

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL COURT DEPARTMENT

CLAIRE CHASE, as heir at law and )  
personal representative of the estate of )  
MARY ELIZABETH D. CHASE, )  
and JOHN CHASE and M. KATHLEEN HANSEN )  
as heirs at law of MARY ELIZABETH D. CHASE )

Plaintiffs, )

vs. )

SHAWNEE MISSION MEDICAL CENTER, INC. )  
and ROBERT T. TENNY, M.D., )

Defendants. )

Case No. 07cv04979  
Court No. 7  
K.S.A. Chapter 60

**PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR PETITION  
PURSUANT TO K.S.A. § 60-3703 TO ASSERT A CLAIM FOR PUNITIVE DAMAGES  
AGAINST DEFENDANT ROBERT T. TENNY, MD.**

In this motion, plaintiffs set forth the evidence and argument establishing that a reasonable jury could find clear and convincing evidence that defendant Tenny acted in a wanton and fraudulent manner toward Maribeth Chase. Based on this conduct, plaintiffs seek leave to file an amended petition which includes a claim for punitive damages pursuant to K.S.A. § 60-3702.

I. The Evidence

a. Background regarding Maribeth Chase.

In early 2007, Maribeth Chase was a healthy and active seventy-seven year-old woman. She lived on her own. *Deposition of Claire Chase attached hereto as "Exhibit A" at 21:8-12.* She still drove her own car. *Deposition of Kathleen Hansen attached hereto as "Exhibit B" at 13:23-25.* She had complete control over her environment and her life. *Exhibit B at 14:18-21.*

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In the weeks prior to February 26, 2007, Mrs. Chase began to manifest subtle neurologic symptoms such as mild headache and difficulty doing her cross-word puzzles. *Shawnee Mission Medical Center Records attached hereto as "Exhibit C" at p. 21.*

Mrs. Chase saw her primary care physician who suggested that she have an MRI which was performed on February 26, 2007. *Diagnostic Imaging Center Record attached hereto as "Exhibit D."* The MRI ruled out a stroke as the cause of Maribeth's deficits and diagnosed a subdural hematoma as the cause of her symptoms. *Exhibit D.*

A subdural hematoma is a collection of blood between the outer surface of the brain and the protective membrane surrounding the brain called the dura. The blood is entirely contained between the surface of the brain and the dura – there is no bleeding or collection of blood inside the brain. Subdural hematomas are common in older patients and often result from minor trauma such as a fall or a bump-on-the-head. Because the initial trauma can be minor, these hematomas are often diagnosed weeks later only after growing in size to the point where it creates a slight "mass effect." In other words, the bleeding continues slowly and the hematoma grows to a point where it begins pushing on the surface of the brain, which in turn causes the neurologic symptoms.

The universal treatment of subdural hematomas is to drain the blood from the subdural space thereby alleviating the mass effect and the neurologic symptoms. *Deposition of Carole Miller, MD attached hereto as "Exhibit E" at 45:10-12.* The operation is common and generally uncomplicated. *Exhibit E at 86:12-17.*

Following her MRI, Mrs. Chase was admitted to Shawnee Mission Medical Center where she was examined by defendant Robert Tenny, MD, the on-call neurosurgeon. *Deposition of Robert Tenny, MD attached hereto as "Exhibit F" at 132:7-134:4.* On admission, Mrs. Chase

was “awake, alert and oriented.” *Exhibit C at 4-7*. She had trace difficulty with word-finding and “mild headache.” *Exhibit C at 21-23*. All other neurologic findings were normal. Surgery to drain the hematoma was planned the next day. *Exhibit C at 81*.

b. February 27, 2007.

At around 2:00 pm on February 27, 2007, Mrs. Chase was taken to the operating room for a “burr-hole evacuation” procedure. *Exhibit C at 430*. Two small holes were drilled in the skull, a small incision was made in the dura, and then the blood was drained (i.e., the hematoma) from the subdural space. *Exhibit C at 424-25*. Those in attendance at Maribeth Chase’s surgery were defendant Tenny, Christine Miller, RN, Carolyn Hogan, CRNA and Sergio Valadez, Surgical Technician. *Exhibit C at 436-37*.

All parties agree that something bad happened to Maribeth Chase during the surgery. She sustained a traumatic penetrating injury deep into the substance of her brain (the parenchyma) which caused immediate and substantial bleeding, or “hemorrhage,” in her brain. According to an “Addendum” to defendant Tenny’s operative note, defendant Tenny turned away from Maribeth Chase to cut a drain to the appropriate length for use in the surgery and then turned

to find the surgical technician at the end of a forceful irrigation directly into the left frontal burr hole site and which was perpendicular to the surface of the brain. I had not implied suggested nor instructed that this should be done. I did not do any similar form of irrigation or any form of irrigation perpendicular to the surface of the brain during this case or any other case and, especially, in any previous surgical case that I have worked with this technician.

*Exhibit C at 426*. According to the note, defendant Tenny then “noted a small piece of brain tissue draining” out of a burr hole. *Exhibit C at 426*. He stated that “the subdural

space was nearly absent where, moments before, it had been open.<sup>1</sup> *Exhibit C at 426*. He noted “bleeding from the underlying surface of the brain.” *Exhibit C at 426*. Defendant Tenny concluded his Addendum by stating “[a]t no time during this procedure was it felt that there was any injury to, or penetration of, the substance of the brain by the operating surgeon.” *Exhibit C at 426*. Defendant Tenny explained this final sentence as follows:

Q. But in regard to that last sentence, at no time during this procedure was it felt that there was any injury to or penetration of the substance of the brain, would you agree the fact is that you did feel that there had been an injury to and penetration of the substance of the brain?

A. I was -- felt that it was not done by the operating surgeon.

Q. By you.

A. That is correct.

Q. But it was done.

A. That was my assumption.

Q. Well, you personally eye-witnessed a piece of brain coming out of the hole, correct?

A. That is correct.

Q. And I think we have established that means that the brain was penetrated.

A. That is correct.

Q. And this would be in that category of a traumatic open head injury to the brain.

A. Yes, sir.

*Exhibit F at 199:8-200:8*. Following the surgery, defendant Tenny told no one of the events he claimed to have witnessed in the operating room. *Exhibit F at 124:3-10*. Defendant Tenny did

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<sup>1</sup> This would presumably be due to swelling of the brain as a result of the “forceful irrigation.”

not compose the above-cited “addendum” until June 5, 2007, more than three months after his original operative note was on the chart.<sup>2</sup> *Exhibit F at 121:17-123:10*. The original note, dictated immediately following the surgery, made no mention of any of the untoward events described in the addendum and in fact portrayed the operation as uneventful. *Exhibit C at 424-25*. He told no physicians, hospital personnel or family members that he had witnessed Maribeth Chase suffer a penetrating brain injury during the surgery. *Exhibit F at 124:3-10; Claire Chase’s Response to Defendant Tenny’s First Set of Interrogatories attached hereto as “Exhibit G” No. 6*. He ordered no tests or other imaging; rather, he transferred Mrs. Chase to the recovery unit as though nothing had happened. He told Mrs. Chase’s family that the operation went great. *Exhibit F at 212:22-214:8*.

When Mrs. Chase awoke from anesthesia it was immediately apparent that something had gone drastically wrong. She was paralyzed on one side of her body and unable to speak. *Exhibit F at 215:25-216:2*. Defendant Tenny was called to see his patient. *Exhibit C at 84*. A CT of Maribeth Chase’s brain was ordered. *Exhibit C at 84*. Defendant Tenny told no one of the events that he witnessed in the operating room and he told no one of the traumatic injury he had witnessed Maribeth Chase suffer. *Exhibit F at 124:3-10; Exhibit G No. 6; John Chase, MD’s response to Defendant Tenny’s First Set of Interrogatories attached hereto as “Exhibit H” No. 5*.

The CT showed a large area of acute hemorrhage inside Mrs. Chase’s brain. *Deposition of Richard Miller, MD attached hereto as “Exhibit I” at 17:11-18:11*. It also showed pockets of air deep in the substance of the brain in and around the area of hemorrhage. *Exhibit I at 18:25-19:3*. The only way for air to be introduced into the substance of the brain is through penetrating trauma – it cannot be accounted for by any type of “stroke.” *Exhibit F 267:7-18; Deposition of*

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<sup>2</sup> In fact, the “addendum” was composed after the undersigned requested Maribeth Chase’s medical records and after defendant Tenny had consulted with counsel.

*Sol Batnitsky, MD attached hereto as "Exhibit J" at 23:23-24:11.* After viewing these images himself, defendant Tenny then made a fateful decision to cover-up the injury instead of disclosing what had occurred in the operating room, acknowledging the serious penetrating injury Maribeth Chase had suffered and taking the appropriate steps to treat it, i.e. surgery. Instead of telling Mrs. Chase's family, or any of her other doctors, what had happened, he told John Chase, MD, Maribeth Chase's son and Durable Power of Attorney for Health Care Decisions, that he suspected a "stroke" and that they would have to wait for a matter of days in order to confirm this. *Exhibit H.*

c. February 28, 2007.

The next day, Mrs. Chase was seen by Hassan Saradih, MD, a Hospitalist who had seen her before the surgery. *Exhibit C at 86-87.* On his prior exam, Maribeth Chase was generally fine with only minor deficits due to the subdural hematoma. *Deposition of Hassan Saradih, MD attached hereto as "Exhibit K" at 19:21-22:6.* On the 28<sup>th</sup> however, she was paralyzed on one side of her body, unable to speak, her eyes were locked in a gaze to one direction, and she could not swallow. *Exhibit K at 31:9-33:16.* She had cognition however, and could follow commands such as "raise your left hand." *Exhibit K at 33:12-16.* Dr. Saradih suggested that Mrs. Chase be seen by a neurologist. *Exhibit K at 36:24-37:16.* Dr. Saradih testified that "the family wanted like to see why this happened to the patient." *Exhibit K at at 44:11-15.*

Later that day, defendant Tenny ordered an MRI. *Exhibit C at 57.* Again, defendant Tenny did not tell the family about the events he witnessed in the operating room, the injury he saw inflicted, or that a CT scan the night before had confirmed the existence of a penetrating injury to the substance of Maribeth Chase's brain. *Exhibit H No. 6; Exhibit G No. 5.* The MRI scan confirmed the existence of "a large intraparenchymal hematoma" involving the left frontal

lobe.<sup>3</sup> *Exhibit C at 152-53*. Again, the radiologist immediately contacted defendant Tenny and communicated the results of the study to him. *Exhibit C at 152-53*. At that point, surgical intervention was imperative to remove the hematoma, stop the bleeding, stop the pressure created by the hematoma, and to allow the brain to heal. *Exhibit E at 65:1-67:21*

After the results of the MRI were reported to defendant Tenny, he contacted Shawnee Mission Medical Center to prepare an operating room for surgery. *Exhibit F at 258:13-260:5*. Defendant Tenny did not tell the family he reserved the operating room. *Affidavit of John Chase attached hereto as "Exhibit L"; Exhibit H No. 6; Exhibit G No. 5*.

At some point on the afternoon of February 28<sup>th</sup> defendant Tenny cancelled the operating room. *Exhibit F at 256:23-257:8*. He then ordered another CT scan to "rule out acute intraparenchymal hematoma," i.e. what the radiologist had reported and the MRI showed. *Exhibit F at 262:25-263:6*. That CT once again showed air deep in the brain and an increasingly large area of hemorrhage – which was the indication for the earlier surgery according to defendant Tenny. *Exhibit F at 264:13-264:21*. Yet, defendant Tenny did not take Mrs. Chase to surgery and withheld from the family the fact that it was the only option likely to save Maribeth Chase's life and improve her condition. Instead, defendant Tenny again told John Chase, MD that his mother likely had suffered a "stroke." *Exhibit F at 269:23-270:4*.

Thus, despite 1) seeing what he acknowledged to be a traumatic penetrating brain injury to Maribeth Chase during an operation he performed; 2) seeing a piece of his patient's brain leak from a burr hole during the surgery; 3) having Maribeth Chase wake from the operation with paralysis and aphasia; 4) having three radiologists relay the existence of a large, increasingly serious, hemorrhage in Maribeth Chase's brain; 5) seeing air within the substance of Maribeth

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<sup>3</sup> "intraparenchymal" means inside the parenchyma. The parenchyma is the actual substance of the brain.

Chase's brain that could not be explained by a stroke; and 7) knowing that surgery was the only option to preserve Maribeth Chase's function and in fact, her life, - defendant Tenny chose to "cover-up" and tell the family their mother had suffered a "stroke" and to conceal the truth and the need for surgical treatment.

In an extraordinary exercise of self-interest, at about this same time on February 28, 2007, defendant Tenny called his liability insurance carrier, KAMMCO. *Exhibit F at 101:22-25; Deposition of Traci Ferrell, attached hereto as "Exhibit M" at 26:24-27:2.* The recipient of the phone call was Traci Ferrell, an employee in KAMMCO's loss prevention division. *Exhibit M at 8:11-13.* Traci Ferrell testified as follows:<sup>4</sup>

He told me that he was doing a procedure on a female patient, and that she was a speech language pathologist, that type of employment, and during the procedure that there was a forceful irrigation done by a technician, and that it affected the area of her brain that controlled her speech.

*Exhibit M at 14:1-8.* She continued:

Q. All right. And you have given us some basics that there was a woman who was a speech and language pathologist, there was a forceful irrigation, and what was the result of it?

A. To the best of my knowledge, he told me that her -- the area of her brain was damaged that controlled her speech.

Q. Damaged was it your understanding as a result of this forceful irrigation by the technician?

A. To the best of my knowledge, that's what I remember.

Q. That's what he told you?

A. Yes.

Q. Did he tell you what the status of the patient was at the time?

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<sup>4</sup> Defendant Tenny admits making the call but claims he does not remember the details of the conversation. Tenny 102:12-15.

A. All he told me at the time that I can remember is that the area of her brain that controlled her speech was damaged.

*Exhibit M at 18:7-19:3.* The Ferrell testimony is direct evidence that defendant Tenny was lying to the Chase family on February 28, 2007 and thereafter.

The inconsistency between what defendant Tenny's told Traci Ferrell of KAMMCO and what he told the family is at the core of this case. When this call was made on February 28th, Mrs. Chase was still responding to commands and still had a substantial chance of survival and improvement if defendant Tenny had operated on her. *Exhibit E at 70:12-21; 71:17-22; deposition of William Friedman attached hereto as "Exhibit N" at 53:2-13; 55:14-15; 61:15-25; 75:15-22.* But instead of acting to save Mrs. Chase's life, defendant Tenny lied to the family about the existence and cause of her injury, and chose to disclose the existence of the injury to only his malpractice insurance carrier.

Defendant Tenny's last involvement with Maribeth Chase on the night of February 28, 2007, was when he called the nurses' station to ensure that the following order was on the chart:

**Pt. is a DNR per pt. request as noted on pre-op advance directive (family aware)**

*Exhibit C at 58 (note produced as it appears in original).<sup>5</sup>*

d. March 1, 2007.

The next day, at Dr. Saradih's request, Mrs. Chase was seen by Gordon Kelley, MD., a neurologist. *Exhibit C at 92.* After examining Mrs. Chase and looking at the MRI and CT films, Dr. Kelley suspected a traumatic penetrating brain injury. *Deposition of Gordon Kelley attached hereto as "Exhibit O" at 45:5-10.* He spoke with defendant Tenny but defendant Tenny did not disclose what had happened in the operating room. *Exhibit O at 26:24-27:6; Exhibit F at*

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<sup>5</sup> "DNR" stands for Do Not Resuscitate.

290:16-292:17. Following that conversation, Dr. Kelley filed an incident report with the SMMC's Risk Management department asking the surgical department to investigate what had happened to Maribeth Chase. *Exhibit O at 35:20-36:14.*

Later that day, Dr. Kelley and Dr. Saradih had a conversation about Mrs. Chase's condition. *Exhibit K at 63:21-25.* Dr. Kelley informed Dr. Saradih that the hemorrhage was likely secondary to a traumatic injury inflicted during surgery. *Exhibit K at 64:6-13.* This was news to Dr. Saradih. *Exhibit K at 64:15.* Dr. Saradih went home and struggled with the fact that defendant Tenny had not told Maribeth Chase's family what had happened to their mother. *Exhibit K at 88:7-89:1.*

d. March 2, 2007.

On March 2, 2007, Dr. Saradih called defendant Tenny to urge him to come clean with Maribeth Chase's family. His description of the conversation is as follows:

I called Dr. Tenny and I told him that the family -- I think Abby, the daughter, Abby, Abby, and Dr. Chase are asking me questions that I could not answers, and I wish if he could just answer the questions to them to give them an explanation why this happened after surgery. So -- so Dr. Tenny, at that time, told me that, you know, he was -- he could not tell them what happened because he was concerned that the hospital will get sued because the technician, by mistake, wanted to help him, but he advanced whatever the metal that they used to drain the -- the hemorrhage into the brain tissue. So I told him, you know, I -- I personally don't care whether the hospital, yourself, or myself gets sued, I think at this time we need to bring the information and just answer the family, you know, and what the -- and answer their questions. They need to know what happened. So that's my feeling at that time. And I made sure that they just -- I make an arrangement for this to happen....

*Exhibit K at 84:4-85:5.* Dr. Saradih contacted Deb Vermillion, the Risk Manager at Shawnee Mission Medical Center with his concerns that defendant Tenny had not been forthcoming with the Chase family. *Exhibit K at 88:5-89:4.* Deb Vermillion then met with defendant Tenny in her

office in the hospital. *Deposition of Deb Vermillion attached hereto as "Exhibit P" at 44:8-20.*

Her recollection of that conversation is as follows:

I recall Doctor Tenny coming down to my office, and basically when he walked in he indicated to me that he needed to talk to me about an issue that occurred in the OR involving Chuck, who he identified as the night supervisor who is also a surgical tech, and it also involved Maribeth Chase. And I said, okay. And as I recall the conversation, basically Doctor Tenny said that there had been a complication in Maribeth Chase's surgery and he believed it was caused because a -- Chuck, the surgical tech who he said was assisting him on the day that Ms. Chase had her surgery, which was a few days prior, had irrigated a burr hole with the use of a 60 cc irrigation syringe, and that that had caused a -- an -- an operative complication which led to Mrs. Chase's condition that she was currently then in ICU with at the hospital. I do also recall Doctor Tenny said that he had looked at the films. I -- I asked Doctor Tenny why he was just coming down on March 2nd to report this when the surgery had occurred several days earlier. He said that he wanted to review everything **because he wanted -- he did not -- he wanted to protect the hospital.** And one of the things that he said to me when we were talking about - you know, because I said to him, you need to call the family, you need to call Doctor Chase and talk to them about what's going on. And I specifically recall him saying to me, well, what should I tell them? And I said, I'm not going to tell you what to say, just tell them the truth. And I said, and make sure that you're telling them the truth because if you're not it's going to come -- it will eventually be flushed out. So all I'm saying is call them up and just tell them the truth, and if a surgical tech did something wrong then tell them, but I'm not going to tell you what to say. And I also -- he did say that he had looked at the films and looked at the chart. He described her language difficulties, that she had right-sided weakness and then kind of described some of the symptoms that she had had when she entered, and then made a comment at some point in time that, you know, that perhaps this was just a-- what would normally -- could normally be classified as a post-operative complication and not necessarily caused by the tech, but his position was that the injury was caused by Chuck Schwegler the night Supervisor.

*Exhibit P at 48:5-50:16 (emphasis added).* Later that day, at approximately 5:20 pm, defendant Tenny went to Maribeth Chase's room and "examined" her. *Exhibit C at 97-98.* It was the first time he had seen her in 28 hours. *Kathleen Hansen's Response to Defendant Tenny's First Interrogatories attached hereto as "Exhibit Q" No. 7.* He simply changed the dressing on her head. *Exhibit Q No. 7.* He then made a note in the chart attributing Mrs. Chase's deterioration on a medication change made by Dr. Kelley. *Exhibit C at p. 97-98.*

At approximately 6:45 pm on March 2, 2007, defendant Tenny called John Chase, MD.

and reported the following:

“you know how things are in surgery. The technician took it upon himself to irrigate the brain,” and we now probably know this is how the injury and the bleeding occurred. I asked why are we just hearing about this now, three days after the event? His response was because we wanted to make sure there were no other causes and probably ruled this out, so I thought I should tell you. There are no other distractions.

*Exhibit H No. 8(d)*. That evening, at the request of the family, Mrs. Chase was seen by another neurosurgeon, Stephen Hess, MD. By this time, her condition had significantly deteriorated.

*Exhibit K at 78:19-20*. Dr. Hess attributed her declining status to the on-going expansion of the hematoma that was present in the immediate post-op period. *Exhibit C at p. 29*. The family opted against “heroic” surgical measures at that point. *Exhibit C at p. 29-30*.

e. The Aftermath.

On March 7, 2007, Maribeth Chase was transferred to hospice care. *Exhibit C at p. 76*. On March 14, 2007, she died from the injury inflicted during the February 27, 2007 surgery. *Amended Autopsy Report attached hereto as “Exhibit R.”* Beginning on March 2, 2007, Shawnee Mission Medical Center undertook a thorough investigation of the alleged conduct of its surgical scrub technician, Charles Schwegler. Deb Vermillion, the SMMC Administrative Director of Risk Management Corporate Compliance, directed the investigation. It did not take long to determine that defendant Tenny’s belated version of events did not square with the facts.

First, the contemporaneously created intraoperative records demonstrated that Mr. Schwegler was not involved in Maribeth Chase’s surgery in any capacity. *Exhibit C at 436-37*. In fact, the surgical technician present for the operation was Serjio Valadez. Mr. Valadez testified as follows:

Q. Okay. Now, was Chuck Schwegler involved in any aspect of the surgery on Mrs. -- Mrs. Chase?

A. No.

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Q. Was there any point in the procedure that was done on Mrs. Chase where you stepped out and may not have known what was going on?

A. I never stepped out.

Q. You were there the whole time?

A. Yes.

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Q. And do you know of any basis for anybody saying that Chuck Schwegler had come into contact with Mrs. Chase?

A. He never came into contact. I was there that whole time.

*Deposition of Serjio Valadez attached hereto as "Exhibit S" at 22:2-5; 26:17-23; 29:10-14. Mr. Valadez testified that he performed no irrigation on Maribeth Chase. Statement Under Oath of Serjio Valadez attached hereto as "Exhibit T" at p. 15-25. Significantly, Mr. Valadez did recall defendant Tenny having difficulty passing a drain into the subdural space below one of the burr holes, however. Exhibit S at 35:17-20. All persons in the operation testified that Serjio Valadez was in fact the scrub tech and that Charles Schwegler never scrubbed in or came into contact with Maribeth Chase. Exhibit S at 29:10-14; Deposition of Christine Miller, RN attached hereto as "Exhibit U" at 3:11; Deposition of Charles Schwegler attached hereto as "Exhibit V" at 38:14-19; Deposition of Carolyn Hogan, CRNA attached hereto as "Exhibit W" at 24:14-20. Yet, despite the overwhelming evidence to the contrary, defendant Tenny testified at his deposition as follows:*

Q. And you know who Sergio Valdez is?

A. Yes, sir.

Q. And how long have you known him?

A. For as long as he had worked at Shawnee Mission Medical Center, approximately the same amount of time.

Q. Do you work together with him regularly?

A. Yes, sir.

Q. And do you know the difference between Chuck Schwegler and Sergio Valdez?

A. Yes, sir.

Q. And is it your testimony here today that Mr. Schwegler did a forceful irrigation on Mrs. Chase during your surgery?

A. Yes, sir.

Q. Was he scrubbed in?

A. Yes, sir.

Q. Was he the surgical technician for the procedure?

A. Yes, sir.

Q. And what, if any, role did Sergio Valdez [sic] have?

A. None, to my knowledge.

Q. And have you been advised that the records reflect and the statements show that Mr. Valdez is the one who was the surgical tech for the procedure?

A. Yes, sir.

*Exhibit F at 83:15-94:21.*

Experts retained by plaintiffs find defendant Tenny's claims regarding the cause of Maribeth Chase's injury to be entirely implausible. Dr. William Friedman dismissed defendant

Tenny's version of events as "improbable." *Exhibit N at 43:4-11*. Dr. Carole Miller testified that it would be "impossible" for the injury to have occurred as alleged by defendant Tenny. *Exhibit E at 103:4-9*.

Importantly, for the purpose of this motion, the identity of the party who injured Maribeth Chase is not determinative of the issue. The conduct of defendant Tenny that gives rise to plaintiffs' claim for punitive damages is his conduct *after* the penetrating injury was inflicted. It is the cover-up that deprived Mrs. Chase of surgical intervention that would have both saved her life and likely improved her quality of life. In fact, defendant Tenny's conduct deprived Maribeth Chase of the opportunity to have John Chase, MD, her orthopedic surgeon son, make treatment decisions on her behalf. Experts have testified that the standard of care required defendant Tenny to immediately disclose the injury to the Chase family and offer to perform surgery in order to evacuate the hematoma that ultimately led to their mother's death. *Exhibit E at 85:23-86:5; Exhibit N at 74:2-75:5*.

Drs. Miller and Friedman believe with a high degree of medical probability that an operation on either February 27 or 28 would have saved Mrs. Chase's life. *Exhibit E at p. 70:12-21; 71:17-22; Exhibit N at 53:2-13; 55:14-15; 61:15-25; 75:15-22*. Maribeth Chase had an Advanced Health Care directive which expressed her desires as follows:

I want my doctor to try treatments that may get me back to an acceptable quality of life. By acceptable quality of life, I mean living in a way that lets me do things that are important and necessary for me. Those things are: I do not want life support if I can no longer expect to communicate and recognize family and friends in order to make decisions to take care of myself.

*Maribeth Chase's Health Care Directive attached hereto as "Exhibit X."* On February 28, 2007, Maribeth Chase remained responsive to commands and stimuli. *Exhibit K at p.*

33:12-16. Had surgery been performed on that day (i.e. the surgery for which defendant Tenny reserved the OR), Dr. Miller testified that:

I believe based on how good she was when she came in -- it's only 24 hours after her surgery -- I think it would be certainly very reasonable to go ahead and do everything that you can. I wouldn't bail on this lady at this point because she may have significant neurologic return if you can control the intracranial pressure.

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I believe that she would have lived. And, you know, patients who have had significant trauma to the brain, strokes, if you give them time they often show significant recovery over a year or two, and particularly if they have good family support.

*Exhibit E at 70:12-21; 71:17-22.* Dr. Friedman testified about the surgical option as follows:

evacuating the hematoma, in my opinion, would have improved her chances of recovering from that injury.

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I think she most likely would have had some difficulty with language and some weakness, that she would have recovered and gone to a rehab center, where she would have steadily improved, and that there was a good possibility that she would have had reasonable quality of life after that rehab process had been completed.

*Exhibit N at 53:2-13; 55:14-15; 61:15-25; 75:15-22.* Attached to this motion is the affidavit of John Chase, MD, establishing that had proper disclosures been made, surgery would have been performed and his mother would have had a substantial chance at significant neurologic recovery. *Exhibit L.* But because defendant Tenny covered up and misled the Chase family, Maribeth Chase suffered conscious pain, suffering and anguish as she was forced to live the remaining weeks of her life with progressively worsening brain damage.

In reference to defendant Tenny's post-operative actions, Dr. Miller testified that defendant Tenny's decision not to discuss the injury and counsel the family on their options showed

“reckless disregard and conscious indifference to the rights of Mrs. Chase and her family”

*Exhibit E at 114:19-23.* According to Dr. Friedman, “the postoperative failure to admit to the surgical complication and offer to perform surgery was a reckless indifference to the rights, health and safety of Mrs. Chase and her family at a time when treatment was necessary, and time was of the essence.” *Exhibit N at 37:16-23; Amended Expert Disclosure attached hereto as “Exhibit Y.”* It is this decision to withhold information and treatment options from Maribeth Chase and her family that forms the basis of plaintiffs’ claim for punitive damages. It does not matter, for the purpose of this motion, who inflicted the injury to Mrs. Chase during the surgery.

## **II. The K.S.A. § 60-3703 procedure for pleading a claim for punitive damages.**

No petition may include a claim for punitive damages. K.S.A. § 60-3703. Rather, a plaintiff must obtain leave to file an amended pleading to include a claim for punitive damages. For leave to be granted, the plaintiff must show the Court that there is a “probability” that the plaintiff will prevail on the claim for punitive damages. K.S.A. § 60-3703. To prevail on a claim for punitive damages against defendant Tenny, plaintiffs must produce clear and convincing evidence to the jury demonstrating that defendant Tenny acted with willful conduct, wanton conduct, fraud or malice toward Maribeth Chase. K.S.A. § 60-3701(c). The interplay between the “probability” standard contained in K.S.A. § 60-3703 for bringing a claim and the “clear and convincing” standard in K.S.A. § 60-3702(a) for prevailing on the merits of the claim is “whether a jury could reasonably find that the evidence is clear and convincing and not whether the court [finds] it so.” Fusaro v. First Fam. Mortg. Corp., Inc., 17 Kan. App. 2d 730, 735-36, 843 P.2d 737 (1992). Obviously, sufficient discovery to outline the material facts in the

case must be accomplished before a motion to amend to request punitive damages can be ruled upon appropriately. Once this discovery has taken place:

the plaintiff must show there is actual evidence which will reasonably support a verdict for punitive damages before being allowed to plead them. On the other hand, the sufficiency of the evidence is not judged solely by the court except on the level of whether a jury could reasonably rule for the plaintiff.

Fusaro, 17 Kan. App. 2d 730, 735-36. Thus, this Court must determine whether a reasonable jury could conclude that the evidence of defendant Tenny's conduct would support an award of punitive damages. The Kansas Supreme Court has clarified the lense through which this Court is to view the evidence in reaching its conclusion:

In making this threshold determination, the trial court is not to usurp the role of the jury. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts remain jury functions. The trial court is to consider the evidence presented in the opposing affidavits as well as other evidence in a light most favorable to the party moving for the amendment.

Fusaro v. First Fam. Mortg. Corp., Inc., 257 Kan. 794, 802, 897 P.2d 123 (1995). Thus, the Court must determine, viewing the evidence presented in the light most favorable to the plaintiffs, whether there exists evidence from which a reasonable jury could assess punitive damages against defendant Tenny.

As shown herein, a reasonable jury could determine that there exists clear and convincing evidence that defendant Tenny's conduct toward Maribeth Chase was both wanton and fraudulent. Defendant Tenny's intraoperative negligence aside, the punitive damages claim is based on his failure to disclose the existence of Maribeth Chase's injury; his misrepresentations in the medical records, to the family and to other physicians regarding its nature and cause; and most importantly, his withholding any discussion of surgical treatment from Mrs. Chase and her family which prevented any chance of her recovery and ultimately sealed her fate.

To be clear, in Kansas punitive damages are not recoverable in a wrongful death action. Smith v. Printup, 254 Kan. 315, 335, 866 P.2d 985 (1993). Punitive Damages are recoverable, however, as part of a survival action. Lake v. Res-Care Kansas, Inc., No. 98-1019-JTR, 2002 WL 32356436 at \* 1 (Kan. 2002). In this case, along with the wrongful death cause of action, the estate of Maribeth Chase has brought a survival action for her damages, both economic and non-economic, arising out of defendant Tenny's intraoperative negligence and Maribeth Chase's lost chance for improvement due to defendant Tenny's refusal to disclose the injury and treat her surgically following the operation. It is this survival action which serves as the vehicle for plaintiffs' punitive damages claim.

a. Defendant Tenny's "wanton" conduct.

A jury may award punitive damages upon clear and convincing evidence of wanton conduct. K.S.A. § 60-3702. "To be wanton, the acts alleged must show more than a lack of due care. The act must indicate a realization of the imminence of danger, and a reckless disregard, complete indifference or an unconcern for the probable consequences of the wrongful act." Rios v. Bigler, 847 F.Supp. 1538, 1548 (D. Kan. 1994). Punitive damages may be based upon wanton passive acts of omission as well as acts of commission. Cerretti v. Flint Hills Rural Electric Coop. Ass'n, 251 Kan. 347, 837 P.2d 330 (1992). "Acts taken may indicate wanton conduct, but a reckless disregard and indifference may also be inferred from a failure to act when action is called for to prevent injury." Rios 847 F. Supp. At 1548-49. Thus, leave to amend should be granted upon a showing of evidence from which a reasonable jury could find that defendant Tenny realized the imminence of injury and failed to act when action was called for to prevent injury.

Plaintiffs' evidence, as set forth above, demonstrates the life or death choice defendant Tenny made on the evening of February 28, 2007. He knew on February 27, 2007 that his patient had suffered a penetrating trauma to her brain. The radiographic evidence confirmed that the bleeding in his patient's head was expanding. His patient was deteriorating. At that point, he had the opportunity to perform surgery to save her life and give her a very real opportunity to recover neurologically. The other option was to cover-up, do nothing and watch Maribeth Chase die. Defendant Tenny chose to let her die.

The bottom line is that instead of acknowledging what had happened to Maribeth Chase during her operation and coming clean to the family defendant Tenny cancelled the operating room he had reserved for Maribeth Chase. He told Dr. Saradih and Deb Vermillion that he remained silent to protect the hospital. Defendant Tenny lied to the family telling them that their mother had suffered a "stroke." Then, in an incredible act of self-interest, called his insurance carrier to report that his patient had suffered a traumatic injury to her brain. His final act that evening was to ensure a DNR order was placed on Maribeth Chase's chart.

This conduct is unacceptable for any person, let alone a physician to whom the family is looking for answers and hope. According to Dr. Miller, defendant Tenny's conduct showed "reckless disregard and conscious indifference to the rights of Mrs. Chase and her family" *Exhibit E at 114:19-23*. According to Dr. Friedman, "the postoperative failure to admit to the surgical complication and offer to perform surgery was a reckless indifference to the rights, health and safety of Mrs. Chase and her family at a time when treatment was necessary, and time was of the essence." *Exhibit Y*.

The evidence of defendant Tenny's wanton conduct is direct and overwhelming. There is no doubt that a reasonable jury could determine that this evidence establishes that defendant

Tenny “realized the imminence of injury and failed to act when action was called for to prevent injury” and that his decision establishes his reckless disregard and indifference to the rights, health and safety of Maribeth Chase.

b. Defendant Tenny’s “fraudulent” conduct.

Another basis upon which a jury may award punitive damages is fraudulent conduct. K.S.A. § 60-3702. In Kansas fraudulent conduct may involve either affirmative fraudulent representations or omissions of material fact which a person is under an obligation to disclose. PIK 3d § 127.40 & § 127.41; see also Safety Technologies L.C. v. Biotronix 2001, Inc., 136 F. Supp. 2d 1169, 1176 (D. Kan. 2001) (affirming punitive damages award based on clear and convincing evidence of fraud by silence).

i. Fraud by silence

For the jury to find that defendant Tenny acted fraudulently based on fraudulent omissions, it must find that 1) he had knowledge of material facts which the plaintiff did not have; 2) that he was under an obligation to communicate the facts to the plaintiff; 3) he intentionally failed to communicate material facts to the plaintiff; 4) plaintiff justifiably relied upon the defendant to communicate the material facts to the plaintiff; and 5) the plaintiff sustained damages as a result of the defendant’s failure to communicate such facts. PIK 3d 127.41.

1. Defendant Tenny knew material facts which the plaintiffs did not know.

As set forth above, defendant Tenny’s operative note “Addendum” sets forth the shocking events which he claims occurred at the time of the operation:

I turned back to the patient to find the surgical technician at the end of a forceful irrigation directly into the left frontal burr hole site and which was perpendicular to the surface of the brain. I had not implied suggested nor instructed that this

should be done. I did not do any similar form of irrigation or any form of irrigation perpendicular to the surface of the brain during this case or any other case and, especially, in any previous surgical case that I have worked with this technician.

He also indicated that he saw a "piece of brain tissue" fall out of a burr hole. He testified as to his understanding at the time of the surgery:

Q.... would you agree the fact is that you did feel that there had been an injury to and penetration of the substance of the brain?

A. I was -- felt that it was not done by the operating surgeon.

Q. By you.

A. That is correct.

Q. But it was done.

A. That was my assumption.

Q. Well, you personally eye-witnessed a piece of brain coming out of the hole, correct?

A. That is correct.

Q. And I think we have established that means that the brain was penetrated.

A. That is correct.

Q. And this would be in that category of a traumatic open head injury to the brain.

A. Yes, sir.

*Exhibit F at 199:8-200:8.* Defendant Tenny knew that the post-operative imaging, both CT and MRI, showed the existence of a growing hemorrhage in Mrs. Chase's brain. Defendant Tenny reported Mrs. Chase's traumatic injury to his malpractice insurance carrier on February 28, 2007.

Plaintiffs experts have testified that given defendant Tenny's knowledge of the events and evidence of injury at that point, the standard of care required surgery. There is evidence

from which a reasonable jury could conclude that in fact, defendant Tenny knew the true nature of Maribeth Chase's injury and that surgery was the appropriate treatment. He did, after all, reserve an operating room for Maribeth Chase. Yet, he provided none of this information to Mrs. Chase or her family.

2. He was under an obligation to communicate the facts to the plaintiff.

That defendant Tenny was under an obligation to communicate the above facts to the plaintiffs is not in dispute. To begin with, defendant Tenny acknowledged that Maribeth Chase and her family had the right "to be informed about the outcomes of care, treatment, and services, including unanticipated outcomes." *Exhibit F at 63:12-21; SMMC Patient's Bill of Rights attached hereto as "Exhibit Z."*

Additionally, a physician's fiduciary obligation toward his or her patient has been acknowledged by Kansas Courts. In the seminal case regarding a physician's duty to disclose information to his or her patients, the Kansas Court of Appeals held as follows:

The plaintiff ... is not complaining about negligence, incompetence, or unauthorized treatment. She is complaining about being lied to and misled by someone she trusted and by someone who was obligated to tell her the truth. It should not matter if that someone is a physician, lawyer, banker, or magazine salesman. Fraud is fraud, and we reject the notion that physicians are not answerable for it as are the other members of our society.

The obligation to tell the truth to people who depend on you to do so is not an exclusive obligation of a physician. It is an obligation shared with fiduciaries, with bankers, with lawyers, with shoe salesmen, and with myriad other members of our society. We reject the notion that because a physician has an obligation to tell his or her patients the truth that any suit against a physician for violating that duty can only be one for malpractice and not for fraud.

There is no logic and no justice in a conclusion that when a physician misleads someone, it is malpractice, but when a banker does so, it is fraud. **The duty to speak honestly to those who trust you and to not engage in fraud or deception are duties shared by the medical profession with myriad members of our society. Physicians are not immune from the consequences of their**

**fraudulent conduct.**

Robinson v. Shah, 936 P.2d 784, 790 (Kan. Ct. App. 1997) (emphasis added). Defendant Tenny had an obligation to disclose the nature and existence of Maribeth Chase's injury to her and her family.

The Chase family also had a right "to be involved in decisions about care, treatment, and services provided." *Exhibit F at 63:3-6*. Defendant Tenny's withholding information from the Chase family when they had an opportunity to make decisions regarding potentially function-preserving treatment led to Maribeth Chase's death and constitutes fraud.

3. Maribeth Chase, and her Durable Power of Attorney for Health Care, justifiably relied upon the defendant to communicate material facts regarding Maribeth Chase's medical condition and treatment options to the plaintiff.

There can be no dispute that Maribeth and John Chase's reliance on defendant Tenny for information concerning the outcome and complications of Mrs. Chase's surgery is justified. During the period of February 27 through March 2, 2007, the Chases had no reason to know that defendant Tenny was misleading them regarding their mother's condition and the treatment options.

4. The plaintiff sustained damages as a result of the defendant's failure to communicate such facts.

Defendant Tenny withheld the availability of an operation from Maribeth Chase and her family. Had this been offered, Mrs. Chase would have had surgery which would have saved her life and importantly, saved her from the suffering, anguish and indignity she experienced during the weeks following the initial injury and her death. The opinions of plaintiffs' retained experts are uniform that an operation on either February 27 or 28 would have saved Mrs. Chase's life.

Mrs. Chase had an Advanced Health Care directive as follows:

I want my doctor to try treatments that may get me back to an acceptable quality of life. By acceptable quality of life, I mean living in a way that lets me do things that are important and necessary for me. Those things are: I do not want life support if I can no longer expect to communicate and recognize family and friends in order to make decisions to take care of myself.

*Exhibit X.* On February 28, 2007, Mrs. Chase remained responsive to commands and stimuli. When Dr. Saradih saw her on that day, she could “follow command” i.e. “like if you ask her to raise her left hand, or something, she would listen to you, she would do it.”

*Exhibit K at 33:13-16.* Had surgery been performed on that day, the surgery for which defendant Tenny reserved the OR, Dr. Miller testified that:

I believe based on how good she was when she came in -- it's only 24 hours after her surgery -- I think it would be certainly very reasonable to go ahead and do everything that you can. I wouldn't bail on this lady at this point because she may have significant neurologic return if you can control the intracranial pressure.

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I believe that she would have lived. And, you know, patients who have had significant trauma to the brain, strokes, if you give them time they often show significant recovery over a year or two, and particularly if they have good family support.

*Exhibit E at 70:12-21; 71:17-22.* Dr. Friedman testified about the surgical option as follows:

evacuating the hematoma, in my opinion, would have improved her chances of recovering from that injury.

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I think she most likely would have had some difficulty with language and some weakness, that she would have recovered and gone to a rehab center, where she would have steadily improved, and that there was a good possibility that she would have had reasonable quality of life after that rehab process had been completed.

*Exhibit N at 53:2-13; 55:14-15; 61:15-25; 75:15-22.* Mrs. Chase, and John Chase, MD, her Durable Power of Attorney for Health Care Decisions, never got to take advantage of that

chance. Attached to this motion is the affidavit of John Chase, MD, stating that had he been aware of the potential benefits of surgical intervention, he would have opted for that intervention on his mother's behalf. *Exhibit L*.

Instead of offering the Chases the treatment their mother needed, defendant Tenny called his insurance carrier. This refusal to disclose the possibility of treatment and an opportunity for a recovery caused Mrs. Chase to suffer for weeks with progressively worsening brain damage. When there was nothing the physicians at SMMC could do, she was transferred to hospice care and eventually died of her injuries. Had defendant Tenny offered and performed surgery the economic and non-economic damages suffered by Maribeth Chase during the weeks leading to her death would have been avoided and, in fact, she would have lived.

ii. Defendant Tenny's affirmative fraudulent conduct.

Defendant Tenny's statements regarding the cause and nature of Maribeth Chase's injury also were affirmatively fraudulent. For the jury to find that defendant Tenny acted fraudulently, it must determine that he made 1) false or untrue statements of a material fact; 2) the statements were either known to be false or were recklessly made without knowledge; 3) that the representations were intentionally made for the purpose of inducing another party to act upon them; 4) that the party reasonably relied and acted upon the representations made and 5) that the party sustained damage. PIK 3d 127.40. As set forth above, despite knowing the true cause and nature of Maribeth Chase's injury, defendant Tenny represented to the family that she had had a "stroke." Remember, the air in the parenchyma of the brain could not be accounted for by a stroke. There is ample direct evidence, including defendant Tenny's own operative report Addendum, his statements to Traci Ferrell and Deb Vermillion establish that his characterization of the injury as a "stroke" was knowingly false. Because Tenny intentionally misled plaintiffs

into believing their mother had had a “stroke,” Mrs. Chase did not receive the surgical treatment she needed.

It is a rare case in which the jury should be asked to consider awarding punitive damages against a health care provider. This however, is such a case. Defendant Tenny’s conduct was wanton and fraudulent and it cause Maribeth Chase to endure significant damage prior to her death. For this reason, plaintiffs should be permitted leave to amend their petition to assert a claim for punitive damages against defendant Tenny.<sup>6</sup>

Respectfully submitted,

SHAMBERG, JOHNSON & BERGMAN, CHTD.



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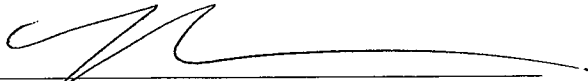
<sup>6</sup> An affidavit of counsel in support of the claim for punitive damages is attached as “Exhibit AA.”

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of May, 2008, a true and correct copy of the above and foregoing was sent via First Class Mail, postage paid, to:

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