

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

DONNA L. DONMOYER, et al. :
Plaintiffs :
 :
v. : No. 98-01,189
 :
MATTHEW C. INDECK, M.D., et al. :
Defendants :

Issued: December 28, 2000

OPINION and ORDER

With this opinion our punitive damage trilogy is transformed into a quartet in order to address a proposal by the plaintiffs to resolve an alleged dilemma created by our recently enunciated punitive damage standard.¹ The plaintiffs complain they have been placed in an unfair position: this standard makes it very difficult for them to properly assert a claim for punitive damages in their complaint, yet the statute of limitations prevents them from adding the claim later if they should uncover facts during discovery which justify punitive damages. The plaintiffs therefore propose that we enter an order making the dismissal of their punitive damage claim contingent upon the defendants waiving their right to assert a statute of limitations objection should the plaintiffs later uncover facts to justify the claim.² We reject

¹ In the cases of Temple v. Susquehanna health Systems, et al., Lycoming County No. 97-00,099; Trimble v. Beltz, et al., Lycoming County No. 98-01,720; and Donmoyer v. Indeck, Lycoming County No. 98-01,189, we issued opinions addressing when punitive damages are appropriate. We held that to properly assert a punitive damage claim, a complaint must allege facts from which one could conclude the defendant knew about the risk at the time of the allegedly wrongful conduct, and proceeded in spite of that awareness. We also held that the complaint must contain factual allegations from which one could infer that a particular defendant realized the risk—not merely that any reasonable physician would have realized the risk. To do this in a medical malpractice case, we opined, a plaintiff may certainly use circumstantial evidence of the defendant’s state of mind, but it will probably be necessary to allege facts involving the physician’s own words or the non-verbal equivalent.

² The proposed order reads:

Plaintiffs’ claims for punitive damages are dismissed, contingent upon Defendants’ waiver of the statute of limitations with respect to punitive damages should the Court decide that a sufficient pleading is filed at a later time to permit punitive damages to be plead [sic];

this proposal because we fail to see how our punitive damage pronouncement erects any unfair hurdles for the plaintiffs, whereas their proffered solution creates numerous problems.

DISCUSSION

The Problematic Solution

The plaintiffs argue that the punitive damage standard enunciated by this court requires them to plead facts generally unavailable at the time the complaint is filed. Since they must allege the defendant physician knew his conduct imposed a risk upon the patient, the plaintiffs must essentially plead facts demonstrating a state of mind, which is difficult prior to discovery. Their solution, however, is troublesome for the following reasons.

First, an order making the punitive damage dismissal contingent upon the defendants' waiver of a statute of limitations objection smacks of coercion. It is not the function of courts to strong-arm litigants into waiving defenses or forfeiting arguments. The adversarial system works only when the parties can use, and do use, all the weapons available to them. We are therefore highly reluctant to limit one party's arsenal in this manner.

Moreover, the court's job is to decide issues raised before us, and not to force litigants into making certain decisions. We prefer to have the parties attempt to persuade *us*—not vice versa.

In addition, although the proposed order is not exactly an advisory opinion, it is precariously close to one. If we issued the order requested by the plaintiffs, we would be asking the defendants to waive their statute of limitations defense so that *if* the plaintiffs uncover facts supporting a punitive damage claim

Therefore, if Defendants, within ten (10) days of the date of this order, object to waiving the statute of limitations with respect to punitive damages, the preliminary objections moving to strike the punitive damages shall be denied;

If Defendants do not object within ten (10) days of the date of this Order to their waiver of the statute of limitations, the punitive damages shall be stricken, although Plaintiffs may file a motion to amend their pleading, adding punitive damages at a later time, should the facts so justify.

later on, *then* the plaintiffs would be permitted to add the claim. That would be, in effect, to resolve a situation that might never occur. We prefer to stick to the events that *have* occurred: namely, that the plaintiffs have pled a claim for punitive damages without any facts to support it.

Another distasteful aspect of the proposed order is that it is a *contingent decision*. It makes the disposition of the defendants' preliminary objections to the punitive damage claim contingent upon their waiver of the statute of limitations defense. If they waive it, the preliminary objection is granted; if they do not waive it, the preliminary objection is denied. A judicial determination ought to be just that—a determination. It ought not to depend upon the decision of a litigant. This court has been charged with the duty to decide the issues before us, and we will not delegate that duty to the defendants. Either the plaintiffs have properly pled a punitive damage claim or they have not, and that decision ought not to depend upon the defendants' decision whether to waive the statute of limitations.

Perhaps most important of all, however, the proposed solution relieves the plaintiffs from the responsibility to diligently investigate their case before filing a complaint. Instead of investigating whether punitive damages are warranted, they can shirk that duty and preserve the claim by pleading it and obtaining a contingent dismissal order. After all, under the proposed order if they happened to uncover facts during discovery that substantiate punitive damages, they could add the claim at that time without interference from the dreaded statute of limitations.

The plaintiffs argue that the proposed contingent order is necessary because it is so difficult to uncover facts demonstrating the defendants were aware of the risk their conduct posed to the patient. That argument, however, undermines their later claim that the discovery rule would not be applicable when attempting to amend the complaint to include a punitive damage claim. Granted, facts justifying a punitive damage claim are harder to uncover than facts substantiating a negligence claim. For that very reason, however, the discovery rule will frequently come to the aid of plaintiffs who have attempted but failed to

uncover such facts before the complaint was filed.

Under the discovery rule, the statute of limitations begins to run when the plaintiff knew or reasonably should have known he has been injured by another party's conduct. Romah v. Hygienic Sanitation Company, 705 A.2d 841, 857 (Pa. Super. 1997). It begins to run when the plaintiff possesses facts putting him on notice that a wrong has been committed and that he needs to investigate to determine whether he is entitled to relief. Id.

Fraudulent concealment can trigger the discovery rule. Id. Moreover, the defendant's conduct need not rise to fraud or intentional concealment; unintentional fraud or concealment is sufficient. Id. Mere mistake, misunderstanding or lack of knowledge, however, is insufficient. Id.

Plaintiffs have a duty to investigate their claims—all possible claims, including punitive damages. If a plaintiff diligently does this, and is thwarted by concealment on the part of a defendant—even unintentionally—the plaintiff's punitive damage claim will be protected by the discovery rule. Thus if somewhere along the line a defendant doctor indicates to the patient or a family member or even to plaintiff's counsel that he did not know his conduct constituted a risk, and the plaintiff later discovers otherwise, the discovery rule may well kick in. In short, the heightened difficulty of properly stating a punitive damage claim heightens the chances a plaintiff will be protected by the discovery rule.

This result is particularly just because it puts much of the onus upon the defendant doctors themselves. If those physicians deserving of punitive damages conceal their knowledge about the risk they created, they will be caught in their own trap, for the plaintiff will be able to add punitive damages when that concealment becomes evident.

Finally, the court rejects the plaintiffs' proposed solution because it returns us to the very problem we tried so hard to eliminate with our punitive damage trilogy: the Pavlovian inclusion of punitive damages in all medical malpractice complaints. Dishing out contingent dismissal orders like the one the

plaintiffs propose would surely result in heaping helpings of the legal lard we have tried so hard to reduce.

BY THE COURT,

Date:

Clinton W. Smith, P.J.

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