IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

NORMA TEMPLE as Executrix of the Estate of LOIS WALDMAN, and BARRY WALDMAN, VAN WALDMAN, RANDY WALDMAN, Individually, Plaintiffs	:	
	:	CIVIL ACTION -- LAW
v.	:	NO. 97-00,099
SUSQUEHANNA HEALTH SYSTEMS; SURGICAL ASSOCIATES OF WILLIAMSPORT; DIVINE PROVIDENCE HOSPITAL; FAXON FAMILY MEDICINE DEMETRI POULIS, M.D.; KURT BERNSDORFF, M.D.; TIMOTHY PAGANA, M.D.; WILLIAM MATTIACE, M.D.; WILLIAM J. TODHUNTER, M.D.; JANELLE CASWELL, R.N.; H. DEAN MINTZER, M.D.; JOHN F. ISAACSON, CRNA; HARRY R. CARODISKI, CRNA; SUSQUEHANNA GASTROENTEROLOGY; BRENDA ROSLEVICH, LPN; LAURIE HEINTZELMAN, R.N.; YVONNE LUPOLD, LPN; SHERRI CODDINGTON, LPN, Defendants	:	

OPINION and ORDER

This opinion addresses the important issue of when punitive damages are available in Pennsylvania. The case before this court raises two related questions: (1) what is the legal standard to establish "reckless indifference,"[1] and (2) do the factual allegations contained in the complaint meet this standard?

Generally, Pennsylvania follows the principles set forth in the Restatement (Second) of Torts on

[1] Curiously enough, neither party briefed or argued this issue, although their briefs stated very different definitions of this term.

this issue, permitting punitive damages when a defendant's conduct is "outrageous because of an evil motive or reckless indifference to the rights of others."[2] Chambers v. Montgomery, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963). For conduct to rise to the level of reckless indifference the defendant must deliberately act or fail to act in a manner that creates an unreasonable risk of physical harm to another individual.[3] The question at issue in this case is whether the defendant must have been *aware* that his or her conduct created such a risk.

Since 1985, our appellate courts have been less than clear on this issue. For the reasons stated in this opinion, this court holds that punitive damages may be imposed only in cases where the defendant was aware of the risk while committing the misconduct. Turning to the case before this court, we find that while the allegations in this skillfully-written complaint make out a strong case for negligence, they simply do not rise to the level at which punitive damages are appropriate.

Procedural Background

The complaint in this complicated medical malpractice case is currently in its third incarnation. All defendants have filed answers. Now the plaintiffs wish to amend several ad damnun clauses to include claims for punitive damages.[4] The plaintiffs are not attempting to include any new factual allegations; instead, they maintain that the existing factual allegations support an award of punitive damages.

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[2] Restatement (Second) of Torts § 908(2).

[3] Id. at § 500.

[4] Specifically, they wish to amend Count II, against Dr. Pagana; Count V, against Dr. Mattiace; Count VI, against the nursing staff; Count IX, against Susquehanna Health Systems, Surgical Associates of Williamsport, Divine Providence Hospital, and Faxon Family Medicine; Count X, for wrongful death; Count IX, for survival; and Count XII, for infliction of emotional distress.

DISCUSSION

A court has the authority to permit amendments to an ad damnum clause at any point in the litigation. Pa. R.Civ.P. 1033; Sullivan v. City of Philadelphia, 460 A.2d 1191 (Pa. Super. 1983). Generally, permission to amend complaints should be freely granted, unless the plaintiff is attempting to state a new cause of action after the statute of limitations has run. Del Turco v. Peoples Home Savings Association, 329 Pa. Super. 258, 478 A.2d 456, 464 (1984). A new cause of action arises if "the amendment proposes a different theory or a different kind of negligence than the one previously raised or if the operative facts supporting the claim are changed." Junk v. East End Fire Department, 262 Pa. Super. 473, 396 A.2d 1269, 1277 (1978). Punitive damages do not state a new cause of action. McClellan v. Health Maintenance Organization of Pennsylvania, 413 Pa. Super. 128, 604 A.2d 1053 (1992). Therefore, the plaintiffs' request should be granted, provided that the allegations in the Third Amended Complaint support an award of punitive damages. Daley v. Wanamaker, 317 Pa. Super. 348, 464 A.2d 355 (1983).

I. Standard for Punitive Damages

As a general guide in the area of punitive damages Pennsylvania has recognized the principles set forth in the Restatement (Second) of Torts § 908(2), which states, "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Comment *b* following § 908 states, "Reckless indifference to the rights of others and conscious action in deliberate disregard of them (see § 500), may provide the necessary state of mind to justify punitive damages." Reckless disregard of safety is defined in § 500:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is

substantially greater than that which is necessary to make his conduct negligent.

Comment *a* to § 500 describes two different types of mental states constituting reckless conduct. The first is a subjective standard, requiring conscious awareness of the risk. Under that standard, punitive damages may be imposed when the actor "knows or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to that risk." The second is an objective standard, requiring only that the actor *should have been aware* of the risk. Under that standard, punitive damages may be imposed when the actor "has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk, although a reasonable man in his position would do so."

Plaintiffs appear to believe that punitive damages may be awarded under the objective standard. In their reply brief, they maintain: "In medical malpractice cases, the issue is generally whether the defendant's actions were so contrary to the standard of medical practice as to warrant punitive damages, because they so vary from acceptable medical practice that they amount to reckless indifference to the interests of the patient." They then argue that the acts they have alleged in their complaint "so far departed from the standards of care of the decedent that they amounted to reckless indifference."

Prior to 1985, Pennsylvania appeared to permit punitive damages to be imposed under the objective standard.[5] However, in that year our Supreme Court specifically addressed the issue in Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088 (1985), a plurality opinion. In that case the court held that the plaintiff, an applier of finished asbestos products, had failed to produce sufficient evidence to justify an award of punitive damages against the defendants, manufacturers of the asbestos products, for

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[5] See Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984); Fugagli v. Camasi, 426 Pa.1, 229 A.2d 735 (1967); Wilson v. Pennsylvania Railroad Co., 421 Pa. 419, 219 A.2d 666 (1966); Evans v. Philadelphia Trans. Co., 418 Pa. 567, 212 A.2d 440 (1965); Smith v. Brown, 283 Pa. Super. 116, 423 743 (1980); Focht v. Rabada, 217 Pa. Super. 35, 268 A.2d 157 (1970).

failure to warn of the dangers. The two justices adopting the lead opinion outrightly rejected the objective standard. They acknowledged that Pennsylvania followed § 908(2) of the Restatement but pointed out that Pennsylvania state courts had never construed comment *b* of that section as authority for the proposition that reckless indifference to the rights of others is equivalent to both types of conduct included in the § 500 definition of those terms. Id. at 1097. The opinion pointed out that under comment *b* to § 908, punitive damages may not be awarded for misconduct that constitutes ordinary negligence, and the section in fact states that *conscious* and *deliberate* disregard of the rights of others may provide the necessary state of mind to justify punitive damages. Because this language implies an awareness of the risk, the court concluded that "an appreciation of the risk is a necessary element of the mental state required for the imposition of such damages." Id. at 1097, note 12. The lead opinion specifically held, "Under Pennsylvania law, only the first type of reckless conduct described in comment *a* to Section 500 is sufficient to create a jury question on the issue of punitive damages." Id. at 1097.

Justice McDermott filed a concurring opinion, which was joined by Justice Papadakos. Although these justices agreed punitive damages were not appropriate in that case and thus concurred in the result, they maintained that misconduct based on the objective standard is sufficient grounds upon which to assess punitive damages. Justices Nix and Zappala concurred in the result, but filed no opinion.

Ordinarily, the precedential value of a plurality decision is weak and does not constitute a definitive statement on the law. However, this court elects to follow Martin for the following reasons.

First, we believe the language of the Restatement does not necessarily mean punitive damages may be imposed on an actor who is not aware of the risk created by his or her conduct. Comment *b* to § 908 states that "[r]eckless indifference to the rights of others and conscious action in deliberate disregard of them (see § 500) *may* provide the necessary state of mind to justify punitive damages." (Emphasis added.) It does not say the definition under § 500 nor the states of mind listed under comment *a* to §

500 are *necessarily* sufficient. Moreover, the term "deliberate disregard" implies an awareness of the risk, and comment *b* to § 908 clearly states that punitive damages may not be awarded for conduct such as "inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." And finally, even if the Restatement clearly permitted punitive damages to be imposed under the objective standard, Pennsylvania courts would not necessarily have to do so. States need not swallow all of the Restatement in one bite. They are free to choose the provisions they find palatable and reject the rest.

Second, we believe our appellate courts have rejected the objective standard. Subsequent Superior Court panels have followed the lead opinion in Martin. In Smith v. Celotex Corp., 387 Pa. Super. 340, 564 A.2d 209 (1989), another case in which an asbestos supplier sued an asbestos manufacturer for not warning of the danger, the court stated: "Although the lead opinion in Martin was a plurality of two justices, all of the remaining four justices who participated concurred in the result that the punitive damages award should be stricken." Id. at 212. The Smith court then concluded that none of the testimony presented at trial

> related to knowledge specifically held by appellant. The testimony contains no references to appellant. Nor did plaintiff produce other evidence of appellant's specific knowledge of the medical articles . . . . There is no testimony specifically relating to knowledge by the medical profession as to the risks posed by finished asbestos products to those who installed or applied them. . . . The existence of these claims alone . . . does not indicate anything regarding appellant's knowledge of the risks posed . . . .

Id. at 212. The Smith court's emphasis on the defendant's knowledge of the risk demonstrates that it rejected the objective standard.

In Field v. Philadelphia Elec. Co., 388 Pa. Super. 400, 565 A.2d 1170 (1989), the Superior Court cited Martin without ever mentioning it was a plurality decision. In describing the standard to be used in assessing a punitive damage claim the court stated, "If the defendant actually does not realize the high degree of risk involved, even though a reasonable man in his position would, the mental state required for the imposition of punitive damages under Pennsylvania law is not present." Id. at 1182. The court

reversed the trial court's decision to strike a punitive damage claim because the complaint alleged facts establishing that the defendant actually knew of the danger at issue and in fact had been told of the danger by the plaintiff himself. See also, McDaniel v. Merck, Sharp & Dohme, 367 Pa. Super. 600, 533 A.2d 436 (1987) (holding that evidence one of the defendants knew about the danger was sufficient to establish the culpable state of mind); Brandimarti v. Caterpillar Tractor Co., 364 Pa. Super. 26, 527 A.2d 134 (1987) (holding that the evidence was insufficient to show the defendant not only appreciated the risk but was also indifferent to the plaintiff's welfare and acted outrageously.)

Two federal courts also cited Martin as Pennsylvania authority for imposing a subjective standard and then applied that standard. See Villari v. Terminix Intern., Inc., 677 F.Supp. 330, 337 (E.D. Pa. 1987) (stating that a party seeking punitive damages must show the defendant knew the nature of the risk and deliberately acted in conscious disregard or indifference to that risk.); Browne v. Maxfield, 663 F.Supp. 1193, 1206 (N.D.Ill. 1987, applying Pennsylvania law) (stating that the Martin court was "careful to limit punitive damages to cases in which the actor appreciates that his conduct creates a high degree of risk.") But see Ivins v. Celotex Corp., 115 F.R.D. 159 (E.D. Pa. 1986) (stating that the Martin opinion cannot constitute a definitive statement on the requisite mental state for punitive damages.) See also Judge Del Sole's dissenting opinion in Kirkbride v. Lisbon Contractors, Inc., 357 Pa. Super. 322, 516 A.2d 1 (1986).

In the more recent case of Taylor v. Albert Einstein Medical Center, 723 A.2d 1027 (Pa. Super. 1998), the court simply stated that punitive damages may be imposed for reckless indifference to the rights of others and quoted § 500 of the restatement, which defines "reckless disregard" as doing an act or intentionally failing to do an act which it is his duty to do, "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to

make his conduct negligent." Although if read in a void the phrase "or having reason to know" could imply the objective standard, for the reasons discussed above we conclude that the phrase merely indicates that in assessing an individual's state of mind, evidence showing that he or she *has reason to know* of such facts may constitute sufficient circumstantial evidence that the individual *has actual knowledge* of such facts.[6] In support of this holding, we note that the same phrase is used in defining the subjective standard itself, in comment *a* to § 500.

Most importantly, our Supreme Court appears to have adopted the Martin analysis in SHV Coal v. Continental Grain Co., 526 Pa. 489, 587 A.2d 702 (1991). Although the issue in that case was whether the defendant's conduct was outrageous, the court nonetheless quoted extensively from Martin, including the portions pertaining to knowledge of the risk.

And finally, this court is convinced that the subjective standard is the *correct* standard. Punitive damages have never been a favorite of Pennsylvania law, nor should they be. They are an extreme remedy, to be imposed only in extreme circumstances. The purpose of punitive damages is to punish and deter. Obviously, one cannot be deterred from risky conduct if he or she is not aware of the risk, nor should one be punished for mere negligence–even gross negligence.

The objective standard is nothing more than a gussied up version of negligence. It does not require any state of mind on the part of the actor. The defendant need not be aware of the risk, so long as a reasonable person would recognize it. This court will not blur the line between negligence and conduct justifying punitive damages. They are separate and distinct, and should remain so. The imposition of punitive damages is a powerful weapon, which should be used only with the utmost caution. All plaintiffs who suffer from the negligence of another are fully entitled to compensation for their losses. Only those

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[6] A related idea appears in the Martin opinion at 1097 note12: "Of course, the factfinder may consider the seriousness of any potential harm in evaluating the evidence on the extent of the actor's comprehension of potential injurious consequences. The more serious the possible harm, the more the actor is likely to perceive the risk of that harm."

who are the victims of deliberate misconduct should be entitled to punitive damages.

The widespread movement throughout the United States to limit both punitive and compensatory damages in tort cases demonstrates a pervasive view among citizens of this country that our tort system is quickly becoming a ravenous monster growing out of control. This court will not feed its appetite by allowing punitive damages to be awarded for nothing more than gross negligence.

For all these reasons, this court concludes that in order to pursue a claim for punitive damages a plaintiff must allege facts that would permit a jury to conclude the defendant was aware his or her conduct would create a high degree of risk of physical harm to another and yet deliberately acted or failed to act in conscious disregard of that risk.

II. Sufficiency of Factual Allegations

The remaining question in this case is whether the complaint has alleged sufficient facts to sustain a claim for punitive damages. The defendants maintain the claim must be stricken because the complaint alleges only negligence, and contains no words such as "willful, intentional, outrageous, or reckless." Plaintiffs correctly point out that it is not necessary to use "magic words." Rather, the issue is whether the factual allegations, if proven, are sufficient to support an award of punitive damages.

The plaintiffs, however, offer up their own magic word: "refused." Their complaint repeats the phrase "failed or refused" as if it were an incantation which will miraculously fling open the gates to punitive damages. But not every plaintiff who cries "refused, refused" shall enter into those gates.

There are no miracles in a modern court of law. The best a litigant can hope for is justice, or a good approximation thereof. Therefore, to sustain an award for punitive damages in a medical malpractice case, a plaintiff must do more than allege that a physician or nurse "refused" to provide a patient with proper care. The plaintiff must allege specific facts to support such a conclusion.

The plaintiffs in this case have alleged no such facts. Nothing in the complaint indicates that any of the doctors, nurses, or other defendants knew their actions or inactions created a high degree of risk and that they deliberately disregarded that risk.[7]

It is–and should be–fairly difficult for a medical malpractice plaintiff to make out a case for punitive damages. It will be a very rare physician who possesses the state of mind necessary to justify punitive damages. While many physicians make mistakes–even fatal mistakes–few deliberately and recklessly disregard the safety of their patients.

What sort of allegations are necessary to sustain a punitive damage claim in a medical malpractice action? Here, as in many areas of the law, it is impossible to provide a tidy, cut-and-dried answer. Nevertheless one thing is for sure: punitive damages are an extreme remedy for extreme circumstances. When such circumstances occur, they should be fairly obvious. This court is confident we will recognize them when we see them, and we do not see them in this complaint.

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[7] The strongest allegations are against Dr. Mattiace. Count V of the complaint concludes that he "failed to respond in a timely fashion, both verbally or in person, to concerns which were addressed to said physician on July 30, 1995"; "failed to communicate to the nurses his whereabouts and manner of being contacted on an emergency basis"; "failed or refused to be available for his patient"; and "failed or refused to inform nurses or other physicians who would be covering for him or how to obtain coverage." However, these are conclusions–not factual allegations. The only facts alleged in support of them are that he was telephoned by a nurse some time after examining the patient on or about July 30, 1995 at 10:00 a.m., his answering service stated he was not taking calls until 6:00 p.m., and he was paged three times with no response. There is no factual allegation to indicate that he was aware of the patient's critical situation and yet deliberately evaded contact from hospital personnel. The complaint does not even state approximately when he was called or paged, and when he was reached.

O R D E R

AND NOW, this _____ day of July, 1999, for the reasons stated in the foregoing opinion, the plaintiffs' Motion to Amend Ad Damnum Clauses to Add Prayers for Punitive Damages is denied.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
Hon. Clinton W. Smith
Robert Seiferth, Esq.
David Bahl, Esq.
Raymond Ginn, Jr., Esq.
Clifford Rieders, Esq.
Gary Weber, Lycoming Reporter