PETITION FOR REVIEW**

James B. King, WSBA #8723
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ORIGINAL

Defendants/Respondents Antoine Tohmeh M.D., et ux, and Orthopaedic Specialty Clinic of Spokane, P.L.L.C., (hereinafter referred to collectively as Dr. Tohmeh) submit the following Reply to Plaintiffs/Appellants Answer to Dr. Tohmeh's Petition for Review.

Ms. Christian claims that the loss of chance testimony provided by Dr. Bigos in opposition to Dr. Tohmeh's motion for summary judgment was similar to the expert testimony the court found adequate to survive summary judgment in *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011). Dr. Tohmeh acknowledges that the plaintiffs' expert testimony discussed in *Mohr* did not specify what better outcome was lost. However, the focus of the court's opinion was whether loss of chance of a better outcome (as opposed to loss of chance of survival) was a viable cause of action. The court did not analyze the extent to which, in a lost chance of a better outcome case, the plaintiffs' expert, to avoid summary judgment, must identify, to some degree, the alleged lost better outcome. Dr. Tohmeh submits that such testimony is necessary, given the unique nature of a lost chance of a better outcome case, particularly the requirement that the jury, if liability is found, apply a formula which involves the assignment of damages to the better outcome lost. Without such testimony, the expert's opinion on proximate cause and damages is mere speculation, and a

plaintiff's claim based on such speculative testimony should not survive summary judgment.

Next, Ms. Christian cites *Grove v. Peace Health St. Josephs Hospital*, 182 Wn.2d 136, 341 P.3d 261 (2014). That case, however, is inapposite. There, following a complicated six hour surgery, the patient, Grove, developed compartment syndrome in a lower extremity. Post-operatively, Grove was cared for by several providers employed by the defendant hospital, who admitted they utilized a "team" approach in providing treatment. The jury returned a verdict in favor of Grove. However, the trial court granted the defendants motion for judgment notwithstanding the verdict, ruling there was insufficient evidence to support the verdict because Grove did not put on expert testimony establishing that specific health care provider(s) violated his/her standard of care, proximately causing damage to Grove. The Court of Appeals affirmed the trial court, and the Supreme Court reversed, holding that such particularized standard of care testimony was not required. *Grove* was not a loss of chance case.

Finally, Ms. Christian cites *Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282 (1995). That case is also inapposite because it did not involve a loss of chance claim. Rather, the question before the Court was whether statistical proof of the efficacy of a drug, Prolastin, was required to meet the *Frye* test.

The Court held it was not, and that the plaintiff's expert could base his causation opinion on his extensive experience treating the condition in question and on studies involving Prolastin.

Based on the foregoing argument and authorities, and the argument and authorities set forth in his Petition, Dr. Tohmeh respectfully requests that the Court grant his Petition for Review and reverse the Court of Appeals.

DATED this 13 day of April, 2016.

EVANS, CRAVEN & LACKIE, P.S.

By 

JAMES B. KING, #8723

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 13 day of April, 2016, the foregoing **REPLY TO PLAINTIFFS'/RESPONDENTS' ANSWER TO DR. TOHMEH'S PETITION FOR REVIEW** was delivered to the following persons in the manner indicated:

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4-13-2016 /Spokane, WA Carol K. Myer
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Subject: Christian v. Tohmeh, et al. - No. 92837-1

Dear Clerk,

Attached for filing in .pdf format is **Reply to Plaintiffs'/Respondents' Answer to Dr. Tohmeh's 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.

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