

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DANIEL EZERO, Individually and as Administrator	:	
of the Estate of Abby Ezero, M.D., Deceased,	:	DOCKET NO. 10-01023
Plaintiff	:	CIVIL ACTION – LAW
	:	
vs.	:	
	:	
THE WILLIAMSPORT HOSPITAL, et al.,	:	
Defendants	:	

**OPINION AND ORDER**

AND NOW, this 5<sup>th</sup> day of January, 2012, after oral argument on Plaintiff’s Motion for Leave to Amend Complaint to Set Forth a Claim for Punitive Damages, it is hereby ORDERED and DIRECTED that Plaintiff’s motion is DENIED. Plaintiff’s allegations do not state a cognizable claim for punitive damages.<sup>1</sup> This Court will address the standard of awarding punitive damages in a medical malpractice case within Lycoming County and why Plaintiff failed to meet the standard in this case.

**I. Standard for Awarding Punitive Damages**

**a. The Medical Care Availability and Reduction of Error (MCARE) Act**

First, this Court’s analysis of the application of punitive damages in this case must include a discussion of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §§ 1303.501-1303.516. The MCARE Act governs the above-captioned medical malpractice action. Pursuant to the MCARE Act, the Court may grant an award of punitive damages when a health care provider’s conduct is a result of his “willful or wanton conduct or reckless indifference to the rights of others.” 40 P.S. § 1303.505(a). Under the MCARE Act, gross negligence, in and of itself, cannot support an award of punitive damages. 40 P.S. §

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<sup>1</sup> This Court will not address the timeliness of Plaintiff’s motion.

1303.505(b). *See also Williams v. Syed*, 782 A.2d 1090 (Pa. Cmwlth. Ct. 2001) (holding that neither negligence nor gross negligence is sufficient culpability to justify awarding punitive damages).

Thus, an award of punitive damages under the MCARE Act must be supported by willful or wanton conduct or reckless indifference. Wanton conduct exists “where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a *conscious* indifference to the perpetration of the wrong.” *Lewis v. Miller*, 543 A.2d 590, 592 (Pa. Super. Ct. 1988) (citations omitted) (emphasis added). Wanton conduct requires an actor’s conduct to be of unreasonable character, disregarding a risk that would result in harm. *Id.* In the alternative, reckless indifference exists when the “actor had such knowledge or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.” *Hutchison v. Luddy*, 870 A.2d 766, 771 (Pa. 2005) (citations omitted). “[A]n appreciation of the risk [of harm] is a necessary element of the mental state required for the imposition of [punitive] damages.” 870 A.2d at 771 (citing 494 A.2d at 1097 n.12). Therefore, both wanton conduct and reckless indifference require either conscious indifference to risk or an appreciation of the risk.

**b. Case Law**

**i. Pennsylvania Supreme Court in *Hutchison v. Luddy***

The underlying policy behind awarding punitive damages is well-settled within the Commonwealth. *See Hutchison*, 870 A.2d at 770. In that case, our Supreme Court held that in order to create a jury question on the issue of punitive damages, the claim must be supported by

evidence that establishes: “(1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard to that risk.” *Id.* at 772. That Court rationalized that:

[p]unitive 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. As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant’s actions are so outrageous as to demonstrate willful, wanton, or reckless conduct. The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct.... When assessing the propriety of the imposition of punitive damages, *the state of mind of the actor is vital. The act, or failure to act, must be intentional, reckless or malicious.*

*Id.* at 770 (citations omitted) (emphasis added).

## **ii. Court of Common Pleas of Lycoming County**

The standard for awarding punitive damages is well-settled within Lycoming County. Prior to the Supreme Court’s decision in *Hutchison*, the Honorable Clinton W. Smith issued a trilogy of opinions that addressed awarding punitive damages in medical malpractice cases. *See Temple v. Susquehanna Health Systems*, 97-00099 (C.C.P. Lycoming County July 21, 1999), *Trimble v. Beltz*, 98-01720 (C.C.P. Lycoming County Oct. 12, 1999) and *Donmoyer v. Indeck*, 98-01189 (C.C.P. Lycoming County Aug. 16, 2000).

In *Temple*, the Honorable Clinton W. Smith held that “punitive damages may be imposed only in cases where the defendant was *aware* of the risk while committing the misconduct.” *Temple*, 2 (emphasis added). That Court held that a subjective standard should be used when determining the applicability of punitive damages within a particular case because 1) the language of Restatement (Second) of Torts § 908(2)<sup>2</sup> does not mean that punitive damages may

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<sup>2</sup> Section 908(2) of the Restatement (Second) of Torts provides that “[p]unitive damages may be awarded for conduct that is outrageous, because the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature

be imposed on an actor who is unaware of the risks that were created by his conduct, and 2) the appellate courts have rejected the objective standard. Particularly, the Court opined that the subjective standard should be used within the county because:

[p]unitive 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.

*Temple*, 8. Therefore, the Court concluded that in order to allege a claim for punitive damages, the plaintiff must plead facts that “would permit a jury to conclude the defendant was aware of 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.” *Temple*, 9.

Applying this standard in *Temple*, the Court held that the complaint lacked factual averments that illustrated that the defendants knew their actions or inactions created a high degree of risk for the plaintiff, let alone that the defendants deliberately disregarded that risk.

*Temple*, 10. When discussing the adequacy of the plaintiffs’ factual averments, the Court opined that:

[i]t 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.

*Id.* This standard was subsequently applied by that Court in its *Trimble* and *Donmoyer* opinions.

In 2007, the Honorable Kenneth D. Brown held that the subjective approach to punitive damages should be applied within Lycoming County, in accordance to the Supreme Court’s ruling in *Hutchison*, therefore, solidifying Judge Smith’s subjective approach. *See Steppe v.*

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and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.”

*Rajjoub*, 05-01261 (C.C.P. Lycoming County Aug.16, 2007). Particularly, that the Honorable Kenneth D. Brown held that within the Commonwealth:

a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted or failed to act, as the case may be, in conscious disregard to that risk.

*Steppe*, 1 (citing *Hutchison*, 870 A.2d at 772). In that case, the Court determined that the plaintiff failed to provide sufficient direct or circumstantial evidence to prove that the defendant doctor knew of the plaintiff's brain tumor prior to her death.

Therefore, this Court will uphold the established precedent of Lycoming County: a claim for punitive damages must be supported by evidence that establishes 1) the defendant subjectively appreciated the risk of harm that he exposed the plaintiff to and 2) the defendant acted or failed to act in conscious disregard to that risk of harm.

## **II. Sufficiency of the Factual Allegations**

Now, this Court must address whether the factual allegations in this case, if proven, are sufficient to support an award of punitive damages. In this matter, this Court holds that the established record does not support an award of punitive damages against Dr. D'Hue, Dr. Mintzer, or the Williamsport Hospital. This Court will address each of these claims in turn.

### **a. Claims against Dr. D'Hue**

Plaintiff asserts that punitive damage should be awarded against Dr. D'Hue because he:

1. performed a tracheostomy revision instead of an endotracheal intubation as the means of securing Dr. Ezero's airway for transportation back to UPMC,

2. failed to consult with UPMC doctors,<sup>3</sup>
3. performed an upper airway bronchoscopy with a rigid bronchoscope instead of a flexible bronchoscope,
4. continued tracheostomy revision despite alleged problems with the procedure and the use of an endotracheal tube changer as a guide, and
5. failed to perform life-saving procedures.

This Court does not believe that Dr. D'Hue's actions or inaction supports the award of punitive damages. This Court must determine if Dr. D'Hue had a subjective appreciation of the risks that he was exposing Dr. Ezero to through these actions and if Dr. D'Hue acted in conscious disregard to these risks. Sufficient evidence exists to support the conclusion that Dr. Ezero requested a tracheostomy revision in order for her conscious transport back to UPMC. Additionally, no evidence suggests that Dr. D'Hue believed that the rigid bronchoscope would cause harm to Dr. Ezero; Dr. D'Hue performed the bronchoscopy with a rigid scope for multiple reasons, none of which illustrate a subjective appreciation to harm that Dr. Ezero might face. Throughout the tracheostomy revision, evidence supports that both Dr. D'Hue and Dr. Mintzer worked with diligence to secure Dr. Ezero's airway. Lastly, this Court does not believe that Dr. D'Hue's failure to stop Dr. Mintzer from inserting the chest tubes so that Dr. D'Hue could insert them himself constitutes anything more gross negligence on the part of both doctors at most. Plaintiff himself alleges that the chest tube insertion procedure was a "life saving procedure." This Court will not hold that the actions of two doctors in attempt to save a woman's life constitutes the basis for awarding punitive damages on behalf of these doctors.

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<sup>3</sup> This motion is the first time that Plaintiffs have alleged this negligence on behalf of Dr. D'Hue. This Court will not address this claim because it is not supported by the pleadings. *See infra* Claims against the Williamsport Hospital.

**b. Claims against Dr. Mintzer**

Plaintiff asserts that punitive damages should be awarded against Dr. Mintzer because he:

1. suggested and assisted in the use of the endotracheal tube changer to place the tracheostomy tube,
2. diagnosed and treated Dr. Ezero's bilateral tension pneumothoracies,
3. failed to observe Dr. Ezero's condition, including the monitoring of her skin for evidence of cyanosis, and
4. performed a chest tube insertion procedure on Dr. Ezero, despite the fact that he was not credentialed to perform such a procedure.

Plaintiff's allegations do not support an award of punitive damages against Dr. Mintzer.

Plaintiffs have not cited to any factual allegations that would support an award of punitive damages based on these allegations. As previously stated, this Court will not award punitive damages unless the actor had a subjective appreciation of the risk to which he was exposing plaintiff to and, despite this appreciation, acted in conscious disregard to this risk. There is no evidence of record that supports the fact that Dr. Mintzer knew of any risks that he would be putting Dr. Ezero in through these actions. Although Dr. Mintzer was not credentialed to perform the chest tube insertion procedure, Plaintiff himself alleges that this procedure was life-saving. Dr. Mintzer inserted these tubes into Dr. Ezero in an attempt to save her life. These actions can hardly become the basis of a punitive damages award.

**c. Claim against the Williamsport Hospital**

Plaintiff asserts that punitive damages should be awarded against the Williamsport Hospital because the hospital:

1. failed to enact and enforce policies requiring an ENT physician to communicate with all relevant medical personnel preoperatively,
2. failed to select and retain otolaryngologist trained and qualified to perform flexible bronchoscopy, and
3. failed to have a properly trained and credentialed anesthesiologist, particularly in any and all life-saving procedures.

Additionally, Plaintiff's allegations against Williamsport Hospital do not support the award of punitive damages. This motion is the first time that Plaintiff has alleged this conduct on behalf of the Williamsport Hospital. Therefore, the record does not contain evidence to assert these claims. However, even if these allegations were provided for in the pleadings, this alleged conduct can only be characterized as negligence, or at most gross negligence, and cannot be the basis of a punitive damages claim. *See* 40 P.S. 1303.505(b).

In short, this Court holds that Plaintiff's allegations do not state a cognizable claim upon which punitive damages may be awarded against Dr. D'Hue, Dr. Mintzer, or the Williamsport Hospital because of either a lack of subjective intent on behalf of defendant doctors or a lack of factual averments in the pleadings. Based on these deficiencies, Plaintiff's motion to amend must be denied.

### **ORDER**

AND NOW, this 5<sup>th</sup> day of December, 2012, for the reasons stated in the foregoing opinion, Plaintiff's Motion for Leave to Amend Complaint to Set Forth a Claim for Punitive Damages is DENIED. In addition to denying Plaintiff's Motion, this Court hereby DENIES any incorporated motion to seek wealth discovery pursuant to Pa. R.C.P. 4003.7.



BY THE COURT,

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Date

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Richard A. Gray, J.

RAG/abn

cc: Thomas R. Kline, Esquire and Amy Guth, Esquire  
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