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IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
TENTH JUDICIAL DISTRICT

CLAIRE CHASE, as heir-at-law)
and personal representative)
of the estate of MARY ELIZABETH D. CHASE,)
and JOHN CHASE, M.D. and)
M. KATHLEEN HANSEN)
as heirs-at law of MARY ELIZABETH D. CHASE,)
Plaintiffs,)
v.)
SHAWNEE MISSION MEDICAL CENTER, INC.,)
and ROBERT T. TENNY, M.D.,)
Defendants.)

Case No. 07CV4979
Division 7

**PLAINTIFFS' REPLY TO DEFENDANT TENNY'S RESPONSE TO PLAINTIFFS'
MOTION FOR LEAVE TO ASSERT A CLAIM FOR PUNITIVE DAMAGES**

Once the misstatements of the law are corrected and the factual arguments and conclusions contained in the defendant's Response are disregarded, and the implicit and explicit admissions by defendant of his fraudulent and wanton conduct are considered, it becomes clear that this is a compelling case to submit to the jury on punitive damages.

I. The defendant has proffered an erroneous and non-existent legal principle that all aspects of plaintiffs' claim must be established by clear and convincing evidence.

The legal standard set forth in K.S.A. 60-3702(a) was explained in the case of *Fusaro v. First Family Mtg. Corp., Inc.*, 257 Kan. 794, 801, 897 P.2d 123 (1995), as follows:

"The initial question for the trial court when considering all the evidence is whether 'plaintiff has established that there is a probability [considering that the burden on plaintiff is proof by clear and convincing evidence] that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209 and amendments thereto.' K.S.A. 60-3703.

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, and if the evidence is of sufficient caliber and quality to allow a rationale fact finder to find that the *defendant acted towards the plaintiff* with willful conduct, wanton conduct, fraud, or malice, the trial court shall allow the amendment."** (emphasis added)

Many of the defendant's arguments are based upon the erroneous and unsupportable legal premise that the "clear and convincing" standard applies not only to the proof of the fraudulent or wanton conduct of the defendant, but to all other aspects of the action, including, in this case, the proof of causation and damages. Specifically, in this case, the defendant claims that the Plaintiff-Estate must prove by clear and convincing evidence that surgical intervention would have improved Mrs. Chase's condition to an acceptable quality of life, and that Dr. Chase, who had the medical power of attorney, would have approved such surgery in light of the language of Mrs. Chase's Health Care Directive. That is not the standard of proof on those elements of the case. In fact, when it comes to the issue of what surgery might have accomplished, i.e., the loss of a chance claim, the standard of proof of causation is even less than the usual "preponderance of evidence" standard used in negligence cases. *Delaney v. Cade*, 255 Kan 199, 210, 873 P.2d 175 (1994).

In Kansas, the clear and convincing evidence standard for punitive damages applies to the quality of the defendant's conduct only, and not to the other aspects of the claim, like breach of

the standard of care, causation, and actual damages. K.S.A. § 60-3701(c) as explained in *Fusaro*, supra, requires the following:

"At trial, a plaintiff seeking punitive damages 'shall have the burden of proving by clear and convincing evidence, . . . **that the defendant acted toward the plaintiff** with willful conduct, wanton conduct, fraud or malice.' K.S.A. 60-3701(c)." (emphasis added) (deletion by the Court)

PIK 4th Civil 171.44, as approved of by the Kansas Supreme Court, clearly establishes that in order to assert a claim for punitive damages, the Plaintiff must first prove actual damages by the normal preponderance of the evidence standard and then the willful, wanton, fraudulent or malicious nature of the conduct giving rise to the actual damages by clear and convincing evidence.

"In this case the plaintiff claims the defendant acted in a *(willful) (wanton) (fraudulent) (malicious) manner toward the plaintiff*. If you award actual damages, then you may consider whether punitive damages should be allowed. The burden is on the plaintiff to prove by clear and convincing evidence the defendant acted as claimed. *If you find the defendant did one or more of the acts claimed by the plaintiff you should then determine whether clear and convincing evidence has been presented that the defendant acted in a (willful) (wanton) (fraudulent) (malicious) manner.*"

P.I.K. 4th Civil 171.44, cited with approval, *Dold v. Sherow*, 220 Kan. 350, 552 P.2d 405 (1998) (emphasis added).

As pointed out by defendant and explained in the case of *Moore v. State Bank of Burton*, 240 Kan. 382, 390, 729 P.2d 1205 (1987):

"No one has the right to maintain a civil action for the mere purpose of inflicting punishment upon a wrongdoer, and if a party has no cause of action independent of his claim for punitive damages, he has no cause of action at all."

This means the plaintiff must have an independent cause of action, in this case the Estate's survival action, in order to maintain a claim for punitive damages. The punitive

damages claim is distinct and seeks separate damages, and these damages are based on the heightened degree of culpability of the defendant's conduct that caused some of the damages sought in the survival action.

Moreover, punitive damages may be awarded against a defendant whose sole alleged wrongful conduct was an act of omission.¹ *Cerretti v. Flint Hills Rural Electric Co-op Ass'n*, 251 Kan. 347, 837 P.2d 330 (1992). *Cerretti* also underscores the fact that the clear and convincing standard applies only to the conduct that supports punitive damages, and not to the issues of causation and damages that flowed from the same conduct, which are governed by the normal "preponderance of the evidence" standard.

The elements of the Estate's survival action, when judged by the preponderance of the evidence standard, are clearly jury questions.

a. The facts considered in a light most favorable to the Estate are sufficient to allow a rational finder of fact to conclude that defendant Tenny acted wantonly and fraudulently.

Let us now review the evidence the Court must view in the light most favorable to Plaintiff-Estate, which is the legal standard set forth in the *Fusaro* case, cited above, that would allow a rational fact finder to conclude "that the defendant acted towards the plaintiff with willful conduct, wanton conduct, fraud, or malice . . ." ²

1. Defendant Tenny admits that Mrs. Chase suffered a traumatic penetrating injury deep into the substance of her brain (the parenchyma) during her surgery on February 27th, and

¹ In this case, as will be seen below, there is conduct that can be characterized as wanton (reckless disregard) and fraudulent, by both silence and by affirmative misrepresentation.

² Many of the facts listed here were documented in plaintiffs' Motion for Leave to Assert a Claim for Punitive Damages, so the source documents and evidence will not be attached here, except for new material. References to Exhibits A - AA are attached to 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, M.D.; Exhibits BB and CC are attached hereto. Defendant Tenny's deposition was Exhibit F to plaintiffs' Motion.

that he noted a small piece of brain tissue draining out of the hole he had made in her skull, and bleeding from the underlying surface of the brain. Tenny deposition 199:22 – 200:9.³

2. During surgery, in the operating room, he told no one of the untoward events he claims to have witnessed. Tenny deposition 124:3-10.

3. He did not write about these events in his contemporaneous Operative Note. Tenny deposition 121:17 – 123:10.

4. For four days, he told none of the physicians or hospital personnel or family members that he had witnessed Mrs. Chase suffer a penetrating brain injury during the surgery. Tenny deposition 124:3-10.

5. He claims the alleged "forceful irrigation" by the surgical technician was inappropriate because, "I felt that may injure the underlying brain." Tenny deposition 191:6-7.

6. Before discharging Mrs. Chase from the operating room he ordered no tests or other imaging to determine whether she had been injured; rather, he transferred her to the recovery unit as though nothing had happened, and he told Mrs. Chase's family that the operation went great. Tenny deposition 212:22 – 214:8.

7. After Mrs. Chase awoke from anesthesia she was paralyzed on one side of her body and unable to speak, so defendant Tenny was called, and he ordered a CT scan of the brain. Tenny deposition 215:25 – 216:2.

8. Even once it became known that Mrs. Chase was having symptoms consistent with the injury defendant claims he was worried about he still told no one of the events he witnessed in the operating room. Tenny deposition 124:3-10.

³ Defendant Tenny claims that this injury was inflicted by a surgical technician, and not by him. For purposes of this Motion, the identity of the person who inflicted the injury is unimportant, because it is Dr. Tenny's despicable actions after this event that support plaintiffs' claim for punitive damages.

9. The early post-operative CT scan showed a large area of new hemorrhage inside Mrs. Chase's brain, and pockets of air deep in the substance of the brain in and around the area of hemorrhage (called the parenchyma). (Plaintiffs' Motion Exhibit I.)

10. The depositions of six of the radiologists at Shawnee Mission Medical Center who interpreted the various radiographic studies of Mrs. Chase's brain have been taken, and there is not a single one who says that air was not in the parenchyma of Mrs. Chase's brain. Depositions of Michael E. Brun, M.D., Andrew Harmon, M.D., Charles Karlin, M.D., Richard Miller, M.D., Robert E. Moffat, M.D. and Mark Reinsel, M.D.

11. Defendant Tenny alone claims that the air on the radiographic studies is not in the parenchyma. Tenny deposition 267:3-6, 270:11-13.

12. Defendant Tenny admits that if there is air in the parenchyma it cannot be accounted for by any type of "stroke." Tenny deposition 267:7-18.

13. Defendant Tenny's own expert, Dr. Donlin Long, testified about the February 27, 2007, post-operative CT scan, and admitted that the scan confirmed that what occurred in the operating room caused the traumatic injury. Donlin Long deposition 129:10-18, attached as Exhibit BB.

14. Defendant Tenny claims he thought Mrs. Chase had had a stroke to account for her symptoms and that is why he did not do surgery. Tenny deposition 252:25 – 254:4.

15. Defendant Tenny admits that it was his intent to convince the Chase family that their mother had a hemorrhagic stroke. He withheld any information about the injury that had occurred in the operating room. Tenny deposition 269:23 – 270:10.

16. Defendant's expert, Dr. Long, testified, "it was wrong" for defendant Tenny to attribute Mrs. Chase's symptoms to stroke unrelated to the operating room trauma. Long deposition 130:6 – 131:1, attached as Exhibit BB.

17. Defendant Tenny admits that he would have done surgery if he had been convinced that Mrs. Chase had an actual intracranial hemorrhage, meaning a hemorrhage within the substance of the brain. Tenny deposition 258:13-23.⁴

18. On February 28th, defendant Tenny contacted Shawnee Mission Medical Center to prepare an operating room for surgery on Mrs. Chase, but he did not tell the family anything about this. Tenny deposition 259:5-12.

19. On the same day, February 28th, defendant Tenny called his liability insurance carrier, KaMMCO, and spoke to Traci Ferrell, in the Loss Prevention Division, and told her that during surgery Mrs. Chase's brain was injured. See Traci Ferrell deposition 8:11-13; 14:1-8 and 18:7 – 19:3⁵, Exhibit M.

20. On the same day, February 28th, Dr. Tenny took the trouble to write an order reminding the hospital staff that Mrs. Chase was a DNR (Do Not Resuscitate), just before he left for the day. (Exhibit C at page 58.)

21. Dr. Tenny's expert, Donlin Long, M.D., conceded that the standard of care that applied to Dr. Tenny required disclosure to the Chase family of what was wrong with Mrs. Chase, what caused it, the potential outcomes and the potential treatments that might make a difference. Long deposition 131:10 – 132:2, attached as Exhibit BB. Dr. Long also conceded that Dr. Tenny needed to discuss the options with Mrs. Chase's family, including surgical options. Long deposition 140:9 – 142:18, attached as Exhibit BB.

⁴ This was the finding that all of the radiologists and his own expert, Dr. Long, made, that was clearly disregarded by defendant Tenny.

⁵ This is exactly contrary to what Dr. Tenny was telling the Chase family, i.e., that Mrs. Chase had a stroke.

22. Dr. Long agrees that a reasonably competent neurosurgeon would have determined that the most likely cause of Mrs. Chase's post-operative neurologic deficit was the traumatic brain injury she suffered during the operation. Long deposition 139:11-19, attached as Exhibit BB.

23. Dr. Long agrees that when a physician is unable to be objective about a patient and may be placing his interest above that of the patient, it is his duty to get someone else involved in the patient's care. Long deposition 138:7-17, attached as Exhibit BB.

24. Defendant testified that consulting neurologist Gordon Kelley, M.D., diagnosed Mrs. Chase's symptoms as a stroke. Tenny deposition 294:23-25.

25. Under oath, Dr. Gordon Kelley contradicted Dr. Tenny's claim that Dr. Kelley thought there was a stroke:

a. Dr. Kelley remembered it was Dr. Tenny who was saying this was a stroke (Kelley deposition 27:20 – 28:14). (Exhibit O.)

b. Question (to Dr. Kelley): Did you tell Dr. Tenny that you thought Mrs. Chase had a stroke?

Answer: No. (Kelley deposition 30:20-22, Exhibit O.)

c. "I didn't see evidence that she'd had a stroke." (Kelley deposition 31:14-15, Exhibit O.)

26. Dr. Tenny can't remember ever telling Dr. Kelley about the traumatic penetrating injury to Mrs. Chase's brain during surgery. Tenny deposition 291:8 – 292:17.

27. On the night of March 1st, Dr. Kelley filed an Incident Report with the Shawnee Mission Medical Center Risk Management Department asking the Surgical Department to investigate what had happened to Mrs. Chase. (Kelley deposition 35:20 – 36:14, Exhibit O.)

28. Finally, on March 2nd, the day after the Incident Report was filed, Dr. Tenny first told somebody his story about the surgical technician injuring Mrs. Chase by forceful irrigation. Tenny deposition 318:12-22.

29. As his explanation for the delay in reporting the incident **defendant Tenny told two people that he was attempting to cover this up** because he was concerned the hospital might get sued: Dr. Saradih deposition 84:4 – 85:5 (Exhibit K) and Deb Vermillion deposition 48:5 – 50:16 (Exhibit P.)⁶

30. It is also a fact, admitted by Dr. Tenny, that he did not even come in to see Mrs. Chase from 8:00 a.m. on March 1st until 5:20 p.m. on March 2nd, a period of 28 hours. Tenny deposition 77:24 – 78:23.⁷

II. The Estate's survival action, pursuant to K.S.A. § 60-1801, includes three types of damages: (1) the deprivation of Mrs. Chase's valuable right to have her Durable Power of Attorney – her physician-son and her nurse-daughter -- act for her and make the decisions about her care and treatment after she was injured and incapacitated during surgery. (2) The liability of Mrs. Chase's estate for the attorneys-in-fact expenses for their time that default Tenny wasted. (3) the loss of a chance for surgery that had a reasonable chance to restore Mrs. Chase to an acceptable quality of life as a consequence of defendant Tenny's post-operative wanton and fraudulent conduct; and (4) the pain and suffering Mrs. Chase endured as a consequence of the operating room negligence;⁸

a. Deprivation of Mrs. Chase's right to have John Chase, her Durable Power of Attorney make decisions about her care and treatment after she was injured and incapacitated is compensable.

⁶ From this evidence alone, a jury might reasonably conclude that Dr. Tenny was acting in a fraudulent and wanton manner, putting his interests ahead of those of Mrs. Chase and her family.

⁷ Dr. Tenny's failure to come in to see this critically injured patient, who was deteriorating, combined with his note on the night of the 28th that Mrs. Chase was not to be resuscitated, could reasonably be construed by the jury as evidence that he was hoping Mrs. Chase would die quickly, and his mistake would be buried. What he did not count on was the fact that both the family and Dr. Saradih wanted another consultation, and Dr. Kelley would be called on the scene, become suspicious, and write his Incident Report asking for an investigation by the Department of Surgery.

⁸ The last item is not part of the basis for punitive damages

The following additional facts need to be considered on this point:

31. The Shawnee Mission Medical Center official chart for Mrs. Chases' February 2007 surgery contains her Medical Durable Power of Attorney and that is dated May 24, 2005, her Health Care Directive of May 24, 2005; and Durable Power of Attorney for Health Care, a Designation of Health Care Surrogate and a Catholic Declaration of Life and Death, all signed in 1997. Attached as Ex. DD, Hospital chart pages 000466-474, Medical Durable Power of Attorney is page 000468, and Health Care Directive is flip side, 000466.

32. The Medical Durable Power of Attorney appoints Dr. John R. Chase, with the first alternative agent being Abby D. Clutter, one of Mrs. Chase's daughters, a nurse. The document "revokes any prior medical durable power of attorney." Dr. Chase is granted "full power to make all decisions for me about my health care, including the power to direct the withholding or withdrawal of life-prolonging treatment." Dr. Chase was expected to be guided by [his mothers] directions as stated in [her] Health Care Directive" in exercising his power.

33. The Health Care Directive (Ex. DD, document 000466) expresses Mrs. Chase's desire: "**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 the things that are important and necessary to me. Those things are: I do not want life support if I can no longer expect to communicate and recognize family, friends in order to make decisions to take care of myself.**" (emphasis supplied)

The health care directive further states: "Therefore, I direct that no treatment be given just to keep my alive when I have: a condition so bad (including substantial brain damage or

brain disease) with **no reasonable hope** that I will regain a quality of life acceptable to me (as described above).” (emphasis supplied)

34. Defendant Tenny admits that it was Mrs. Chase's or her surrogate's right to be involved in decisions about her care and treatment. Tenny deposition 63:3-7.

35. Defendant Tenny admits that it was his duty to make sure that Mrs. Chase or her surrogate was given that right. Tenny deposition 63:8-11.

36. Defendant Tenny admits that it was the right of his patient, Mrs. Chase, and when appropriate, her family, to be informed about the outcome of care, treatment and services, including unanticipated outcomes. Tenny deposition 63:12-22.

37. Defendant Tenny admits that it would be unprofessional conduct under Kansas law to use any false, fraudulent, or deceptive statement in the medical record. Tenny deposition 66:6-20.

38. Defendant Tenny admits that on February 28th at 2:50 p.m., when he saw Mrs. Chase, she was aware of her surroundings and environment, but did not have the ability to form words, and he was uncertain whether she might not have the ability to process spoken language. He felt she had cognition and probably understood her situation. Tenny deposition 128:10-25.

39. Defendant Tenny understood Dr. John Chase had the Power of Attorney to act on behalf of his mother (Tenny deposition 131:5-12); and did not feel constrained from speaking with Dr. Chase by any rule or regulation, like HIPAA. Tenny deposition 129:8-23.

The Kansas legislature has codified the Durable Power of Attorney for Health Care Decisions. K.S.A. § 58-625. K.S.A. Chapter 58 of the Kansas Statutes governs personal and real property. The Durable Power of Attorney for Healthcare Decisions is a personal services

contract which obligates the agent to act on behalf of the principal, K.S.A. 58-652 (d), and allows for compensation for services rendered by the agent to act on behalf of the principal, K.S.A. 58-661. Personal services contracts are intangible personal property. *See, In re Girton, Oakes & Burger, Inc.*, 326 B.R. 901, 2005 WL 1513114 (6th Cir.BAP (Ohio)), 2005 Fed.App. 007N, at *5. (The court held that employment covenants fall within the definition of intangible personal property). Intangible personal property is generally defined as property that is a right rather than a physical object. *Dell, Inc. v Mohan*, 159 Cal.App.4th911, 923 (2008). Intangible personal property is “property (as a stock certificate or professional license) that derives value not from its intrinsic physical nature butr from what it represents.” *R&L Zook, Inc. v Pacific Indem. CO.*, 2008 WL 1931006 (E.D.Pa. 2008). Intangible personal property “consist[s] of rights not related to physical things, but that are merely relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts.: *Id.*, *quoting*, 63C *Am.Ju.2d Property* § 9 (2004). The Durable Power of Attorney for Health Care Decisions under K.S.A. §58-625 et.seq consists of rights related to relationships between person; namely, the incapacitated principal’s right ht ahave her Attorney In Fact for Health Care Decisions make decision on her behalf. K.S.A. §§ 58-625, 654, 626. Furthermore, by statute, Kansas has recognized this relationship and the rights it entails. K.S.A. § 58-625 et seq. As established by K.S.A. § 58-625 et. seq the Durable Power of Attorney for Health Care Decisions is intangible personal property. By enacting K.S.A. § 58-625 et. seq the Kansas legislature codified the legal right of an incapacitated person to have a surrogate make health care decisions on her behalf, and the agents duties. K.S.A. § 58-656. The question before this court is whether an incapacitated patient, whose physician through fraudulent conduct, deprived her of this legal right, recognized by statute, has suffered an injury that is compensable,

A jury may reasonably conclude that Mrs. Chase appointed her son John and daughter Abby for many reasons –they were close, he is a physician, she is a nurse, she trusted their judgment, and they would act with her best interests in mind. They had not discussed the Health Care Directive in specifics, just in general. From those conversations Dr. Chase had the idea that his mother wanted to live a good quality of life where she could recognize and communicate with her family and friends. Chase Deposition II,15:5-19.

It was Mrs. Chase's unchallenged, absolute right to have her son John and daughter Abby be the decision makers for her; she went to the trouble of executing the necessary documents and providing them for the medical records. Instead, the decision making authority for Mrs. Chase's health care ended up with Defendant Tenny, who clearly had a conflict of interest and was not acting in Mrs. Chase's best interests. At the time, he was engaged in an admitted cover up and deception inimical to Mrs. Chase's interests.

The attempt, in Dr. Long's deposition testimony and in defendant's Response, to justify defendant Tenny's failure to advise the Chase family of what had happened to their mother, and his disregard of their right to be the decision-makers, on the basis of "best judgment" is irrelevant to this Motion and without factual support. Defendant's expert, Dr. Donlin Long, testified eloquently about the fact that the surgical option was one possibility, but it was a reasonable judgment for a surgeon under these circumstances to decide not to do surgery; and in fact in Dr. Long's opinion is that surgery would have made no difference. However, as can be clearly seen, Dr. Long's explanation about judgment has nothing to do with the reason that Dr. Tenny did not perform the surgery that plaintiffs' experts say was indicated. Dr. Tenny is stuck with his dubious testimony that he felt Mrs. Chase had a stroke, and that is what he told the family, and

that is why he says he did not do surgery. See paragraphs 14 and 15 above.⁹ In light of the fact that all of the radiologists, the plaintiffs' two neurosurgical experts, the plaintiffs' neuroradiology expert and defendant Tenny's own neurosurgical expert (Dr. Long) all agree that there was an actual intracranial hemorrhage, and that the air was in the parenchyma, a jury will be entitled to conclude that it is Dr. Tenny who is being disingenuous, in fact dishonest, and that his lone and unsupportable opinion is merely the product of his continuing "cover up."

The measure of Maribeth Chases' damages resulting from Defendant Tenny's fraudulent conduct is the diminished value of her surrogate's decision making on her behalf. Kansas courts, in proper circumstances, will allow recovery for interference with intangible personal property. *DIRECTV, Inc. v Lockwood*, 311 F.Supp. 1147, 1151 (2004) (Intangible personal property may be converted.) Plaintiff anticipates the defendant arguing that the Durable Power of Attorney has no market value and therefore, damages are not available. However, the value of the Durable Power of Attorney lies not in the document itself, but rather, in Mrs. Chase's attorney-in-fact's ability to make informed decisions on her behalf. Under Kansas law, damage to personal property may be assessed where the item has no market value. *Kansas Power and Light Co. v. Thathcer*, 14 Kan.App.2d 613, 616 (1990). Where there is no market value, factors such as "loss of use" and "any special value to the owner" can be considered in assessing damages. *Id.* Kansas courts are given "a great deal of latitude in arriving at the proper measure of damages depending on the facts present" and the purpose of the various methods is "to make the damaged party whole." *Id.* In other words, "[T]he sundry rules for measuring damages are subordinate to the ultimate aim of making good the injury done or loss suffered and hence [t]he answer rests in good sense rather than in a mechanical application of a single formula.: *Id.* (internal quotations

⁹ In fact, contrary to what Dr. Long says (and it is not clear this opinion will ever be competent or admissible evidence because of Dr. Tenny's position), he, Dr. Tenny, would have done surgery if she had had an "actual intracranial hemorrhage." (See paragraph 17 above.)

omitted.) As stated above, Mrs. Chase's Durable Power of Attorney is intangible personal property in that it consist[s] of rights not related to physical things, but that are merely relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts.: *R&L Zook, Inc. v. Pacific Indem. Co.*, 2008 WL 1931006 (E.D.Pa. 2008), *quoting 63C Am.Jr.2d Property* § 9 (2004). Therefore, a jury can measure the damage resulting from the defendant's depriving, through fraud, Mrs. Chase, of the value of her Durable Power of Attorney based upon the special value it had to her.

b. The Liability of the Estate for Services of Mrs. Chase's attorneys-in-fact

The Kansas legislature recognized and codified the Durable Power of Attorney for Health Care Decisions by statute in the Kansas Power of Attorney Act (KPOAA). K.S.A. § 58-625 et. seq. Under the KPOAA, the Durable Power of Attorney for Health Care Decisions is a legal document granting rights to the principal and creating duties and authority in the agent. K.S.A. §58-656. An attorney-in-fact has the duty to act in the interest of the principal, avoid self dealing, and all other duties which flow from a fiduciary relationship. K.S.A. §58-656(a). In addition where the attorney in fact has special skills he has a duty to use those skills on behalf of the principal. § K.S.A. 58-656(a). Finally, recognizing the value of an attorney in fact's services to an incapacitated party, the Kansas legislature provided that an attorney in fact is entitled to reasonable compensation for services rendered to the principal. K.S.A. 58-661. Therefore, any compensation and expenses the estate owes Dr. Chase or Abby Clutter for services provided as Mrs. Chase's attorneys in fact, which arose from defendant Tenny's fraud, are compensable damages to the estate.

Should the Estate receive any funds from Defendant Tenny reimbursement will be owed by the Estate to Dr. John Chase and Abby Clutter. Instead of making informed decisions, John

Chase and Abby Clutter spent their time trying to figure out what was going on, and then dealing with the aftermath of Dr. Tenny's belated claims about what had occurred in surgery. The following services were provided by Dr. John Chase and Abby Clutter pursuant to their duties as Attorney's in Fact for Mrs. Chase's healthcare decisions.

On March 1, 2007, Dr. Chase consulted with Dr. Gordon Kelly in an attempt to ascertain his mother's condition. March 2, 2007, Dr. Chase received a phone call at 1:06 p.m. from Deb Vermillion, Risk Manager, Shawnee Mission Medical Center, to discuss Maribeth Chase's health care, whereby Mrs. Vermillion inquired whether Dr. Tenny had contacted Dr. Chase. March 2, 2007, defendant Tenny called Dr. Chase, at 8:05 p.m. to inform him that a surgical technician injured Maribeth Chase's brain while doing irrigation. Once defendant Tenny's fraud came to light, Dr. Chase kept handwritten notes documenting the events, which, Dr. Chase has testified, he would not have done but for the defendant's fraudulent conduct. Chase Deposition I, 32:8-23. These notes were kept pursuant to his duty as his mother's attorney-in-fact. ON March 10, 2007, Dr. Chase, as Mrs. Chase's attorney-in-fact, reviewed her medical records, including but not limited to, post-operative MRI, post-operative CT Scan, in an effort to determine the cause of Maribeth Chase's brain injury, an activity he would not have undertaken but for the defendant's fraudulent conduct. Chase Deposition I, 77:13-14; 74:12-25; 75:1-7. From the point of Maribeth Chase's post-operative decline until March 2, 2007, when defendant Tenny told Dr. Chase his story, which Dr. Chase found not credible, Dr. Chase used his medical expertise, as he was obligated to do pursuant § K.S.a. 58-656(a), to try and discern the cause of Maribeth Chase's post-operative decline. Id. At 56:16-21.

Abby Clutter has worked in nursing since 1984. Abby Clutter Deposition 6:1-25 – 7:1-25. Technically, she is not Mrs. Chase's daughter, she is actually a niece, but Mrs. Chase raised her as a daughter from the age of 18 months. Abby Clutter deposition, pg. 12.

Abby spoke with her brother John the evening of February 28, and also with her sister Claire, to be informed about what had happened in surgery. Abby Clutter Deposition 19:5-20:5. She had another conversation with John on March 1, in which John said that Dr. Tenny was not a good communicator and they were having a hard time getting questions answered and wanted to bring a neurologist into the case. Abby Clutter deposition 20:10-21:13.

Abby arrived at the hospital on March 1, the day her brother John was leaving for Florida, where he lives. Abby Clutter Deposition 19:3-4. When Abby got to Shawnee Mission Medical Center, her brother John briefed her on what had occurred, going through a lot of the detail. Abby Clutter deposition 25:17-26:8. She then went back to see her mother and assessed the situation. Abby Clutter deposition 27:18-28:24. A lot of time was spent in the ICU talking about her condition and getting up to speed. Abby Clutter 30:25-31:4 She also got herself informed and up to speed as to what another neurologist, Dr. Kelly, had said. Abby Clutter deposition 24:7-25. At approximately 5:30 p.m. on March 1, Abby met with Dr. Kimberly Cochran, a neurologist who had come into see her mother. Abby Clutter deposition 23:20-24:6. On March 2, Abby was at the hospital attending personally to her mother, doing neuro checks, and trying to assess the situation. Abby Clutter deposition 31:24-33:1. At approximately 3:30 Abby met with hospital Risk Manager Deb Vermillion because she was upset that Dr. Tenny had not been in to see Mrs. Chase since the previous morning. Abby Clutter deposition 33:23-35:6. Over the course of the day, Abby had a number of conversations with the nurse, trying to get Dr. Tenny to the bedside to see her mother. Abby Clutter deposition pgs. 33-36. She also spoke to

Dr. Saradih numerous times that day in an attempt to get her mother the attention that was needed. Abby Clutter deposition 37. A PEG tube was going to be put into Mrs. Chase to help with the nutrition, but Abby was unable to sign the permit for the tube because Dr. Tenny had not seen her mother for approximately 28 hours and Abby wanted to know more about her neurological status before agreeing to the tube. Abby Clutter deposition pgs. 45-46. Abby made the decision to terminate defendant Tenny, and asked for a second neurosurgeon to take over the case. This led to a consultation by Dr. Kimberly Cochran, and then to a second opinion by neurosurgeon Dr. Steven Hess. Abby Clutter deposition pp. 50-51.

On March 5th, Abby was involved with another meeting with Deb Vermillion during which Vermillion reported on what the hospital learned about what had happened in surgery and who was present. Abby Clutter 58:20-62:1. During the meeting there was discussion and review of the equipment that was used during the surgery, and Abby obtained a portion of the medical chart, which she reviewed later. Abby Clutter deposition 62:2-65:6. She also obtained copies of the CAT scan reports, MRI reports and other documents. Abby Clutter deposition 67:24-68:11; 72-73. Abby spoke with Deb Vermillion after March 5th, but she can't remember the exact date, it was approximately 2-3 weeks after Mrs. Chase's death, in order to find out if the hospital had done any follow up with the Kansas Board of Healing Arts. Abby Clutter deposition 72:21-74:2. Abby obtained a copy of the autopsy report and sent it to her brother John.

c. The Loss of a Chance Claim

In paragraph 57 of plaintiffs' Amended Petition for Damages a claim for loss of chance is asserted by the Estate. In *Delaney v. Cade*, 255 Kan 199, 873 P.2d 175 (1994) at p. 200, the Court stated:

“At the outset, we point out that the lost chance of recovery theory in medical malpractice applies to two ultimate results: first, the extent to which the alleged

malpractice reduced an already injured or ill person's chance of surviving the injury or illness and, second, the extent to which the alleged malpractice reduced an already injured or ill person's chance of a better recovery from the injury or illness."

If an action had been filed by Mrs. Chase prior to her death,¹⁰ a claim could have been made that, due to the misconduct of defendant Tenny, Mrs. Chase was deprived of an opportunity to have surgery that would have given her a reasonable chance to recover to an acceptable quality of life. This would have been a legally cognizable claim under the *Delaney* case. Unfortunately Mrs. Chase died before such an action was filed, but her claim survives and may be asserted by her Estate. K.S.A. § 60-1801.

1. There is evidence from which a jury may reasonably conclude that surgery done February 28th would given Mrs. Chase a "substantial chance" for an acceptable quality of life.

Plaintiffs have two neurosurgical experts who have given depositions, Carole Miller, M.D., from Ohio State University (deposition is Exhibit E) and William Friedman, M.D., from the University of Florida, (deposition is Exhibit N). While there is not agreement among the plaintiffs' neurosurgical experts that surgery was needed on February 27th, they agree that February 28th was the optimal day to do surgery. Exhibit E at 70:12-21; 71:17-22 and Exhibit N at 53:2-13, 55:14-15, 61:15-25 and 75:15-22. February 28th was the day that defendant Tenny called and reserved the operating room.

Dr. Miller testified that had surgery been performed on February 28th:

"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."

¹⁰ Mrs. Chase died March 14, 2007.

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.

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. Kansas "loss of chance" cases require proof of a . . ." a substantial loss of the chance."

"We do not adopt the any loss of a chance approach nor do we attempt to draw a bright line rule on the percentage of lost chance. That would be sufficient for the case to be submitted to the jury. As we recognized in *Roberson [v. Counselman]*, 235 Kan. 1006, 686 P.2d 149 (1984)], the question of causation is generally a matter to be determined by the finder of fact."

Delaney, supra, at 215-216.

In *Pipe v. Hamilton*, 274 Kan. 905, 913, 56 P.3d 823 (2002), the Kansas Supreme Court determined that a ten percent (10%) chance of recovery "is something that Kansas public policy supports as being substantial." Therefore, the testimony by plaintiffs' two highly competent neurosurgeons, who would have performed surgery because "they often show significant recovery" (Miller), and because there was a "good possibility for a reasonable quality of life" (Friedman) is sufficient to support a jury verdict on the Estate's claim for loss of a chance for

recovery. The loss of a chance claim relies upon a lesser or reduced standard of causation than the traditional standard applied in negligence cases. *Delaney v. Cade*, 255 Kan 199, 210, 873 P.2d 175 (1994) Syllabus ¶ 3. When it comes to the evaluation of the testimony of expert witnesses on the issue of causation "no particular words of art are necessary to express the degree of proof required." *Sharpels v. Roberts*, 249 Kan. 286, 296, 816 P.2d 390 (1991). The *Sharpels* case was not a loss of chance case at all, and therefore the expert testimony there was determined not to be up to the higher standard of proving a "reasonable probability" of cure. Though factually *Sharpels* is distinguishable, the *Sharpels* Court followed the rule that the expert testimony should be "taken as a whole."

When the evidence here, taken as a whole, is viewed in a light most favorable to the plaintiffs, plaintiffs' burden of proving loss of a substantial chance is satisfied. The fact the defendant has an expert with an opposing view is not decisive or even relevant at this point.

c. There is little doubt that John Chase, M.D., Mrs. Chase's son and the principal holder of her Durable Power of Attorney for Health Care, if properly informed and advised, would have approved surgery for his mother on February 28th.

In terms of Mrs. Chase's Directive (attached as Exhibit DD), the first thrust is that "**I want my doctor to try** treatments that may get me back to an acceptable quality of life." She did not want life support, however, "if I can no longer expect to communicate and recognize family and friends in order to make decisions to take care of myself." The guiding principle is in the second section, which indicates she would not want treatment when there is "**no reasonable hope** that I will regain a quality of life acceptable to me." Thus, she set the bar "at reasonable hope." As John Chase pointed out in his deposition, although his mother would have liked to have been able to talk, that was not his understanding of what she meant by "communicate." John Chase Deposition II, 37:19-24, attached as Exhibit CC. What it came

down to, is that Dr. Chase wanted to be well informed, and then after discussion and consultation with his family he would make the decision for his mother. John Chase II, 37:4-17. Attached as Exhibit CC.

Dr. John Chase has been deposed twice. The second deposition focused primarily on his role as Attorney-in-Fact for his mother for healthcare decisions. For purposes of this Motion the debate about what Dr. Chase would have done had he been fully informed and well advised is not relevant because the facts, and the interpretation of those facts, and credibility determinations, must be resolved in plaintiffs' favor; but plaintiffs will respond substantively to defendant's arguments anyway. Defendant has made reference to conversations Dr. Chase had with a friend, Dr. Chris Baker, who is a neurosurgeon, after Mrs. Chase died. Dr. Baker has not been deposed, and any reference to his opinions is without foundation and totally hearsay. Moreover, Dr. Chase testified that he thought Dr. Baker told him that nothing could have been done for his mother just to make him feel better about the situation. John Chase deposition II, 25:9-22, attached as Exhibit CC.

Defendant's Response also references the plaintiffs' encounter with the neurosurgeon who replaced Dr. Tenny on March 2nd, Steven Hess, M.D., who wrote that the family indicated Mrs. Chase would not want to have this type of surgery. The important thing to remember about Dr. Hess's appearance in the case is that by March 2nd there is no dispute that it was too late to salvage the situation.

Also defendant would like to label any testimony by Dr. Chase about what he would probably have done as "speculation," because defense counsel, in a leading question, got Dr. Chase to agree that retrospective testimony about what would have been decided at the time is "speculative." See John Chase deposition 27:22 – 28:1, attached as Exhibit CC. That isolated

answer in Dr. Chase's deposition is not the whole story, and Dr. Chase testified in a very straightforward way, with clarity, about how the entire scenario should have been different. First, Dr. Chase testified that in his opinion the Chase family should have been informed by Dr. Tenny about his mother's intraoperative injury and the availability of surgical intervention, as well as Dr. Tenny's decision to reserve an operating room and then cancel that operating room on February 28th. John Chase deposition II, 7:19 – 8:15, attached as Exhibit CC. Dr. Chase also testified that if he had been informed by Dr. Tenny about what happened in the operating room "his [Dr. Tenny's] credibility would have been kaput and had no credibility whatsoever, and so I wouldn't have listened to anything he said after that." John Chase deposition II, 32:24 – 33:5, attached as Exhibit CC. Dr. Chase testified that he would not have been calling Dr. Baker to ask his opinion of anything, he would have insisted on a second opinion, reevaluation and possibly transfer. John Chase deposition II, 30:9 – 31:13, attached as Exhibit CC.

Most importantly, when asked hypothetical questions about the decision he would probably have made if given the advice that plaintiffs' two experts, Dr. Friedman and Dr. Miller, had set forth in their depositions, Dr. Chase indicated that he most likely would have decided to go forward with surgery. See John Chase deposition II, 36:6 – 40:12, attached as Exhibit CC. Dr. Chase testified that:

"We probably would have been very aggressive about giving her a chance to recover." Id at 40:9-11.

Of course, nobody can ever know for certain what the outcome of surgery would have been, but it was Dr. Chase's right and prerogative to decide, and this was wrongfully deprived and appropriated by defendant Tenny. As the Kansas Supreme Court said in *Delaney*, supra:

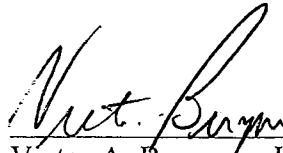
"When a defendant's negligent action or inaction has effectively terminated a persons' chance of survival, it does not lie in the defendant's mouth

to raise conjectures as the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass."

255 Kan. 199, 209 (1994) (applying the same reasoning to loss of chance for a better recovery).

A jury may reasonably conclude that defendant Tenny left the hospital on February 28 expecting Mrs. Chase to die before the true facts of her surgery came to light; and reminding the hospital staff in his note that Mrs. Chase was "Do Not Resussitate"—a decision that was not his to make. In doing so he deprived Mrs. Chase of her right to rely on her trusted decision-maker, i.e., John Chase; and he also deprived her of her substantial chance of recovery. This conduct included defendant Tenny's fraudulent misrepresentations and omissions to the family about what occurred in the operating room; his withholding of material information about her injury from the records and from other care providers; his deception about this being a stroke while admitting to his insurance carrier that his patient had been injured in surgery; his reckless and wanton disregard of his own consultants' interpretations of the post-operative CT and MRI scans; his reserving and then cancelling the operating room on February 28th without the patient's knowledge; his knowingly withholding information from Mrs. Chase's surrogate, thereby depriving and appropriating their decision making rights for himself, nullifying the value of the Medical Directive and wasting everyone's time; and his admitted cover-up of it all, ostensibly to protect the hospital. This more than satisfies plaintiffs' burden of proof.

SHAMBERG, JOHNSON & BERGMAN, CHTD.



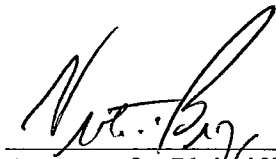
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2008, a true and correct copy of the above and foregoing was deposited in the United States Mail, postage prepaid, addressed to:

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